

No.

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**In the Supreme Court of the United States**

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AMERICAN ATHLETIC CONFERENCE, THE ATLANTIC  
COAST CONFERENCE, THE BIG TEN CONFERENCE,  
INC., THE BIG 12 CONFERENCE, INC., CONFERENCE  
USA, MID-AMERICAN CONFERENCE, MOUNTAIN WEST  
CONFERENCE, PAC-12 CONFERENCE, SOUTHEASTERN  
CONFERENCE, SUNBELT CONFERENCE, AND WESTERN  
ATHLETIC CONFERENCE,

*Petitioners,*

v.

SHAWNE ALSTON, ET AL.,

*Respondents.*

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**On Petition for a Writ of Certiorari to  
the United States Court of Appeals for the  
Ninth Circuit**

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**PETITION APPENDIX**

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BRITT M. MILLER  
ANDREW S. ROSENMAN  
JED W. GLICKSTEIN  
*Mayer Brown LLP*  
*71 South Wacker Dr.*  
*Chicago, IL 60606*  
*(312) 782-0600*

ANDREW J. PINCUS  
*Counsel of Record*  
CHARLES A. ROTHFELD  
*Mayer Brown LLP*  
*1999 K Street, NW*  
*Washington, DC 20006*  
*(202) 263-3000*  
*apincus@mayerbrown.com*

*Counsel for Petitioner The Big Ten Conference, Inc.*

[Additional counsel on inside cover]

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---

ROBERT W. FULLER, III  
LAWRENCE C. MOORE, III  
PEARLYNN G. HOUCK  
ERIK R. ZIMMERMAN  
*Robinson, Bradshaw &  
Hinson, P.A.  
101 North Tryon St.,  
Suite 1900  
Charlotte, N.C. 28246*

MARK SEIFERT  
*Seifert Law Firm  
50 California St.,  
Suite 1500  
San Francisco, CA  
94111*

*Counsel for Southeastern  
Conference*

BENJAMIN C. BLOCK  
*Covington & Burling  
LLP  
One CityCenter  
850 Tenth St. N.W.  
Washington, D.C. 20001*

*Counsel for the American  
Athletic Conference*

LEANE K. CAPPS  
CAITLIN J. MORGAN  
*Polsinelli PC  
2950 North Harwood  
St., Suite 2100  
Dallas, TX 75201*

AMY D. FITTS  
*Polsinelli PC  
900 West 48th Pl.,  
Suite 900  
Kansas City, MO 64112*

*Counsel for The Big 12  
Conference, Inc. &  
Conference USA*

BART H. WILLIAMS  
SCOTT P. COOPER  
KYLE A. CASAZZA  
JENNIFER L. JONES  
SHAWN S. LEDINGHAM, JR.  
*Proskauer Rose LLP  
2029 Century Park East,  
Suite 2400  
Los Angeles, CA 90067*

*Counsel for Pac-12  
Conference*

R. TODD HUNT  
BENJAMIN G. CHOJNACKI  
*Walter Haverfield LLP*  
*The Tower at Erieview*  
*1301 East 9th St.,*  
*Suite 3500*  
*Cleveland, OH 44114*

*Counsel for Mid-  
American Conference*

MERYL MACKLIN  
*Bryan Cave Leighton*  
*Paisner LLP*  
*Three Embarcadero*  
*Center, 7th Floor*  
*San Francisco, CA*  
*94111*

RICHARD YOUNG  
BRENT E. RYCHENER  
*Bryan Cave Leighton*  
*Paisner LLP*  
*90 South Cascade Ave.,*  
*Suite 1300*  
*Colorado Springs, CO*  
*80903*

*Counsel for Mountain  
West Conference*

JON BRADLEY  
*Bradley Devitt Haas &*  
*Watkins, P.C*  
*2201 Ford Street*  
*Golden, CO 80401*

*Counsel for Western  
Athletic Conference*

MARK A. CUNNINGHAM  
*Jones Walker LLP*  
*201 St. Charles Ave.*  
*50th Floor*  
*New Orleans, LA 70170*

*Counsel for Sun Belt  
Conference*

D. ERIK ALBRIGHT  
GREGORY G. HOLLAND  
*Fox Rothschild LLP*  
*230 North Elm St.,*  
*Suite 1200*  
*Greensboro, N.C. 27401*

JONATHAN P. HEYL  
*Fox Rothschild LLP*  
*101 North Tryon St.,*  
*Suite 1300*  
*Charlotte, N.C. 28246*

*Counsel for Atlantic  
Coast Conference*



**APPENDIX A  
FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

IN RE NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION  
ATHLETIC GRANT-IN-AID CAP  
ANTITRUST LITIGATION,

No. 19-15566

D.C. No.  
4:14-md-02541-  
CW

SHAWNE ALSTON; MARTIN  
JENKINS; JOHNATHAN MOORE;  
KEVIN PERRY; WILLIAM  
TYNDALL; ALEX LAURICELLA;  
SHARRIF FLOYD; KYLE THERET;  
DUANE BENNETT; CHRIS STONE;  
JOHN BOHANNON; ASHLEY  
HOLLIDAY; CHRIS DAVENPORT;  
NICHOLAS KINDLER; KENDALL  
GREGORY-MCGHEE; INDIA  
CHANEY; MICHEL'LE THOMAS;  
DON BANKS, "DJ"; KENDALL  
TIMMONS; DAX DELLENBACH;  
NIGEL HAYES; ANFORNEE  
STEWART; KENYATA JOHNSON;  
BARRY BURNETTI; DALENTA  
JAMERAL STEPHENS, "D.J.";  
JUSTINE HARTMAN; AFURE  
JEMERIGBE; ALEC JAMES,  
*Plaintiffs-Appellees,*

v.

NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION, THE  
NCAA; PACIFIC 12  
CONFERENCE; CONFERENCE  
USA; THE BIG TEN  
CONFERENCE, INC.; MID-  
AMERICAN CONFERENCE;  
SOUTHEASTERN CONFERENCE;  
ATLANTIC COAST CONFERENCE;  
MOUNTAIN WEST CONFERENCE;  
THE BIG TWELVE CONFERENCE,  
INC.; SUN BELT CONFERENCE;  
WESTERN ATHLETIC  
CONFERENCE; AMEREICAN  
ATHLETIC CONFERENCE  
*Defendants-Appellants,*

AMERICAN BROADCASTING  
COMPANIES, INC.; CBS  
BROADCASTING, INC.; ESPN  
ENTERPRISES, INC.; ESPN, INC.;  
FOX BROADCASTING COMPANY,  
LLC.; FOX SPORTS HOLDINGS,  
LLC.; TURNER BROADCASTING  
SYSTEM, INC.,  
*Intervenors.*

<p>IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,</p>	<p>No. 19-15662</p> <p>D.C. No. 4:14-md-02541- CW</p>
<p>JOHN BOHANNON; JUSTINE HARTMAN, as representatives of the classes, <i>Plaintiffs-Appellants,</i></p>	<p>OPINION</p>
<p>v.</p>	
<p>NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; MID- AMERICAN CONFERENCE; SOUTHEASTERN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMEREICAN ATHLETIC CONFERENCE <i>Defendants-Appellees,</i></p>	
<p>AMERICAN BROADCASTING COMPANIES, INC.; CBS BROADCASTING, INC.; ESPN ENTERPRISES, INC.; ESPN, INC.; FOX BROADCASTING COMPANY,</p>	

LLC.; FOX SPORTS HOLDINGS, LLC.; TURNER BROADCASTING SYSTEM, INC., <i>Intervenors.</i>
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Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

Argued and Submitted March 9, 2020  
San Francisco, California

Filed May 18, 2020

Before: Sidney R. Thomas, Chief Judge, and Ronald  
M. Gould and Milan D. Smith, Jr., Circuit Judges.

Opinion by Chief Judge Thomas;  
Concurrence by Judge Milan D. Smith, Jr.

## **SUMMARY<sup>1</sup>**

### **Antitrust**

The panel affirmed the district court's order in an antitrust action, enjoining the National Collegiate Athletic Association from enforcing rules that restrict the education-related benefits that its member institutions may offer students who play Football Bowl Subdivision football and Division I basketball.

In *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049 (9th Cir. 2015), the court affirmed in large part the district court's ruling that the NCAA illegally restrained trade, in violation of section 1 of the Sherman Act, by preventing FBS football and D1

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<sup>1</sup> This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.



men's basketball players from receiving compensation for the use of their names, images, and likenesses, and the district court's injunction insofar as it required the NCAA to implement the less restrictive alternative of permitting athletic scholarships for the full cost of attendance.

Subsequent antitrust actions by student-athletes were consolidated in the district court. After a bench trial, the district court entered judgment for the student-athletes in part, concluding that NCAA limits on education-related benefits were unreasonable restraints of trade, and accordingly enjoining those limits, but declining to hold that NCAA limits on compensation unrelated to education likewise violated section 1.

The panel affirmed the district court's conclusion that *O'Bannon II* did not foreclose this litigation as a matter of *stare decisis* or *res judicata*.

The panel held that the district court properly applied the Rule of Reason in determining that the enjoined rules were unlawful restraints of trade under section 1 of the Sherman Act. The panel concluded that the student-athletes carried their burden at the first step of the Rule of Reason analysis by showing that the restraints produced significant anticompetitive effects within the relevant market for student-athletes' labor on the gridiron and the court.

At the second step of the Rule of Reason analysis, the NCAA was required to come forward with evidence of the restraints' procompetitive effects. The district court properly concluded that only some of the challenged NCAA rules served the procompetitive purpose of preserving amateurism and thus improving consumer choice by maintaining a

distinction between college and professional sports. Those rules were limits on above-cost-of-attendance payments unrelated to education, the cost-of-attendance cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives. The panel affirmed the district court's conclusion that the remaining rules, restricting non-cash education-related benefits, did nothing to foster or preserve consumer demand. The panel held that the record amply supported the findings of the district court, which reasonably relied on demand analysis, survey evidence, and NCAA testimony.

The panel affirmed the district court's conclusion that, at the third step of the Rule of Reason analysis, the student-athletes showed that any legitimate objectives could be achieved in a substantially less restrictive manner. The district court identified a less restrictive alternative of prohibiting the NCAA from capping certain education-related benefits and limiting academic or graduation awards or incentives below the maximum amount that an individual athlete may receive in athletic participation awards, while permitting individual conferences to set limits on education-related benefits. The panel held that the district court did not clearly err in determining that this alternative would be virtually as effective in serving the procompetitive purposes of the NCAA's current rules, and could be implemented without significantly increased cost.

Finally, the panel held that the district court's injunction was not impermissibly vague and did not usurp the NCAA's role as the superintendent of college sports. The panel also declined to broaden the injunction to include all NCAA compensation limits, including those on payments untethered to education.

The panel concluded that the district court struck the right balance in crafting a remedy that both prevented anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.

Concurring, Judge M. Smith wrote that because he was bound by *O'Bannon II*, he joined the panel opinion in full. He wrote separately to express concern that the current state of antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprived the student-athletes of the fundamental protections that the antitrust laws were meant to provide them.

#### COUNSEL

Seth P. Waxman (argued), Leon B. Greenfield, Daniel S. Volchok, David M. Lehn, and Kevin M. Lamb, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; Bart H. Williams, Scott P. Cooper, Kyle A. Casazza, Jennifer L. Jones, and Shawn S. Ledingham Jr., Proskauer Rose LLP, Los Angeles, California; Leane K. Capps and Caitlin J. Morgan, Polsinelli PC, Dallas, Texas; Amy D. Fitts, Polsinelli PC, Kansas City, Missouri; Mark A. Cunningham, Jones Walker LLP, New Orleans, Louisiana; Beth A. Wilkinson and Brant W. Bishop, Wilkinson Walsh & Eskovitz LLP, Washington, D.C.; Sean Eskovitz, Wilkinson Walsh & Eskovitz LLP, Los Angeles, California; Jeffrey A. Mishkin and Karen Hoffman Lent, Skadden Arps Slate Meagher & Flom LLP, New York, New York; Robert W. Fuller III, Pearlynn G. Houck, and Lawrence C. Moore III, Robinson Bradshaw & Hinson P.A., Charlotte, North Carolina; Mark J. Seifert, Seifert Law Firm, San Francisco, California; Andrew J. Pincus, Charles A. Rothfeld, and Richard J. Favretto, Mayer Brown LLP,

Washington, D.C.; Britt M. Miller and Andrew S. Rosenman, Mayer Brown LLP, Chicago, Illinois; Meryl Macklin, Bryan Cave Leighton Paisner LLP, San Francisco, California; Richard Young and Brent E. Rychner, Bryan Cave Leighton Paisner LLP, Colorado Springs, Colorado; Benjamin C. Block, Covington & Burling LLP, Washington, D.C.; R. Todd Hunt and Benjamin G. Chojnacki, Walter Haverfield LLP, Cleveland, Ohio; D. Erik Albright and Gregory G. Holland, Fox Rothschild LLP, Greensboro, North Carolina; Jonathan P. Heyl, Fox Rothschild LLP, Charlotte, North Carolina; Charles L. Coleman III, Holland & Knight LLP, San Francisco, California; for Defendants-Appellants.

Steve Berman (argued), Craig R. Spiegel, and Emilee N. Sisco, Hagens Berman Sobol Shapiro LLP, Seattle, Washington; Jeffrey L. Kessler (argued), David G. Feher, and David L. Greenspan, Winston & Strawn LLP, New York, New York; Bruce L. Simon and Benjamin E. Shiftan, Pearson Simon & Warshaw LLP, San Francisco, California; Elizabeth C. Pritzker, Jonathan K. Levine, Bethany L. Caracuzzo, and Shiho Yamamoto, Pritzker Levine LLP, Oakland, California; Linda T. Coberly, Winston & Strawn LLP, Chicago, Illinois; Sean D. Meenan and Jeanifer E. Parsigian, Winston & Strawn LLP, San Francisco, California; for Plaintiffs-Appellees.

Maurice M. Suh, Gibson Dunn & Crutcher LLP, Los Angeles, California; Andrew S. Tulumello and Nick Harper, Gibson Dunn & Crutcher LLP, Washington, D.C.; for Amici Curiae National Football League Players Association and National Basketball Players Association.

Bradley S. Pauley, Horvitz & Levy LLP, Burbank, California, for Amicus Curiae National Federation of State High School Associations.

Emma Reborn, Change to Win, New York, New York; Sandeep Vaheesan, Open Markets Institute, Washington, D.C.; Najah A. Farley, National Employment Law Project, New York, New York; for Amici Curiae Open Markets Institute, Change to Win, National Employment Law Project, and Economics and Law Professors.

### OPINION

THOMAS, Chief Judge:

We consider an appeal and cross-appeal from an order enjoining the National Collegiate Athletic Association (the “NCAA”) from enforcing rules that restrict the education-related benefits that its member institutions may offer students who play Football Bowl Subdivision (“FBS”) football and Division I (“D1”) basketball (collectively, “Student-Athletes”). *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We conclude that the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1. We further conclude that the record supports the factual findings underlying the injunction and that the district court’s antitrust analysis is faithful to our decision in *O’Bannon v. NCAA (O’Bannon II)*, 802 F.3d 1049 (9th Cir. 2015).

**I****A. The NCAA and its Compensation Rules**

Founded in 1905, the NCAA regulates intercollegiate sports. *Id.* at 1053. Its mission statement is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” NCAA regulations govern, among other things, the payments that student-athletes may receive in exchange for and incidental to their athletic participation as well as in connection with their academic pursuits.

The NCAA divides its member schools into three competitive divisions. D1 schools—some 350 of the NCAA’s approximately 1,100 member schools—sponsor the largest athletic programs and offer the most financial aid. D1 football has two subdivisions, one of which is the FBS.

In August 2014, the NCAA amended its D1 bylaws (the “Bylaws”) to grant the so-called “Power Five” conferences—the FBS conferences that generate the most revenue—autonomy to adopt collectively legislation in certain areas, including limits on athletic scholarships known as “grants-in-aid.”<sup>2</sup> In

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<sup>2</sup> The Power Five conferences are the Atlantic Coast Conference (the “ACC”), Big Ten Conference, Big 12 Conference, Pacific 12 Conference (the “Pac-12”), and Southeastern Conference (the “SEC”). Student-Athletes named the Power Five as defendants, along with Conference USA, the Mid-American Conference (the “MAC”), Mountain West Conference, Sun Belt Conference, Western Athletic Conference, and American Athletic Conference (the “AAC”).

January 2015, the Power Five voted to increase the grant-in-aid limit to the cost of attendance (“COA”) at each school. Since August 2015, the Bylaws have provided that a “full grant-in-aid” encompasses “tuition and fees, room and board, books and other expenses related to attendance at the institution up to the [COA],” as calculated by each institution’s financial aid office under federal law. *See* 20 U.S.C. §§ 1087kk, *ll*. The Bylaws also contain an “Amateurism Rule,” which strips student-athletes of eligibility for intercollegiate competition if they “[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport.” “[P]ay” is defined as the “receipt of funds, awards or benefits not permitted by governing legislation.”

However, governing legislation permits a wide range of above-COA payments—both related and unrelated to education. Without losing their eligibility, student-athletes may receive, for instance: (i) awards valued at several hundred dollars for athletic performance (“athletic participation awards”),<sup>3</sup> which may take the form of Visa gift cards; (ii) disbursements—sometimes thousands of dollars—from the NCAA’s Student Assistance Fund (“SAF”) and Academic Enhancement Fund (“AEF”) for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid, health and safety expenses, clothing, travel, “personal or family expenses,” loss-of-value insurance policies, car

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<sup>3</sup> Athletic participation awards include the “Senior Scholar-Athlete Award,” which is a postgraduate scholarship of \$10,000 or less that institutions may award two student-athletes per year, and awards for achievement in special events, such as all-star or post-season bowl games.

repair, personal legal services, parking tickets, and magazine subscriptions;<sup>4</sup> (iii) cash stipends of several thousands of dollars calculated to cover costs of attendance beyond the fixed costs of tuition, room and board, and books, but used wholly at the student-athlete's discretion;<sup>5</sup> (iv) mandatory medical care (available for at least two years after the athlete graduates) for an athletics-related injury; (v) unlimited meals and snacks; (vi) reimbursements for expenses incurred by student-athletes' significant others and children to attend certain athletic competitions; and (vii) a \$30 per diem for "unitemized incidental expenses during travel and practice" for championship events.

The NCAA has carved out many of these exceptions in the past five years. For example, before 2015, athletic participation awards did not take the form of cash-like Visa gift cards. And once the NCAA permitted grants-in-aid for the full COA, effective August 2015, many more student-athletes began to receive above-COA payments, such as cash stipends, Pell Grants, and AEF as well as SAF distributions.

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<sup>4</sup> The record indicates that the NCAA does little to regulate or monitor the use of these funds. While it controls the total pool of money that an institution may distribute each year, it has not capped the amount that an individual athlete may receive. The SAF is broadly available to "assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in an academic curriculum or to recognize academic achievement as determined by conference offices." And the NCAA "encourage[s]" schools to allocate AEF funds to provide "direct benefits to student-athletes that enhance [their] welfare."

<sup>5</sup> Under the Bylaws, student-athletes who have already received Pell Grants (calculated to cover the COA) may also receive these stipends.



This expansion of above-COA compensation has coincided with rising revenue from D1 basketball and FBS football for the NCAA and its members. In the 2015–16 academic year, these programs generated \$4.3 billion in revenue (a \$300 million increase from the previous year) for the Power Five. And in 2016, the NCAA negotiated an eight-year extension (until 2032) of its multimedia contract for the broadcasting rights to March Madness, the annual D1 men’s basketball tournament. Under that agreement, the NCAA will receive \$1.1 billion per year (an annual increase of over \$325 million).

### **B. The *O’Bannon* Litigation**

The NCAA is no stranger to antitrust litigation arising from its compensation rules. In 2009, Ed O’Bannon, a former UCLA basketball player, sued the NCAA after learning that a college basketball video game featured an avatar that resembled him and sported his jersey number. *O’Bannon II*, 802 F.3d at 1055. “The gravamen of [his] complaint” was that the NCAA illegally restrained trade, in violation of section 1, by preventing FBS football and D1 men’s basketball players from receiving compensation for the use of their names, images, and likenesses (“NILs”).<sup>6</sup> *Id.*

After a bench trial, the district court agreed under the Rule of Reason and entered relief for the plaintiffs. *See O’Bannon v. NCAA (O’Bannon I)*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014), *aff’d in part, rev’d in*

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<sup>6</sup> The *O’Bannon* class included “[a]ll current and former student-athletes” who had played D1 men’s basketball or FBS football “and whose [NILs] may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in video[]games licensed or sold by Defendants, their co-conspirators, or their licensees.” *Id.* at 1055–56.

*part, O'Bannon II*, 802 F.3d at 1079. The district court acknowledged the NCAA's evidence that college athletics' "amateur tradition" helps maintain their popularity as a product distinct from professional sports. *Id.* at 999. It nevertheless concluded that this procompetitive benefit did not justify the NCAA's "sweeping prohibition" on NIL compensation. *Id.* Based on evidence that "school loyalty and geography" primarily drive consumer demand and a lack of proof that small payments to student-athletes would diminish college sports' popularity, the district court determined that the NCAA could justify, at most, restrictions on large payments. *Id.* at 1000–01.

After identifying two less restrictive alternatives ("LRAs") to the challenged rules, *id.* at 1004–07, the district court implemented those LRAs through an injunction that required the NCAA to permit its schools to (i) "use the licensing revenue generated from the use of their student-athletes' [NILs] to fund stipends covering the [COA]"; and (ii) to make deferred, post-eligibility cash payments in NIL revenue, not to exceed \$5,000, to student-athletes. *Id.* at 1007–08; *see also id.* at 1008 (finding no evidence that "such a modest payment" would "undermine[]" NCAA's "legitimate procompetitive goals"). The NCAA appealed.

A majority of a Ninth Circuit panel concluded that the district court's decision, the first of its kind, was "largely correct." *O'Bannon II*, 802 F.3d at 1053; *id.* at 1079 (Thomas, C.J., concurring in part and dissenting in part). The panel unanimously affirmed the injunction insofar as it required the NCAA to permit athletic scholarships for the full COA, but a panel majority reversed and vacated the injunction's

requirement that the NCAA allow deferred NIL payments. *Id.* at 1053.

In pertinent part, the panel rejected the NCAA’s threshold argument that its amateurism rules, including those governing compensation, are “valid as a matter of law” under *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). *O’Bannon II*, 802 F.3d at 1061. The panel acknowledged the Supreme Court’s observation, in “dicta,” that the NCAA has historically preserved its product by, *inter alia*, prohibiting payments to student-athletes. *Id.* at 1063 (citing *Bd. of Regents*, 468 U.S. at 102). But it declined to read that statement as perpetual blanket approval for the NCAA’s compensation rules, which were not at issue in *Board of Regents*. *Id.* Though conceding that the NCAA’s “amateurism rules are likely to be procompetitive,”<sup>7</sup> *id.* at 1053, the panel refused to exempt them from antitrust scrutiny, *see id.* at 1064 (explaining that a procompetitive rule “can still be invalid under the Rule of Reason”).

The panel then affirmed much of the district court’s analysis. *See id.* at 1069–76. As is relevant here, it found, based on the record, “a concrete procompetitive effect in the NCAA’s commitment to amateurism: namely that the amateur nature of collegiate sports increases their appeal to consumers.” *Id.* at 1073. As to LRAs, it agreed that the ban on funding COA scholarships with NIL revenue was “*patently and inexplicably* stricter” than necessary to

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<sup>7</sup> In *O’Bannon II*, “amateurism rules” refers to, *inter alia*, the NCAA’s “financial aid rules” and other rules “that limit student-athletes’ compensation and their interactions with professional sports leagues.” *Id.* at 1055.

differentiate college from professional sports. *Id.* at 1075 (“[B]y the NCAA’s own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”). It clarified that courts must invalidate such restraints but may not “micromanage organizational rules” or “strike down largely beneficial market restraints[.]” *Id.*

A panel majority, however, found error in the district court’s adoption of deferred NIL compensation “untethered to [student-athletes’] education expenses” as a viable LRA. *Id.* at 1076. It explained that “not paying student-athletes is *precisely what makes them amateurs*” and disagreed that “being a poorly-paid professional” is “‘virtually as effective’ for that market as being a[n] amateur.” *Id.* To avert a “transition[]” to “minor league status” and to heed the “Supreme Court’s admonition that [courts] must afford the NCAA ‘ample latitude’ to superintend college athletics,” the majority vacated this portion of the injunction. *Id.* at 1079 (quoting *Bd. of Regents*, 468 U.S. at 120). In closing, it “emphasize[d] the limited scope of [its] decision,” explaining that “in th[at] case,” the Rule of Reason did “not require” anything “more” of the NCAA than to permit student-athletes to receive scholarships for the COA. *Id.*<sup>8</sup>

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<sup>8</sup> I dissented from this vacatur, mostly on the basis of the standard of review, because I concluded that the record supported the entirety of the judgment. *Id.* at 1080. Though agreeing that “court[s] should not eliminate the distinction between professional and college sports,” I also disagreed that the vacated remedy would have done so. *Id.* at 1082 n.4. As a practical matter, the remedy that survived appeal required nothing of the NCAA, which had already adopted a more generous adjustment to the grant-in-aid limit by permitting schools to offer *any* D1 recruit an athletic scholarship up to the

### C. The *Alston* Litigation

In March 2014, while the NCAA was litigating *O'Bannon I*, FBS football and D1 men's and women's basketball players filed several antitrust actions against the NCAA and eleven D1 conferences that were transferred to and, with one exception, consolidated before the same district court presiding over *O'Bannon I*. Rather than confining their challenge to rules prohibiting NIL compensation, Student-Athletes sought to dismantle the NCAA's entire compensation framework.

In December 2015, the district court certified three injunctive relief classes comprised of (i) FBS football players, (ii) D1 men's basketball players, and (iii) D1 women's basketball players. Each subclass consists of student-athletes who have received or will receive a full grant-in-aid during the pendency of this litigation.

Nearly a year after our decision in *O'Bannon II*, the NCAA sought judgment on the pleadings, invoking *res judicata*. It argued that *O'Bannon II* “requires nothing more of the NCAA than that it permit its member schools to provide student-athletes with their full education-related [COA].” Because the NCAA had already amended its rules to satisfy that requirement, it reasoned that any post-*O'Bannon* antitrust challenges to its compensation rules must fail. The district court denied the motion. It explained that Student-Athletes, unlike the *O'Bannon* plaintiffs, had challenged, among other things, limits on non-cash, education-related benefits. It acknowledged the possibility that *O'Bannon*

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COA, irrespective of whether his or her NIL was or could be used or licensed.

forecloses a *type* of relief—lifting restrictions on cash payments untethered to educational expenses—but declined to read it more broadly than that.

Cross-motions for summary judgment followed. The district court again rejected the NCAA’s preclusion arguments. As to the merits, it adopted, at the parties’ request, the market definition from *O’Bannon I*: the market for a college education or, alternatively, student-athletes’ labor. It then granted Student-Athletes summary judgment at the Rule of Reason’s first step, as the NCAA did not meaningfully dispute that the challenged rules have anticompetitive effects in the relevant markets. At the Rule of Reason’s second step, it determined that the NCAA had raised triable issues as to whether its rules have the procompetitive effect(s) of maintaining the popularity of its elite college basketball and football products or integrating student-athletes into the wider campus community. Last, the district court found that Student-Athletes had proffered sufficient evidence to support their two proposed LRAs: (i) allowing individual conferences, but not the NCAA, to regulate student-athlete compensation; or (ii) enjoining NCAA rules that restrict both non-cash education-related benefits and benefits that are incidental to athletic participation.

#### **D. The District Court’s Decision**

After a ten-day bench trial, the district court entered judgment for Student-Athletes, in part. The court concluded that NCAA limits on education-related benefits are unreasonable restraints of trade, and accordingly enjoined those limits; however, the court declined to hold that NCAA limits on compensation unrelated to education likewise violate section 1. *Alston*, 375 F. Supp. 3d at 1109.

1. *Determination that O'Bannon Is Not Preclusive*

At the outset of its conclusions of law, the district court again declined to dismiss the case on res judicata grounds. *Id.* at 1092–96. It identified “material factual differences” between *O'Bannon* and the *Alston* litigation, *id.* at 1095, including in the identity of class members and the rules and rights at issue, *see id.* at 1093–94 (explaining that “[t]he crux of the *O'Bannon* case was the right to student-athletes’ NIL[s],” whereas “[t]he conduct at issue here is not connected to NIL rights” but to limits on above-COA compensation and benefits); *id.* at 1094 (noting that challenged rules either did not exist or have “materially changed” since *O'Bannon*). The district court then proceeded to its Rule of Reason analysis.

2. *The Relevant Market*

To begin, the district court accepted Student-Athletes’ trial theory narrowing the relevant market to one in which Student-Athletes sell their “labor in the form of athletic services” to schools in exchange for athletic scholarships and other payments permitted by the NCAA. *Id.* at 1067, 1097.

3. *Anticompetitive Effects*

Next, the court reiterated its summary judgment finding of “significant anticompetitive effects in the relevant market.” *Id.* at 1067, 1097. It relied on Student-Athletes’ economic analyses reflecting that schools, as buyers of athletic services, exercise monopsony power to artificially cap compensation at a level that is not commensurate with student-athletes’ value. *Id.* at 1068. Based on these analyses, it also found that, but for the challenged restraints, schools would offer recruits compensation that more

closely correlates with their talent. *Id.* at 1068–69, 1098.

The district court also highlighted additional trial evidence demonstrating the challenged rules’ anticompetitive effects. This included testimony that, in 2013, the Power Five began to urge the NCAA to loosen its compensation restrictions based on a concern that existing rules incongruously allowed schools to spend on virtually anything, including palatial athletic facilities and seven-figure coaches’ salaries, *except* direct financial support for student-athletes. *Id.* at 1068–69. In the district court’s view, the Power Five’s concerns constituted further proof that, absent the NCAA’s rules, student-athletes would receive higher compensation. *Id.* at 1069. Although the NCAA granted the Power Five autonomy to create new forms of compensation and to expand previously available compensation and benefits in 2015, the district court observed that these conferences remain constrained by “overarching NCAA limits” that cap compensation at an artificially low level. *Id.*

#### 4. *Procompetitive Effect*

The district court then turned to the NCAA’s asserted procompetitive justifications. In pertinent part, the NCAA argued that the challenged rules implement “amateurism,” which drives consumer interest in college sports because “consumers ‘value amateurism.’”<sup>9</sup> *Id.* at 1070 (internal citation omitted).

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<sup>9</sup> This justification is the only one raised on appeal. The district court rejected the NCAA’s other proffered justification (abandoned on appeal): The challenged rules purportedly enhance student-athletes’ college education by integrating them into the wider campus community. *Id.* at 1083–86, 1102–03. The district court declined to find that the challenged rules improve academic performance or prevent a social “wedge” between



The district court accepted this justification with respect to the NCAA's limits on cash compensation untethered to education, but not as to its limits on non-cash education-related benefits. *Id.* at 1082–83, 1101–02.

As a preliminary matter, the district court found no proof that the challenged rules *directly* foster consumer demand. *Id.* at 1070. It acknowledged the NCAA's theory that its rules safeguard "amateurism" for consumers' benefit, but the meaning of that term eluded the court.<sup>10</sup> *See id.* at 1070–71 (noting former SEC commissioner's testimony that he "do[es not] even know what [amateurism] means" (internal citation omitted)). Though the NCAA defined amateurism during the litigation as "not paying" the participants," *id.* at 1071 (internal citation omitted), the district court observed that this purported pay-for-play prohibition is riddled with exceptions. *See id.* at 1071–74.

After cataloguing the long list of above-COA payments that the NCAA permits, the court then reached two conclusions: (i) the challenged rules "do not follow any coherent definition of amateurism . . . or even 'pay,'" and (ii) these payments (many of which

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athletes and non-athletes. *Id.* at 1083–85, 1102–03. To the contrary, it found that the challenged rules foster resentment by permitting expenditures on "frills, like extravagant athletes-only facilities." *Id.* at 1085–86, 1103.

<sup>10</sup> The NCAA's "Principle of Amateurism" provides that student-athletes' "participation should be motivated primarily by education and by the physical, mental and social benefits to be derived," that their "participation in intercollegiate athletics is an avocation," and that they "should be protected from exploitation by professional and commercial enterprises." *Id.* at 1070 (internal citation omitted).

post-date *O'Bannon*) have not diminished demand for college sports, which “remain[] exceedingly popular and revenue-producing.” *Id.* at 1074.

On the question of consumer demand, the district court found Student-Athletes’ evidence regarding the effect (or lack thereof) of above-COA compensation on demand more compelling than the NCAA’s. For instance, in the battle of economic experts, the district court found the NCAA’s only demand expert, Dr. Kenneth Elzinga, unreliable because he failed to study “standard measures of consumer demand, such as revenues, ticket sales, or ratings,” but instead relied on interviews with NCAA affiliates introduced to him by defense counsel. *Id.* at 1075. The district court further found his analysis irrelevant as he refused to study consumer response to historical changes in compensation levels based on the false premise that the NCAA’s amateurism rules have not materially changed over time. *Id.*

By contrast, the district court credited Student-Athletes’ expert Dr. Daniel Rascher’s demand analysis, which was based on two natural experiments and, in some respects, corroborated by defense witnesses. *Id.* at 1076–78, 1100. The first experiment—comparing consumer demand before and after the August 2015 increase to the grant-in-aid limit, which resulted in “thousands of class members receiving significant” above-COA payments, including SAF and AEF distributions—demonstrated “no negative impact on consumer demand.” *Id.* at 1076. In fact, Dr. Rascher found that revenues from D1 basketball and FBS football, “one of the best economic measures of consumer demand,” have increased since 2015. *Id.* at 1076–77; *see also id.* at 1078 (noting corroborating testimony by an NCAA Rule 30(b)(6)

witness and a Big 12 Rule 30(b)(6) witness). The second experiment—comparing demand before and after the University of Nebraska (of the Big Ten) began providing athletes up to \$7,500 in post-eligibility education-related aid—likewise did not demonstrably reduce interest in Nebraska sports or FBS football and D1 basketball more broadly. *Id.* at 1077–78.

The district court also found Student-Athletes’ survey expert, Dr. Hal Poret, considerably more persuasive than the NCAA’s, Dr. Bruce Isaacson. *Id.* at 1078–80, 1100–01. Dr. Isaacson asked respondents why they watch college sports and listed “amateurs and/or not paid” as one possible reason, but failed to indicate that “amateurs” means “not paid” or to otherwise define “amateurs,” thus “render[ing] the responses hopelessly ambiguous.” *Id.* at 1078. Moreover, he measured only consumer *preference* and conceded that he did not attempt to study *behavior*. *Id.* at 1079. By contrast, Dr. Poret tested behavior and found that consumers would continue to view or attend college athletics (at the same rate) even if eight types of compensation that the NCAA currently prohibits or limits were individually implemented. *Id.* at 1079–80. The district court credited this conclusion. *Id.* at 1079–80 & n.24.

Testimony by NCAA lay witnesses that “student” status drives demand also failed to persuade the district court of a connection between the challenged compensation regime and demand. *Id.* at 1082, 1101. It reasoned that “student-athletes would continue to be students in the absence of the challenged rules,” *id.* at 1082, relying on *O’Bannon II*’s observation that higher education “would still be available to student-

athletes if they were paid some compensation in addition to their athletic scholarships,” *id.* at 1101 (quoting *O’Bannon II*, 802 F.3d at 1073). It also underscored the absence of evidence that the NCAA had promulgated its rules based on demand analyses. *Id.* at 1080, 1100–01.

Despite finding the NCAA’s procompetitive theory largely unpersuasive, the district court “credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports.” *Id.* at 1082. The court then found that some NCAA rules—the COA limit on the grant-in-aid, limits on compensation unrelated to education, and limits on cash awards for graduating or other academic achievements—serve that purpose by precluding “unlimited payments unrelated to education, akin to salaries seen in professional sports leagues.” *Id.* at 1082–83; *see also id.* at 1101–02. But the court concluded that limits on “non-cash education-related benefits,” such as post-eligibility graduate scholarships or tutoring, do not have that effect; it reasoned that such benefits “could not be confused with a professional athlete’s salary” and would only “emphasize that the recipients are students.” *Id.* at 1083.

##### 5. *Less Restrictive Alternative*

At the Rule of Reason’s third step, the district court considered whether three potential alternatives to the challenged restraints were less restrictive but virtually as effective in preventing “demand-reducing unlimited compensation indistinguishable from that observed in professional sports.” *Id.* at 1086. The district court rejected two proposed LRAs, both of which would have permitted individual conferences to limit above-COA compensation, but would have

otherwise invalidated either (i) *all* NCAA compensation limits or (ii) NCAA limits on education-related compensation *and* existing caps on benefits incidental to athletics participation, such as healthcare, pre-season expenses, and athletic participation awards. *Id.* at 1086–87. The district court found that both these alternatives would enable professional-style cash payments, thus threatening the distinction between college and professional sports. *Id.* at 1087. The court acknowledged the possibility that conferences could “discover” demand-preserving compensation levels. *Id.* But it rejected these LRAs to avoid demand-reducing “miscalculations” during “the inevitable trial-and-error phase.” *Id.*

The district court then identified a viable LRA:

- (1) allow the NCAA to continue to limit grants-in-aid at not less than the [COA];
- (2) allow the [NCAA] to continue to limit compensation and benefits unrelated to education;
- (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future.<sup>11</sup>

*Id.* The court enumerated specific education-related benefits that the NCAA would be unable to prohibit or limit under the LRA: “computers, science equipment, musical instruments and other items not currently

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<sup>11</sup> The district court found that the current aggregate limit on such awards is \$5,600. *Id.* at 1072, 1099.

included in the [COA] but nonetheless related to the pursuit of various academic studies”; post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school; tutoring; study-abroad expenses; and paid post-eligibility internships. *Id.* at 1088.

The district court explained that this LRA would permit some NCAA regulation of cash graduation or academic awards because these payments could otherwise morph into professional-like salaries. *Id.* It instructed that the cap on such awards should not fall below the existing limit on aggregate athletic participation awards (currently, \$5,600), as receipt of the latter “has been shown not to decrease consumer demand and not to be inconsistent with the NCAA’s understanding of amateurism.” *Id.* Under this LRA, individual conferences may continue to limit all payment types because “no individual conference dominates nearly the entire market, like the NCAA does.” *Id.* The district court further reasoned that this LRA would not “greatly impact[]” the NCAA’s “latitude to superintend college sports,” as it “would affect only a small fraction of [its] rulemaking jurisdiction.” *Id.*

The district court concluded that this LRA would be virtually as effective as the challenged rules at preserving student-athletes’ status as students (and thus demand), analogizing it to the LRA affirmed in *O’Bannon II*: Both require the NCAA to permit members “to cover legitimate education-related costs.” *Id.* at 1105 (citing *O’Bannon II*, 802 F.3d at 1075). Finally, it determined that, far from resulting in significantly increased costs, the LRA’s elimination of a category of rules would decrease the NCAA’s enforcement costs. *Id.* at 1090–91, 1105.

## 6. Remedy

The district court implemented this LRA via a permanent injunction. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019). The injunction provides that the parties may move to modify its list of education-related benefits and that the NCAA may move to incorporate a definition of compensation and benefits that are “related to education” if it chooses to adopt one. *Id.* at \*1. It also allows the NCAA to regulate *how* its members provide education-related benefits. *Id.*; *see also Alston*, 375 F. Supp. 3d at 1107 (“[T]he NCAA could require schools to pay for these items directly or to reimburse student-athletes for [equipment] expenses if adequate proof of purchase is shown.”). The court reiterated that NCAA members remain free to independently restrict pay. *Alston*, 375 F. Supp. 3d at 1109. And it stayed the injunction pending resolution of a timely appeal. *Id.* at 1110.

### **E. Post-Appeal Developments**

After the NCAA timely appealed, California enacted the Fair Pay to Play Act (the “FPP Act”). *See* Cal. S.B. 206 (Sept. 30, 2019), Cal. Educ. Code § 67456. The FPP Act requires the NCAA and its member institutions to permit student-athletes enrolled in California colleges and universities to earn compensation from the use of their NILs. *Id.* § 67456(a), (g). It takes effect on January 1, 2023. *Id.* § 67456(h).

In response to the FPP Act, the NCAA created a working group that has recommended permitting NIL benefits so long as they are tethered to education and otherwise preserve the distinction between college and professional sports recognized in *O’Bannon II*. *See*

Fed. and State Leg. Working Grp. Report 4 (Oct. 23, 2019), *available at* <https://tinyurl.com/working-grp-report>. In recent testimony before the Senate Commerce Subcommittee on Manufacturing, Trade and Consumer Protection, NCAA President Dr. Mark Emmert denied that the NCAA would be “taking any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with respect to the type of NIL payments that were at issue in the *O’Bannon* case[.]” *See* Test. of Dr. Mark Emmert 6 (Feb. 11, 2020), *available at* <https://tinyurl.com/Emmert-Test-y>.

## II

The application of *stare decisis* and *res judicata* are questions of law that we review *de novo*. *See In re Watts*, 298 F.3d 1077, 1079 (9th Cir. 2002); *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019).

We review factual findings for clear error and legal conclusions *de novo*. *See O’Bannon II*, 802 F.3d at 1061. Under clear error review, we must “accept the district court’s findings of fact unless we are left with the definite and firm conviction that a mistake has been committed.” *Id.* (quoting *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014)); *see also United States v. Alexander*, 106 F.3d 874, 877 (9th Cir. 1997) (“We must not reverse as long as the findings are plausible in light of the record viewed in its entirety[.]”). In other words, a decision is not clearly erroneous unless it “strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Prete v. Bradbury*, 438 F.3d 949, 968 n.23 (9th Cir. 2006) (internal citation omitted).



Last, “[w]e review a district court’s decision to grant a permanent injunction for an abuse of discretion”; the “factual findings underpinning the award” for clear error; and the “rulings of law relied upon by the district court in awarding injunctive relief” de novo. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 867 (9th Cir. 2014) (internal citations and quotation marks omitted).

### III

The district court correctly concluded *O’Bannon II* did not foreclose this litigation as a matter of stare decisis and res judicata.

#### A

Stare decisis binds “today’s Court” to “yesterday’s decisions.” *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) (quoting *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015)). “In determining whether [we are] bound by an earlier decision,” we consider “not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence.” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). “Insofar as there may be factual differences between the current case” and *O’Bannon II*, we “must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.” *Id.* at 1172; *see also In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) (explaining that decisions “furnish[] the rule for the determination of a subsequent case involving identical or similar material facts” (internal citation omitted)).

Antitrust decisions are particularly fact-bound. The Supreme Court has long emphasized that the

Rule of Reason “contemplate[s]” “case-by-case adjudication.” See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); see also *Maple Flooring Mfrs.’ Ass’n v. United States*, 268 U.S. 563, 579 (1925) (“[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . opinions in those cases must be read in the light of their facts”); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1205c3 (4th ed. 2018) (“Continuing contracts in restraint of trade,” are “typically subject to continuing reexamination,” and “even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.”).

*O’Bannon II* was a decision of “limited scope,” which the panel majority summarized as follows:

[W]e reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. . . . [T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules. *In this case*, the NCAA’s rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. *The Rule of Reason requires* that the NCAA permit its schools to provide up to the [COA] to their student athletes. It does not require more.

802 F.3d at 1079 (emphasis added).

In arguing that the last two sentences of this passage foreclose the current litigation, the NCAA ignores the inherently fact-dependent nature of a Rule of Reason analysis, which evaluates dynamic market conditions and consumer preferences; the panel majority's manifest effort to limit its decision to the record before it; and the majority's mandate that courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny. *See id.* at 1064 (“The amateurism rules’ validity must be proved, not presumed.”).

Far from straying outside *O’Bannon II*’s bounds, the district court here sought to toe the line that the panel majority drew. The court uncapped education-related benefits, but left in place NCAA limits on compensation unrelated to education, consistent with the majority’s observation that “student-athletes remain amateurs as long as any money paid to them goes to cover *legitimate educational expenses*.” *Id.* at 1075 (emphasis added); *see also id.* at 1076 (vacating injunction only insofar as it forced NCAA to permit “cash payments untethered to . . . education expenses”).

The district court meaningfully and properly distinguished *O’Bannon II* from the current litigation as a narrow challenge to restrictions on NIL compensation. *See id.* at 1052 (introducing challenged rules as those that “prohibit student-athletes from being paid for the use of their [NILs]”); *id.* at 1055 (stating that the “gravamen of O’Bannon’s complaint was that the NCAA’s amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade”); *id.* at 1073 n.17 (“The correct inquiry under the Rule of Reason is: What

procompetitive benefits are served by the NCAA's existing rule banning NIL payments?"). Additionally, the proposed LRAs in *O'Bannon* were expressly limited to "licensing revenue generated from the use" of student-athletes' NILs. *See O'Bannon I*, 7 F. Supp. 3d at 1007. By contrast, this action more broadly targets the "interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services." *Alston*, 375 F. Supp. 3d at 1062. And Student-Athletes sought LRAs that would uncap above-COA compensation, regardless whether their NILs have, will, or could generate any revenue that would fund such compensation. *See id.* at 1086.

The NCAA's argument that it should not incur antitrust liability for *relaxing* its compensation limits since *O'Bannon* is not persuasive. The district court rightly concluded that this argument misses the mark: "It is the fact that the prices of student-athlete compensation are fixed, as opposed to the amount at which these prices are fixed, that renders the agreements at issue anticompetitive." *Id.* at 1095 (citing *O'Bannon II*, 802 F.3d at 1071 ("It is no excuse that the prices fixed are themselves reasonable.") (quoting *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980))).

Additionally, the NCAA's concession that it has relaxed its compensation limits since *O'Bannon* only underscores that the instant litigation is materially factually different from *O'Bannon*. Indeed, as Student-Athletes argue, the changes to compensation limits since *O'Bannon* "alter the factual assumption that drove the result in *O'Bannon*: they show that non-education-related cash payments in excess of the [COA] are no longer a 'quantum leap' from current

NCAA practice[.]” See *O’Bannon II*, 802 F.3d at 1078 (“The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”)).

In *O’Bannon II*, the majority addressed only two types of above-COA allowances: Pell Grants and prize money for tennis recruits. See *id.* at 1058–59. It distinguished Pell Grants, which are “intended for education-related expenses,” from “pure cash compensation” for athletic performance. *Id.* at 1078 n.24. And it declared that “award money from outside athletic events implicates amateurism differently than allowing schools to pay student-[athletes] directly.” *Id.* at 1077 n.21. Neither of these above-COA allowances is analogous to the post-*O’Bannon II* forms of compensation—provided by schools and unrelated to education—that the district court cited to support its conclusion that the NCAA, contrary to its theory of amateurism, *does* provide at least some “pay for play.” See *Alston*, 375 F. Supp. 3d at 1071–74. For example, the court found that, after the *O’Bannon* record closed, student-athletes have received, *inter alia*, athletic participation awards in the form of Visa gift cards,<sup>12</sup> SAF disbursements in the thousands of dollars to pay for loss-of-value insurance,<sup>13</sup> and

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<sup>12</sup> Visa gift cards function like cash, even if the NCAA declines to admit as much.

<sup>13</sup> The NCAA characterizes this insurance as a “legitimate expense to protect against the risk of loss that could be incurred during athletic competition,” but the legitimacy of these payments is irrelevant here. What matters, for *stare decisis* purposes, is that the *O’Bannon II* panel had no occasion to consider whether such payments accord with the NCAA’s conception of amateurism.

personal expenses unrelated to education. *Id.* at 1095. Based on these innovations, the court fairly concluded that the compensation landscape has meaningfully changed since *O’Bannon*. *See id.* at 1094.

In sum, because *O’Bannon II* “was decided on a narrow set of facts that are distinguishable from the present case,” we “decline to adopt” the NCAA’s “broad interpretation” of that decision. *United States v. Silver*, 245 F.3d 1075, 1079 (9th Cir. 2001).

## B

Res judicata, also known as “claim preclusion,” “bars a party in successive litigation from pursuing claims that ‘were raised or could have been raised in [a] prior action.’” *Media Rights Techs.*, 922 F.3d at 1020 (internal citation omitted). It applies when there is: (i) an identity of claims between the prior and subsequent actions; (ii) a final judgment on the merits; *and* (iii) identity or privity between the parties. *Id.* at 1020–21. The NCAA bears the burden of proving all three elements. *Id.* at 1021. The NCAA fails to carry its burden with respect to the first element.

“Claim preclusion does not apply to claims that were not in existence and could not have been sued upon . . . when the allegedly preclusive action was initiated.” *Id.* (internal citation omitted). That bright-line rule is dispositive here. Because Student-Athletes’ antitrust claim “arose from events that occurred after” the *O’Bannon* record closed in August 2014—that is, the above-described proliferation of permissible above-COA payments alongside a growth in revenues from FBS football and D1 basketball—it is “not barred.” *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017); *see also Harkins*

*Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989) (“Failure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time”); *California v. Chevron Corp.*, 872 F.2d 1410, 1415 (9th Cir. 1989) (providing that “conduct of the parties since the first judgment[] must be considered” in connection with successive antitrust suits).<sup>13</sup>

#### IV

The district court properly granted judgment on the Student-Athletes’ Sherman Act § 1 claim. The Sherman Act prohibits, *inter alia*, agreements “in restraint of” interstate trade or commerce. 15 U.S.C. § 1. The Supreme Court has interpreted section 1 “as ‘outlaw[ing] only unreasonable restraints’ of trade.” *See In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149 (9th Cir. 2019) (alteration in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). “[W]hen considering agreements among entities involved in league sports, such as here, [we] must determine whether the restriction is unreasonable under the [R]ule of [R]eason.” *Id.* at 1150 n.5; *see also O’Bannon II*, 802 F.3d at 1069 (“[T]he appropriate rule is the Rule of Reason.”).

As applied here, under the Rule of Reason’s “three-step framework:” (1) Student-Athletes “bear[] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market”; (2) if they carry that burden, the NCAA “must come forward with evidence of the restraint’s procompetitive effects”; and (3) Student-Athletes “must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.” *O’Bannon II*, 802 F.3d at 1070

(quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). Throughout this analysis, we remain mindful that, although “the NCAA is not above the antitrust laws,” *id.* at 1079, courts are not “free to micromanage organizational rules or to strike down largely beneficial market restraints,” *id.* at 1075. Accordingly, a court must invalidate a restraint and replace it with an LRA only if the restraint is “*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives.” *Id.* at 1075.

### A

The district court properly concluded that the Student-Athletes carried their burden at the first step of the Rule of Reason. The district court found that the NCAA’s rules have “significant anticompetitive effects in the relevant market” for Student-Athletes’ labor on the gridiron and the court. *See Alston*, 375 F. Supp. 3d at 1070 (“[B]ecause elite student-athletes lack any viable alternatives to [D1], they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [D1] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.”). These findings “have substantial support in the record,” *O’Bannon II*, 802 F.3d at 1070; *see Alston*, 375 F. Supp. 3d at 1067–70, and the NCAA does not dispute them, *see O’Bannon II*, 802 F.3d at 1072.

### B

The NCAA does, however, quarrel with the district court’s analysis at the Rule of Reason’s second step, where the NCAA bears a “heavy burden” of



“competitively justify[ing]” its undisputed “deviation from the operations of a free market.” *Bd. of Regents*, 468 U.S. at 113; *see also O’Bannon II*, 802 F.3d at 1064 (explaining that the NCAA is not entitled to a presumption that its restraints are procompetitive). On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve “amateurism,” which, in turn, “widen[s] consumer choice” by maintaining a distinction between college and professional sports.

“Improving customer choice is procompetitive.” *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1157 (9th Cir. 2003); *see also O’Bannon II*, 802 F.3d at 1072 (“[A] restraint that broadens choices can be procompetitive.”). Thus, the district court properly “credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports.” *Alston*, 375 F. Supp. 3d at 1082.<sup>14</sup>

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<sup>14</sup> Writing in support of Student-Athletes, amici assert that courts may not consider a restraint’s procompetitive benefits in a market outside the market deemed relevant for the purpose of evaluating a restraint’s anticompetitive effects. That proposition is not settled. *See Paladin*, 328 F.3d at 1157 n.11 (acknowledging the “theory that procompetitive effects in a separate market cannot justify anticompetitive effects in the market . . . under analysis” (citing *United States v. Topco Assocs., Inc.* 405 U.S. 596, 610 (1972))). The *O’Bannon II* panel had no occasion to address it, as the parties there limited their dispute to whether the challenged rules, as a factual matter, preserved consumer demand. *See* 802 F.3d at 1072–74. So, too, here: The parties have agreed that the relevant market is the market for Student-Athletes’ labor, while the market to be assessed for procompetitive effects is the market for college sports. Thus, the issue is not presented in this case. Because the issue raised by amici is “not properly before us,” we express no view on its merits, and leave it for another day. *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982).

The district court concluded, however, that only *some* of the challenged rules serve that procompetitive purpose: limits on above-COA payments unrelated to education, the COA cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives. *Id.* at 1101–02 (recognizing that removal of these restrictions could result in unlimited cash payments akin to professional salaries). It explained that the remaining rules—those restricting “non-cash education-related benefits”—do nothing to foster or preserve demand because “[t]he value of such benefits, like a scholarship for post-eligibility graduate school tuition, is inherently limited to its actual value, and could not be confused with a professional athlete’s salary.” *Id.* at 1083.

The record amply supports these findings. The district court reasonably relied on demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification. *See id.* at 1076–80.

First, Dr. Rascher’s and Dr. Noll’s demand analyses demonstrate that the NCAA has loosened its restrictions on above-COA, education-related benefits since *O’Bannon* without adversely affecting consumer demand. These benefits include SAF and AEF distributions to cover fifth- and sixth-year aid, postgraduate scholarships, tutoring, international student fees, educational supplies, academic achievement or graduation awards, graduate school exam fees, and fees for internship programs. *Id.* at 1072 n.15.

Second, Student-Athletes’ survey evidence reflects that individually implementing seven types of

education-related benefits—limited or forbidden under the challenged rules— would not diminish the survey respondents’ viewership or attendance.<sup>15</sup>

Third, NCAA witnesses confirmed that the NCAA set limits on education-related benefits without consulting any demand studies. *See id.* at 1080 (“Indeed, [Kevin] Lennon, who has worked for the NCAA for more than thirty years, testified that he does not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation”); *see also id.* at 1074 (“Defendants have not provided any cogent explanation for why the NCAA generally prohibits financial aid for graduate school at another institution, or for why the Senior Scholar Awards are limited in quantity and amount.”).

Notwithstanding this evidence, the NCAA accuses the district court of straying from a purported “judicial consensus” that the NCAA expands consumer choice by enforcing an amateurism principle under which student-athletes “must not be paid” a penny over the COA. This sweeping procompetitive justification—the “Not One Penny” standard, in Dr. Noll’s parlance—lacks support in both precedent and the record.

Although both *Board of Regents* and *O’Bannon II* define amateurism to exclude payment for athletic

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<sup>15</sup> These benefits were: an academic incentive payment with a maximum value of \$10,000, a graduation incentive payment with a maximum value of \$10,000, a post-eligibility undergraduate scholarship, a work-study payment, off-season expenses, a graduate school scholarship for the COA, and a post-eligibility study-abroad scholarship.

performance, neither purports to immortalize that definition as a matter of law. In fact, *O'Bannon II* recognizes that *Board of Regents'* discussion of amateurism is “dicta.” 802 F.3d at 1063. And to the extent the *O'Bannon II* majority accepted the NCAA’s conception of amateurism, it did so based on the record, which demonstrated a “concrete procompetitive effect,” *id.* at 1073, of limiting above-COA “NIL cash payments untethered to [students’] education expenses,” *id.* at 1076.

The record in this case, by contrast, reflects no such concrete procompetitive effect of limiting non-cash, education-related benefits. Instead, the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes “unlimited payments unrelated to education, akin to salaries seen in professional sports leagues” is what makes them “amateurs.” *Alston*, 375 F. Supp. 3d at 1083. The district court credited NCAA testimony that college sports resonates with fans because they are not professionalized, and that “if the college game looks to be professional sports, [fewer] people will watch it.” *Id.* at 1082 (internal citations omitted). But the court reasonably declined to adopt the Not One Penny standard based on considerable evidence that college sports have retained their distinctive popularity despite an increase in permissible forms of above-COA compensation and benefits.

In defense of its expansive conception of amateurism, the NCAA relies on its survey of 1,100 college sports fans, reflecting that 31.7 percent watch college sports because, *inter alia*, they “like the fact that college players are amateurs and/or are not paid.” The NCAA claims that the district court rejected this

survey on “baseless grounds.” But it disregards the court’s primary and most compelling reason for dismissing this evidence: The survey results reflect, at most, a consumer *preference* for “amateurism,” but do not capture the effects (if any) that the tested compensation scenarios would have on consumer *behavior*. *See id.* at 1079 (“Dr. Isaacson acknowledged that measuring consumer preferences is ‘not the same thing’ as measuring future consumer behavior, and that he did not do any work to measure any relationship between the two.” (internal citation omitted)). The NCAA does not deny this flaw in its survey evidence.

The district court offered another sound reason to reject the NCAA’s survey evidence: The survey’s use of the phrase “amateurs and/or not paid” made its responses “hopelessly ambiguous.” *Id.* at 1078. In so finding, the district court did not, as the NCAA complains, “inject ambiguity into a commonplace term.” Amateurism does not have a fixed definition, as NCAA officials themselves have conceded. *See, e.g., id.* at 1070–71 (“Mike Slive, who served as commissioner of the SEC, one of the Power Five, . . . testified that amateurism is ‘just a concept that I don’t even know what it means. I really don’t.’” (internal citation omitted)); *see also O’Bannon II*, 802 F.3d at 1083 (Thomas, C.J., dissenting) (referring to amateurism as a “nebulous concept prone to ever-changing definition”). Survey respondents who selected “amateurs and/or not paid” may have very well equated amateurism with student status, irrespective of whether those students receive compensation for athletics. *See Alston*, 375 F. Supp. 3d at 1082 (acknowledging defense witness testimony that “consumers’ perception that student-athletes are, in fact, students” drives consumer demand for D1

basketball and FBS football). Given this lack of clarity, the district court reasonably concluded that the NCAA's survey results were of limited evidentiary value.

Finally, the district court properly considered whether the challenged rules themselves, rather than hypothetical alternatives, have procompetitive benefits. As both parties recognize, the proper “inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA’s [challenged] rule[s]?” See *O’Bannon II*, 802 F.3d at 1073 n.17. As we have recounted, the district court gave reasoned consideration to the procompetitive effects achieved by each type of challenged rule, ultimately concluding that the NCAA “sufficiently show[ed] a procompetitive effect of *some aspects of the challenged compensation scheme*,” but not all. *Alston*, 375 F. Supp. 3d at 1103 (emphasis added). By contrast, in *O’Bannon*, the district court erred at step two because it considered the procompetitive benefits of *hypothetical* limits on large amounts of compensation. See *O’Bannon II*, 802 F.3d at 1073 n.17 (“During the second step, the district court could only consider the benefits of the NCAA’s existing rule prohibiting NIL payments—it could not consider the potential benefits of an alternative rule (such as capping large payments).”). Here, the NCAA has conceded that its rules, in part, “prevent the receipt of unlimited pay” unrelated to education. Dr. Isaacson also acknowledged that the challenged rules prohibit unlimited pay. Thus, the court did not err in assessing whether such rules have procompetitive effects.

In short, the district court fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to

professional salaries, but not insofar as they restrict certain education-related benefits.<sup>16</sup>

### C

At the Rule of Reason’s third step, it is Student-Athletes’ burden to “make a strong evidentiary showing” that their proposed LRAs to the challenged scheme “are viable.” *Id.* at 1074. “[T]o be viable,” an alternative “must be ‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current rules, and ‘without significantly increased cost.’” *Id.* (quoting *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)). Where “a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with [an LRA].” *Id.* at 1075.

The LRA identified by the district court would prohibit the NCAA from (i) capping certain education-related benefits<sup>17</sup> and (ii) limiting academic or

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<sup>16</sup> The NCAA asserts that the district court proceeded from the “simply fictional” premise that the dividing line between student-athletes and professionals is that the latter may receive “unlimited pay.” In context, the district court was using the term “unlimited pay” as shorthand for payments that run the risk of eroding consumer perception of student-athletes as students—that is, *cash payments unrelated to education* and *akin to professional salaries*. The NCAA’s own expert used that shorthand in surveying consumer attitudes toward an “unlimited payments scenario,” where “a college could pay a student-athlete any amount it wanted to, without any limit, for playing college sports.”

<sup>17</sup> Those benefits are the following: “computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at

graduation awards or incentives below the maximum amount that an individual athlete may receive in athletic participation awards, while (iii) permitting individual conferences to set limits on education-related benefits. *See Alston*, 375 F. Supp. 3d at 1087. The district court did not clearly err in determining that this LRA would be “‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current rules,” and may be implemented without “‘significantly increased cost.” *See O’Bannon II*, 802 F.3d at 1074 (internal citation omitted).

## 1

The district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do. Such benefits are easily distinguishable from professional salaries, as they are “connect[ed] to education”; “their value is inherently limited to their actual costs”; and “they can be provided in kind, not in cash.” *Alston*, 375 F. Supp. 3d at 1102. And, as already detailed, the record furnishes ample support for the district court’s finding that the provision of education-related benefits has not and will not repel college sports fans.

The district court drew an apt analogy between the LRA upheld in *O’Bannon II* and the LRA it identified here: Both athletic scholarships for the COA and education-related benefits “cover legitimate education-related costs.” *Id.* at 1105. Indeed, in

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any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships.” *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2019 WL 1593939, at \*1.



affirming the district court's order insofar as it raised the grant-in-aid cap to the COA, the *O'Bannon II* panel noted Dr. Emmert's testimony that this alternative would not harm demand "because all the money given to students would be going to cover their 'legitimate costs' to attend school." *O'Bannon II*, 802 F.3d at 1075. In reference to this litigation, Dr. Emmert similarly announced the NCAA's approval of the court's order to the extent that it would foster competition among conferences and schools "over who can provide the best educational experience"—"an inherently good thing." Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN, Apr. 4, 2019, available at <https://tinyurl.com/emmert-NCAA/>.

Dr. Emmert's comment is consistent with the record. As in *O'Bannon II*, the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value. Indeed, its evidence was to the contrary. For instance, in testifying about a University of Nebraska program that permits student-athletes to receive up to \$7,500 in post-eligibility aid (for study-abroad expenses, scholarships, and internships), the University's former chancellor conceded that such benefits "relate to the educational enterprise" and, thus, do not erode demand. When asked about the propriety of above-COA compensation, the current MAC commissioner similarly testified that the "key" is "linking" payments to the "pursuit of the educational opportunities of the individual involved." The LRA fashioned by the district court achieves that link.

In light of this evidence, the district court reasonably concluded that market competition in

connection with education-related benefits will only reinforce consumers' perception of student-athletes as students, thereby preserving demand. *See Alston*, 375 F. Supp. 3d at 1089 (observing that NCAA's "own witnesses" testified that "consumer demand for [D1] basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students").

Moreover, no evidence in the record substantiates the NCAA's concerns that certain benefits permissible under the LRA, if uncapped, will become vehicles for payments that are virtually indistinguishable from a professional's salary. These concerns are premised on an unreasonably expansive reading of the injunction, including its requirement that the NCAA permit reimbursement for "tangible items not included in the [COA] calculation but nonetheless related to the pursuit of academic studies." *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2019 WL 1593939, at \*1. We construe injunctions in "context" and "so as to avoid . . . absurd result[s]." *Gathright v. City of Portland*, 439 F.3d 573, 581 (9th Cir. 2006). The context here makes plain that it "cannot have been the district court's intent," *id.*, for uncapped benefits to be vehicles for unlimited cash payments. Instead, it expressly envisioned "non-cash education-related benefits" for "legitimate education-related costs," not luxury cars or expensive musical instruments for students who are *not* studying music. *Alston*, 375 F. Supp. 3d at 1105 (emphasis added). Thus, properly construed, the injunction does not permit the type of unlimited cash payments asserted by the NCAA. Further, as the district court properly concluded, it is doubtful that a consumer could mistake a *post-eligibility* internship for a professional athlete's

salary, where the former is necessarily divorced from participation in college athletics.

The NCAA's challenges to the evidence underlying this LRA are likewise unavailing. To be sure, neither the survey nor Dr. Rascher's observations regarding the Nebraska program purport to reflect the effect that *nationwide* education-related benefits, implemented in the *aggregate*, would have on consumer demand. But the district court did not rely exclusively on this evidence. Under the deferential standard of review required here, we must examine the record "in its entirety." *Alexander*, 106 F.3d at 877. The NCAA fails to explain why the cumulative evidence, which included demand analyses regarding the growth of NCAA revenue alongside the expansion of SAF and AEF payments for education-related expenses, was insufficient.

And though the record does not reflect whether an athlete has ever received \$5,600 in aggregate athletic participation awards, the district court reasonably concluded that permitting student-athletes to receive up to that amount in academic or graduation awards and incentives will not erode consumer demand. *See Alston*, 375 F. Supp. 3d at 1072 (citing Dr. Elzinga's testimony that a player on a successful team could obtain \$5,600 in cumulative awards under existing rules). The district court had before it (and fairly credited) evidence that demand would withstand even *higher* caps on such awards and incentives. *See id.* at 1080 (discussing Student-Athletes' survey, which indicated that consumers would continue to view and attend college sports events even if student-athletes received academic or graduation incentive payments of up to \$10,000); *see also id.* at 1074, 1102, n.42 (observing that NCAA's 30(b)(6) witness was unable

to explain the NCAA's reason for limiting Senior Scholar-Athlete Awards to two students per year and a value of \$10,000). The NCAA's objection to the \$5,600 cap rings especially hollow considering that it does not cap individual academic or graduation awards drawn from the AEF or SAF. *See id.* at 1072 n.15.<sup>18</sup>

Finally, the NCAA contends that the district court engaged in improper judicial price setting by tying the cap on academic and graduation awards and incentives to the cap on aggregate athletic participation awards. The Supreme Court has remarked that courts are "ill suited" to identify terms of dealing between competitors, including a product's "proper price." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). But the district court did not *fix* the value of these academic awards: The task of setting their value to protect demand, by adjusting the aggregate value of athletic participation awards, remains in the NCAA's court. *See Alston*, 375 F. Supp. 3d at 1107.

## 2

The district court did not clearly err in finding that this LRA will not result in significantly increased costs. The district court reasoned that enjoining NCAA caps on most education-related benefits will actually save the NCAA resources that it would have

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<sup>18</sup> The \$5,600 cap on academic achievement awards and the \$5,000 cap on deferred NIL compensation that the panel majority struck down in *O'Bannon II* may be "remarkably close" as a numerical matter, but they are different where it counts: Unlike deferred NIL compensation, academic achievement awards are plainly education-related and, thus, reinforce the demand-preserving perception of student-athletes as students.

otherwise spent on enforcing those caps. *Id.* at 1090. Commonsense supports that determination, as does the record.

Moreover, though the injunction permits the NCAA to regulate, to an extent, academic and graduation awards and incentives, and conferences to regulate all education-related benefits, there is no reason to believe that such regulation, if pursued, will result in significantly increased costs. The NCAA does not dispute that it and its conferences have existing rulemaking and enforcement infrastructure to achieve such regulation. *See id.* at 1090 n.32 (noting NCAA’s recent creation of enforcement body to adjudicate violations of “complex” NCAA rules, including the “prioritiz[ation of] academics and the well-being of college athletes” (internal citation omitted); *see also id.* (noting that conferences are legislative bodies under the Bylaws).

The court’s findings at step three are supported by the record, and certainly not clearly erroneous.

## V

The final question remaining is whether the district court’s injunction goes too far or not far enough in enjoining the NCAA’s unlawful conduct. In the NCAA’s view, the injunction is impermissibly vague, in violation of Federal Rule of Civil Procedure 65(d) (“Rule 65(d)”), and usurps the association’s role as the “superintend[ent]” of college sports, *O’Bannon II*, 802 F.3d at 1074. On cross-appeal, Student-Athletes urge that the district court should have enjoined *all* NCAA compensation limits, including those on payments untethered to education. In our view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive

harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports. Thus, we neither vacate nor broaden the injunction, but affirm.

#### A

Rule 65(d) reflects the “basic principle” that “those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.” *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086–87 (9th Cir. 2004) (internal citation omitted). “[W]e will not set aside injunctions under Rule 65(d) ‘unless they are so vague that they have no reasonably specific meaning.’” *Id.* at 1087 (internal citation omitted). The challenged injunction clears this hurdle.

The district court enjoined the NCAA from limiting *enumerated* “compensation and benefits related to education,” *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2019 WL 1593939, at \*1 (listing computers, science equipment, musical instruments, etc.). The NCAA does not claim confusion as to the meaning of any of these items. Instead, it stakes its Rule 65(d) objection on the injunction’s reference to “other tangible items not included in the [COA] but nonetheless related to the pursuit of academic studies.” *Id.* When read in context, following a list of specific types of education-related equipment, this language is reasonably specific. And unlike in *Columbia Pictures Industries, Inc. v. Fung*, a copyright infringement case on which the NCAA relies, the injunction here does not make cryptic reference to “general[]” or “wide[spread]” understanding and knowledge of technical terms. 710 F.3d 1020, 1048 (9th Cir. 2013).

Nor did the district court impermissibly wrest control of college sports from the NCAA by empowering itself to determine the types of benefits that qualify as “related to” education, instead of “leaving th[at] task” to “the institutions experienced in and responsible for providing education.” The NCAA does not (nor can it reasonably) dispute that the benefits enumerated in the injunction are plainly related to academics. What is more, the injunction invites the NCAA to promulgate a definition of “related to education,” based on its institutional expertise, subject to the court’s approval. *See In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2019 WL 1593939, at \*1. This allowance does not constitute judicial usurpation by a long shot.

In sum, we uphold the injunction against the NCAA’s challenges.

## B

If the district court had concluded, as Student-Athletes contend, that NCAA limits on compensation unrelated to education unreasonably restrain trade, then it should have enjoined those limits. *See* 15 U.S.C. §§ 4, 25 (conferring jurisdiction on federal courts to “prevent and restrain violations” of antitrust law ); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 577–78 (1972) (“Antitrust relief should unfetter a market from *anticompetitive conduct*.” (emphasis added)). The problem for Student-Athletes is that the court did not conclude as much; instead, it determined that NCAA limits on *education*-related compensation are the only challenged rules that flunk the Rule of Reason.

Although the district court found that *all* the challenged rules have an anticompetitive effect,

*Alston*, 375 F. Supp. 3d at 1067–70, a finding of anticompetitive harm at step one does not end the inquiry. A defendant may escape antitrust liability despite inflicting harm if a court determines that the restraint has a procompetitive effect, and a proposed LRA eliminating that restraint is not viable. *See, e.g., O’Bannon II*, 802 F.3d at 1070, 1076–79 (finding that rules prohibiting NIL compensation had significant anticompetitive effects, but vacating portion of injunction requiring deferred compensation for NILs after concluding that this alternative was not a viable LRA).

As previously stated, the district court concluded, at step two, that the NCAA satisfied its burden of showing that “[r]ules that prevent unlimited payments”—“unrelated to education” and “akin to salaries seen in professional sports leagues”—serve the procompetitive end of distinguishing college from professional sports. *Alston*, 375 F. Supp. 3d at 1083. And at step three, it rejected Student-Athletes proposed LRAs, which would have eliminated such limits, reasoning:

[A]t least some conferences would allow their schools to offer student-athletes unlimited cash payments that are unrelated to education. Such payments could be akin to those observed in professional sports leagues. Payments of that nature could diminish the popularity of college sports as a product distinct from professional sports.

*Id.* at 1087. Contrary to Student-Athletes’ understanding, this analysis reflects the judgment that limits on cash compensation unrelated to education do *not*, on this record, constitute



anticompetitive conduct and, thus, may not be enjoined.

This judgment was adequately reasoned and rests on neither factual nor legal error. The district court acknowledged the theoretical possibility that “conference officials, as rational economic actors, would not act contrary to their members’ aggregate economic interests” by paying demand-reducing levels of compensation. *Id.* But it reasonably perceived a risk of “miscalculations” by conferences during an “inevitable trial-and-error phase.” *Id.* The district court did not clearly err in declining to assume that conferences, in reality, would act rationally.

The record indicates that the Power Five schools have exercised their autonomy in recent years to expand benefits unrelated to education and that conferences and schools have provided largely discretionary SAF and AEF payments for a wide range of expenses unrelated to education—both without harming consumer demand. But the district court reasonably concluded that this evidence may not reliably indicate that *individual* conferences would regulate payments in a demand-preserving manner absent any restrictions: The autonomy structure permits the Power Five to *collectively* adopt compensation-related legislation, in line with *O’Bannon II*’s guidance that some degree of “mutual agreement” is necessary to make the college sports product available. *See* 802 F.3d at 1069 (quoting *Bd. of Regents*, 468 U.S. at 102). And the NCAA currently limits the use of SAF funds to payments that are distinguishable from a professional’s salary in that they “meet[] financial needs that arise in conjunction with participation in intercollegiate athletics,

enrollment in academic curriculum or to recognize academic achievement.”

Student-Athletes’ claims of legal error are likewise unpersuasive. They cite no support for their position that a court “should not simply import the [LRA] as its injunction.” Indeed, *O’Bannon II* holds otherwise: “Where, as here, a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and *order it replaced with a [viable LRA]*.” *Id.* at 1075 (emphasis added).

Finally, Student-Athletes argue that the NCAA may no longer rely on *O’Bannon II*’s conclusion that NCAA limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports now that it has “endorse[d]” the very “same NIL benefits” at issue there. This argument is premature. As it stands, the NCAA has *not* endorsed cash compensation untethered to education; instead, it has undertaken to comply with the FPP Act in a manner that is consistent with *O’Bannon II*—that is, by loosening its restrictions to permit NIL benefits that are “tethered to education.” Fed. and State Leg. Working Grp. Report 4 (Oct. 23, 2019), *available at* <https://tinyurl.com/working-grp-report>; *see also* Test. of Dr. Mark Emmert 6 (Feb. 11, 2020), *available at* <https://tinyurl.com/Emmert-Test-y>. Accordingly, we disagree that the NCAA’s response to the FPP Act militates in favor of enjoining all NCAA compensation limits.<sup>19</sup>

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<sup>19</sup> Student-Athletes further contend that the FPP Act and similar proposed legislation in other states indicate a “consensus” that student-athletes’ receipt of payments unrelated to education will

## VI

To repeat my observation in *O'Bannon II*: “The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law and under the appropriate standard of review.” *O'Bannon II*, 802 F.3d at 1083 (Thomas, C.J., concurring in part and dissenting in part).

For the foregoing reasons, we hold that the district court properly concluded that NCAA limits on education-related benefits do not “play by the Sherman Act’s rules.” *Id.* at 1079. Accordingly, we affirm its liability determination and injunction in all respects.

**AFFIRMED.**

M. SMITH, Circuit Judge, concurring:

Because I am bound by our decision in *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049 (9th Cir. 2015), I join the panel opinion in full. I write separately to express concern that the current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case (Student-Athletes) of the fundamental protections that our antitrust laws were meant to provide them.

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not dampen consumer interest in college sports. However, the Act’s legislative history suggests that concerns about fundamental fairness, rather than considerations regarding demand, drove its enactment. *See, e.g.*, S.B. 206 Assembly Floor Analysis 2 (Sept. 4, 2019), *available at* <https://tinyurl.com/SB-206-AFA>.

Student-Athletes are talented, hardworking individuals who have dedicated their young lives to excelling in specific sports. As amici describe, Student-Athletes work an average of 35–40 hours per week on athletic duties during their months-long athletic seasons, and most work similar hours during the off-season to stay competitive. At the same time, most of them do their best to succeed academically, managing to devote on average another 40 hours per week to classes and study. Nevertheless, their coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate. In addition to lessening their chances at academic success because of the time they must devote to their sports obligations, Student-Athletes are often prevented from obtaining internships or part-time paying jobs, and, as a result, often lack both income and marketable work experience. Meanwhile, the grueling hours and physical demands of college sports carry significant health risks, such as sleep deprivation, stress, broken bones, and even potential brain damage. Despite their best efforts, however, fewer than 5% of Student-Athletes will ever play at a professional level, and most of those lucky few will stay in the pros only a few short years. In short, the college years are likely the only years when young Student-Athletes have any realistic chance of earning a significant amount of money or achieving fame as a result of their athletic skills.

For all their dedication, labor, talent, and personal sacrifice, Student-Athletes go largely

uncompensated. They may receive tuition for an academic experience that they cannot take full advantage of, minimal living expenses, and some lavish perks that do nothing for their present or future financial security. However, that is not because their athletic services have little value. On the contrary, the NCAA and Division 1 universities make *billions* of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of Student-Athletes. A number of Division 1 head football coaches take home multimillion-dollar salaries that exceed those of many NFL coaches. Moreover, contrary to the NCAA's representations about the importance of "amateurism," the evidence in this case shows that college sports viewership has only increased since we reduced some limitations on student-athlete compensation in *O'Bannon II*. See Panel Op. at 11–13.

My reaction to our application of federal antitrust law to the case of the Student-Athletes is similar Justice Alito's reaction to the majority's view in *Collins v. Virginia*, 584 U.S. \_\_\_, 138 S. Ct. 1663 (2018). Said he: "An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, 'the law is a ass—a idiot.'" *Id.* at 1681 (Alito, J., dissenting) (quoting C. Dickens, *Oliver Twist* 277 (1867)).

The treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust

laws were originally meant to prohibit exactly this sort of distortion.

The Sherman Act and related antitrust laws were designed to preserve our economic freedom. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Under those laws,

the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector for the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

*Id.* The Sherman Act thus “protect[s] the economic freedom of participants in the relevant market.” *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983)). Those protections extend to sellers of goods and services—such as Student-Athletes—to the same extent they do buyers, consumers, or competitors. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). “The Act is comprehensive in its terms and coverage, protecting *all* who are made victims of the forbidden practices by whomever they may be perpetrated.” *Id.* (emphasis added).

Section 1 of the Sherman Act, at issue here, prohibits agreements that unreasonably restrain trade. 15 U.S.C. § 1; *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911). In evaluating alleged violations of Section 1 that fall outside the bounds of several now-established *per se* rules, courts apply the Rule of Reason to determine the effect of a given restraint on competition. “[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978). Importantly, it is *not* the purpose of the Rule of Reason analysis “to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.” *Id.* at 692.

The Rule of Reason entails a three-step analysis, of which the starting point is to identify the market in which the restraint occurs. *See Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1104–05 (9th Cir. 1999). At Step One, the “plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within” that market. *O’Bannon II*, 802 F.3d at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). If the plaintiff meets that burden, at Step Two, “the defendant must come forward with evidence of the restraint’s procompetitive effects.” *Id.* (quoting *Tanaka*, 252 F.3d at 1063). Finally, at Step Three, “the plaintiff must . . . show that any legitimate objectives can be achieved in a substantially less restrictive manner.” *Id.* (quoting *Tanaka*, 252 F.3d at 1063).

Despite confining the Step One analysis of anticompetitive effects to the defined market, courts have not consistently limited the scope of the Step Two analysis in the same way. Some, including our court, have permitted defendants to offer procompetitive effects in a collateral market as justification for anticompetitive effects in the defined market. In *NCAA v. Board of Regents of Univ. of Oklahoma (Board of Regents)*, 468 U.S. 85 (1984), for example, the Supreme Court considered whether preserving demand for tickets to live college football games could justify anticompetitive restraints in the market for live college football television. *Id.* at 95–96, 115–17. The district court defined the relevant market at Step One as “live college football television.” *Id.* at 95. The NCAA had restrained competition in this market by fixing the price of telecasts, negotiating exclusive contracts with two television networks, and artificially limiting the number of televised games. *Id.* at 96. Among other alleged procompetitive justifications, all of which the Court ultimately rejected, the NCAA argued that its television plan promoted consumer demand for live attendance at college football games. *Id.* at 115. The Court rejected this argument for three reasons: (1) individual schools could protect live attendance at the specific game being televised by negotiating a regional blackout, without acting in concert with other schools; (2) no evidence supported the NCAA’s theory that limiting televised games actually promoted live attendance, especially since games would still be broadcast at all hours of the day; and (3) the NCAA’s live attendance theory was “not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that . . . ticket sales for most college games are unable to compete in a free



market”—“a justification that is inconsistent with the basic policy of the Sherman Act.” *Id.* at 115–17. The Supreme Court did not, however, say that the live attendance justification failed because courts categorically cannot consider procompetitive benefits outside the defined market.

Our relevant precedents follow a similar analysis. In *O’Bannon II*, we held that preserving consumer demand for college sports was a legitimate procompetitive justification for anticompetitive restraints on compensation for student-athletes’ names, images, and likenesses in the market among colleges for student-athletes’ services. 802 F.3d at 1069–73. The district court had defined the relevant market at Step One as the “college education market,” “wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.” *Id.* at 1070. The NCAA had restrained competition in this market by preventing member schools from paying student athletes for the use of their names, images, and likenesses. *Id.* Contrary to two of the NCAA’s proffered justifications, we accepted the district court’s factual determinations that the restraint did “not promote competitive balance,” and did “not increase output in the college education market.” *Id.* at 1072. We also rejected the NCAA’s argument that, by preserving the character of college sports, the restraint “widen[ed]’ the choices ‘available to athletes.’” *Id.* (quoting *Board of Regents*, 468 U.S. at 102). “As the district court found, it is primarily ‘the opportunity to earn a higher education’ that attracts athletes to college sports rather than professional sports, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic

scholarships.” *Id.* at 1073. Yet, without tying the Step 2 analysis to the “college education market,” we held that the NCAA had demonstrated that the restraint served the procompetitive purpose of preserving “the amateur nature of collegiate sports [that] increases their appeal to consumers.” *Id.* Accordingly, we proceeded to Rule of Reason Step Three, wherein we upheld the district court’s less restrictive alternative of allowing grant-in-aid up to the full cost of attendance, but we vacated the district court’s less restrictive alternative of allowing “small” amounts of deferred cash compensation as incompatible with amateurism. *Id.* at 1074–79.

Other courts, however, have rejected procompetitive justifications outside of the defined market. For example, in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), a former NFL player challenged rules governing the draft of graduating college players under which “no team was permitted to negotiate prior to the draft with any [eligible] player . . . and no team could negotiate with (or sign) any player selected by another team in the draft.” *Id.* at 1176. The D.C. Circuit affirmed the finding that the draft had anticompetitive effects. The draft eliminated competition by “inescapably forc[ing] each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power.” *Id.* at 1185.

At Step Two of the Rule of Reason analysis, the NFL asserted that the draft rules were procompetitive because they promoted “competitive balance” among the league’s teams, in turn “producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs.” *Id.* at 1186. The court rejected those

justifications because they did not have procompetitive effects in the *market for players' services*. “The draft is ‘procompetitive,’ if at all, in a very different sense from that in which it is anticompetitive.” *Id.* “[W]hile [the draft] may heighten athletic competition and thus improve the entertainment product offered to the public, [it] does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost.” *Id.* The court concluded that the draft’s anticompetitive and procompetitive effects were “not comparable,” and thus it was “impossible to ‘net them out’ in the usual rule-of-reason balancing.” *Id.*

Despite its ruling in *Board of Regents*, the Supreme Court has not squarely addressed the proper scope of the Step Two analysis. And, although we conducted a similar analysis in *O’Bannon II*, neither have we. In my view, the underlying purpose of the Sherman Act—promoting competition— counsels in favor of conducting a more limited Rule of Reason analysis, as the court in *Smith* did. Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified from the outset. If the purpose of the Rule of Reason is to determine whether a restraint is net procompetitive or net anticompetitive, accepting procompetitive effects in a collateral market disrupts that balancing. It weakens antitrust protections by permitting defendants to rely on a broader array of justifications that promote competition, if at all, in collateral markets where the restraint under analysis does not occur.

Jurists faced with weighing the anticompetitive effects in one market with the procompetitive effects

in another cannot simply “net them out” mathematically. *Smith*, 593 F.2d at 1186. Rather, courts employing a cross-market analysis must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market. As the Supreme Court has warned, this is not what the antitrust laws invite courts to do. “If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking.” *Topco*, 405 U.S. at 611.

Consider this case. The district court accepted the relevant market as that for Student-Athletes’ “labor in the form of athletic services in men’s and women’s Division I basketball and FBS football,” in which Student-Athletes “sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation permitted by NCAA rules.” *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston)*, 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019). At Step One, the district court found that Student-Athletes had established significant anticompetitive effects in the market for their athletic services. The court concluded that the NCAA rules “have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services.” *Id.* at 1068.

At Step Two, the court did not limit its consideration to the procompetitive effects of the compensation limits in the market for Student-Athletes' athletic services. Rather, it found that certain of the compensation limits are procompetitive because they drive consumer demand for college sports by distinguishing collegiate from professional athletics. *Id.* at 1083. In other words, the court found that limiting Student-Athletes' pay in the market for their services was justified because that restraint drove demand for the distinct product of college sports in the consumer market for sports entertainment. The court did not require that the NCAA prove that this impact on consumer demand had a corollary procompetitive impact on the market for Student-Athletes' services, that it "increase[d] output" or "widen[ed] the choices 'available to athletes.'" *O'Bannon II*, 802 F.3d at 1072 (quoting *Board of Regents*, 468 U.S. at 102). The court did not require that the NCAA prove its compensation rules, within the defined market, "increase competition in the economic sense of encouraging others to enter the market to offer the product at lower cost." *Smith*, 593 F.2d at 1186. It was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market.

Although the district court correctly applied our precedents, the result of this analysis seems to erode the very protections a Sherman Act plaintiff has the right to enforce. Here, Student-Athletes are quite clearly deprived of the fair value of their services. *Alston*, 375 F. Supp. 3d at 1068. As the district court found, while the NCAA and its conferences generate billions in revenue from college sports, they "have monopsony power to restrain student-athlete compensation in any way and at any time they wish,

without any meaningful risk of diminishing their market dominance.” *Id.* at 1063, 1070. Under the Rule of Reason analysis we affirm today, so long as the NCAA cites consumer demand for college sports, we allow it to artificially suppress competition for collegiate athletes’ services by limiting their compensation. Instead of requiring the NCAA to explain how those limits promote schools’ competition for athletes, we leave Student-Athletes with little recourse under the antitrust laws. Student-Athletes are thus denied the freedom to compete and, in turn, “of compensation they would receive in the absence of the restraints.” *Id.* at 1068.

Our Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification. It may be that scholars or litigants can develop a purely economic, mathematically-defensible method for cross-market analysis that does not depend on policy judgments that our antitrust laws never meant to delegate to the courts. But we do not currently have such a method, and it may equally be the case that no such method is possible or desirable.

Lacking a robust justification, I fear that our cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws, in this case to the great detriment of Student-Athletes. I hope our court will reconsider this issue in a case that squarely raises it.

**Federal and State Legislative Working Group  
Report to the NCAA Board of Governors  
October 23, 2019**

**Introduction.**

For the reasons identified in the Board of Governors charge, and after our own further examination of the issues around name, image and likeness, we agree change is appropriate, necessary and in the best interest of student-athletes and the Association. The NCAA membership and its divisions have a long history of expanding opportunities for college athletes, and enhanced opportunities related to name, image or likeness would be an appropriate extension of efforts to modernize NCAA rules in a way that is consistent with our values and principles. We believe additional flexibility in this space can and must continue to support the collegiate model in clear contrast to the professional sports model.

The working group spent many hours studying, considering extensive feedback, discussing and deliberating challenges and opportunities related to student-athlete engagement in activities that use a student-athlete's name, image or likeness in return for some form of compensation. As part of this process, the working group engaged a diverse group of stakeholders through in-person interviews, written feedback and formal presentations. These stakeholders included current and former student-athletes, faculty, presidents, conference commissioners, athletics administrators and coaches from Divisions I, II and III, as well as thought leaders and experts in the higher education and college sports communities. Members of the working group agree that issues related to such use are complex and any potential modifications should be carefully considered

by the NCAA membership. Further, members of the working group agree that any changes must both enhance the student-athlete experience and support the collegiate model.

At this stage, the working group is prepared to make the following recommendations to the Board of Governors with the request that each division have the benefit of providing input to identify appropriate regulations and address divisional needs. Membership input and decision-making are the foundation of our voluntary association and, while our working group was a representative body, the issues here are so important, complex and challenging that we believe further dialogue is appropriate before we submit additional recommendations. These recommendations will form the basis for continued conversations and engagement with state and federal lawmakers around enacted, introduced and proposed legislation.

### **Recommendations.**

To best serve student-athletes, the Federal and State Legislation Working Group recommends that the Board of Governors:

- Authorize change in policy and bylaws to permit name, image and likeness benefits consistent with NCAA values and principles as well as with legal precedent.
- Reject any approach that would make student-athletes employees or use likeness as a substitute for compensation related to athletic participation and performance.
- Reaffirm the integrity of the student-athlete recruitment process, which is unique to college



sports. Changes to NCAA name, image and likeness rules should support this principle and not result in undue influence on a student's choice of college.

- Extend the timeframe of this working group through April 2020 to continue to gather feedback and work with the membership on the development and adoption of new NCAA legislation.
- Endorse the regulatory framework described in this report as appropriate guardrails for future conversations and possible NCAA legislation.
- Instruct NCAA leadership on engagement with state and federal lawmakers.

The NCAA, over many years, has progressively adapted to changing student-athlete environments by adopting regulations that meet their needs in a manner consistent with NCAA values and principles, including the opportunity to receive cost of attendance. Our recommendations reject the idea of student-athletes as employees and the use of their name, image, or likeness as a substitute currency in a “pay-for-play” model.

The current state and federal legislative efforts are in conflict with NCAA values and principles and fail to differentiate the NCAA intercollegiate athletic experience from those of professional athletes. These efforts also undermine the legal precedent that the U.S. Supreme Court and other courts have afforded the NCAA to regulate intercollegiate athletics at a national level. What we are proposing within this document is a framework by which all student-athletes in all sports across all three divisions have the opportunity to engage in name, image and

likeness activities without eroding the priorities of education and the collegiate experience.

NCAA member schools also continue to seek opportunities to allow prospective and current student-athletes to go directly into the professional leagues. Students should have choice and opportunity to select the professional model whenever they believe they are ready to pursue a professional sports career.

The law does not recognize name, image and likeness compensation to individuals in the broadcast of athletic events. Student-athletes cannot be afforded special publicity rights regarding name, image or likeness that are not available to the general population.

The working group recommends a uniform set of principles and a framework that will allow for equitable national collegiate competition and championships. State mandates such as the law enacted by California or those contemplated by other jurisdictions fail to address this necessary uniformity. NCAA legislation that allows for variability based on identified circumstances must first be vetted and adopted by the membership representing college athletics in all 50 states – not by a single state or even multiple states. The framework proposed by the working group will facilitate national consistency while allowing for divisional differences and greater student-athlete choice within our structure. This approach works for colleges and universities throughout our membership, public and private, urban and rural, in all three divisions and addresses the needs of 500,000 student-athletes nationwide. Institutions will need to consider how gender equity, including Title IX regulations, may be applied for all student-athletes.

Our recommendations are made with the explicit reliance on the principles, guidance, and framework identified below, based on the NCAA constitution and operating bylaws.

**PRINCIPLES AND ADDITIONAL GUIDANCE  
FOR THE DECISION-MAKING  
PROCESS RELATED TO POTENTIAL NAME,  
IMAGE AND LIKENESS MODIFICATIONS**

Student-athletes may pursue and receive benefits for the use of their name, image and likeness in a manner consistent with the principles stated below.

1. In order to maintain the differentiation of collegiate and professional sports, payment to a student-athlete for use of his or her name, image or likeness should not be a substitute form of currency to pay for athletic performance or participation; nor should the payment serve as an inducement for a prospective or current student-athlete to select a particular NCAA member school.
2. Regulation of a student-athlete's name, image or likeness use should be transparent, narrowly tailored and enforceable, and it should facilitate the principle of fair competition among schools in a division, including the integrity of the recruiting process. While the concept of fair competition is important to all three divisions, all divisions recognize variability will exist among member schools based on institutional mission, priorities, resources and membership in a particular division or subdivision.
3. A student-athlete should be able to use his or her name, image or likeness similar to college students who are not student-athletes, while

recognizing the importance of interstate, uniform competition and recruiting rules that are unique to NCAA athletics. To fairly balance these interests, there must be some factors that result in treating student-athletes differently.

When identifying a compelling reason to differentiate, through regulation, a student-athlete's name, image and likeness activities from those of a college student who is not a student-athlete, the following considerations may allow for additional flexibility in some form:

- a. Name, image and likeness benefits should be tethered to education.
- b. The determination and receipt of name, image and likeness benefits should be transparent, objective and reasonable.
- c. The activity is regulated to allow first amendment expression that is without the expectation of compensation.
- d. Regulation of a student-athlete's name, image and likeness use should promote student-athlete well-being and educational achievement.

**Regulatory framework developed by the working group.**

The working group spent considerable time discussing a regulatory framework that will serve as guidance for additional discussions by the working group and the divisions' governance structures, as well as the enactment of future NCAA legislation. The working group believes the framework is consistent with NCAA values and principles, enhances the collegiate model, affirms an appropriate nexus between higher education and intercollegiate athletics and supports

the guiding principles developed by the working group.

It is important that the framework addresses both current and future opportunities related to the use of a student-athlete's name, image or likeness. The working group will continue to develop resource materials, including targeted issues for discussion, that will inform the group and the membership about licensing and monetization opportunities so that proper assessment can occur before additional recommendations are provided to the Board of Governors in April 2020.

The working group conceptualized name, image and likeness benefits and opportunities on a continuum. At one end of the spectrum, the working group generally believes student-athletes should be permitted to use their name, image or likeness to promote their own work product or business, particularly when the work product or business is not related to athletics. Even when the work product or business is related to athletics, the working group believes sufficient controls can be developed to mitigate potential abuse, including current rules related to recruitment offers and inducements and extra benefits, and permit student-athletes to pursue opportunities in a manner consistent with the collegiate model. Any regulation should focus on restricting behavior that is inconsistent with the collegiate model. Further, the working group acknowledges some amount of regulation may be necessary to ensure the relevant activities remain consistent with the principles developed by the working group.

It is important to note that NCAA bylaws already allow for student-athletes to have outside

employment and business activity. This framework of review and regulation is specific to when student-athletes wish to lend their name, image or likeness to promote a student's own enterprise or an employer's business activity, such that name, image and likeness become intertwined.

Examples include but are not limited to:

- Student-athlete uses name, image or likeness to promote his or her legitimate commercial activity (for example, writing and publishing a book or charging a fee for a lesson).
- Student-athlete creates a social media channel to serve as the platform for his or her business.
- Student-athlete uses name, image or likeness to promote his or her own nonprofit organization.
- Student-athlete creates and produces a video series containing nutritional tips for athletes and distributes the content via social media.

Potential issues to consider:

- Whether a student-athlete is truly being compensated for the work product, as opposed to being compensated (directly or indirectly) for participation in NCAA athletics.
- Challenges of determining where "work product" ends and the name, image and likeness begins as the value-driver.
- Possible inappropriate involvement of institutional boosters that could impact enrollment decisions of prospective student-athletes.

Examples of regulation to consider:

- Prior approval from athletics director, faculty athletics representative or their designee (for example, the compliance administrator) to address potential pay-for-play and related concerns.
- Student-athletes may not miss class or required team activities to participate in promotional activities.
- No involvement of schools, employees or boosters in the development or promotion of these opportunities.
- No use of institutional, conference or NCAA brand marks.
- Include a “failsafe” or “backstop” provision to address obvious malfeasance not clearly prohibited by the legislation.

Next steps for working group and divisional governance structures:

- Develop regulation to mitigate potential abuse and ensure appropriate institutional oversight.
- Propose legislation to codify or develop waiver guidelines to facilitate or support the concepts noted above.
- Determine the extent to which current rules would apply to possible modifications.
- Examine and make recommendations about application of these rules to pre-enrollment activities.

On the other end of the spectrum of activities, the working group believes that the commercial value of a student-athlete’s name, image or likeness may be derived largely through that student-athletes

association with his or her school and/or participation in NCAA athletics. As such, the working group believes that, in many cases, allowing student-athletes to be paid for the right to use their name, image or likeness in these circumstances could be tantamount to allowing compensation for athletic participation. Such compensation could be a substitute form of currency to pay for athletic performance, which is inconsistent with the principles developed by the working group. Without mitigation, these activities would be inconsistent with the collegiate model.

Potential issues to consider:

- Unregulated use of student-athlete name, image and likeness could inappropriately impact the recruitment process. (For example, a student-athlete's endorsement agreement explicitly or implicitly requires the student-athlete to attend a particular college or university.)
- Representatives of a student-athlete's interests or an institution's athletics interests could inappropriately insert themselves into business agreements to provide enrollment inducements for prospective student-athletes or extra benefits for enrolled student-athletes.

Examples of regulation to consider:

- Agreements may not require or encourage enrollment in a particular school or set of schools.
- Institutions and boosters may not be involved in arranging endorsement activities.
- Institutional, conference and NCAA brand marks may not be used in any aspect of the activity.



- Student-athletes may not miss class or required team activities to participate in promotional activities.

Next steps for working group and divisional governance structures:

- Determine whether enforceable regulation could address the concerns around recruiting and improper inducement in order to make the activities permissible.
- Review and develop current agent and advisor regulations with respect to allowing student-athletes representation to further permissible name, image and likeness activities.
- Examine and make recommendations about application of these rules to pre-enrollment activities.
- Examine whether shared revenue activities generated by the commercial use of a student-athlete's name, image or likeness would be lawful.

**HEARING BEFORE THE UNITED STATES  
SENATE COMMERCE  
SUBCOMMITTEE ON MANUFACTURING,  
TRADE AND CONSUMER  
PROTECTION**

February 11, 2020

Testimony of Dr. Mark Emmert  
President, National Collegiate Athletic Association

Chairman Moran, Ranking Member Blumenthal, and distinguished members of the Subcommittee, thank you for the opportunity to submit this testimony in connection with today's hearing. For almost ten years I have had the privilege of serving as the president of the NCAA, a school-led organization dedicated to the well-being and lifelong success of college athletes on the field, in the classroom, and in life. We appreciate the Subcommittee's attention to the important issue of name, image, and likeness ("NIL") opportunities.

College sports in America is at a critical juncture: while a record number of college athletes are benefiting from more opportunities than ever before, there is a legitimate concern about the fundamental fairness of our system. We share that concern, and NCAA schools and conferences are currently evaluating reforms to give athletes opportunities to take advantage of their own NILs. We believe that these efforts will address the concerns that have been raised about how to treat student-athletes equitably. But the process will take time, because we need to make sure that we operate consistent with two principles that are not always aligned. On the one hand, we want to allow opportunities for students to benefit from their NILs. On the other hand, we want to preserve the character and quality of the uniquely

American phenomenon of college sports. And with ongoing serial litigation and NIL legislation pending in over half the states, we may need your help to accomplish this on a nationwide basis.

I welcome the opportunity to speak to you today about our progress and goals, and I welcome the opportunity to hear from the Members of this Subcommittee. We greatly value the ongoing dialogue with you and look forward to the continued support of the Congress as we work toward a solution that meets the needs of student-athletes in a manner consistent with the long-held educational values of the NCAA, its schools and conferences, and the nearly 500,000 individuals who participate in college sports each year.

***NCAA Background: Who We Are***

I would like to begin by briefly describing the mission of the NCAA. As the governing body for intercollegiate athletics, the NCAA prioritizes three important principles in providing opportunities for students: academic success, well-being, and fairness. While most people associate the NCAA primarily with college sports, the truth is that education is at the heart of our work. Each year, students from across the country and the world participate in sports they love. 16% are first-generation college students, and a similar number report that they would not have attended college if not for athletics. To make these opportunities possible, our member schools award nearly \$3.5 billion in athletic scholarships each year, including up to the cost of attendance. Athlete recruitment to attend a particular institution is one of the key principles that sets apart college sports from professional sports. This unique recruiting environment encourages student choice in where to

attend college. No other model in sports is like it—not the Olympics nor professional sports.

Student-athlete graduation rates are the highest ever, with 84% earning their degrees. In Division I, nearly 9 in 10 student-athletes are earning bachelor's degrees, their highest rate ever. 83% of men's basketball players graduate, as well as 82% of Football Bowl Subdivision participants. And in particular, since 2002, the graduation rate for African-American men's basketball players has increased by 36 percentage points, and 79% of African-American student-athletes are earning their degrees. Historically, student-athletes have graduated at rates higher than the rest of the student body.

But I acknowledge that what happens off the field does not always garner as much attention as what happens on the field. When many people think of college sports, they think of March Madness, the College Football Playoff, or College Game Day. They think of the popularity and success of powerhouses like the University of Kansas men's and the University of Connecticut women's basketball teams. They see multi-million dollar contracts, elaborate facilities, and Hollywood-style productions. But this is just a sliver of college sports. College sports is half a million student-athletes in 24 different sports spread across three divisions and 19,000 teams, most of which generate no revenue. College sports is a culture in which hundreds of thousands of fans feel connected through alma mater or geography and appreciate that the athletes are "kids" in pursuit of an education that will last them a lifetime. College sports is, and always has been, about students playing other students.

College sports has always had commercial aspects, but its rules have consistently promoted education, opportunity, well-being, and fairness. While we are considering important and necessary changes to create additional monetary opportunities for student-athletes, any changes must take into consideration these core values.

***NCAA Rules: The Legislative Process and Enforcement***

College sports as we know it is evolving. For over a hundred years, the NCAA's member schools have provided significant opportunities to tens of millions of athletes to obtain an education at this country's top colleges and universities. But recent increases in the popularity of NCAA-governed competition have brought greater interest in college sports, raising questions about how to ensure that this evolving system is inclusive, equitable, and fair.

The internal balancing act between preservation and reform poses particular challenges in an organization with hundreds of diverse schools. Each of our schools brings a unique perspective to college sports, often informed by the size of the school and its athletic program, the NCAA division in which it competes, its mission, its geography, and myriad other factors. Each perspective is valuable individually, but the adoption of each, without harmonizing, would result in a chaotic college sports landscape. The NCAA's role reflects the reality that no one school has the expertise or resources to ensure that all opponents play by the same set of rules, both on and off the field. The voluntary agreement to a central governing system offers a whole that is greater than the sum of its parts.

In its role as convener, the NCAA National Office oversees a ground-up, school-driven legislative process in which representatives serve on committees that propose rules, and schools ultimately decide which rules to adopt. Reflecting the diversity of our schools and conferences, each of the NCAA's three divisions develops and approves legislation unique to that division. Groups of presidents and chancellors lead each division through committees with regularly scheduled meetings. Once the NCAA schools and conferences establish a rule through the legislative process, responsibility for enforcing that rule on campus rests on both the institutions and the NCAA National Office. By mutual agreement, each school agrees to establish mechanisms to detect, prevent, and discourage rule violations, as well as protocols to self-report and cure any rule violations.

***Student Equity in the NCAA Model: Recent Reforms***

As president of the NCAA, my role is to make sure that, during our rigorous rulemaking process, our schools and conferences are considering the best interests of students in a constantly evolving college sports landscape while keeping our values front and center. In recent years, we have undertaken initiatives or changed rules to promote better student well-being. For example, within the last few years the NCAA:

- Partnered with leading organizations to develop best practices and training modules for coaches and administrators in support of student-athlete mental wellbeing. The goal of these resources is to encourage a culture in which reaching out for mental health care is normal and expected.

- Paired with the U.S. Department of Defense to launch a landmark alliance to enhance the safety of athletes and service members by more accurately preventing, diagnosing, and treating concussions. This alliance is undertaking the most comprehensive longitudinal study of concussion and head impact ever conducted, managed by the Concussion Assessment, Research, and Education (“CARE”) Consortium. Twenty-six participating universities enrolled their student-athletes in the study, and the four military academies enrolled all cadets. The CARE Consortium is continuing its work in a phase known as CARE 2.0, featuring 40,000 participants.
- Funded and operated the Sport Science Institute (the “Institute”), which promotes health and safety through a variety of initiatives, including research and training on cardiac health, concussions, overuse injuries, drug testing, mental health, nutrition and sleep, sexual violence prevention, athletics healthcare administration, and data-driven decisions. Last year, the Institute, in partnership with the NCAA Office of Inclusion, released the second edition of a sexual violence prevention tool kit that provides schools with appropriate tools to support a safer campus environment. The new tool kit was developed with input from leading professionals in the field and aims to help NCAA schools reduce incidents of sexual violence involving student-athletes and other college students, and to respond appropriately when they occur. The Institute also is collaborating with the most respected medical and sports organizations in the country to promote research, education, and best

practices around cardiac health to reduce injuries and death from heart conditions.

- Enhanced funding for an insurance policy covering all college athletes who experience catastrophic injuries while playing or practicing their sport—providing up to \$20 million in lifetime insurance benefits—and saw many of our schools provide medical coverage for athletic-related injuries for at least two years after a student-athlete graduates or leaves school.
- Permitted any Division I institution to provide athletic scholarships to the federally-defined cost of attendance, without limits on duration.
- Enhanced student voice and vote by expanding the Division II and III student representation to Division I, where they are now voting participants at all levels of governance.
- Allowed college basketball players investigating their professional options to be represented by an agent.
- Reformed the transfer rules to make it easier for students to change schools.
- Required Division I schools to provide independent medical care for student-athletes to determine medical management and return-to-play decisions.

These reforms demonstrate that the NCAA is ready and able to address emerging challenges to ensure that students are treated equitably and the essential character of the college sports is preserved. While we have more work to do, including on the issue of NILs (discussed below), I am confident that the NCAA, in



partnership with Congress, has the tools to achieve a balance that minimizes unintended consequences.

***Modernization of Name, Image, and Likeness Rules***

We have heard the concerns about the NCAA's current rules governing an athlete's ability to license his or her NIL for commercial purposes, and we recognize that changes need to be made. Currently, the NCAA schools and conferences are reviewing our rules and proposing changes. We are moving thoughtfully on this, and our membership plans to vote on those changes in January 2021.

Recent Developments around NIL

Recognizing the need to further modernize our rules with respect to NILs, in October 2019 our Board of Governors directed each of the NCAA's three divisions to immediately begin considering how the relevant NCAA rules could be modified to permit student-athletes the opportunity to benefit financially from the use of their NILs consistent with the values of intercollegiate athletics—including and especially the principle of amateurism. This principle means that students are "students first" and not professional athletes who are paid for their athletic performance. What makes college sports different from and more popular than other sporting options (such as minor-league professional sports) is that college athletes are participating in a sport they love as part of their educational experience, because the reality is that most student-athletes will not play professional sports and thus need to rely on their education to support their success in life. Our schools and conferences' commitment to amateurism helps keep athletics programs and student-athletes integrated within the

larger educational mission, promotes competitive balance among schools, and creates a fairer system for recruiting and retaining top talent. Without rules, the highest-resourced schools would use their greater financial resources to attract the most promising student-athletes, depriving other schools of the ability to build strong teams and decreasing fair competitive opportunities for many student-athletes.

The Board of Governors' decision followed the work of our Federal and State Legislation Working Group (a group consisting of presidents, commissioners, athletics directors, administrators, and student-athletes) in gathering input on NIL issues from current and former student-athletes, coaches, presidents, faculty, and commissioners across all three divisions in response to federal and state legislators proposing NIL legislation. The Board directed these modernization efforts to take place in harmony with eight principles and guidelines.

- First, schools should assure that student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.
- Second, schools should maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Third, schools should ensure rules are transparent, focused, and enforceable and facilitate fair and balanced competition.
- Fourth, schools should make clear the distinction between collegiate and professional opportunities.

- Fifth, schools should make clear that compensation for athletics performance or participation is impermissible.
- Sixth, schools should reaffirm that student-athletes are students first and not employees of the university.
- Seventh, schools should enhance principles of diversity, inclusion, and gender equity.
- Eighth, schools should protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.

The Working Group will continue to gather feedback from the schools and conferences and their student-athletes through April 2020 and will refine its recommendations. And the NCAA's divisions are working to create new NCAA bylaws reflecting divisional priorities. This effort is to be completed in January 2021.

We have undertaken this modernization effort committed to balancing the vital need for the continuation of college sports with the need to adapt our rules to changing student-athlete environments. We want to improve the experience for our student-athletes, as well as fans, alumni, and student bodies. We remain committed to our student-athletes being students first, with emphasis on their education and the physical, mental, and social benefits to be derived from intercollegiate athletic competition.

It is for this reason that, as part of this modernization effort, we will not consider any concepts that could be construed as payment for athletic play. We believe it is imperative to the success of college sports as both an integral component of the educational experience

and a popular form of entertainment that we maintain a clear line of demarcation between college and professional sports. To do so, payment to student-athletes for use of their NILs should not be a substitute for or vehicle to deliver pay for athletic performance; nor should the payment serve as an inducement for a prospective or current student-athlete to select or remain at a particular NCAA school. Consequently, the NCAA has no intention of taking any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with respect to the types of NIL payments that were at issue in the *O'Bannon* case decided a few years ago.

#### Need for National Uniformity

Just as the NCAA has done in the past on issues involving student fairness, we believe that the modernization efforts currently underway with respect to NILs will address the concerns about equity. But given the current legislative landscape, uniformity will not be achieved without federal support for our mission.

The Subcommittee is aware of the dozens of proposals on NILs in state legislatures that, in our view, risk converting college sports into professional sports. While we understand the desire to assist student-athletes, we believe many of these ideas would be harmful to intercollegiate athletics and its many stakeholders, including the student-athletes. For instance, one state has passed legislation that effectively eliminates the distinction between college and professional sports. It allows payments for NILs to serve as pay for play and thus turns college athletes into employees. This law in particular, and others like it, threaten to undermine the mission of college sports

within the context of higher education—that student-athletes are students first and choose to play a sport they love while earning a degree.

In the short term, such legislation is creating confusion for current and future student-athletes, coaches, administrators, and campuses. Some of these laws would take effect as early as July 2020. If implemented, these laws would give some schools an unfair recruiting advantage and open the door to sponsorship arrangements being used as recruiting inducements. This would create a huge imbalance among schools and could lead to corruption in the recruiting process.

As more states consider their own NIL legislation, it is clear that a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field—let alone the essential requirement of a common playing field—for our schools and nearly half a million student-athletes nationwide. It is thus critical that the administration of college sports be supported at a national level. We believe that, given its role, the NCAA—informed by its schools and conferences—is best positioned to provide a uniform and fair NIL approach for *all* student-athletes on a *national* scale. But we cannot effectively achieve our goals if we are pulled in various and potentially inconsistent directions by state legislatures that may be focused on serving one set of constituents rather than serving the entire array of participants that the NCAA’s own rulemaking processes are designed to serve.

### ***Conclusion***

At the NCAA, we are proud of the role that intercollegiate athletics have played in creating

opportunities for our nation's student-athletes, especially those who might not otherwise have had the opportunity to pursue higher education. Over the last ten years, we have actively worked to drive much-needed change and address many of the concerns that surround intercollegiate athletics. Our membership is large and diverse with an equally large and diverse range of viewpoints. While this diversity can, at times, slow the pace of reform in our democratically governed association, we have made significant strides across a variety of areas and are actively working to modernize in the area of NIL opportunities. But that process takes time, and we may need Congress's support in helping maintain uniform standards in college sports. I appreciate the Subcommittee's attention to this issue and look forward to collaborating with this body to achieve these important goals. Thank you again and I look forward to your questions.

MINNEAPOLIS -- NCAA president Mark Emmert says a judge's recent ruling in a federal antitrust lawsuit reinforced that college athletes should be treated as students, not employees.

Emmert spoke to The Associated Press on Wednesday at U.S. Bank Stadium, the site of the men's basketball Final Four, and made his first public comments since last month's decision in the so-called Alston case.

Judge Claudia Wilken ruled that the NCAA did violate antitrust laws and cannot prohibit schools from providing more benefits to athletes as long as they are tethered to education.

"There were also components of that ruling that reinforced what a number of judges and administrative court proceedings have reinforced, and that is that college sports is about student-athletes playing student-athletes, not employees playing employees," Emmert said. "And the fact that, once again, another federal decision has come down reinforcing the fundamentals of what college sport is about, we're very pleased with that. And the way that she wrote what could and could not be prohibited by the NCAA is not in any way fundamentally inconsistent with what we've been doing for about a decade now."

In recent years, NCAA member schools have passed legislation permitting an increase in the value of an athletic scholarship by as much as several thousand dollars to include the federal cost of attendance. Also, schools are now allowed to provide athletes with unlimited meals and guaranteed four-year scholarships.

The plaintiffs argued in the Alston case that implementation of cost-of-attendance stipends and

other rewards to players for participation such as bowl gifts and championship rings prove that paying athletes even more would not hurt college sports.

Plaintiffs in the Alston case sought to have all NCAA rules capping compensation struck down. They wanted conferences to set standards for compensation in the hope of creating a market in which schools compete for talent at the highest levels of football and men's and women's basketball.

Even though Wilken's ruling fell well short of that, plaintiffs' attorneys have celebrated it. They called it another step toward unraveling the NCAA's definition of amateurism, which they consider unjust and arbitrary. In 2014, Wilken ruled against the NCAA in an antitrust lawsuit brought by former UCLA basketball star Ed O'Bannon. He claimed the NCAA and conferences inappropriately used the names, images and likenesses of college athletes without compensation.

Much like with the Alston case, the NCAA came away from O'Bannon with its model of amateurism basically intact.

As it did in O'Bannon, the NCAA is appealing Wilken's latest ruling to the Ninth Circuit Court.

"We don't like the notion that we're in violation of antitrust laws," Emmert said.

Emmert added that the association does not believe the courts should decide what qualifies as a benefit tethered to education.

"We just find that an unworkable proposal that anytime you want to have a discussion over whether or not something is or isn't tethered [to] education, we have to go back to a judge and have that debate and discussion. That just seems inherently inappropriate



and not an appropriate role for the judiciary, but one that does fit the role of the NCAA,” Emmert said.

Wilken cited things such as computers, scientific equipment and musical instrument as benefits tethered to education. Emmert said it is already within NCAA rules for schools to provide the “vast majority” of the items to college athletes.

“We provide around \$100 million a year to schools to support student-athletes through student-support fund programs for precisely that purpose,” he said.

Wilken also cited postgraduate scholarships as benefits that should be permissible.

As with the introduction of any new benefit, there is concern among NCAA membership for potential corruption.

“You know, we have schools competing now on who can do the best gold-plated locker room? You know, who can do the best recreational facilities?” Emmert said. “Having them compete over who can provide the best educational experience ... is an inherently good thing, not a bad thing from my point of view.”

California LEGISLATIVE INFORMATION BILL  
ANALYSIS

SB-206 Collegiate athletics: student athlete  
compensation and representation. (2019-2020)

**Bill Analysis**

09/09/19- Senate Floor Analyses

09/04/19- Assembly Floor Analysis

08/12/19- Assembly Appropriations

07/08/19- Assembly Higher Education

06/24/19- Assembly Arts, Entertainment, Sports,  
Tourism, And Internet Media

05/20/19- Senate Floor Analyses

05/16/19- Senate Appropriations

05/06/19- Senate Appropriations

04/02/19- Senate Education

SENATE THIRD READING

SB 206 (Skinner and Bradford)

As Amended September 3, 2019

Majority vote

**SUMMARY:**

Allows, commencing on January 1, 2023, college student athletes to earn compensation for the use of their own name, image, or likeness and also obtain professional representation such as a sports agent, in relation to their college athletics.

**Major Provisions**

- 1) Specify that a postsecondary educational institution will not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.
- 2) Further specify that earning compensation from the use of a student's name, image, or likeness will not affect the student's scholarship eligibility.
- 3) Provide that an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association (NCAA), will not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.

- 4) Additionally provide that an athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the NCAA, will not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness. Also, explicitly specified is that:
  - a) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics will not provide a prospective student athlete with compensation in relation to the athlete's name, image, or likeness;
  - b) Professional representation obtained by student athletes will be from persons licensed by the state. Professional representation provided by athlete agents will be by persons licensed, as specified; and,
  - c) Athlete agents representing student athletes shall comply with the federal Sports Agent Responsibility and Trust Act, as specified, in their relationships with student athletes.
  - d) A scholarship from the postsecondary educational institution in which a student is enrolled that provides the student with the cost of attendance at that institution is not compensation for purposes of this section, and a scholarship will not be revoked as a result of earning compensation or obtaining legal representation.

- 5) Specify that a student athlete's individual contracts or sponsorships shall not contain any provision in conflict with any provision of an existing contractual obligation of the student athlete's team contracts or sponsorships.
- 6) Require a student athlete to disclose to their university any contracts for compensation based on the use of the student's name, image, or likeness.
- 7) Require the university asserting a conflict between the student's contract and the teams' contract or sponsorship to disclose to the student the relevant conflicting contract provisions.
- 8) Declare that a team contract of a postsecondary educational institution's athletic program entered into on, or after, January 1, 2023, shall not prevent a student athlete from using the athlete's name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities.
- 9) Define, for purposes of this section, "postsecondary educational institution" to mean any campus of the University of California (UC), the California State University (CSU), or an independent institution of higher education, as defined in Education Code Section 66010, or a private postsecondary educational institution, as defined in Education Code Section 94858.
- 10) Establish a name, image, and likeness working group that will be charged with reviewing California Community College Athletic Association (CCC AA) bylaws and making recommendations to CCCAA and the Legislature, as provided, no later than July 1, 2021.

- 11) Declare the intent of the Legislature to monitor the NCAA working group created in May 2019 to examine issues relating to the use of a student's name, image, and likeness and revisit this issue to implement significant findings and recommendations of the NCAA working group in furtherance of the statutory changes proposed by this act.
- 12) Declare the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities.

**COMMENTS:**

Please see the policy committee analysis for a full discussion of the measure.

**According to the Author:**

*"...Inside Higher Education* and Drexel University revealed that over 80% of full-scholarship athletes live at or below the federal poverty level. Meanwhile, the NCAA and universities use these athletes to generate billions in profits, through ads, TV deals and ticket sales. Athletes face severe repercussions if they receive compensation from sponsorship deals or use their own image for financial gain. For many athletes, college is the only time that their name, image, and likeness is profitable. Athletes have lost eligibility to participate in their sport for things such as accepting groceries and assistance with rent. Meanwhile they generate millions [of dollars] for universities and billions [of dollars] for the NCAA. The NCAA president Mark Emertt made over 3 million dollars in salary just last year, while any athletes who put their bodies on the line struggle to make ends meet. SB 206 will prevent any student in California from losing

their scholarship due to compensation on their own name, image, and likeness.”

**Arguments in Support:**

The bill’s cosponsor, The Alliance for Boys and Men of Color, writes in support to say, “Many collegiate athletes are participating without a guaranteed scholarship or no scholarship at all. Scholarships may be revoked for poor performance in their respective sport or failure to participate in ‘voluntary’ workouts. University studies have found that athletes are spending 32 to 44 hours a week on their respective sports. The time commitment athletes dedicate make it practically impossible for athletes to obtain outside employment to provide for themselves or families.” They add that, “SB 206 will give young athletes the dignity of a fair wage.”

The American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, adds in support, “In addition, (under SB 206) athletes cannot be prohibited from consulting with an agent. This is important for allowing college athletes to prepare for their future in professional athletics.”

Finally, Teamsters write to share their belief that, “athletes should have a financial avenue to provide for their families without facing loss of their athletic scholarship.”

**Arguments in Opposition:**

Opposition to this bill spans public and private institutions, and includes both four-year and community colleges. Opposition wrote to express concern in several key areas:

*Inconsistency with prior court rulings.* Stanford University wrote that, “...SB 206 is inconsistent with recent court rulings, first in O’Bannon v. NCAA, and

more recently in *Alston v. NCAA* that determined that all student-athlete benefits must be tied directly to education purposes only.”

*NCAA Bylaws Violation.* NCAA-member institutions wrote concerning violations of NCAA bylaw 12.1.2, which dictates ways in which a student can lose their amateur status, and NCAA bylaw 12.5.2.1, which makes a student ineligible for participation if they accept compensation for name, image, and likeness or for the endorsement of commercial products. The University of Southern California states, “This bill would put the student-athlete, their teammates, and the athletics programs at risk of losing NCAA and conference eligibility, which would result in the loss of educational benefits and other competitive opportunities for UC student-athletes.”

*Current NCAA working group.* The Association of Independent California Colleges and Universities (AICCU) wrote that “Last month the NCAA announced the creation of a working group that will review the NCAA’s policies around name, image, and likeness. ...We believe SB 206 should be held, in order for this work to conclude and for policymakers to then assess what changes to state law are appropriate without putting athletic programs and student athletes at risk.”

*Request by NCAA and PAC-12 Conference for delay in legislation.* The President of the NCAA has reached out to request delay in hearing SB 206, asking “On behalf of the nearly 1,300 NCAA member colleges, universities and conferences, I write to request respectfully that the Assembly (Committees on Arts, Entertainment, Sports, Tourism and Internet Media and Higher Education) postpone further



consideration of Senate Bill 206, the Fair Pay to Play Act, while we review our rules.”

**FISCAL COMMENTS:**

According to the Assembly Appropriations Committee:

- 1) One-time General Fund costs to the CCCCCO of about \$500,000.
- 2) Ongoing General Fund cost pressures to the University of California (UC), likely in the hundreds of thousands of dollars, for staff to ensure compliance and to manage procedures related to the bill's conflict of interest provisions.
- 3) Ongoing General Fund cost pressures to the California State University (CSU), likely in the low millions of dollars annually, for staff to ensure compliance and to manage procedures related to the bill's conflict of interest provisions.
- 4) Unknown, ongoing General Fund cost pressures to UC and CSU to pay fines resulting from violations of NCAA bylaws, to the extent this bill results in NCAA fines.
- 5) Unknown, ongoing systemwide revenue losses to UC and CSU to the extent they lose NCAA and conference eligibility as a result of this bill.

**VOTES:**

**SENATE FLOOR: 31-5-2**

**YES:** Allen, Archuleta, Atkins, Beall, Bradford, Caballero, Chang, Dodd, Durazo, Galgiani, Glazer, Hertzberg, Hill, Hueso, Hurtado, Jackson, Leyva, McGuire, Mitchell, Monning, Morrell, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk

102a

**NO:** Bates, Grove, Jones, Nielsen, Stone

**ABS, ABST OR NV:** Borgeas, Moorlach

**ASM ARTS, ENTERTAINMENT, SPORTS,  
TOURISM, AND INTERNET MEDIA: 5-0-2**

**YES:** Chu, Chiu, Friedman, Kamlager-Dove,  
Nazarian

**ABS, ABST OR NV:** Diep, Choi

**ASM HIGHER EDUCATION: 11-0-1**

**YES:** Medina, Choi, Arambula, Bloom, Gabriel, Irwin,  
Kiley, Levine, Low, Santiago, Weber

**ABS, ABST OR NV:** Patterson

**ASM APPROPRIATIONS: 15-1-2**

**YES:** Gonzalez, Bigelow, Bloom, Bonta, Calderon,  
Carrillo, Chau, Eggman, Gabriel, Eduardo Garcia,  
Maienschein, Obernolte, Petrie-Norris, Quirk, Robert  
Rivas

**NO:** Brough

**ABS, ABST OR NV:** Diep, Fong

**UPDATED:**

**VERSION:** September 3, 2019

**CONSULTANT:** Dana Mitchell / A.,E.,S.,T., & I.M. /  
(916) 319-3450 FN: 0001736

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN  
DISTRICT OF CALIFORNIA

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION
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No. 14-md-02541  
CW

FINDINGS OF  
FACT AND  
CONCLUSIONS OF  
LAW

**INTRODUCTION**

Plaintiffs are current and former student-athletes who played men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball during the relevant period. Defendants are the National Collegiate Athletic Association (NCAA) and eleven of its conferences<sup>20</sup> that participate in FBS football and Division I basketball.

Plaintiffs challenge the current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services. Plaintiffs contend that these limits on compensation,

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<sup>20</sup> Conference Defendants are: Pac-12 Conference (Pac-12), The Big Ten Conference, Inc. (Big Ten), The Big 12 Conference, Inc. (Big 12), Southeastern Conference (SEC), and The Atlantic Coast Conference (ACC) (collectively, the Power Five Conferences); American Athletic Conference (AAC), Conference USA, Inc., Mid-American Conference (MAC), Mountain West Conference, Sun Belt Conference, and Western Athletic Conference (WAC).

which are set and enforced by agreement of Defendants, violate federal antitrust law, because Plaintiffs would receive greater compensation in exchange for their athletic services in the absence of these artificial limits.

Defendants respond that the limits are procompetitive for two reasons. First, the limits help preserve the demand for college sports because consumers value amateurism as Defendants define it. Second, the rules promote integration of student-athletes into their academic communities, which in turn improves the college education they receive in exchange for their services.

The Court resolved certain of the issues relevant to Plaintiffs' claims on summary judgment, and presided over a non-jury trial on the remaining issues.

The Court finds and concludes that Defendants agreed to and did restrain trade in the relevant market, affecting interstate commerce, and that the challenged limits on student-athlete compensation produce significant anticompetitive effects. The Court further finds that the only procompetitive effect that Defendants established, namely preventing unlimited cash payments, unrelated to education, similar to those observed in professional sports, can be achieved through less restrictive means. Specifically, the Court finds that an alternative compensation scheme that would allow limits on the grant-in-aid scholarships at not less than the cost of attendance and limits on compensation and benefits unrelated to education, but that would generally prohibit the NCAA from limiting education-related benefits, would be virtually as effective as the challenged rules in achieving the only procompetitive effect that Defendants have shown here. The only education-related compensation

that the NCAA could limit under this alternative would be academic or graduation awards or incentives, provided in cash or cash-equivalent. The limit imposed by the NCAA could not be less than its current or future caps on athletics participation awards.

Based on the findings of fact and conclusions of law set forth below, the Court will enter separately a permanent injunction barring the restraints that the Court finds to be overly and unnecessarily restrictive.

### FINDINGS OF FACT<sup>21</sup>

#### II. Background

The NCAA, then known as the Intercollegiate Athletic Association (IAA), was founded in 1905 to regulate college football. Today, the NCAA and its members collectively issue rules that govern many aspects of athletic competitions among NCAA member schools. Joint Stipulation of Facts (Stip. Facts) ¶ 1, Docket No. 1098.

The NCAA comprises three Divisions. Id. 91 2. Of the NCAA's eleven hundred schools, approximately three hundred and fifty schools compete in Division I. Id. ¶ 5. Division I itself is divided, for the purposes of football competition, into two subdivisions, one of which is the FBS. Id. ¶ 6. There are thirty-two conferences in Division I. Id. ¶ 7. Conferences may

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<sup>21</sup> Defendants moved to strike portions of Plaintiffs' closing brief, Docket No. 1125, on the ground that they improperly rely on expert testimony to support substantive assertions of fact. The Court will resolve this motion by way of a separate order. The findings of fact in this order do not rely on evidence that is inadmissible.

enact and enforce conference-specific rules, but these must be consistent with the NCAA's own rules. Id.

The NCAA rules governing participation in Division I generally are enacted by the Division I Board of Directors. Id. 191 11, 12. The rules that Plaintiffs challenge here govern a small subset of the conduct that the NCAA regulates.

The NCAA generates approximately one billion dollars in revenues each year. See Defs.' Ex. 0532 (D0532); Pls.' Ex. 0030 (P0030). Its revenues have increased consistently over the years. See P0030. Most of the NCAA's revenues are derived from the Division I men's basketball post-season tournament known as March Madness, and the media and marketing rights relating to it. Trial Transcript (Tr.) (McNeely) at 2134; D0532 at 0006. The total value of the current multi-year media contracts for March Madness, which extend to 2032, is \$19.6 billion. See P0045 at 0001-02 Each year, the NCAA distributes about half of its revenues to the conferences. Joint Ex. 0021 (J0021); P0030.

Division I conferences negotiate their own contracts and generate their own revenues from regular-season basketball and regular- and post-season FBS football. See, e.g., Dr. Daniel Rascher Direct Testimony Declaration ¶¶ 169-172, Docket No. 865-3. The FBS conferences have a multi-year media contract with ESPN for the College Football Playoff, the total value of which is \$5.64 billion. See P0045 at 0006-07. The five conferences with the largest revenues, known as the Power Five Conferences, each generate hundreds of millions of dollars in revenues per year, in addition to the money that the NCAA distributes to them. See P0031; P0032; P0033; P0036; see also P0037 (showing that SEC made more than

\$409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding \$650 million that year). The revenues of the Power Five have increased over time and are projected to continue to increase. See P0031; P0032; P0033; P0036; P0037. Conferences distribute most of their revenues to their member schools.

Among the areas that the NCAA regulates are the compensation and benefits that can be afforded to student-athletes. The 1906 bylaws of the IAA, as the NCAA was originally known, expressly prohibited student-athletes from receiving any compensation whatsoever, even athletics scholarships, in exchange for their participation in college sports. In 1956, the NCAA enacted a new set of rules permitting schools to award athletics scholarships, known as “grants-in-aid,” to student-athletes. Stip. Facts ¶ 25, Docket No. 1098. These rules imposed a limit on the size of the grant-in-aid that schools were permitted to offer. Id. The limit precluded student-athletes from receiving any financial aid beyond that needed for commonly accepted educational expenses, which were tuition, fees, room and board, books, and cash for incidental expenses such as laundry.

In 1976, the cash for incidental expenses was disallowed by way of an amendment to the definition of the grant-in-aid that limited the scope of commonly accepted educational expenses to include only “tuition and fees, room and board and required course-related books.” Stip. Facts ¶ 26, Docket No. 1098. Cash for incidental expenses related to school attendance, such as laundry, supplies, and transportation, was not included in the grant-in-aid limit. This definition of a grant-in-aid remained in place until August 2015. See Stip. Facts ¶ 10, Docket No. 1093.

On August 7, 2014, the NCAA adopted a new legislative process for the Power Five, which is referred to as the Autonomy structure.<sup>22</sup> It allows those five conferences collectively to adopt legislation in specific areas, which include limits on grants-in-aid. Soon afterward, in January 2015, the Power Five voted to increase the overall limit on grants-in-aid, from the limit then in place, to a higher limit based on the cost of attendance at each school. See O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1054-55 (9th Cir. 2015) (O’Bannon II), cert. denied, 137 S. Ct. 277 (2016). This became effective on August 1, 2015. The revised “full grant-in-aid” comprises “tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance[.]” Division I Bylaw 15.02.6; Stip. Facts ¶ 10, Docket No. 1093. Cost of attendance is calculated by each school in accordance with federal regulations. J1517 at 0002; Stip. Facts ¶¶ 3-6, Docket No. 1093. It is generally several thousand dollars higher than the prior grant-in-aid limit because it includes cash for incidental expenses related to the cost of attendance. See Stip. Facts ¶ 5, Docket No. 1093.

Compensation and benefits in addition to the full grant-in-aid, some related and some unrelated to education, are also allowed and regulated by the NCAA. These include benefits the NCAA denominates “incidental to athletics participation,” as well as money from the NCAA’s Student Assistance Fund and Academic Enhancement Fund, government grants,

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<sup>22</sup> See NCAA Constitution, Article 5.3.2.1.2; Stip. Facts ¶ 17, Docket No. 1098.



and payments from outside entities. Other compensation is generally prohibited.

In 2009, a group of Division I male basketball and FBS football student-athletes brought an antitrust class action against the NCAA and its licensees to challenge the association's rules preventing them from being paid by schools or other entities for the sale of licenses to use their names, images, and/or likenesses (NIL) in videogames, live game telecasts, and other footage.<sup>23</sup> See O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F Supp. 3d 955, 962-63 (N.D. Cal. 2014) (O'Bannon I), aff'd in part, vacated in part, 802 F.3d 1049 (9th Cir. 2015). The rules challenged by the O'Bannon plaintiffs related to the release, use, and licensing of NIL. The then-applicable maximum limit on the grant-in-aid was discussed and implicated in the relief ordered by the Court, but the plaintiffs did not specifically challenge it in O'Bannon I. Some of the rules challenged in the present case were challenged in O'Bannon; others were not.

This Court held in O'Bannon I that the NCAA rules challenged there violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Id. at 963. The Court found that the plaintiffs met their burden to show that

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<sup>23</sup> The class in O'Bannon was defined as including “[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as ‘University Division’ before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.” O'Bannon II, 802 F.3d at 1055-56.

the NCAA had fixed the price of the student-athletes' NIL rights, which had significant anticompetitive effects in the relevant market. Id. at 971-73, 988-93. On the question of procompetitive justifications of the restraints, the Court found that the NCAA's challenged restrictions on student-athlete compensation played "a limited role in driving consumer demand for FBS football and Division I basketball-related products." Id. at 1001. The Court also found that the challenged rules might facilitate the integration of student-athletes with their academic communities. Id. at 1003.

The O'Bannon plaintiffs proposed alternatives they asserted were less restrictive than the NCAA rules they challenged. This Court found that two of these proposed alternatives, which relied specifically on the use of revenue derived from NIL licensing, constituted "less restrictive means of achieving" the challenged rules' limited procompetitive effects. Id. at 982-84; 1004-07.

Accordingly, this Court issued an injunction barring the NCAA from enforcing any rules that would prohibit its member schools and conferences from offering their FBS football and men's Division I basketball recruits compensation for the use of their NIL in addition to a full grant-in-aid as then defined. The Court permitted the NCAA to implement rules capping the amount of compensation that could be paid to student-athletes while they are enrolled in school as long as the amount of the cap was not lower than the cost of attendance for students at that school. Id. at 1007-08. The Court also required the NCAA to allow member schools to deposit a limited share of NIL licensing revenue in trust for their student-athletes. Id. at 1008. The Ninth Circuit affirmed the

liability finding and the remedy prohibiting the NCAA from limiting payment of a share of NIL revenues to less than the cost of attendance. It vacated the remedy allowing a trust fund payment. O'Bannon II, 802 F.3d at 1074-79. By the time the O'Bannon injunction went into effect, the NCAA had already increased, through the Autonomy structure, the grant-in-aid limit to the cost-of-attendance amount for all Division I student-athletes, regardless of NIL use or revenue.

Plaintiffs in the present case are student-athletes who played Division I FBS football and men's and women's basketball between March 5, 2014, and the present.<sup>24</sup> Order Granting Motion for Rule 23(b)(2) Class Certification (Class Cert. Order) at 1, Docket No. 305. The Court certified three injunctive relief classes in the consolidated action under Federal Rule of Civil Procedure 23(b)(2), each consisting of student-athletes who would be offered or receive a full grant-in-aid during the pendency of this action.<sup>25</sup> Id. at 4-5, 31.

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<sup>24</sup> The first of the actions that became a part of this consolidated case, Alston v. NCAA, Case No. 14-cv-01011, was filed on March 5, 2014. Additional actions were filed in that year and in 2015. The United States Judicial Panel on Multidistrict Litigation transferred actions filed in other districts to this Court pursuant to 28 U.S.C. § 1407. Plaintiffs in all of the actions, except Jenkins v. NCAA, Case No. 14-cv-02758, filed a consolidated amended complaint. Docket No. 60.

<sup>25</sup> The Division I FBS Football Class is defined as “[a]ny and all NCAA Division I Football Bowl Subdivision (‘FBS’) football players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid.” Class Cert. Order at 5, Docket No. 305. The Division I Men’s

### III. Agreement in Restraint of Trade Affecting Interstate Commerce

On summary judgment, the Court found that the existence of an agreement (i.e., a contract, combination, or conspiracy) restraining trade and affecting interstate commerce was undisputed. Defendants did not contest evidence showing that (1) the compensation limits that Plaintiffs challenge are enacted by agreement of Defendants and other NCAA members through the NCAA's legislative process and are embodied in NCAA rules published in the NCAA Division I Manual; (2) Defendants enforce these rules by requiring all NCAA members to comply with them, and by punishing violations; (3) the challenged rules affect interstate commerce, because they regulate transactions between Plaintiffs and their schools in multiple states nation-wide; and (4) these transactions are commercial because they regulate an essential component of Division I basketball and FBS football. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment (Summary Judgment Order) at 15, Docket No. 804.

The Court also found on summary judgment that the challenged NCAA rules restrain trade in that they limit the compensation that student-athletes may receive for their athletic services. These limits cap athletics-based grants-in-aid at the cost of attendance, but they also allow and fix the prices of numerous and varied additional benefits and compensation on top of a grant-in-aid that have a

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Basketball Class and the Division I Women's Basketball Class are defined similarly. *Id.* In the *Jenkins* action, the Court certified the men's football and basketball classes; women's basketball class certification was not sought in that case. *Id.*

monetary value above the cost of attendance.<sup>26</sup> Some of these rules regulate compensation that relates to education; others regulate compensation incidental to athletics participation and unrelated to education, including monetary awards that reward performance in athletics. The compensation limits are artificially set through an exercise of Defendants' monopsony power, and Plaintiffs would receive more compensation in exchange for their athletic services in the absence of the challenged limits. This Court had made similar findings in O'Bannon I, which were affirmed on appeal in O'Bannon II. O'Bannon I, 7 F. Supp. 3d at 971-73; O'Bannon II, 802 F.3d at 1064-69. Horizontal price-fixing among competitors is usually a per se violation of antitrust law. However, because "a certain degree of cooperation" is necessary to market athletics competition, the Court applies the Rule of Reason. See O'Bannon II, 802 F.3d at 1069 (citation and internal quotation marks omitted).

#### **IV. Rule of Reason: Market Definition**

The Court's first step in applying the Rule of Reason is to determine the relevant market. On summary judgment, at the request of both parties and in the absence of a genuine issue of material fact, the Court adopted the market definition from the O'Bannon case.<sup>27</sup> The relevant market there was that

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<sup>26</sup> The rules that Plaintiffs challenge here are listed and described in Plaintiffs' Opening Statement at 13-15 and Appendices A-C, Docket No. 868-3.

<sup>27</sup> After the Court had entered summary judgment on market definition, Defendants argued that the Court should have considered or adopted an alternative market definition that their economics expert, Dr. Kenneth Elzinga, discussed in his report, namely a "multi-sided market for college education in the United States" in which colleges operate as multi-sided platforms that

for a college education combined with athletics, or, alternatively, the market for the student-athletes' athletic services. See Summary Judgment Order at 18, Docket No. 804. In O'Bannon I, the Court had found that the plaintiffs' antitrust claims could be analyzed as a monopoly or, alternatively, as a monopsony. 7 F. Supp. 3d at 991. Under the theory of monopsony, sometimes referred to as a buyers' cartel, schools were characterized as buyers and student-athletes as sellers in a market for recruits' athletic services and licensing rights. Id. The NCAA did not challenge the market definitions on appeal and the Ninth Circuit adopted them. O'Bannon II, 802 F.3d at 1070.

At trial in this case, Plaintiffs based their claims on a theory of monopsony only. Dr. Rascher, Plaintiffs' economics expert, defined the relevant market here as comprising national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market. See Rascher Report II 30-130, 148-85. In these markets, the class-member recruits sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation

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balance their pricing to numerous constituencies. Elzinga Report at 26-28; see also Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga at 9, Docket No. 1018. The Court rejected this argument on the ground that it was untimely, because Defendants did not offer any alternative definition of the relevant market or point to any admissible evidence to raise a genuine issue of material fact with respect to market definition during summary judgment proceedings; and on the ground that Dr. Elzinga's expert opinions about a multi-sided relevant market were unreliable and inadmissible. See generally id.

permitted by NCAA rules. Dr. Rascher found that Defendants have monopsony power in all of these markets and exercise that power to cap artificially the compensation offered to recruits. Id. ¶ 37.

Dr. Rascher's definition of these markets is based on economic analyses similar to those performed in the O'Bannon case. His analyses here are predicated on updated data and take into account women's Division I basketball, which was not at issue in O'Bannon. Id. ¶¶ 148-53. Dr. Rascher's economic analyses show that the most talented athletes are concentrated in the respective markets for Division I basketball and FBS football; possible alternatives, such as the National Association of Intercollegiate Athletics (NAIA) or the National Christian College Athletic Association (NCCAA), have not proved to be viable substitutes; none of the major professional sports leagues in class members' sports provide competitive options for most college-aged talent; high barriers to entry into the market preclude any viable alternatives emerging for class members' athletic services; and the geographic scope of the markets is nationwide. Id. ¶¶ 154-85. In sum, class members cannot obtain the same combination of a college education, high-level television exposure, and opportunities to enter professional sports other than from Division I schools.

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## **V. Rule of Reason: Anticompetitive Effects**

On summary judgment, the Court found that the challenged restraints produce significant anticompetitive effects in the relevant market. The absence of a genuine dispute with respect to the existence of an agreement among Defendants that is

intended to, and does, limit student-athlete compensation in the relevant market, is in and of itself sufficient to find that this agreement has a strong potential for significant anticompetitive effects. Plaintiffs offered evidence of significant anticompetitive effects, however, which Defendants did not meaningfully dispute. The Court had also found significant anticompetitive effects with respect to the rules challenged in O'Bannon I, which the Ninth Circuit affirmed in O'Bannon II. O'Bannon I, 7 F. Supp. at 973, 993; O'Bannon II, 802 F.3d at 1057-58, 1070-72.

The economic analyses of Plaintiffs' experts established that the challenged rules have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services. The compensation that student-athletes receive under the challenged rules does not correlate meaningfully with the value of their athletic services, based on indicators of their talent.<sup>28</sup> This is consistent with the absence of rigorous competition among schools with respect to student-athlete compensation. In a market free of the challenged restraints, competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result. Student-athletes would receive offers that would more closely match the value of their athletic services. See Lazear Report ¶¶ 11-50.

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<sup>28</sup> Dr. Edward Lazear, Plaintiffs' economics expert on summary judgment, relied on ratings of talent based on a system for rating athletes by 247sports.com. Lazear Report ¶ 29.



Plaintiffs' experts' analyses also show that Defendants are able to artificially compress and limit student-athlete compensation as described above because they possess monopsony power in the relevant market. See Rascher Report ¶¶ 30-130, 148-85; id. ¶ 37 ("Defendants and their co-conspirators have monopsony power in all three markets - that is, they have the power to collectively depress input prices without fear of loss of revenue in excess of the immediate cost savings"). Because of the absence of viable alternatives to Division I basketball and FBS football, and because of reduced competition among conferences due to the challenged compensation limits, the market for recruits in these sports is highly or perfectly concentrated under the current NCAA compensation limits. By contrast, if each conference were free to set its own compensation limits in competition with other conferences, the market concentration would decrease from highly or perfectly concentrated, to "moderately concentrated" for FBS football and "unconcentrated" for Division I basketball. Rascher Report ¶¶ 155-57.

This evidence shows that student-athletes are harmed by the challenged compensation limits, because these rules deprive them of compensation they would receive in the absence of the restraints.

At trial, Plaintiffs offered additional proof of the anticompetitive effects of the NCAA's limits on compensation. It shows that changes had been made, starting in August 2014, to the amounts and types of permissible student-athlete compensation. The changes were caused, in part, by the desire of the Power Five, those conferences with the highest revenues in Division I, to divert some of their relatively significant resources away from

expenditures that only indirectly benefit student-athletes (such as expenditures on opulent athletic facilities and multi-million dollar coaches' salaries) and toward student-athlete compensation. See, e.g., P0056 at 0001-02; Rascher Direct Testimony Declaration ¶ 212. Dr. Harvey Perlman, chancellor of the University of Nebraska, agreed with the statement that, “[i]n short, we recruit by shifting funds from regulated benefits for student athletes to unregulated frills[.]” Perlman Deposition Transcript (Dep. Tr.) at 60-61.

In a presentation in 2013, the presidents and chancellors of the Power Five had asked the Division I Board of Directors for autonomy in a variety of subject areas, for the following reasons: (1) the recognition of criticisms and accusations “of exploiting student athletes for our own financial gain”; (2) the desire to avoid “unintended consequences” if “ill-advised reforms are imposed” as a result of these criticisms; (3) a wish to move away from efforts to “create `a level playing field,” because “[t]oo often, our efforts to improve the lives of student athletes have been deflected because of cost implications that are manageable by our institutions but not by institutions with less resources”; and (4) a sense that efforts to “level the playing field” led the Power Five to “spend these resources in almost any way we want EXCEPT to improve support for student athletes.” P0056 at 0001-02. This is evidence that these conferences were prevented from making the increases in student-athlete compensation that they would have made absent the anticompetitive effects of the challenged restraints.

After the new Autonomy structure became effective on August 7, 2014, in January 2015, the

Power Five voted to increase the overall limit on grant-in-aid athletics scholarships from the limit in place at the time of the O'Bannon I trial to the higher, cost-of-attendance limit, effective on August 1, 2015.<sup>29</sup> The Power Five also created new forms of permissible compensation for student-athletes, and expanded the scope of previously permissible benefits or compensation. These changes permitted student-athletes to borrow against their future professional earnings to purchase loss-of-value insurance (Division I Bylaw 12.1.2.4.4); expanded reimbursement or payment of travel expenses for certain family members to attend certain events (Division I Bylaw 16.6.1.1); provided unlimited food (Division I Bylaw 16.5.2.5); and required schools to pay for medical care

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<sup>29</sup> 10 This Court issued its O'Bannon I injunction on August 8, 2014, to take effect on August 1, 2015. Case No. 09-cv-3329, Docket Nos. 292, 298. On July 31, 2015, the Ninth Circuit stayed the injunction. Case No. 09-cv-3329, Docket No. 418. On September 30, 2015, while the injunction was stayed, the Ninth Circuit issued its opinion affirming in part this Court's decision; the judgment became effective on December 28, 2015, when the Ninth Circuit issued its mandate. See O'Bannon II, 802 F.3d at 1079; Case No. 09-cv-3329, Docket Nos. 437, 463. Thus, the Autonomy structure change to the full grant-in-aid limit became effective before the injunctive relief ordered by this Court in O'Bannon I ever went into effect. The Autonomy structure change differs from the relief ordered in O'Bannon; it permits grants-in-aid up to the cost of attendance for any Division I athlete (in any sport) and is not limited to compensation for the use or licensing of NIL. By contrast, the relief ordered in O'Bannon I, in relevant part, prohibited the NCAA from precluding its members from compensating Division I men's basketball and FBS football student-athletes for the licensing or use of their NIL, at an amount lower than the cost of attendance. Compare Division I Bylaw 15.02.6 "Full Grant-in-Aid" with Case No. 09-cv-3329, Docket No. 292 (injunction).

for athletics-related injuries for at least two years after graduation (Division I Bylaw 16.4.1).

Although the Power Five's Autonomy legislative enactments have resulted in greater compensation for student-athletes, such compensation is still capped by overarching NCAA limits that prevent the Power Five and all NCAA members from expanding compensation beyond a point determined by the NCAA through its traditional rulemaking process.<sup>30</sup>

In light of the foregoing, the Court finds that Defendants, through the NCAA, have monopsony power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance. This is because the NCAA's Division I essentially is the relevant market for elite college football and basketball. And, because elite student-athletes lack any viable alternatives to Division I, they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services. Moreover, the compensation that class members receive under the challenged rules is not commensurate with the value that they create for Division I basketball and FBS football; this value is reflected in the

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<sup>30</sup> See, e.g., Trial Tr. (Lennon) at 1618 (the Power Five's ability to modify athletics financial aid caps is limited by NCAA Bylaw 15.01.6); id. at 1620 (the Power Five's ability to award expenses and benefits is limited by NCAA Bylaw 12.1.2.1.4); id. at 1629 (the NCAA Board of Directors has the authority to override Autonomy legislation).

extraordinary revenues that Defendants derive from these sports.

The challenged rules thus have severe anticompetitive effects and student-athlete are harmed as a result of the challenged rules, because the rules deprive them of compensation that they would otherwise receive for their athletic services.

## **VI. Rule of Reason: Asserted Justifications for the Challenged Restraints<sup>31</sup>**

### **A. Consumer Demand for Amateurism**

Defendants argue that the challenged compensation limits are procompetitive because “amateurism is a key part of demand for college sports” and “consumers value amateurism.” Defs.’ Closing Brief at 7, 10, Docket No. 1128. The corollary is that if consumers did not believe that student-athletes were amateurs, they would watch fewer games and revenues would decrease as a result. Defendants rely on the notion that it is the “principle” of amateurism that drives consumer demand, and that the challenged restraints are procompetitive because they “implement” or “effectuate” that principle. *Id.* at 37. They did not offer evidence to establish that the challenged compensation rules, in

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<sup>31</sup> Two additional pro-competitive justifications had been offered previously: increased output and competitive balance. These were rejected by the Court on summary judgment. They also were rejected in O’Bannon I and the NCAA did not address them on appeal, so the rejection was accepted in O’Bannon II. See Summary Judgment Order at 23 n.7, Docket No. 804; see also O’Bannon II, 802 F.3d at 1072. Some testimony offered by Defendants at this trial seemed aimed at resurrecting these justifications. The Court will not consider these arguments again.

and of themselves, have any direct connection to consumer demand.

Defendants nowhere define the nature of the amateurism they claim consumers insist upon. Defendants offer no stand-alone definition of amateurism either in the NCAA rules or in argument. The "Principle of Amateurism," as described in the current version of the NCAA's constitution, uses the word "amateurs" to describe the amateurism principle, and is thus circular. It does not mention compensation or payment. The constitution says, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA Constitution Article 2.9. No connection between the "Principle of Amateurism" and the challenged compensation limits is evident. Mike Slive, who served as commissioner of the SEC, one of the Power Five, from 2002 to 2015, testified that amateurism is "just a concept that I don't even know what it means. I really don't." Slive Dep. Tr. at 23, 45. He repeated, "You know, the term amateur I've never been clear on what is meant either by in your question or otherwise, what is really meant by amateurism[.]" Id. at 43.

The definition of amateurism that Defendants point to is one that cannot be found in the Division I manual. Defendants and their witnesses often describe amateurism by reference to what they say it is not: namely, amateurism is not "pay for play." See, e.g., Defs.' Closing Brief at 36 n.214, Docket No. 1128 ("Amateurism is, by definition, 'not paying' the

participants.”); Trial Tr. (Lennon) at 1275-77 (justifying challenged compensation limits on the ground that they prevent “pay for play”). Defendants do not explain the origin or meaning of the term “pay for play.” The NCAA constitution and the Division I Bylaws do not define, or even mention, “pay for play.”

The concept of “pay” is addressed only in certain bylaws that govern student-athlete compensation and eligibility. In these bylaws, “pay” is defined only indirectly; it is defined by listing a variety of forms of compensation that could be considered pay, and indicating that each form of compensation constitutes prohibited “pay,” unless it falls within one of many exceptions or is otherwise permitted by the NCAA. Thus, whether any form of compensation constitutes “pay” in violation of NCAA rules cannot be determined except by studying all of the relevant bylaws and all of their exceptions and cross-references. Erik Price, the Pac 12’s Rule 30(b) (6) witness, testified, “Well, I think the NCAA, the way Bylaw 12 is written is a series of things that you cannot do, and by then still remain an amateur. It doesn’t exactly have a beautiful definition of [amateurism].” Pac 12 Rule 30(b) (6) witness (Erik Price) Dep. Tr. at 60; see Division I Bylaw 12.1.2 (listing items that would cause a student-athlete to lose “amateur status” and eligibility for intercollegiate competition); Division I Bylaw 12.1.2(a) (prohibiting a student-athlete from using his or her athletic skills “for pay in any form” in his or her sport); but see Division I Bylaw 12.1.2.4 (“Exceptions to Amateurism Rule”).

“Pay” under NCAA rules does not necessarily track the plain meaning of the word, whereby something of monetary value is provided in exchange for something else. Indeed, a review of the bylaws

shows that many forms of payment, often in unrestricted cash, from schools and other sources, are allowed by the NCAA as “not pay,” and thus as not inconsistent with amateurism. Much of this permissible compensation appears on its face to be akin to “pay” under the plain meaning of the word. In some instances it is provided to student-athletes in exchange for their athletic performance, making it similar to what a reasonable person could consider to be “pay for play.”

As noted, the NCAA allows grants-in-aid up to the cost of attendance, which are intended to pay for the student-athletes’ education-related expenses. It also allows monetary awards it describes as “incidental to athletics participation” on top of a grant-in-aid, which reward participation or achievement in athletics, such as qualifying for a bowl game in FBS football. See Division I Bylaw 16.1.4.1 and Figures 16-1, 16-2, 16-3; Trial Tr. (Lennon) at 1275. These performance awards, which are not related to education and can be provided on top of a full cost-of-attendance grant-in-aid, are allowed at several hundred dollars for each award, but the rules permit student-athletes to qualify for multiple of these awards, meaning that they could receive several thousand dollars in cash-equivalent compensation if they perform well enough in their sport. See Rascher Direct Testimony Declaration ¶¶ 72, 205; Dr. Kenneth Elzinga Direct Testimony Declaration ¶¶ 95-96, Docket No. 883-1 (a student-athlete on a team that won a national championship could receive \$5,600 total in athletics participation awards when combined); Hostetter Dep. Tr. at 207. These awards can be provided to student-athletes in the form of Visa gift cards that can be used



like cash.<sup>32</sup> See Hostetter Dep. Tr. at 224-27. Robert Bowsby, the Big 12 Conference’s Rule 30(b)(6) witness, explained that “these things [gift cards] were all previously geared towards being mementos of the . . . games” and “it’s . . . taken . . . another turn, and the gift cards are representative of that.” Big 12 Conference Rule 30(b)(6) witness (Robert Bowsby) Dep. Tr. at 160. On their face, athletics participation awards seem to violate other Division I bylaws, including those that prohibit cash or cash-equivalent payment or compensation that incentivizes athletic performance (Division I Bylaws 12.1.2.1.4.1 and 12.1.2.1.5); nevertheless, these awards do not constitute a prohibited form of payment or compensation only because the NCAA has chosen to permit them.

Without affecting their status as amateurs, Division I student-athletes can also receive money from their schools, from monies provided by the NCAA each year through the conferences, by way of the Student Assistance Fund (SAF) and the Academic Enhancement Fund (AEF), on top of a full cost-of-

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<sup>32</sup> At the time of O’Bannon I, student-athletes could receive performance awards in the form of store-specific gift cards but can now receive these awards in the form of Visa gift cards. See Hostetter Dep. Tr. at 224-27. Performance awards also can be provided in the form of “gift suites,” which involve allowing student-athletes access to a location where they can select from a variety of gifts. See Elzinga Direct Testimony Declaration ¶ 95. Gifts available through gift suites include prepaid debit cards from stores such as Best Buy, iPad minis, speakers, watches, and headphones. See, e.g., James Dep. Tr. at 168 (received a watch and a \$452 Best Buy gift card at gift suite, which he used to buy his mother a television); Jemerigbe Dep. Tr. at 206 (received iPad mini, iTunes gift card, headphones, and speaker through gift suites).

attendance grant-in-aid.<sup>33</sup> In 2018, the NCAA made available for distribution more than \$84 million in SAF money, and more than \$48 million in AEF money. This money is disbursed by schools to assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement.<sup>34</sup> Division I Revenue

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<sup>33</sup> Division I Bylaw 16.11.1.8 (“A student-athlete may receive money from the NCAA Student Assistance Fund.”); Division I Bylaw 15.01.6.1 (“The receipt of money from the NCAA Student Assistance Fund for student-athletes is not included in determining the permissible amount of financial aid that a member institution may award to a student-athlete.”).

<sup>34</sup> The Division I Bylaws address only the uses of SAF monies that are impermissible. Neither schools nor conferences report to the NCAA detailed information (i.e., by student-athlete or by expense) to show how SAF funds were allocated; conferences report to the NCAA only amounts and types of uses of SAF monies in the aggregate. Trial Tr. (Lennon) at 1634-35. SAF monies have been used for expenses related to education, including postgraduate scholarships; fees for internship programs; international student fees, taxes, and insurance; school supplies and electronics (such as laptops, cameras, tablets); graduate school application fees; graduate school exam fees; tutoring; and academic achievement or graduation awards. J0002 at 0010; J0020 at 0001; P0043 at 0001; J0019 at 0001. SAF monies also have been used for benefits that are not related to education, such as loss-of-value insurance premiums, Trial Tr. (Lennon) at 1340; medical expenses; professional program testing; career assessments; travel expenses for both the student-athlete and family members; clothing; magazine subscriptions; and grocery reimbursement. J0002 at 0010; J0020 at 0001. AEF monies have been used for education-related benefits, such as academic achievement or graduation awards; summer school; fifth- or sixth-year aid; tutoring; academic support services; international student fees and taxes; professional program testing; and supplies (expendable or educational). J0021 at 0004-05. They have also been used for benefits that are not related to education, such as insurance

Distribution Plan, J0021 at 0004, 0014. It can be provided in cash or as a benefit, and it is not limited to education-related expenses. The schools are not constrained in the amount of these funds they can disburse to an individual student-athlete; they are limited only in the aggregate by the amount that the NCAA distributes through these funds each year. Since 2015, SAF disbursements to individual student-athletes has reached to the tens of thousands of dollars above a full cost-of-attendance grant-in-aid,<sup>35</sup> and in some cases, \$50,000 for premiums for loss-of-value insurance against the loss of future professional earnings, Trial Tr. (Lennon) at 1340.

Schools can also make thirty-dollar per diem payments to student-athletes for un-itemized incidental expenses while they are travelling for certain events. Division I Bylaw 16.8.1.1 Schools can pay travel expenses for certain family members to attend certain events. Division I Bylaw 16.6.1. In January 2015, without changing any bylaws, the NCAA began to pay up to \$3,000 for family members of student-athletes who reach the Final Four but do not advance to the basketball championships, and up

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premiums; medical, dental, or vision expenses (not covered by another insurance program); clothing; travel; and capital improvements/equipment. *Id.*; Stip. Facts ¶ 15, Docket No. 1094.

<sup>35</sup> See P0104 (showing SAF payments above the cost of attendance (COA) provided to in-state students at Ohio State University, with the highest above-COA payment being \$14,740); P0105 (showing SAF payments above COA provided to out-of-state students at Ohio State University, with the highest above-COA payment being \$49,015); P0106 (showing SAF payments above COA at nineteen schools, with the highest above-COA payment being \$61,000); Rascher Direct Testimony Declaration ¶¶ 75, 78-81; Trial Tr. (Lennon) at 1338-40; Trial Tr. (Rascher) at 111.

to \$4,000 to attend the basketball championships. See P0148. Also in January 2015, the College Football Playoff committee began to pay up to \$3,000 for each competing athlete's family members to travel to that event. Id.

Cost-of-attendance grants-in-aid themselves provide cash for expenses, as well as providing tuition, room, board, and books at no cost to the student-athlete. Any athletics aid in excess of the fixed expenses of tuition, room, board and books is provided to the student-athlete in the form of a cash stipend. The cash stipend can total several thousand dollars for some students. Defendants do not monitor how student-athletes spend their stipend. NCAA Rule 30(b)(6) witness (Kevin Lennon) Dep. Tr. at 35, 37; Hostetter Dep. Tr. at 85-86. Schools may provide full cost-of-attendance grants-in-aid to student-athletes who have already received federal Pell grants, which also are calculated to cover the cost of attendance. Any athletics aid in excess of tuition, room, board, and books, therefore, pays student-athletes a second time for the same cost-of-attendance expenses that the Pell grant is intended to cover.<sup>36</sup>

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<sup>36</sup> Division I Bylaw 15.1.1. Pell grants are awarded by the government based on financial need measured by the difference between a student's ability to pay and the cost of attendance. The maximum amount of a Pell grant is \$6,000. Noll Direct Testimony Declaration ¶¶ 78-79. When a student-athlete receives athletics aid permitted by the NCAA in addition to a Pell grant, the athletics aid may exceed the student's need as determined by federal regulations. See J1518 at 0001-02. This is an exception to the general practice that requires schools to adjust non-federal aid awards to ensure that the total aid does not exceed a student's financial need. Id.

Each school may award two post-eligibility graduate school scholarships per year of \$10,000 each that can be used at any institution (Senior Scholar Awards). Division I Bylaw 16.1.4.1.1. This is an exception to the NCAA's prohibition on post-eligibility financial aid to attend graduate school at a different institution. Defendants have not provided any cogent explanation for why the NCAA generally prohibits financial aid for graduate school at another institution, or for why the Senior Scholar Awards are limited in quantity and amount. The record suggests that these limitations are arbitrary. For example, when asked whether increasing the current limit on Senior Scholar Awards from two students per school to five students per school would render the awards inconsistent with amateurism, the NCAA's Rule 30(b)(6) witness, Kevin Lennon, provided no meaningful response other than to justify the current limit on the basis that the membership decided that limiting the awards to two students per school constituted a "reasonable cap." Trial Tr. (Lennon) at 1551-53. Lennon agreed that if the membership wanted to increase the awards "from two to three . . . they'd certainly be permitted to raise that[.]" Lennon Rule 30(b)(6) Dep. Tr. at 179.

In addition to the payments in excess of cost of attendance allowed from schools to student-athletes described above, the NCAA has allowed, and in recent years increased, payments that student-athletes may receive from outside entities without being found ineligible to play. For example, since 2015, international student-athletes have been allowed to receive unlimited payment from their national Olympic governing body in exchange for their performance at certain international competitions. And student-athletes continue to receive unlimited

funds from the U.S. Olympic Committee for their performance in the Olympics; this also is not “pay.” NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 50-51 (a swimmer received \$115,000 for participating in the Olympics, permissible under NCAA rules).

A given student-athlete is permitted to receive, in combination, all of the foregoing compensation and benefits for which he or she qualifies, on top of a full cost-of-attendance grant-in-aid, regardless of what the total amount of such compensation may turn out to be. Yet this compensation, some of which is unrelated to education and some of which is provided in cash or a cash-equivalent, is not considered to be “pay” and student-athletes who receive it remain amateurs.

These payments and benefits are, without a doubt, justifiable and well-deserved. They are relevant to the analysis of Defendants’ consumer-demand procompetitive justification for two reasons. First, the rules that permit, limit, or forbid student-athlete compensation and benefits do not follow any coherent definition of amateurism, including Defendants’ proffered definition of no “pay for play,” or even “pay.” The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it.

Second, whatever understanding consumers have of amateurism, they enjoy watching sports played by student-athletes who receive compensation and benefits such as these, because this compensation has been paid and increased while college athletics has become and remains exceedingly popular and revenue-producing. This belies Defendants’ position that the challenged current restrictions on student-

athlete compensation are necessary to preserve consumer demand. Indeed, as discussed in more detail below, increases in compensation since 2015 have not reduced consumer demand, suggesting that all of the current limits on student-athlete compensation are not necessary to preserve consumer demand.

Defendants' only economics expert on the issue of consumer demand, Dr. Elzinga, failed to show that the challenged compensation limits are necessary to preserve consumer demand. First, Dr. Elzinga's opinions on consumer demand are unreliable. He did not study any standard measures of consumer demand, such as revenues, ticket sales, or ratings. See Trial Tr. (Noll) at 285–287. The “narrative” evidence that formed the primary basis of his demand analysis was not representative. Trial Tr. (Elzinga) at 477-78, 445-47 (acknowledging that his economic analysis did not include interviews of fans, coaches, student-athletes, broadcasters, or conference commissioners). Instead, he interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel. Id. at 446-47.

Second, Dr. Elzinga's analysis of consumer demand is not relevant because he failed to study the effect of changes to student-athlete compensation on consumer demand. Dr. Elzinga explained his failure to study this issue by opining that “no test of the effect of amateurism” is possible “because there is no period during which the NCAA did not have and enforce amateurism standards.” See Elzinga Direct Testimony Declaration ¶ 20. Dr. Elzinga also posits that studying the effects on consumer demand of changes to compensation would be unnecessary in any event because the principle of amateurism has been “materially consistent over the years.” Id. ¶ 23. He

explains that “[t]he central tenet of amateurism is not a specific dollar amount (as in  $\$X = \text{amateur}$ , but  $\$X + \varepsilon = \text{professional}$ ),” rather, it is whether student-athletes are “being paid to play.” Id. ¶¶ 14, 34-35; see also id. ¶ 14 (“[T]he difference between amateurism and professionalism isn’t captured in some wooden and mechanical way by the number of dollars a student-athlete receives. True student-athletes are amateurs in the sense that they are not being paid to play.”) (emphasis omitted).

The record directly undercuts the premises of Dr. Elzinga’s analysis. Dr. Elzinga’s assertion that there is “no period” during which the NCAA did not “have and enforce amateurism standards” is contradicted by undisputed facts, which show that “NCAA did not have any rule-making or enforcement authority over its members until the 1950s.” Stip. Facts ¶ 23, Docket No. 1098. And, as discussed above in the Background section, the NCAA’s implementation of amateurism has changed materially on multiple occasions throughout its history.<sup>37</sup> Further, Dr. Elzinga’s contention that amateurism does not depend on a specific dollar amount is contradicted by the NCAA. The NCAA’s Rule 30(b)(6) witness, Kevin Lennon, testified that specific dollar limits on student-athlete compensation incidental to athletics participation, such as performance awards, are set precisely for the purpose of distinguishing between permissible

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<sup>37</sup> In addition to the changes described in the Background section above, the fact that the NCAA currently permits student-athletes to receive the other forms of compensation discussed in this section in addition to a full grant-in-aid scholarship, such as compensation “incidental to athletics participation, including performance awards, also distinguishes today’s concept of the amateur student-athlete from that in effect in earlier years.



compensation and “pay for play.” Trial Tr. (Lennon) at 1275. In other words, the amounts are set for the purpose of distinguishing between amateurism and non-amateurism. Dollar amounts (and changes to such amounts), therefore, cannot be said to be irrelevant to the analysis of this procompetitive justification. As described above, such amounts can reach the hundreds and thousands of dollars.

For these reasons, the Court is not convinced by Dr. Elzinga’s testimony.

The only economic analysis in the record that specifically speaks to the effects of compensation amounts on consumer demand is that by Dr. Rascher. Dr. Rascher analyzed two natural experiments to determine whether increases in student-athlete compensation would have an impact on consumer demand. He concluded that increased student-athlete compensation does not negatively affect consumer demand for Division I basketball and FBS football. The Court finds Dr. Rascher’s analysis and opinions to be reliable and persuasive.

The first natural experiment involved comparing consumer demand before and after the increase to the grant-in-aid limit to the cost of attendance, which was voted on in January 2015 and implemented in August 2015. As explained earlier, this change to the grant-in-aid limit, on its own, resulted in a significant increase in permissible compensation per student-athlete, because it allowed grants-in-aid to provide cash for expenses that previously could not be covered, such as supplies and transportation. Rascher Direct Testimony Declaration ¶¶ 52, 54; Noll Direct Testimony Declaration ¶ 12. Some schools adjusted their cost-of-attendance calculations so that the value of a full cost-of-attendance grant-in-aid would be

greater. See, e.g., Trial Tr. (Lennon) at 1365 (“some” schools’ financial aid offices “revisited their calculation[s]” regarding the cost of attendance after the increase of the grant-in-aid limit to cost of attendance). Moreover, because the NCAA rule that permits schools to award full grants-in-aid to student-athletes in addition to a Pell grant was not adjusted after the change to the grant-in-aid limit in 2015, the amount of cash provided above the cost of attendance increased even more for student-athletes who are awarded both a Pell grant and a full grant-in-aid scholarship. See Noll Direct Testimony Declaration ¶¶ 78-79.

Dr. Rascher’s conclusions are also supported by the fact that the NCAA has increased its SAF and AEF distributions since 2015. See P0039 at 0001; D0695 at 0001. As noted, a student-athlete can receive unlimited money through the school, from the NCAA’s SAF and AEF, on top of a full cost-of-attendance grant-in-aid. Since 2015, SAF cash to individual students has reached to the tens of thousands of dollars above a full cost-of-attendance grant-in-aid. See P0104; P0105; P0106; Rascher Direct Testimony Declaration ¶¶ 75, 78-81. The schools are not constrained in terms of the amount of these funds they can disburse to an individual student-athlete. Stip. Facts ¶¶ 3-12, Docket No. 1094.

Thus, Dr. Rascher found that total permissible student-athlete compensation has increased since August 2015, resulting in thousands of class members receiving significant benefits and compensation on top of full cost-of-attendance grants-in-aid since O’Bannon I was decided. Rascher Direct Testimony

Declaration ¶ 52.<sup>38</sup> This has had no negative impact on consumer demand; to the contrary, Dr. Rascher found that NCAA, conference, and school revenues from Division I basketball and FBS football have increased since 2015. Rascher Direct Testimony Declaration ¶¶ 45, 47, 52, 54-55; P0139, P0030, P0032-P0039; P0048, P0049; P0137. The revenues of the schools in the Power Five alone for basketball and FBS football increased from a very large amount in 2014-2015 disclosed under seal, to an even larger amount in 2015-16. Rascher Direct Testimony Declaration ¶ 47; see also P0045; J0017 at 0012-13 (showing that generated revenues have increased since 2014 for schools in the Power Five and other schools not in the Power Five). Revenues are one of the best economic measures of consumer demand. Rascher Direct Testimony Declaration ¶ 51.

Dr. Rascher acknowledged that some of the media revenues he examined are derived from multi-year contracts that were executed before 2015 and have escalating clauses (i.e., the payments under the contracts will increase each year for their duration without the need to renegotiate). Trial Tr. (Rascher) at 32. Nonetheless, some of the most valuable and longest-term contracts were executed after 2015.<sup>39</sup>

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<sup>38</sup> Again, this is not intended to suggest that student-athletes should not receive these payments, but that the increases in compensation described above have not negatively affected consumer demand.

<sup>39</sup> For example, in 2016, the NCAA extended its agreement with CBS/Turner for the March Madness tournament; the previous contract was to run through 2024. The 2016 extension increased substantially the average annual fees owed to the NCAA relative to the prior iteration of the contract. D0532 at 0023; Rascher Direct ¶ 47; P0045 at 0001-02. The total value of the 2016 extension, which covers eight years, from 2024 to 2032, is \$8.8

This supports the finding that consumer demand was not negatively affected after more student-athlete compensation became permissible in 2015. Dr. Rascher also testified that multi-year contracts that were executed before 2015 show that the increase in student-athlete compensation in 2015 did not negatively impact consumer demand given that these contracts were not renegotiated after the compensation change in 2015.<sup>40</sup> Trial Tr. (Rascher) at 32.

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billion. P0045 at 0002. The prior iteration, which covers fourteen years, from 2010 to 2024, is valued at \$10.8 billion. P0045 at 0001. Additionally, the 2016 extension is through 2032; witnesses who have experience negotiating media contracts in the context of college sports have described this as a major extension on the ground that contracts of greater potential value to broadcasters are typically executed for a longer timeframe. See Trial Tr. (Aresco) at 1009 (characterizing the 2016 extension as a “major extension”); id. at 998 (in the context of media contracts in college sports, “[t]he more attractive the product, the longer [the networks would] want to go” with the length of a contract).

<sup>40</sup> Some defense witnesses speculated that networks or sponsors could choose to renegotiate broadcast rights fees under provisions for “changed circumstances” if they believed that Division I basketball and FBS football changed from amateur to professional. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 247. This testimony, however, is not supported. Defendants have not pointed to any instance in which networks or sponsors have chosen to renegotiate licensing rights fees as a result of changes in student-athlete compensation or otherwise, and the record shows no renegotiations or fees adjustments after the grant-in-aid limit was increased to cost of attendance on August 1, 2015. See, e.g., Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 121, 125-28. No evidence was presented that student-athlete compensation or amateurism have even been discussed with media partners in this context, suggesting that these issues are not of concern to media partners and that renegotiation based on these issues is unlikely. See, e.g.,

The second natural experiment is based on the University of Nebraska Post-Eligibility Opportunities (PEO) program, which was created after the O'Bannon I trial and allows post-eligibility aid from the university, on top of a grant-in-aid, of up to \$7,500 for education-related endeavors, including graduate school, as well as study abroad, or an internship. Perlman Dep. Tr. 127-28. This natural experiment shows two things. First, at least one school has the desire to offer post-eligibility benefits such as these provided on top of a grant-in-aid. Second, there is no evidence that the creation of this program has reduced consumer demand for Nebraska sports or Division I basketball or FBS football in general. The evidence is to the contrary: Nebraska's chancellor testified that this program is consistent with amateurism because it advances "the kinds of activities that higher education are involved with" and that Nebraska's "Athletic Director talks about it at every opportunity, public and private[.]" Perlman Dep. Tr. at 127-28; see also Trial Tr. (Rascher) 19-20; Rascher Direct Testimony Declaration ¶¶ 206-07; Trial Tr. (Elzinga) at 434-37.

Dr. Rascher's analysis and opinions, therefore, support a finding that, because the described increases to student-athlete compensation did not lead to a decrease in consumer demand, similar future increases in compensation would not reduce demand.

Some defense witnesses corroborated Dr. Rascher's conclusions. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 112 (negotiated

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Conference USA Rule 30(b)(6) witness (Judy McLeod) Dep. Tr. 149-50; Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. 125-28.

media contracts for NCAA, testified that increase of grant-in-aid limit to cost of attendance did not affect consumer demand for FBS football and Division I basketball); Big 12 Rule 30(b)(6) witness (Robert Bowlsby) Dep. Tr. at 67-68 (he is not aware of “any impact on revenue” based on “greater meals and snacks,” and “with respect to Big 12 members’ ability to provide cost of attendance scholarships”).

Defendants try to show that consumer demand is dependent on maintaining current restrictions on student-athlete compensation by presenting the opinions of a survey expert, Dr. Bruce Isaacson, who concluded that “amateurism” is an “important” factor in consumers’ decision to watch or attend college sports, and is an “important reason for the popularity of college sports.” Dr. Bruce Isaacson Direct Testimony Declaration ¶¶ 24, 26, 160, 13, Docket No. 883-3. Dr. Isaacson surveyed 1,086 consumers of college football and basketball, *id.* ¶¶ 111, 114, on-line to determine the reasons why they watch college sports. One of the reasons that respondents could select was that student-athletes are “amateurs and/or not paid.” He also asked whether consumers would favor or oppose certain compensation scenarios.

Dr. Isaacson’s survey results and the inferences he draws from them do not establish or reliably indicate that a relationship exists between the challenged compensation limits and consumer demand for Division I basketball and FBS football.

First, the Court is not persuaded that the selection by some respondents of the “amateurs and/or not paid” option as a reason for viewing college sports sheds any light on the question of whether the challenged compensation limits, or increases in them, would cause those respondents to view fewer college

sports events. Dr. Isaacson did not define “amateurs” or “not paid” in his survey, or determine what either of those terms meant to respondents. Trial Tr. (Isaacson) at 1907-09. Worse, the use of the phrase “amateurs and/or not paid” renders the responses hopelessly ambiguous. (emphasis added). The phrase includes the response “amateurs or not paid,” implying that a respondent could believe that an athlete could be an amateur though not unpaid. Dr. Isaacson “intend[ed] [the terms] to be synonymous” but admits that he provided no indication to respondents in his survey that they were so intended Id. at 1908-09.

Even so, Dr. Isaacson’s conclusion that “amateurism” is an “important” factor in consumers’ decision to watch or attend college sports is an overstatement, because only 31.7% selected the “amateur and/or not paid” option as a reason why they watch or attend college sports, meaning that the great majority of respondents, 68.3%, gave other reasons. Isaacson Direct Testimony Declaration ¶¶ 153, 24, 26; Trial Tr. (Isaacson) at 1903-04. More respondents selected the options “I like it when certain colleges win or lose” and “my friends or family watch games, or attend games in person” than the “amateurs and/or not paid” option (which was the third most common selection). This suggests that these more-frequently selected reasons are more “important” factors for viewing college sports than “amateurism and/or not paid.” Moreover, the respondents who selected the “amateurs and/or not paid” option selected an average of more than four other reasons they watch college sports. Trial Tr. (Isaacson) at 1902.

Second, Dr. Isaacson did not show that opposition or support for the hypothetical compensation

scenarios he asked about would serve as a reliable indicator of how consumers would actually behave if the scenarios were implemented. Trial Tr. (Isaacson) at 1893; Dr. Hal Poret Direct Testimony Declaration ¶ 28. Dr. Isaacson tested four compensation scenarios: (1) academic incentive payment; (2) graduation incentive payment; (3) off-season expenses; and (4) unlimited payments. Isaacson Direct Testimony Declaration ¶ 126. He also tested a fifth “control” scenario that was not related to compensation. *Id.* ¶ 130. Dr. Isaacson’s survey did not ask whether respondents would view fewer or more Division I basketball and FBS football events if additional compensation were provided to student-athletes. Dr. Isaacson acknowledged that measuring consumer preferences is “not the same thing” as measuring future consumer behavior, and that he did not do any work to measure any relationship between the two.<sup>41</sup> See Trial Tr. (Isaacson) at 1894-96; see also *id.* (testified at his deposition that his “survey does not attempt to measure future behavior”); see also Poret Direct Testimony Declaration ¶ 28 and Poret Rebuttal Testimony ¶ 2-3 (opposition to a scenario does not translate to a change in behavior if the scenario were implemented).<sup>42</sup>

By contrast, Plaintiffs’ survey expert, Dr. Hal Poret, did attempt to measure the potential impact on

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<sup>41</sup> The NCAA offered in O’Bannon a survey by Dr. J. Michael Dennis that did ask respondents about their future behaviors. This survey suffered from other defects. See O’Bannon I, 7 F. Supp. 3d at 975-76; O’Bannon II, 802 F.3d at 1059.

<sup>42</sup> Moreover, Dr. Isaacson acknowledged that he was “not providing an opinion on whether or not opposition to a particular benefit relates to amateurism. I’m going to leave that to you and the NCAA and the conferences.” See Trial Tr. (Isaacson) at 1912.



future consumer behavior of providing additional compensation.<sup>43</sup> He conducted a survey of 2,696 people who watch or attend college basketball or football to assess the extent to which certain scenarios involving increased compensation, if permitted by conferences and schools, would cause them to watch or attend these sports events more or less often. Poret Direct Testimony Declaration ¶¶ 4, 17 and n.2, 18. Unlike Dr. Isaacson, Dr. Poret specifically asked respondents to indicate whether scenarios whereby compensation provided by conferences or schools would include some compensation that is not currently permitted or is currently limited would affect their viewership or attendance and, if so, to indicate the extent. *Id.* ¶¶ 44-47. Dr. Poret tested scenarios involving (1) a healthcare fund; (2) an academic incentive payment of up to \$10,000 per school year; (3) a one-time graduation incentive payment of up to \$10,000; (4) a post-eligibility undergraduate scholarship; (5) a work-study payment; (6) off-season expenses; (7) a graduate school scholarship for the cost of attendance; and (8) a post-eligibility study abroad scholarship. Poret Direct Testimony Declaration ¶ 24. Dr. Poret concluded, based on the survey responses, that viewership and attendance would not be negatively impacted if the scenarios he tested were implemented individually.

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<sup>43</sup> The Court finds that Dr. Poret's survey results and the conclusions he draws therefrom regarding future consumption of Division I basketball and FBS football are based on a methodology that is sufficiently reliable. Dr. Poret showed that his use of controls and other aspects of his survey's design allowed him to assess reliably the potential impact on future consumer behavior of implementing the scenarios he tested. Poret Rebuttal Testimony ¶¶ 12-26; Trial Tr. (Poret) at 1713-16; 1725-26; 1729; 1781-82; 1784.

Id. ¶ 59; Trial Tr. (Poret) at 1792, 1795. Dr. Poret’s survey, therefore, supports the finding that the current limits on student-athlete compensation, to the extent they relate to the scenarios that he tested, are not necessary to preserve consumer demand.

Defendants presented no evidence that NCAA bylaws limiting compensation are enacted based on any analysis of consumer demand.<sup>44</sup> Limits on student-athlete compensation and benefits are set through “a deliberative process” of NCAA members, Trial Tr. (Lennon) at 1309, and are based on the “delicate balancing that the membership . . . engage[s] in,” Trial Tr. (Lennon) at 1552. That deliberative process and delicate balancing do not appear to include considering any possible effects on consumer demand. Indeed, Lennon, who has worked for the NCAA for more than thirty years, testified that he does not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation. Trial Tr. (Lennon) at 1550–51. Lennon did not offer much insight as to what the NCAA membership does consider when it decides where to set a compensation

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<sup>44</sup> Some witnesses referred to studies conducted by third parties at the request and for the use of conferences. See Trial Tr. (Scott) at 1167, 1153-57; D0541 (third-party study commissioned by the Pac-12, dated January 2014); Trial Tr. (Scott) 1149-53, 1172; D0683 (third-party study commissioned by the Big Ten, dated September 21, 2009); Trial Tr. (Smith) at 1412-18; D0239 (third-party study commissioned by the Big Ten, dated June 3, 2008). There is no evidence that these or any other studies were considered by the NCAA when enacting any bylaws limiting compensation. These studies were admitted for a limited purpose and not for the truth of the matter asserted therein because their contents constitute hearsay within hearsay.

cap, and the explanations that he did provide suggest that the caps are set arbitrarily.

Defendants also rely on the testimony of lay witnesses to try to establish a connection between the compensation limits and consumer demand. These lay witnesses presented their own personal opinions and those of unidentified other people with whom they have spoken. This testimony posits that consumers oppose increasing compensation to student-athletes and support what the witnesses described as amateurism. The witnesses imply that these consumers would watch fewer games if they did not believe that student-athletes were amateurs. But there is no way to know what that concept means to the consumers these witnesses reported on.

Some lay defense witnesses testified that, absent the challenged NCAA limits in their current form, conferences would set limits, or not, based upon different values and resources, and that could diminish the consumer appeal of national tournaments or rivalries or lead to conference realignment. See, e.g., Trial Tr. (Scott) at 1141-1143. But, at present, there is wide variation among conferences and their members in Division I in terms of the compensation they permit their student-athletes to receive within the current NCAA limits.<sup>45</sup>

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<sup>45</sup> For example, the Ivy League does not offer any athletics-based scholarships. Military academies offer no athletics scholarships but pay their students as salaried employees. Some conferences, like the Big 12, require their members to offer athletics scholarships up to the maximum allowed by the NCAA. Some schools in other conferences cap athletics-related compensation at the cost of attendance (in other words, these schools do not permit students to, for example, receive a full cost-of-attendance

Further, resources, budgets, revenues, and performance among schools and conferences that continue to play each other in Division I already vary significantly, and the disparities that exist are longstanding.<sup>46</sup> There is no evidence that this lack of uniformity detracted from the popularity of national tournaments or rivalries. Rascher Direct Testimony Declaration ¶¶ 97-98. The variety in compensation models and resources across schools and conferences may, in fact, promote the popularity of national tournaments. See Trial Tr. (Elzinga) at 546 (agreeing that a “david/goliath story” is appealing to consumers in the national NCAA men’s basketball tournament, March Madness, because it provides “differentiation” due to the schools’ varying economic models and strengths); id. at 483.<sup>47</sup> Moreover, this testimony is further undermined by the fact that other rules that

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grant-in-aid on top of a Pell grant). Rascher Direct Testimony Declaration ¶¶ 41, 96; Big 12 Handbook J0005 at 0017.

<sup>46</sup> See e.g., Trial Tr. (Aresco) at 1054-55 (disparities in revenue and branding opportunities currently exist between conferences, and schools with fewer resources still play schools with greater resources); Bowlsby Dep. Tr. at 38-39 (agreeing that the concept of “competitive equity is largely a mirage” because “in reality, there hadn’t been much balance in the past”); Slive Dep. Tr. at 39 (“the effort to ensure a level playing field was an unattainable concept”).

<sup>47</sup> See also Lynn Holzman Dep. Tr. 129-30 (NCAA Vice President for Women’s Basketball, testifying that under current NCAA rules for March Madness, “institutions with different resources, institutions that provide athletic scholarships and some that don’t end up being matched up and play against one another. So if there’s an institution that permissibly is providing a benefit or something to student-athletes, under the current construct of the championship, an institution that does not provide the same thing, in my opinion, would be okay for them to play one another”).

assist in promoting equity among conferences, such as the limits on total scholarships, are not being challenged in this litigation and would not be modified through any of the proposed alternatives.<sup>48</sup>

Further, even if modifications to the NCAA's current compensation scheme resulted in some conferences realigning their membership because of differences in values, the argument that this would harm college sports as a product is unconvincing. Changes in conference membership have happened frequently in the last two decades. See Trial Tr. (Elzinga) at 485-87 (it is a "well-established fact" that "dozens and dozens of teams have" changed conferences over the years and conference changes "have increased in the past two decades"); Stip. Facts ¶ 10, Docket No. 1098.

The record does not support a finding that media or other commercial agreements would be renegotiated or terminated if conferences realigned. Some of the conference media agreements in the record contain clauses that permit the networks to renegotiate fees or terminate the agreement in the event that certain schools leave the conference. There is no evidence that any agreement was renegotiated or terminated in the past as a result of realignment. Instead, when the Big East experienced a significant realignment and ultimately became the AAC in July 2013, ESPN did not terminate its contract with the Big East/AAC; in fact, the existence of this contract was described as one of the reasons why the Big

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<sup>48</sup> See Trial Tr. (Aresco) at 1025-26 (the "larger schools" cannot "take 200 of the best student athletes" because "there are scholarship limits, 85 per school. And that was imposed in 1992. And it was to enhance the competition in college football").

East/AAC was able to “recover” from the realignment. Trial Tr. (Aresco) at 1023, 1048; J1509 at 0003-05.

Defense lay witnesses also testified that consumer demand for Division I basketball and FBS football is driven by consumers’ perception that student-athletes are, in fact, students. See, e.g., Bowsby Dep. Tr. at 12-13 (“This really isn’t about amateurs or not amateurs. This is . . . about the concept of student athlete.”); NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 166 (he would draw the line to limit pay in the context of consumer demand as follows: “the line is if it’s now not about . . . going to school, but now it’s about paying somebody to play a sport”); Trial Tr. (Blank) at 954, 869 (fans of college sports “love seeing their fellow students out there playing”); Trial Tr. (Blank) at 949-50 (viewership of college sports is based on student-athletes being “students at the university”); Trial Tr. (Smith) at 1411-12 (same); Trial Tr. (Smith) at 1394-95, 1407-08 (the “collegiate fan is more aligned to the educational experience that college sports provide”). Michael Aresco, the commissioner of the AAC who previously worked for CBS and ESPN, noted that the programming of televised college sports focuses on “the college experience,” which includes the campus, academics, and community service. See Trial Tr. (Aresco) at 1032. This testimony does not establish that the challenged rules have a connection to consumer demand, however, because student-athletes would continue to be students in the absence of the challenged rules. Fellow students, alumni, and neighbors of the schools would continue to identify with them.

The Court does credit the importance to consumer demand of maintaining a distinction between college sports and professional sports. In addition to the fact

that college sports are played by students actually attending the college, student-athletes are not paid the very large salaries that characterize the professional sports leagues that many student-athletes aspire to, the National Basketball Association and the National Football League.

Some lay witnesses, particularly those who have professional experience with third-party networks such as CBS or ESPN, testified that the value of media rights contracts has a relationship to the popularity of college sports as being distinguishable from professional sports. Trial Tr. (Aresco) at 1004, 1032-35; see also NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 65-66 (“the people that are our fans who create that consumer demand would feel differently if college sports looked like professional sports”); id. at 99 (“if the college game looks to be professional sports, less people will watch it” and “there won’t be the same demand” and “revenue will decline”).

The Court credits this testimony and finds that some of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports. That distinction cannot be based on student-athletes not receiving any compensation and benefits on top of a grant-in-aid; this is because student-athletes currently can receive thousands or tens of thousands of dollars in such compensation, related and unrelated to education, while remaining NCAA amateurs. Accordingly, it follows that the distinction between college and professional sports arises because student-athletes do not receive unlimited payments

unrelated to education, akin to salaries seen in professional sports leagues.

Rules that prevent unlimited payments such as those observed in professional sports leagues, therefore, are procompetitive when compared to having no such restrictions. Such rules include those challenged that are necessary to limit compensation and benefits unrelated to education. The same is true with respect to the challenged limit on grants-in-aid; because the difference between the fixed costs of tuition, room, board, and books and the cost of attendance is paid to student-athletes in cash, removing the limit on the grant-in-aid could result in unlimited cash payments.

However, rules that limit or prohibit non-cash education-related benefits do not serve to foster consumer demand by maintaining a distinction between college and professional sports. The value of such benefits, like a scholarship for post-eligibility graduate school tuition, is inherently limited to its actual value, and could not be confused with a professional athlete's salary. Further, the relationship of the benefits to education would serve to emphasize that the recipients are students, and not professional athletes. A subset of these education-related rules, namely those that limit cash or cash-equivalent benefits, such as academic or graduation awards or incentives, have a procompetitive effect to the extent that they prevent unlimited cash payments similar to those observed in professional sports. As will be discussed in more detail below in the section on less restrictive alternatives, the current challenged rules that limit education-related benefits and compensation are more restrictive than necessary to accomplish this procompetitive effect.



## B. Integration

Defendants' second remaining procompetitive justification is that the challenged limits promote the integration of student-athletes with their academic communities, which improves the college education student-athletes receive.<sup>49</sup> Within this rubric, Defendants present evidence that student-athletes benefit from receiving a college education, that the challenged limits help to incentivize academics and that the limits help integrate student-athletes into their academic communities where otherwise a "wedge" might be created.

Defendants have not shown that the challenged rules have an effect on improving or promoting integration. While the evidence shows that student-athletes benefit from receiving a college education, it does not support the notion that any such benefits arise out of, or are caused by, the challenged compensation limits.

Defendants rely on the expert testimony of Dr. James Heckman to support the proposition that student-athletes benefit from their college education. Plaintiffs quarrel with Dr. Heckman's methodology,<sup>50</sup>

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<sup>49</sup> In this context, Defendants also argue that academic integration itself plays a role in preserving consumer demand for college sports. This is merely a restatement of the argument that the challenged limits preserve consumer demand because consumers value amateurism. Indeed, the evidence that Defendants offer to support both of these arguments overlaps. The Court considers this argument to be part of the consumer demand justification.

<sup>50</sup> Dr. Heckman's analysis was based on data whose temporal scope did not capture the class period in this litigation, and did not include any information about whether the student-athletes actually received an athletics scholarship (and if so, the amount

but accepting his opinion that student-athletes benefit from attending college, this opinion says nothing about whether the challenged compensation rules cause the benefits that he observed. Indeed, Dr. Heckman conceded as much at trial. See Trial Tr. (Heckman) at 564-66. Dr. Heckman also conceded that additional compensation could improve outcomes for student-athletes, which contradicts the notion that the challenged compensation limits have a positive effect on student-athlete outcomes. Trial Tr. (Heckman) at 597 (if a student-athlete received “another \$10,000” then the “student is clearly better off. No question about it”).

Defendants also proffer lay witness testimony on the benefits of college education. None of this shows a connection between the challenged compensation limits and the benefits of the education. Some student-athletes testified that they gained skills and learning opportunities, but they did not attribute these benefits to the caps on their grant-in-aid athletic scholarships. See, e.g., Trial Tr. (Hartman) at 825-27.

Dr. Heckman’s opinion that student-athletes would be incentivized to spend time on athletics to the detriment of academics if they received additional compensation is undermined by evidence suggesting that additional compensation can have a positive impact on academic achievement. See, e.g., NCAA Research: Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Institutions (Nov. 2017), J0018 at 0026-29; see also Trial Tr. (Petr) 1884-85 (showing that graduation rates for student-athletes in Division I basketball and

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of such scholarship) or any of the other types of compensation that are at issue in this case.

FBS football have increased since 2015, when permissible athletics-related compensation increased).

Defendants point to policies that assist with student-athletes' involvement in academics and other aspects of university life, but these policies are not related to the challenged compensation limits. See, e.g., Trial Tr. (Blank) at 887-89 (student-athletes at Wisconsin are not limited in their selection of major or to athlete-only dorms, and are permitted to miss only a certain number of classes in a season); Trial Tr. (Smith) at 1398-99 (Ohio State requires student-athletes to live on campus for two years); Trial Tr. (Hatch) at 1997 (same at Notre Dame); Division I Bylaw 17.1 (governing required time off); Emmert Dep. Tr. at 209-15 (proposals to reduce athletics time demands).

Defendants next contend that the challenged rules help prevent a "wedge" between student-athletes and other students that could result if student-athletes received compensation that was not available to ordinary students. Defendants again rely on Dr. Heckman, who opined that academic achievement incentives would isolate student-athletes "from the rest of the student body" and affect the "camaraderie in these various institutions." Trial Tr. (Heckman) at 631-33. Defendants also point to testimony, by university administrators and former student-athletes, that additional compensation for student-athletes would create tensions and resentment between student-athletes and non-athletes, as well as among student-athletes to the extent that any additional compensation is not provided equally. See, e.g., Trial Tr. (Hatch) at 2000-

01; Trial Tr. (Smith) at 1409-10; Jemerigbe Dep. Tr. at 294-95.

This testimony is outweighed by the fact that income disparities inevitably exist as a result of family background or wealth derived from other sources. See e.g., Trial Tr. (Blank) at 920-21 (Wisconsin students come from different socioeconomic backgrounds). Moreover, levels of student-athlete compensation vary already. The amount of a cost-of-attendance grant-in-aid is calculated by each school with the discretion to adjust it on an individual-student basis. J1517 at 0002; Stip. Facts ¶¶ 3-6, Docket No. 1093; NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 164. Another reason why compensation can vary among student-athletes is that the NCAA permits them to receive their grant-in-aid on top of federal Pell grants, which the government awards to some but not all student-athletes. Also variable is the payment of SAF and AEF benefits, which are not limited on an individual-student basis, and the awards incidental to athletics participation, including performance awards paid in Visa gift cards. Athletes who perform well in the Olympics can receive unlimited compensation for their performance; such compensation has reached six figures. NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 50-51. And athletes in certain sports, such as tennis, can receive up to \$10,000 in prize money per year prior to enrolling in college and still compete as amateurs. See Division I Bylaw 12.1.2.4.2.1. At least for some, these disparities are not problematic. See, e.g., Trial Tr. (Jenkins) at 735-736 (he did not resent a football teammate who received more than a million dollars from a baseball professional league as a recruitment bonus).

In O'Bannon I, the Court found that the challenged limits may help integrate student-athletes with their academic communities by preventing a wedge, which may improve their college education. See 7 F. Supp. 3d at 980-81. The Ninth Circuit affirmed that finding, although it noted that on appeal the NCAA focused its argument regarding procompetitive justifications entirely on the amateurism justification. O'Bannon II, 802 F.3d at 1072. Nonetheless, support for the Court's finding with respect to integration in O'Bannon I was weak, and it is weaker now. Evidence was presented at this trial that did not exist at the time of the O'Bannon trial showing that the challenged rules are not necessary to prevent a wedge between student-athletes and other students. This is the natural experiment resulting from the increase to the cost of attendance for grants-in-aid. As discussed above, since 2015, student-athletes have been allowed to receive thousands of dollars in increased compensation and benefits from full cost-of-attendance grants-in-aid and other payments. Rascher Direct Testimony Declaration ¶¶ 52, 54, 75, 78-81; Noll Direct Testimony Declaration ¶ 12; P0104; P0105; P0106. Yet, there is no evidence that, since 2015, student-athletes have experienced more separation. The NCAA's Rule 30(b)(6) witness, Kevin Lennon, has acknowledged that there is no evidence that the recent increase in student-athlete compensation has created a wedge. Trial Tr. (Lennon) at 1355-58 (agreeing that there is no evidence that increased compensation that student-athletes have received because of the increase of the grant-in-aid limit to cost of attendance and because of benefits that became permissible or expanded recently, such as premiums for loss-of-value insurance against loss of

future professional wages, unlimited food, and travel expenses for family members for certain events, has created a wedge).

In fact, the challenged limits may serve to increase separation among students, not decrease or prevent it. According to Dr. Perlman, the University of Nebraska chancellor, the challenged compensation limits result in schools spending their recruitment resources on “unregulated frills” in facilities that benefit student-athletes exclusively, which promotes separation. See, e.g., Perlman Dep. Tr. at 60-61; see also Bilas Dep. Tr. At 105-06 (Kentucky’s “opulent” facility for basketball players “functions to segregate them from the normal student population”); Emmert Dep. Tr. at 24-29 (expenditures on training facilities, stadiums, and student-athlete living quarters are not limited by NCAA). Limits on compensation may constrain student-athletes’ financial ability to engage in social activities with other students. See, e.g., Trial Tr. (Alston) at 680 (additional compensation would have permitted him to “mingle” more with non-athletes). Accordingly, the evidence here does not support the notion that the challenged rules promote integration by preventing a wedge.

Finally, Defendants proffer Dr. Heckman’s opinion that a “substantial change” to what he terms the “Collegiate Model” would alter the incentives of “participants/stakeholders in the college sports world,” and would result in a “new equilibrium.” Heckman Direct Testimony Declaration ¶ 14. This opinion does not appear to be related to the integration theory. Further, Dr. Heckman did not conduct any empirical, econometric, or quantitative analysis to distinguish “substantial” changes from those that are not; when asked at trial to describe

exactly what would qualify as a “large” or “substantial” change, he referred to dollar amounts that “have been put out in the literature” or that others had mentioned during trial, but he declined to adopt any such numbers as what he believes, based on his own work, is “large” or “substantial.” Trial Tr. (Heckman) at 607-11.

Because Defendants have not met their burden to show that the challenged limits are procompetitive due to an effect on promoting integration, by preventing a wedge or otherwise, the Court finds that Defendants have not shown that the challenged rules are justified based on this theory.

#### **VII. Rule of Reason: Alternatives to the Challenged Restraints**

The Court finds that the current rules, read together, are more restrictive than necessary to prevent demand-reducing unlimited compensation indistinguishable from that observed in professional sports. Plaintiffs propose three alternatives to the challenged restraints as less restrictive.

First, they propose an alternative that would prohibit the NCAA from placing any limits on compensation or benefits, whether or not related to education, given in exchange for athletic services. This would permit individual conferences to set limits on such compensation or benefits.

Second, they propose an alternative that would allow the NCAA to continue limiting the compensation or benefits given in exchange for athletic services except for (1) benefits that are related to education, and (2) the seventeen benefits incidental to athletics participation that the NCAA currently allows and caps. These are listed in Plaintiffs’

Opening Statement, Appendix C, Docket No. 868-3. While these could no longer be capped by the NCAA, limits on these two types of compensation and benefits could nonetheless be maintained or set by individual conferences.

Third, Plaintiffs propose an alternative that would allow the NCAA to continue to limit the compensation or benefits given in exchange for athletic services, but would not allow NCAA limits on compensation and benefits related to education. Again, limits on education-related benefits could be set by individual conferences.

For all of the proposed alternatives, any permissible limits could be enforced by the NCAA, the conferences, or the schools. Schools, of course, could continue to set their own limits on their offers.

#### **A. First and Second Proposed Alternatives**

The Court finds that Plaintiffs' first proposed alternative, which would eliminate all NCAA limits on compensation, would not be as effective as the current rules in preserving consumer demand for Division I basketball and FBS football; that alternative leaves open the possibility that at least some conferences would allow their schools to offer student-athletes unlimited cash payments that are unrelated to education. Such payments could be akin to those observed in professional sports leagues. Payments of that nature could diminish the popularity of college sports as a product distinct from professional sports. The Court notes that Plaintiffs' survey expert Dr. Poret did not test a proposed scenario of cash compensation greater than \$10,000 in value.



Plaintiffs and their experts strenuously argue and opine, perhaps correctly, that if this alternative were adopted, conference officials, as rational economic actors, would not act contrary to their members' aggregate economic interests, and would not choose to pay amounts of cash compensation unrelated to education that would be demand-reducing for Division I sports. Whether by survey or trial and error, these actors would eventually discover the level of cash compensation to student-athletes that would encourage competition for recruits but would not reduce the demand for their product. Be that as it may, the inevitable trial-and-error phase could result in miscalculations by one or more conferences as to levels of cash pay that would not reduce demand for the product, and this could produce unintended consequences.

It is to be hoped that gradual change will be instructive. If it were persuaded to do so, the NCAA could conduct market research and allow gradual increases in cash compensation to student-athletes to determine an amount that would not be demand-reducing.

Plaintiffs' second proposed alternative likewise would not be as effective in achieving the procompetitive effect of the challenged rules to the extent that it would remove the NCAA caps on athletics participation awards and other compensation and benefits that are unrelated to education. It would prohibit NCAA caps on cash or cash-equivalent awards or incentives. Without such limits, conferences could suddenly decide to allow the award of any sum of cash to some or all student-athletes. This could lead to unlimited cash payments and the same effect as the first alternative.

**B. Third Proposed Alternative as Modified:  
Prohibiting Limits on Most Education-  
Related Payments**

The Court finds that a less restrictive alternative to the current set of challenged NCAA limits would be to (1) allow the NCAA to continue to limit grants-in-aid at not less than the cost of attendance; (2) allow the association to continue to limit compensation and benefits unrelated to education; (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future. This is Plaintiffs' third proposed alternative, as modified by the Court. It would be less restrictive than the current compensation rules, allowing for additional compensation and benefits related to education. It would therefore be less harmful to competition in the relevant market, but would not provide a vehicle for unlimited cash payments, unrelated to education.

The types of education-related benefits that could not be capped by the NCAA would include those that it currently prohibits or limits in some fashion. These include computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies. Also included would be post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-

eligibility internships. See Trial Tr. (Lennon) at 1559-1565, 1571-72; NCAA Rule 30(b)(6) witness (Kevin Lennon) Dep. Tr. 195-213; Division I Bylaw 13.2.1.1(k). There may be other education-related benefits that the NCAA, in an exercise of its good faith judgment, would allow. Payment for these benefits would be limited to their actual value and could be provided in kind. For that reason, they would not be a vehicle for potentially unlimited cash payments.

A subset of education-related benefits, namely, cash academic or graduation awards and incentives, if not capped by the NCAA, could potentially be unlimited and allow for payments indistinguishable from those received in professional sports. Accordingly, limits on these awards or incentives may have the procompetitive effect of preventing professional-style unlimited cash payments. This alternative would allow the NCAA to place a limit on such awards, as long as the limit is not less than the maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined) under Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2, and 16-3 of the Division I Manual, J0024 at 0249-50. (These figures list the current caps.) If the NCAA increased the current athletics participation awards limit just described, any limits on academic or graduation awards and incentives must be increased so that they are never less than the new athletics participation awards limit. Allowing the NCAA to cap education-related awards and incentives at the athletics participation awards limit, which is an amount that has been shown not to decrease consumer demand and not to be inconsistent with the NCAA's understanding of amateurism, would enable

the NCAA to prevent unlimited cash, demand-reducing payments. On the other hand, the NCAA could decide to set higher limits, or no limits at all, for academic or graduation awards and incentives.

Individual conferences could vote to set or maintain limits on education-related benefits that the NCAA will not be allowed to cap. Conferences could also set limits on academic and graduation awards and incentives. This would not have an anticompetitive effect because no individual conference dominates nearly the entire market, like the NCAA does. Rascher Direct Testimony Declaration II 160-61. Market concentration would be reduced in the absence of NCAA caps limiting education-related compensation and benefits described above. Thus, the third alternative would be less restrictive than maintaining the current NCAA compensation scheme. *Id.* ¶¶ 162, 175.

NCAA's latitude to superintend college sports would not be greatly impacted. This alternative would affect only a small fraction of the NCAA's rulemaking jurisdiction, namely rules that limit education-related compensation and benefits.

The third alternative as modified would be virtually as effective as the current rules in achieving the effect on the preservation of consumer demand for Division I basketball and FBS football that the Court found here, and its implementation would not require significant increased costs.

*1. Virtually as Effective*

As discussed above, according to Defendants' own witnesses, consumer demand for Division I basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students.

Providing additional, even uncapped, education-related compensation and benefits to student-athletes would not affect student-athletes' status as students. These benefits are, by definition, related to education and thus would be consistent with the values propounded by the NCAA. The Principle of Amateurism in its constitution, quoted above, holds that amateur student-athletes should be motivated primarily by education. Education-related compensation and benefits would enhance the student-athletes' connection to academics. See, e.g., Perlman Dep. Tr. at 126-27 ("I think if you're paying them to play athletics, I think it is inconsistent with the idea of what a student athlete is. I don't think it's inconsistent to provide them with benefits that relate to the educational enterprise"); MAC Rule 30(b)(6) witness (Jon Steinbrecher) Dep. Tr. at 189 (compensation above cost of attendance is not problematic because "the key point" is "linking what we're doing to the pursuit of the educational opportunities of the individual involved"); Renfro Dep. Tr. at 84 ("I personally don't see the offer of a post graduate grant in aid as something that violates the concept of amateurism[.]"); Bowsby Dep. Tr. at 13-14 (an inducement to stay in school an extra year or to graduate "is worthy of consideration").

Other evidence shows that providing additional education-related compensation would not negatively impact consumer demand. See, e.g., NCAA Rule 30(b)(6) witness (Mark Lewis) Dep. Tr. at 269-70 (changes to the NCAA rules regarding compensation and benefits that have occurred in the last five years have not had "any adverse impact on consumer demand" because "they're all tied to education"). Prohibitions or limitations on such benefits have not been shown to be necessary to preserve the distinction

between college and professional sports in that the benefits are inherently limited in value and nature and can be provided in kind, not cash; accordingly, they could not be confused with professional-style unlimited cash payments. The natural experiments, discussed above, show that recent increases in student-athlete compensation, related and even unrelated to education, have not decreased consumer demand for Division I basketball or FBS football. Dr. Hal Poret's survey also supports this finding. One of the scenarios he tested was offering scholarships to complete an undergraduate or graduate degree at any institution, which he found would not negatively impact consumer demand. Poret Direct Testimony Declaration 9191 17, 19-24, 26, 59, 131. Dr. Isaacson's survey does not speak to the possible effects of implementing this alternative, because he did not test any analogous scenarios.

The academic and graduation awards and incentives that would be allowed with a cap in the same amount as current caps on athletic performance awards likewise will be virtually as effective as the current compensation scheme. The amount will not be demand-reducing because it will be in the same amount that is allowed for athletic performance awards, which are deemed to be consistent with amateurism and the preservation of the distinction between college and professional sports. And because they are education-related, they will further the perception of the student-athletes as students.

Thus, this alternative set of rules will be as effective as the current set of challenged rules in preserving consumer demand. It will also allow the NCAA to maintain the distinction between college student-athletes playing for educational benefits and

professional athletes playing for large cash salaries unrelated to education. The education-related amounts that could be expended under this alternative would be either inherently limited by the actual value of the benefit, or limited by the NCAA at a level that has been shown not to be demand-reducing or inconsistent with amateurism. The NCAA will be permitted to continue to cap grants-in-aid at not less than the cost of attendance. The association will remain free to bar or limit compensation and benefits that are unrelated to education, including cash or cash-equivalent awards for athletic performance. Conferences individually will be free to limit any benefits that the NCAA could not.

## *2. No Significant Increased Costs*

The Court finds that the implementation of this third alternative as modified would not result in significant increased costs. To the contrary, because this alternative would result in the elimination of NCAA caps on most education-related benefits, it would eliminate the need to expend resources on compliance and enforcement in connection with such caps. The NCAA engages in rule-making, interpretation, investigations, and enforcement of its rules.<sup>51</sup> It could employ its systems and resources to

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<sup>51</sup> Starting in August 2019, as a result of the findings and recommendations of the Commission on College Basketball chaired by Dr. Condoleezza Rice, see P0060, the NCAA will add a body composed of “both external investigators with no school or conference affiliations and select NCAA enforcement staff” to adjudicate independently cases involving potential violations of NCAA rules that are deemed “complex.” Stip. Facts ¶ 9, Docket No. 1098 (internal quotation marks omitted). Examples of complex cases include alleged violations of core NCAA values such as prioritizing academics and the well-being of college athletes. Id. The perceived need for this new enforcement

the extent it chooses to limit cash or cash-equivalent academic or graduation awards and incentives.

Individual conferences would not be required to enact their own rules to limit any education-related benefits that the NCAA would not be able to cap. Even so, the Court finds no evidence that the costs that could be incurred to do so, if any, would be significant. Conferences are required to be “legislative bod[ies],” Division I Constitution Article 3.3.1.1, and thus, they already can and do enact their own rules. The scope of the benefits that could not be capped by the NCAA under this alternative would be those related to education, which is a small fraction of the conduct that the NCAA currently regulates and enforces. Any new rulemaking activities by the conferences would be correspondingly limited.

Conferences are also required by the NCAA to have compliance programs and are involved in ensuring compliance with both NCAA and conference rules by their members. The changes contemplated here would not add to their enforcement burden. Conferences also may require their members to enforce both conference and NCAA rules. See, e.g., The Big 10 Handbook at J0006 at 0013 (providing that it “shall be the responsibility of each member university” to “adhere to and enforce all Conference Rules and Agreements, and the NCAA Constitution, Bylaws and Regulations and their respective interpretations”). Thus, schools currently engage in compliance efforts, including investigations, and enforcement of NCAA and conference rules relating to

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mechanism is unrelated to the changes mandated here, but this mechanism could certainly be used to police them.



student-athlete compensation and eligibility.<sup>52</sup> Schools also currently interpret NCAA rules. P0146 at 0002. Implementing this alternative will impose little or no additional burden on the schools.

Some defense witnesses testified that eliminating all of the challenged NCAA limits would result in new costs to the conferences and schools. See, e.g., Trial Tr. (Scott) 1180; Trial Tr. (Smith) at 1520-23. The Court finds that this testimony lacks specificity or support and thus is speculative. Other evidence also outweighs or undermines it.<sup>53</sup> Additionally, this testimony hypothesized the removal of all NCAA compensation limits, which diminishes its relevance in the context of implementing the third alternative as modified, whereby only a subset of the challenged rules will be affected.<sup>54</sup>

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<sup>52</sup> The NCAA requires all of its members to comply with and enforce its rules. See, e.g., Division I Constitution Article 1.3.2 (requiring member institutions to “apply and enforce” NCAA legislation about eligibility, financial aid, and recruiting, among other matters); Division I Constitution Article 2.1 (requiring member schools to maintain “institutional control”).

<sup>53</sup> For example, Larry Scott testified that in the absence of NCAA compensation limits, there would be “significant additional infrastructure and expense” at the Pac-12 relating to “rule development.” Trial Tr. (Scott) at 1136-37. But other evidence shows that the Pac-12 already has a system in place for passing and amending bylaws relating to student-athlete financial aid and otherwise. See Pac-12 Handbook, J0010 at 0008, 0014, 0015, 0017-18.

<sup>54</sup> Defendants contend in their opening statement that adopting any of Plaintiffs’ proposed alternatives would result in conference realignment, which would entail increased costs. As discussed above, conference realignment is common and the evidence does not support a finding that adopting the third alternative would result in conference realignment.

Finally, to the extent that new enforcement costs at the conference or school levels are incurred, the NCAA could shift to its members some of the resources it now spends on enforcement, so there would be no net new costs. Trial Tr. (Scott) at 1240 (suggesting that any new costs at the conference and school levels could be offset by such distributions). In sum, the Court finds that any new costs of implementing this alternative would not rise to the level of “significant.”

The Court notes that it asked Defendants several times, during the closing argument hearing held on December 18, 2018, and previously, to propose, based on their superior knowledge of the NCAA and its members and their functions, adjustments to the challenged rules or to Plaintiffs’ proposed less restrictive alternatives that would be more workable from their perspective. They offered none.

## **CONCLUSIONS OF LAW**

### **I. Legal Standard under Section 1 of the Sherman Act**

Section 1 of the Sherman Act makes it unlawful to form a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]” 15 U.S.C. § 1. “To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce.” Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001) (citation and internal quotation marks omitted).

Here, Plaintiffs challenge the NCAA rules that generally (1) cap at the cost of attendance grants-in-aid they may receive for their athletic services, and (2) limit the additional compensation and benefits that they can receive in addition to a grant-in-aid athletic scholarship, which have a monetary value above the cost of attendance. Plaintiffs contend that Defendants enact these limits by exercising their monopsony power by way of price-fixing agreements that are made and enforced through the NCAA's bylaws. Plaintiffs contend that they would receive more compensation in exchange for their athletic services in the absence of these limits.

As discussed in the findings of fact above, on summary judgment the Court found no genuine dispute of material fact as to the existence of an agreement among Defendants in restraint of trade that affects interstate commerce, which satisfies the first and third elements of a Section 1 claim. Specifically, Defendants did not meaningfully dispute evidence showing that (1) the compensation limits that Plaintiffs challenge are enacted by agreement of Defendants through the NCAA's legislative process and are embodied in NCAA rules published in the NCAA Division I Manual; (2) Defendants enforce these rules by requiring all NCAA members to comply with them, and by punishing violations; (3) these rules affect interstate commerce, because they regulate transactions between Plaintiffs and their schools with respect to Plaintiffs' athletic services in multiple states nation-wide; and (4) these transactions are commercial because they regulate an essential component of Division I basketball and FBS football. Summary Judgment Order at 15, Docket No. 804; see also O'Bannon II, 802 F.3d at 1065-66 (holding that

the NCAA's compensation rules are restraints of trade that regulate "commercial transaction[s]").

As to the remaining element of a Section 1 claim, which requires a showing that the challenged restraints are unreasonable under either the per se rule or the Rule of Reason, the Court held on summary judgment that the NCAA's regulations "must be tested under a rule-of-reason analysis" as opposed to under the per se rule. Summary Judgment Order at 15, Docket No. 804; see also O'Bannon II, 802 F.3d at 1053 (holding that "the NCAA's amateurism rules . . . must be analyzed under the Rule of Reason").

Horizontal price-fixing agreements, those among competitors, like the challenged rules in this case, "are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high . . . . In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (Board of Regents) (citation omitted). But where, as here, a "certain degree of cooperation" is necessary to market college sports, the Rule of Reason is appropriate. O'Bannon II, 802 F.3d at 1069 (quoting Board of Regents, 468 U.S. at 117) (internal quotation marks omitted).

## **II. Issue or Claim Preclusion**

As a threshold matter, Defendants argue that Plaintiffs have not shown that this case is not precluded by the Ninth Circuit's ruling in O'Bannon II. The Court denied Defendants' motion for summary judgment that this action is barred by O'Bannon II

under the doctrines of res judicata<sup>55</sup> and collateral estoppel.<sup>56</sup> See Summary Judgment Order at 9-15, Docket No. 804. Defendants invite the Court to revisit these issues, arguing that Plaintiffs must, but have failed to, show that a new antitrust violation occurred since O'Bannon I or that there has been any material change in the factual basis for O'Bannon II.

It is not Plaintiffs' burden to show that this action is not precluded; instead, the burden of proving preclusion is on Defendants. See Karim-Panahi v Los Angeles Police Dep't, 839 F.2d 621, 627 n.4 (9th Cir. 1988) (res judicata); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050-51 (9th Cir. 2008) (collateral estoppel). Defendants failed to satisfy this burden on summary judgment, and they have offered nothing new to warrant altering the Court's summary judgment holding on this issue.

In its Summary Judgment Order, the Court found that material differences between this action and the O'Bannon case prevent a finding that this action is

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<sup>55</sup> Res judicata prohibits the re-litigation of any claims that were raised or could have been raised in a prior action. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077-78 (9th Cir. 2003). Three elements must be present for res judicata to apply: (1) an identity of claims; (2) a final judgment on the merits; and (3) the same parties or their privies. Id. at 1077.

<sup>56</sup> Collateral estoppel "prevents a party from relitigating an issue decided in a previous action if four requirements are met: (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008) (citation omitted).

precluded by that case. These include (1) that class members in the two actions are not in complete privity; and (2) that the conduct and rules challenged, the rights implicated, and the evidence presented and available were not the same in both actions.<sup>57</sup>

The class in O'Bannon did not include, as does one of the classes here, female student-athletes. The class in O'Bannon was not limited to student-athletes in receipt of an offer for a full grant-in-aid athletic scholarship; it included male Division I basketball and FBS football student-athletes whose NIL were used or could have been used in game footage or videogames licensed or sold by the NCAA and its licensees, regardless of whether they received any scholarship money. O'Bannon II, 802 F.3d at 1055-56. By contrast, the classes in this case include student-athletes who were offered or received a full grant-in-aid athletic scholarship. No use of their NIL was necessary; therefore, these classes are not limited to student-athletes whose NIL were used or licensed. Additionally, the classes in this case are limited to student-athletes who received an offer for a full grant-in-aid from March 5, 2014, to the date of final judgment in this action; few of the male class members in this case would have been O'Bannon class members because most would have been recruited

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<sup>57</sup> See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (citation omitted) (holding that a single cause of action for the purpose of applying res judicata exists in successive lawsuits, if, among other things, both actions “involve infringement of the same right,” and “substantially the same evidence” was presented in both actions); Cent. Delta Water Agency v. United States, 306 F.3d 938, 953 (9th Cir. 2002) (holding that collateral estoppel cannot be applied where the facts of the prior action are merely “similar” to the ones in the second case) (citation and internal quotation marks omitted).

after the O'Bannon I trial, which ended in August 2014.

The crux of the O'Bannon case was the right to student-athletes' NIL. The plaintiffs sought relief as a result of price-fixing conduct by the NCAA and its licensing partners that prevented them from benefiting financially, through compensation from their schools or from outside sources, from the use and licensing of their NIL. The class members in O'Bannon were required to release the rights to their NIL, the use and licensing of which had monetary value, to the NCAA as a condition of eligibility to play in Division I basketball and FBS football; this was the case regardless of whether they received a grant-in-aid. The rules challenged in O'Bannon related to NIL rights and their commercialization by the NCAA and its licensees, to the exclusion of student-athletes.<sup>58</sup> See O'Bannon II, 802 F.3d at 1055 (“The gravamen of O'Bannon's complaint was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NIL, were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.”); *id.* at 1072 (concluding that “the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits”). The plaintiffs in O'Bannon did not challenge the limit on a full grant-in-aid athletic scholarship, although the limit was implicated in the less restrictive alternative that the plaintiffs proposed and that this Court adopted.

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<sup>58</sup> See O'Bannon I, Case No. 09-cv-3329, Pls.' Trial Brief at 4, Docket No. 172 (listing challenged rules); Case No. 09-cv-1967, Third Am. Consolidated Complaint 1 359, Docket No. 832 (same).

In this case, by contrast, Plaintiffs seek relief from price-fixing conduct by the NCAA, Conference Defendants, and other NCAA members that prevents them from receiving compensation and benefits from their schools in excess of certain limits in exchange for their athletic services. The conduct at issue here is not connected to NIL rights. The rules challenged in this case, in addition to the limit on a grant-in-aid, include those that limit other compensation and benefits that student-athletes can receive on top of a full cost-of-attendance grant-in-aid. See Pls.' Opening Statement at 13-15 and Appendices A-C, Docket No. 868-3, for a list of the challenged rules. They include those that limit compensation and benefits related to education, such as scholarships for undergraduate or graduate study at other institutions. They also include rules that limit compensation and benefits incidental to athletics participation but are unrelated to education, such as performance awards and travel expenses for student-athletes' family members. These rules were not challenged in O'Bannon. Accordingly, neither these rules nor the compensation and benefits that can be provided pursuant to them were comprehensively addressed in that case.

Some of the rules challenged in this case did not exist or have materially changed since the O'Bannon trial, those relating to reimbursement for travel expenses for family members, student-athletes borrowing against their future earnings to purchase loss-of-value insurance, and payments to international student-athletes from their home countries.

While some NCAA rules were challenged in both cases, these are core rules that address eligibility and



compensation in general terms.<sup>59</sup> This overlap is a consequence of the interconnected nature of NCAA bylaws, and does not indicate that the two actions overlap in terms of the specific and distinct conduct being challenged, or the rights affected. The fact that the limit on the grant-in-aid is addressed in both cases also does not preclude this action. The NCAA changed this limit before the Court's injunction in O'Bannon went into effect, and the NCAA's changed rule differs from the less restrictive alternative that the Court found in O'Bannon I with respect to the student-athletes who would receive the relief and the source and type of the compensation that would cover the difference between the prior grant-in-aid limit and the cost of attendance.

Moreover, since O'Bannon, there have been material increases in permissible compensation above the cost of attendance that is not related to education. These increases are relevant to the question of whether restrictions on student-athlete compensation are necessary to preserve consumer demand for college sports as distinct from professional sports. These include the payment by schools from SAF monies of \$50,000 premiums for loss-of-value insurance against the loss of future professional earnings in case of injury in college. In January 2015, the NCAA began to pay up to \$3,000 for family

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<sup>59</sup> For example, challenged rules that are common to both cases include Division I Bylaw 13.2.1 (prohibiting benefits and financial aid not permitted by the NCAA); Division I Bylaw 16.02.5 (prohibiting funds, awards, or benefits not permitted by the NCAA); and Division I Bylaw 12.1.2.1 (listing prohibited forms of "pay"). These rules must be read in conjunction with rules that address compensation and benefits in more specific terms and in more specific contexts.

members of student-athletes to attend the Final Four games and up to \$4,000 to attend basketball championships; the College Football Playoff committee began to pay up to \$3,000 for each competing athlete's family members to travel to that event. Student-athletes previously could receive performance awards in the form of store-specific gift cards but can now receive these awards, in capped amounts, in the form of Visa gift cards that can be used anywhere that accepts Visa. Schools can now provide unlimited food to student-athletes.

Defendants note that some of the forms of compensation and benefits addressed in this case, such as Pell grants, benefits from the SAF, and store-specific gift cards, were mentioned or can be found in the record in O'Bannon. This fact is not sufficient to support Defendants' claim preclusion argument.

Because student-athlete compensation has expanded since O'Bannon, Defendants also argue that no new actionable conduct or material change in the factual basis of O'Bannon has occurred since O'Bannon I to justify a conclusion that this action is not precluded. This argument misses the point. It is the fact that the prices of student-athlete compensation are fixed, as opposed to the amount at which these prices are fixed, that renders the agreements at issue anticompetitive. See O'Bannon II, 802 F.3d at 1071 ("It is no excuse that the prices fixed are themselves reasonable.") (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980)) (internal quotation marks omitted). Defendants do not dispute that the challenged rules embody agreements among competitors that fix the prices of student-athlete compensation. Accordingly, the Court cannot dismiss Defendants' "anticompetitive price-

fixing agreement as benign,” see id., simply because they contend that the fixed prices are more reasonable than they used to be. See Associated Press v. United States, 326 U.S. 1, 16 n.15 (1945) (“[T]he Sherman Act cannot be evaded by good motives.”) (citation and internal quotation marks omitted).

The material factual differences discussed above defeat Defendants’ preclusion arguments and warrant examining the conduct challenged in this case under the Rule of Reason. See Oltz v. St. Peter’s Cmty. Hosp., 861 F.2d 1440, 1449 (9th Cir. 1988) (“The rule of reason requires an evaluation of each challenged restraint in light of the special circumstances involved. That the analysis will differ from case to case is the essence of the rule.”) (citation omitted). Whether the challenged price-fixing conduct here is justified by a procompetitive effect must be proved, and not presumed. See O’Bannon II, 802 F.3d at 1063-64

In sum, because Plaintiffs raise new antitrust challenges to conduct affecting a different class, in a different time period, relating to rules and forms of compensation that are not the same as those challenged in O’Bannon, the claims in this case are not precluded by O’Bannon II.

### **III. The Rule of Reason**

The Rule of Reason is intended for the analysis of “agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.” Nat’l Soc. of Prof’l Eng’s v. United States, 435 U.S. 679, 692 (1978). “[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not

to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.” *Id.*; see also Cont’l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (“Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”).

Several Ninth Circuit opinions have articulated burden-shifting schemes to apply the Rule of Reason. “Under the rule of reason burden-shifting scheme, plaintiffs first must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.” Cnty. of Tuolumne, 236 F.3d at 1150 (citation omitted). Second, if the plaintiffs make that showing, the burden then shifts to the defendants to offer evidence that a legitimate procompetitive effect is produced by the challenged behavior. *Id.* Third, if the defendants do so, the burden then shifts back to the plaintiffs to demonstrate that there are less restrictive alternatives to the challenged conduct. *Id.* Finally, if the plaintiffs fail “to meet their burden of advancing viable less restrictive alternatives,” the court then will “reach the balancing stage,” wherein the court “must balance the harms and benefits” of the challenged conduct to determine whether it is “reasonable.” *Id.* at 1160 (citing Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1507b).

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#### **IV. Rule of Reason: Market Definition**

Plaintiffs first must show that the challenged conduct has significant anticompetitive effects in the

relevant market. “Proof that defendant’s activities had an impact upon competition in the relevant market is `an absolutely essential element of the rule of reason case.” Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir. 1986) (citation omitted). The term “relevant market” in this context “encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (citation and internal quotation marks omitted).

As discussed in the findings of fact, Plaintiffs produced sufficient evidence on summary judgment to establish the existence of a relevant market comprising national markets for Plaintiffs’ labor in the form of athletic services in men’s and women’s Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market. In these markets, the class members sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other compensation and benefits permitted by NCAA rules on top of grants-in-aid. Because of the absence of any viable substitutes for Division I basketball and FBS football, Defendants hold monopsony power in all of these markets and exercise that power to cap artificially the compensation offered to recruits. This is reflected in the high degree of concentration found in the relevant market. Class members cannot obtain the same combination of a college education, high-level

television exposure, and opportunities to enter professional sports other than from Division I schools. See O'Bannon I, 7 F. Supp. 3d at 965-68, 991-93 (finding relevant market wherein Division I basketball and FBS football schools compete to recruit elite football and basketball players); O'Bannon II, 802 F.3d at 1056-57, 1070 (affirming relevant market found in O'Bannon I on the ground that the NCAA did not “take issue with the way that the district court defined” the relevant market).

During summary judgment proceedings, Defendants did not request that the Court adopt an alternative market definition, or point to any admissible evidence to create a genuine issue of material of fact with respect to market definition. Although Defendants argued later that this Court should have considered or adopted a multi-sided market definition, the Court rejected these arguments on the ground that they were untimely, and on the ground that the only evidence to support the belated multi-sided market definition was inadmissible in any event. See generally Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga, Docket No. 1018.

#### **V. Rule of Reason: Anticompetitive Effects**

The requisite showing of significant anticompetitive effects calls for evidence that “the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude.” Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991). This can be done by showing that “the defendant plays enough of a role” in the relevant market “to impair competition significantly,” or by showing that the challenged restraint “has actually produced significant anti-competitive effects,” such as

by restricting output or fixing a price. Id.; Board of Regents, 468 U.S. at 109 (“[W]hen there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’”) (citation omitted).

Because Defendants have near complete dominance of, and exercise monopsony power in, the relevant market, and because it is undisputed that the challenged restraints suppress competition and fix the price of student-athletes’ services, the Court has found that the anticompetitive effects of the challenged rules are severe. On summary judgment, the Court found no genuine issue of material fact that the challenged rules cause significant anticompetitive effects in the relevant market. Plaintiffs produced sufficient evidence on summary judgment and at trial to show that the challenged rules amount to overt horizontal price-fixing among competitors, because they essentially eliminate price competition as to one key aspect of the recruitment of student-athletes in Division I basketball and FBS football, namely the price of the services of student-athletes. See Board of Regents, 468 U.S. at 100 (noting that horizontal price-fixing agreements have a “high” probability of resulting in anticompetitive effects and are “ordinarily condemned as a matter of law” under an illegal per se approach).

This evidence also established that the challenged rules harm class members, because the rules deprive them of compensation they would receive in the absence of the restraints. See O’Bannon II, 802 F.3d at 1071 (holding that NCAA compensation rules have anticompetitive effects because they “extinguish” one form of competition among schools seeking to land

recruits and deprive student-athletes of compensation they would receive absent the rules) (citation and internal quotation marks omitted).

## **VI. Rule of Reason: Asserted Justifications for the Challenged Restraints**

Because Plaintiffs have established that the challenged rules restrain competition and have severe anticompetitive effects, the burden shifts to Defendants to show that the challenged price-fixing conduct “brings about some procompetitive effect in order to justify it under the antitrust laws.” O’Bannon II, 802 F.3d at 1073 (emphasis omitted).

The only two asserted procompetitive justifications for the challenged rules that survived summary judgment<sup>60</sup> are (1) that the challenged rules promote amateurism, which in turn enhances consumer demand for Division I basketball and FBS football; and (2) that the challenged rules promote integration of student-athletes with their academic communities, which in turn improves the quality of the college education that student-athletes receive for their athletic services.

### **A. Consumer Demand for Amateurism**

Defendants first contend that the challenged rules are procompetitive because they promote the principle of amateurism, which enhances consumer demand.

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<sup>60</sup> The Court will not consider arguments relating to procompetitive justifications that it rejected on summary judgment. See Summary Judgment Order at 23 n.7, Docket No. 804; see also O’Bannon II 802 F.3d at 1072 (affirming the district court’s rejection of competitive balance and increased output procompetitive justifications because the NCAA “offered no meaningful argument that those findings were clearly erroneous”).



Defendants argue that consumers value amateurism, and that consumer demand for Division I basketball and FBS football would deteriorate if student-athletes received more compensation. To support their contentions, Defendants rely on the expert opinions of Dr. Elzinga and Dr. Isaacson, and lay testimony by various NCAA, conference, and school administrators regarding the preferences of viewers of college sports.

As a threshold matter, it is important to recognize that the challenged limits on compensation cannot be deemed procompetitive simply because they promote or are consistent with amateurism. To be procompetitive, the challenged rules must have some procompetitive effect on the relevant market.

Although their theory is that the challenged rules promote amateurism, Defendants did not offer an affirmative definition of amateurism. While Defendants place great emphasis on the Principle of Amateurism, which is described in the Division I constitution, the principle does not mention or address compensation; nor does it prohibit or even discourage compensation. Accordingly, no link appears between this principle and the challenged compensation limits.

Defendants argue that amateurism can be defined based on what it is not, namely, amateurism is not “pay for play.” But the concept of “pay for play” does not help define amateurism because this term itself is undefined.

Defendants have not pointed to any NCAA bylaws that define amateurism, pay for play, or pay. In the bylaws, “pay” is defined only indirectly, by way of a list of forms of compensation that the NCAA permits and does not permit. A reading of these bylaws

discloses no principled, articulable difference between amateurism and not amateurism, or “pay for play” and not “pay for play.” The only thing that can be inferred is that compensation constitutes “pay for play” or “pay” if the NCAA has decided to forbid it, and compensation is not “pay for play” or “pay” if the NCAA has decided to permit it.

The NCAA permits grants-in-aid up to the cost of attendance. In addition, student-athletes can receive cash or cash-equivalent compensation that exceeds the cost of attendance by thousands of dollars. The NCAA permits schools and conferences to pay student-athletes awards for their performance in their sport, which can be paid in cash-equivalent Visa cards; student-athletes who reach high levels of competition can receive up to \$5,600 in such awards in a school year. Because these awards are directly correlated with athletic performance, they appear, on their face, to be “pay for play,” and thus, inconsistent with amateurism as Defendants and their witnesses describe that term. Yet, they are allowed. Also permissible are SAF payments in the thousands of dollars for varying purposes, including for \$50,000 premiums for loss-of-value insurance against future loss of professional wages.

The NCAA permits schools to provide per diem payments to student-athletes for un-itemized expenses. It also permits schools to pay for family members’ travel expenses to attend certain events; separately, the NCAA and the College Football Playoff committee have paid thousands of dollars for family members to travel to the Final Four, as well as the basketball and FBS championships. The NCAA allows outside organizations to provide payments to certain student-athletes for their performance; in the

case of student-athletes who do well in the Olympics or in international competitions, the payments that can be provided under current NCAA rules are unlimited.

Some of the compensation and benefits above the cost of attendance that the NCAA currently permits are related to education. For example, the NCAA permits schools to provide student-athletes with funding for post-eligibility graduate school at any institution, although this is capped at \$10,000 per student, two students per school, per year. These are the Senior Scholar Awards. It also permits schools to pay, with SAF funds, for education-related items and expenses, such as laptops and pre-eligibility tutoring, that are not covered by the cost of attendance.

An individual student-athlete could receive all of the aforementioned forms of compensation, in combination, without losing his or her status as an amateur or eligibility to play in Division I sports. When combined, this compensation can total thousands and even tens of thousands of dollars above a full cost-of-attendance grant-in-aid. Again, the Court does not mean to imply that these payments should not be made. The point is that student-athletes' receipt of this compensation in excess of the cost of attendance, some of which is related to education and some of which is not, has not led to a reduction in consumer demand for college sports as a distinct product, which continues apace.

Defendants' only economics expert on consumer demand, Dr. Elzinga, did not even attempt to examine whether a relationship exists between compensation and consumer demand. He opines that this analysis is not possible because amateurism has always existed and the NCAA has always enforced it; he also opines

that any such analysis would be unnecessary in any event because amateurism is not about whether student-athletes receive specific dollar amounts in compensation, but is instead about whether they are paid to play, which is a concept that he does not define. Dr. Elzinga's opinions and assumptions are contrary to the record, which shows that the NCAA has not always enforced amateurism rules; that amateurism, and amounts of permissible student-athlete compensation, have changed materially over time; and that the amounts of compensation that student-athletes receive are very relevant to the determination of whether a student-athlete is an NCAA amateur or not, because the NCAA's limits on certain forms of compensation are set based on specific dollar amounts for that very purpose. Accordingly, the Court found Dr. Elzinga's opinions to be unconvincing.

Defendants attempted to establish a connection between student-athlete compensation and consumer demand by way of the opinions of their survey expert, Dr. Isaacson. His opinions, however, do not establish or suggest that a relationship exists between the challenged rules and consumer demand.

The only economic analysis in the record that addresses the impact of changes to student-athlete compensation on consumer demand, that of Dr. Rascher, shows that recent increases in student-athlete compensation, related and unrelated to education, have not decreased consumer demand. Dr. Rascher concluded, in fact, that revenues, which are an indicator of demand, at the NCAA, conference, and school levels have increased since 2015, when class members' permissible compensation increased significantly as a result of the change to the grant-in-

aid limit that year and the expansion or creation of other benefits that schools can provide on top of a full grant-in-aid. Accordingly, Dr. Rascher's findings suggest that additional increases in compensation would not reduce consumer demand.

Dr. Rascher's conclusions are corroborated by other evidence, including the opinions of Plaintiffs' survey expert, Dr. Poret, and some testimony from defense witnesses.

Dr. Poret specifically tested whether providing certain forms of additional compensation to student-athletes would affect future viewership or attendance of basketball and football. He concluded that viewership and attendance would not be negatively impacted if the scenarios he tested were implemented individually.

If limits on student-athlete compensation were necessary to maintain consumer demand, one would expect to see increases in compensation leading to decreases in consumer demand. The evidence described above shows that actual increases in compensation have not decreased demand, and it suggests that future increases in compensation likewise would not do so.

The challenged compensation limits do not appear to be set by the NCAA based on considerations of consumer demand. The NCAA's Rule 30(b)(6) witness, Kevin Lennon, testified that he does not recall any instance in his more than thirty years with the organization in which a study on consumer demand was considered by the NCAA membership when making rules about compensation.

Defendants rely on lay witness testimony to try to establish a connection between the challenged

compensation rules and consumer demand. Most of this testimony is predicated on personal opinion and conversations with unidentified fans of college sports with whom witnesses have spoken. Some of these witnesses testified that the challenged rules prevent conferences from setting different rules on student-athlete compensation based on their different values and resources; these witnesses posited that changing the challenged rules could negatively impact the consumer appeal of national tournaments and rivalries, or could result in conference realignment, all of which could negatively affect consumer demand for college sports. But this testimony is unsupported by the weight of the evidence, which shows that significant variance already exists among conferences in terms of student-athlete compensation schemes, resources, and performance, and that conference realignment has been frequent. None of this has negatively affected consumer demand or revenues.

Some witnesses testified that consumers enjoy college sports because of the difference between college sports and professional sports. Much of this difference is based on the fact that student-athletes are students playing for their school. But this does not in itself establish any connection between consumer demand and the challenged rules. Indeed, student-athletes would remain students even if their compensation were not limited by the challenged rules. See O'Bannon II, 802 F.3d at 1073 (concluding that the opportunity to earn a higher education “would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships. Nothing in the plaintiffs’ prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes”).

Other distinctions between college and professional sports are the amounts and types of compensation players receive. The distinction, currently, cannot be based on student-athletes receiving no compensation or benefits above the cost of attendance and professionals receiving large cash salaries, sometimes in the millions of dollars. This is because student-athletes already receive moderate amounts in compensation and benefits on top of a grant-in-aid without affecting the distinction between college and professional sports. Instead, the Court found that a distinction between college and professional sports arises from the fact that student-athletes do not receive unlimited cash payments, especially those unrelated to education, like those seen in professional sports leagues.

Accordingly, the Court found that, when compared with having no limits on compensation, some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues. As will be discussed in more detail in the next section, however, not all of the challenged rules in their current form are necessary to achieve this procompetitive effect, and there is a less restrictive alternative to the set of current challenged compensation restrictions.

The challenged compensation limits can be divided into three categories: (1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits unrelated to education paid on top of a grant-in-aid; (3) compensation and

benefits related to education provided on top of a grant-in-aid.

The Court found that the challenged limits in the first and second categories are procompetitive relative to having no limits, to the extent that they help maintain consumer demand for college sports as a distinct product by preventing unlimited cash payments unrelated to education.

As for the limits in the third category, only some have been shown to be procompetitive, namely limits on academic or graduation awards and incentives that are provided in cash or cash-equivalents. These could become a vehicle for unlimited payments. The Court found that limits or prohibitions on most other benefits related to education that can be provided on top of a grant-in-aid, such as those that limit tutoring, graduate school tuition, and paid internships, have not been shown to have an effect on enhancing consumer demand for college sports as a distinct product, because these limits are not necessary to prevent unlimited cash compensation unrelated to education. Educational benefits limited or prohibited by these rules are distinct from professional-level compensation because they have a connection to education, are paid to students, their value is inherently limited to their actual cost, and they can be provided in kind, not in cash. Defendants have offered no cogent explanation for why limits or prohibitions on these education-related benefits are necessary to preserve consumer demand. Some evidence instead suggests that the challenged limits on education-related compensation



are arbitrary.<sup>61</sup> Accordingly, because no procompetitive justification for limiting these education-related benefits has been shown, limits on these benefits cannot be included in a less restrictive alternative.

### **B. Integration**

Defendants contend that the challenged rules have a procompetitive effect because they promote the integration of student-athletes into their academic communities. Defendants posit that this integration improves the college education that student-athletes receive for their athletic services.

For this proffered justification to be viable, Defendants would have to establish (1) that the challenged rules promote integration, and (2) that integration has a procompetitive effect in the relevant market. As detailed in the findings of fact, Defendants did not meet their burden to show that the challenged rules have an effect on promoting integration. That alone defeats integration as a procompetitive justification.

The evidence shows that student-athletes benefit in various ways from the college education they receive, but Defendants have not shown that such benefits arise out of the challenged compensation

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<sup>61</sup> For example, when asked whether increasing the current limit on Senior Scholar Awards from two students per school to five students per school would render the awards inconsistent with amateurism, the NCAA's Rule 30(b)(6) witness, Kevin Lennon, provided no meaningful response other than to justify the current limit on the basis that the membership decided that limiting the awards to two students per school constituted a reasonable cap. Trial Tr. (Lennon) at 1551-53. It could be raised from two to three. Lennon Rule 30(b)(6) Dep. Tr. at 179.

limits. Most of the benefits that student-athletes can gain from attending college are caused, instead, by the education itself and by other rules and policies, such as those relating to academic eligibility requirements, tutoring, academic support, living conditions, and the scheduling of athletic practice and events. None of these rules and policies, which appear to be the driving force behind the integration that Defendants describe, are challenged here. Accordingly, student-athletes would still enjoy the benefits caused by the latter rules and policies even if the challenged compensation limits were changed.

Defendants' expert, Dr. Heckman, conceded that additional compensation could improve outcomes for student-athletes, belying the notion that the challenged compensation limits, as they currently stand, are necessary to achieve positive student-athlete outcomes. Additionally, other evidence shows that student-athlete achievement, as measured by graduation rates, has increased since 2015, when permissible athletics-related compensation increased. This also suggests that the challenged compensation limits are not necessary to improve student-athlete academic outcomes. This evidence also undermines Dr. Heckman's opinion that student-athletes would be incentivized to spend time on athletics to the detriment of academics if they received additional compensation.

Defendants also rely on testimony positing that additional compensation for student-athletes would create a "wedge" between student-athletes and non-athletes, and even among student-athletes if any additional compensation provided were not distributed equally. The NCAA advanced the same theory in O'Bannon I. See 7 F. Supp. 3d at 980-81.

There, this Court found that certain limited restrictions on student-athlete compensation “may help” prevent a wedge between student-athletes and others on campus, see id. at 980, and the Ninth Circuit affirmed that finding, although it noted that, on appeal, the NCAA focused all of its arguments regarding a procompetitive justification on its amateurism theory. O’Bannon II, 802 F.3d at 1059-60, 1072.

Here, the evidence that Defendants cite in support of their “wedge” theory is even weaker than that presented in O’Bannon I, and it also is directly contradicted by evidence that was not available at the time of O’Bannon I. This shows that student-athlete compensation increased since 2015 and this greater compensation, which can reach thousands or tens of thousands of dollars above a full cost-of-attendance grant-in-aid, has not resulted in increased separation between student-athletes and other students. This evidence distinguishes the factual record here regarding the “wedge” theory from the record in O’Bannon I, and it justifies a different conclusion with respect to the “wedge” theory and integration as a procompetitive justification. Divisions among students exist and are inevitable as a result of factors that are unrelated to the challenged rules. Further, the challenged rules may create or exacerbate a wedge because they result in some schools spending money that would otherwise go to student-athlete compensation on frills, like extravagant, athletes-only facilities.

Because Defendants failed to show that the challenged rules have an effect on promoting integration, Defendants’ integration justification fails.

## VII. Rule of Reason: Alternatives to the Challenged Restraints

Defendants have sufficiently shown a procompetitive effect of some aspects of the challenged compensation scheme.<sup>62</sup> These are the cost-of-attendance limit on the grant-in-aid, the limits on compensation and benefits unrelated to education, and the limits on cash or cash-equivalent education-related awards and incentives for academic achievement or graduation. The procompetitive effect of these caps is preventing unlimited, professional-level cash payments, unrelated to education, that could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand for Division I basketball and FBS football. Defendants, however, have not shown a procompetitive justification for caps on education-related benefits that are inherently limited by their actual cost and that can be provided in kind, not in cash, such as rules that limit scholarships for graduate school.

The burden shifts to Plaintiffs to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.

Where a restraint “is patently and inexplicably stricter than is necessary to accomplish” demonstrated procompetitive objectives, “an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.” O’Bannon

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<sup>62</sup> Because Defendants have not shown that the challenged rules can be justified on the ground that they promote integration, the Court does not consider whether any proffered less restrictive alternatives would promote integration.

II, 802 F.3d at 1075 (emphasis omitted). To be viable, a less restrictive alternative must be “virtually as effective” in serving the established procompetitive effect of the challenged restraints, and its implementation must be achieved “without significantly increased cost.” See id. at 1074, 1076 n.19 (citation and internal quotation marks omitted). In the context of NCAA rules limiting student-athlete compensation, a court must afford the NCAA “ample latitude” to superintend college athletics, and may not “use antitrust law to make marginal adjustments to broadly reasonable market restraints.” Id. at 1074-75 (citation and internal quotation marks omitted).

As discussed in the findings of fact, there is a less restrictive alternative to the set of challenged rules that meets these requirements. Under these alternative rules, the NCAA can continue to cap the grant-in-aid at not less than the cost of attendance. The NCAA can also continue to limit compensation and benefits, paid in addition to the cost of attendance, that are unrelated to education. The association can continue to limit academic or graduation awards or incentives, provided in cash or cash-equivalent on top of a grant-in-aid, as long as the limit is not less than the athletics participation awards limit.<sup>63</sup> A lower cap is not necessary to preserve consumer demand because athletics participation awards, at the current caps, have not

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<sup>63</sup> As discussed in the findings of fact, the athletics participation awards limit is the maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined) under Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2, and 16-3 of the 2018-2019 Division I Manual, J0024.

been demand-reducing. In fact, the NCAA considers these amounts consistent with amateurism. While the NCAA could reduce the athletics participation awards limit in the future, it may not reduce academic or graduation awards or incentives to amounts lower than the current athletics participation awards limit. The NCAA may increase athletics participation awards in the future, but it must increase any limits on academic or graduation awards and incentives so that such limits are never lower than the limit on athletics participation awards.

Defendants have not shown a procompetitive effect for NCAA rules that restrict inherently limited, non-cash, education-related benefits provided on top of a grant-in-aid. Accordingly, such limits are not included in the less restrictive alternative rules. The types of inherently limited education-related benefits that are uncapped as part of this alternative include those that currently are prohibited or limited in some fashion by the NCAA. These are listed in the findings of fact.

As discussed in the findings of fact, this alternative would be virtually as effective as the challenged set of rules in preserving the same contribution to consumer demand for Division I basketball and FBS football, as a product distinct from professional sports, that the current NCAA compensation scheme achieves. This is because this alternative expands education-related compensation and benefits only, and it does so in a way that would not result in unlimited cash payments, untethered to education, similar to those observed in professional sports.

This alternative also would not require significant new costs to implement, because it eliminates NCAA

caps on education-related benefits. This will eliminate the need to expend resources on compliance and enforcement in connection with such caps. To the extent that the NCAA, conferences, or schools choose to regulate compensation in any way that is permissible under this alternative, they could employ existing rule-making, interpretation, and enforcement structures to do so. The NCAA could assist conferences and schools in that undertaking, by reallocating the resources it uses to enforce or interpret the NCAA caps that this alternative eliminates, or otherwise.

The alternative adopted here is consistent with the teachings of O'Bannon II. As noted above, in that case, the Ninth Circuit affirmed this Court's conclusion that the NCAA's compensation limits relating to the use or licensing of NIL violated the Sherman Act, and affirmed its order that the NCAA could not cap compensation for student-athletes' NIL at an amount lower than the cost of attendance. The circuit court reasoned that (1) the evidence in that case did not "suggest[] that consumers of college sports would become less interested in those sports" if this compensation were provided because it "would be going to cover [student-athletes'] 'legitimate costs' to attend school"; and (2) the additional compensation "would have virtually no impact on amateurism" as the NCAA defined the concept in that case. O'Bannon II, 802 F.3d at 1074-75. "By the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." Id. at 1075. The circuit court, however, vacated this Court's order that the NCAA could not limit the schools' compensation in trust to student-athletes for their NIL at an amount lower than \$5,000 per year. The majority found that this

Court erred in allowing student-athletes to be paid cash untethered to their education expenses, even if such payment was deferred, because that alternative would not be “virtually as effective as the NCAA’s current amateur-status rule.” Id. at 1074.

The non-cash education-related benefits allowed here, like the compensation approved by the court of appeal in O’Bannon II, will go to cover legitimate education-related costs. As in O’Bannon II, there is no evidence here suggesting that uncapping non-cash education-related benefits would negatively affect consumers’ interest in Division I basketball and FBS football. According to defense witnesses, consumer demand for Division I basketball and FBS football as distinct from professional sports is driven by consumers’ perception that student-athletes are students. See Board of Regents, 468 U.S. at 101-02 (noting that “[t]he identification of this ‘product’ [college football] with an academic tradition differentiates [it]” from professional sports). Additional education-related benefits, if anything, would serve to enhance student-athletes’ connection to academics. The natural experiments discussed in the findings of fact, as well as the testimony of Plaintiffs’ survey expert, Dr. Poret, and some testimony by defense witnesses, also show that increasing education-related compensation and benefits would not reduce consumer demand for Division I basketball or FBS football. Defendants and their witnesses agree that the types and amounts of compensation that the NCAA currently permits schools to provide to student-athletes on top of a grant-in-aid are consistent with what they describe as amateurism. Some of this currently permissible compensation on top of a grant-in-aid, which can reach thousands and even tens of thousands of dollars



above the cost of attendance, is related to education, and some is not. It follows that allowing limited non-cash education-related benefits on top of a grant-in-aid is not inconsistent with what Defendants describe as amateurism.

Nor is there evidence here that allowing limited academic awards would negatively affect consumers' interest in Division I basketball or FBS football. The NCAA will be permitted to limit academic and graduation awards and incentives that are provided in cash or a cash-equivalent to a level that the record shows is not demand-reducing or inconsistent with NCAA amateurism, namely the level at which athletics participation awards, which are provided in cash-equivalents, are capped by the NCAA. The NCAA also will be permitted to continue to limit grants-in-aid at not less than the cost of attendance and limit compensation and benefits unrelated to education.

Defendants rely heavily on the following language from O'Bannon II: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more." Id. at 1079. But this language from O'Bannon II cannot be read to preemptively bar any Rule of Reason challenge to any NCAA rule that restricts or prohibits student-athlete compensation. Such a broad reading would be inconsistent with the circuit court's statement elsewhere in the opinion that, under the Rule of Reason, the validity of each rule "must be proved, not presumed." Id. at 1064.

Further, this statement was made in the context of the majority's disapproval of allowing deferred cash payments above the cost of attendance and "untethered to educational expenses." Id. at 1078. Based on

the evidence in that case, the majority held that paying student-athletes any amount of cash above the cost of attendance, if unrelated to education, would "vitate their amateur status," *id.* at 1077, whereas including additional compensation in a grant-in-aid up to the cost of attendance would not.

New evidence presented in this case shows that payments above the cost of attendance do not vitiate student-athletes' NCAA amateur status, even when such payments are made in cash-equivalents, are unrelated to education, and can amount to thousands and even tens of thousands of dollars. The NCAA permits student-athletes to receive, above the cost of attendance, cash-equivalent payments for their athletic performance directly from their schools and conferences, the cumulative value of which could reach \$5,600 in an academic school year. This evidence was not before the Ninth Circuit in O'Bannon II. Moreover, the NCAA also currently permits a variety of other payments above the cost of attendance that have no tether to education, such as payments of \$50,000 premiums for loss-of-value insurance against loss of future professional wages, thousands of dollars of SAF and AEF monies that can be used in a wide variety of ways, and thousands of dollars of travel expenses for family members. Defense witnesses have testified that these payments are not inconsistent with amateurism. The economic analyses discussed above show that consumer demand has not been negatively affected.

The concern described in O'Bannon II that, if the line of paying cash, non-education-related compensation were crossed, there would be "no defined stopping point," *id.* at 1078-79, is inapplicable here. The alternative being adopted would remove

NCAA caps on education-related benefits only. These benefits are inherently limited to their actual value, such as graduate school tuition. Cash or cash-equivalent academic and graduation awards and incentives would be limited to the NCAA-approved amounts of athletics participation awards. Thus, the alternative rules being adopted here do have a stopping point, and that stopping point falls within amateurism as Defendants described it in this case.

Under these less restrictive rules, the NCAA would retain the right to define these education-related benefits and to regulate how schools provide them to student-athletes. For example, the NCAA could require schools to pay the cost of such benefits directly to the educational institution or provider from which the student-athletes will obtain the benefits. In the case of education-related supplies, such as computers and science equipment, the NCAA could require schools to pay for these items directly or to reimburse student-athletes for these expenses if adequate proof of purchase is shown.

The adoption of this alternative set of rules also would not significantly impact the NCAA's ability to superintend college sports, because only a small fraction of the conduct that the NCAA regulates would be affected. The NCAA will otherwise remain free to manage college sports as it wishes.

These alternative rules are less restrictive than the current compensation rules, and therefore less harmful to competition in the relevant market. They will result in increased competition among NCAA members and increased education-related compensation for student-athletes.

### VIII. Balancing

As discussed above, the Court has found and concluded that Plaintiffs have shown a less restrictive alternative to the challenged rules. Accordingly, the Court can impose its remedy without weighing the anticompetitive effects of the challenged restraints against their procompetitive benefits as a final balancing consideration.

Several Ninth Circuit cases describe the balancing inquiry as being necessary as a final consideration only if the court finds no viable less restrictive alternative. For example, in County of Tuolumne, the Ninth Circuit explained that where “plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives,” a court then “reach[es] the balancing stage,” where it “must balance the harms and benefits of the [challenged restraints] to determine whether they are reasonable.” 236 F.3d at 1160 (citing Areeda ¶ 1507b at 397). Similarly, in Bhan, the circuit court described the Rule-of-Reason inquiry as involving four steps, and noted that, after the third step in which a plaintiff must “try to show that any legitimate objectives can be achieved in a substantially less restrictive manner,” “[f]inally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance.” 929 F.2d at 1413 (citing Areeda ¶ 1502 at 371-72).

An argument can be made that balancing should be done at an earlier stage, and in the Ninth Circuit, the Rule of Reason inquiry has been described in varying ways. In Tanaka, the circuit court described it as involving three steps but also noted that a “restraint violates the rule of reason if the restraint’s harm to competition outweighs its procompetitive

effects.” 252 F.3d at 1063. In Paladin Assocs., Inc. v. Mont. Power Co., the circuit court described the Rule of Reason inquiry as “determin[ing] whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects,” without mentioning any burden-shifting steps. 328 F.3d 1145, 1156 (9th Cir. 2003). In Am. Ad Mgmt., Inc. v. GTE Corp., the court ruled, “The fact finder must balance the restraint and any justifications or pro-competitive effects of the restraint in order to determine whether the restraint is unreasonable.” 92 F.3d 781, 791 (9th Cir. 1996) (citation, internal quotation marks, and emphasis omitted).

Some Supreme Court cases have described the Rule of Reason inquiry without mentioning a burden-shifting framework at all. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition”) (citation and internal quotation marks omitted).

Thus, Supreme Court and Ninth Circuit cases have used various formulations of the Rule of Reason: three steps followed by balancing, four steps including balancing, balancing at the second step, or eschewing a burden-shifting test with defined steps altogether. None of these cases has endorsed or required the use of any particular formulation over any other.

The Court is not persuaded by Defendants’ contention that the mention of a three-step test by the Supreme Court in Ohio v. American Express Co., 138 S. Ct. 2274, 2284 (2018) (analyzing challenged restraints under the Rule of Reason using “a three-step, burden-shifting framework”) and by the Ninth

Circuit in O'Bannon II, 802 F.3d at 1060 (referring to the “third and final” step), means that the Rule of Reason analysis can end without balancing if a viable less restrictive alternative is not shown. Neither the Supreme Court nor the Ninth Circuit has so held. In O'Bannon II, the Ninth Circuit found a less restrictive alternative was viable; accordingly, balancing as a final consideration was not necessary in that case. See 802 F.3d at 1070. The Supreme Court’s rule-of-reason analysis in American Express did not reach the balancing stage either, because the plaintiffs had not satisfied their burden to show that the conduct at issue had anticompetitive effects.

As can be observed in many citations above, the Supreme Court and the Ninth Circuit frequently rely on the treatises and other writings of Phillip E. Areeda and Herbert Hovenkamp in cases involving the Sherman Act. See, e.g., American Express, 138 S. Ct. at 2284 (citing Areeda & Hovenkamp). These scholars have noted that a three-step burden-shifting framework and balancing “are hardly the same thing” because “the sequence of evidentiary steps, with its shifting burdens, is an attempt to avoid general balancing.” See Areeda & Hovenkamp ¶ 1507d. Their view is that balancing is appropriate as a final consideration where no viable less restrictive alternative has been established. See id. (“A better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a prima facie anticompetitive restraint, but no less restrictive alternative has been shown . . . . The court must then determine whether the anticompetitive effects made in the prima facie case are sufficiently offset by the proffered defense.”).

If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown. In this case, however, the Court has found a viable less restrictive alternative and will enter its injunction accordingly.

### **IX. Summary of Liability Determinations**

For the reasons set forth above, the Court finds and concludes that the challenged rules, in their current form, unreasonably restrain trade in violation of Section 1 of the Sherman Act. The challenged rules constitute horizontal price-fixing agreements enacted and enforced with monopsony power. This essentially eliminates price competition as to one key aspect of the recruitment of student-athletes in Division I basketball and FBS football, namely the labor that goes into these sports. As such, the challenged rules harm student-athletes by depriving them of compensation they otherwise would receive for their athletic services.

Defendants failed to show that the challenged rules have an effect on promoting integration of student-athletes and their academic communities. While Defendants have shown that limiting student-athlete compensation has some effect in preserving consumer demand for Division I basketball and FBS football as compared with no limit, Plaintiffs have shown that not all of the challenged rules are necessary to achieve this effect and that a less restrictive alternative set of rules would be virtually as effective as the set of challenged rules, without requiring significant costs to implement. The less restrictive alternative would remove limitations on most education-related benefits provided on top of a

grant-in-aid, while allowing the NCAA to limit cash or cash-equivalent awards or incentives for academic achievement or graduation to the same extent it limits athletics awards. Limits on compensation and benefits that are not related to education and a limit on the grant-in-aid at not less than the cost of attendance would remain.

## **X. Remedy**

The Sherman Act grants the power to district courts to “prevent and restrain violations” of Section 1. 15 U.S.C. § 4. In accordance with the viable less restrictive alternative discussed above, the NCAA may continue to limit the grant-in-aid at not less than the cost of attendance, and to limit compensation and benefits that are unrelated to education provided on top of a grant-in-aid. The NCAA may also limit academic or graduation awards or incentives, provided in cash or cash-equivalent, as long as the limit imposed by the NCAA is not less than the athletics participation awards limit.

Current NCAA limits on other education-related benefits that can be provided on top of a grant-in-aid are invalidated. The NCAA may not limit these benefits in the future.

Each conference will continue to be able to limit any compensation or benefits, including the education-related benefits that the NCAA will not be permitted to cap, as long as it does so independently from other conferences. Schools will remain free to set limits on their own offers to student-athletes.

The NCAA will retain the right to define, in an exercise of discretion and good faith, education-related benefits and to regulate how schools provide them to student-athletes. The NCAA may also assist



conferences and schools in enforcing any conference rules limiting educational benefits.

The Court will herewith issue an injunction, which will take effect in ninety days but will be stayed pending the issuance of a mandate if a notice of appeal is timely filed. The Court will retain jurisdiction over the enforcement and amendment of the injunction.

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### CONCLUSION

There is a great disparity between the extraordinary revenue that Defendants garner from Division I basketball and FBS football, and the modest benefits that class members receive in exchange for their participation in these sports relative to the value of their athletic services and the contributions they make. Class members contribute their elite talent and time, they limit their educational options, and they risk their long-term health to create enormous financial value for Defendants.

Restricting non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not been proven to be necessary to preserving consumer demand for Division I basketball and FBS football as a product distinct from professional sports. Allowing each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions, as well as academic awards, will help ameliorate their anticompetitive effects and may provide some of the compensation student-athletes would have received absent Defendants' agreement to restrain trade.

The clerk shall enter judgment in favor of the Plaintiff class. Plaintiffs shall recover their costs from

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Defendants. The parties shall not file any post-trial motions based on arguments that have already been made.

IT IS SO ORDERED.

Dated: March 8, 2019

/s/ Claudia Wilken

Claudia Wilken

United States District Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF  
CALIFORNIA

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	No. 14-md-02541 CW  PERMANENT INJUNCTION
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The Court, having considered the evidence presented at the bench trial in this matter and consistent with its findings of fact and conclusions of law, hereby orders as follows:

1. Defendant National Collegiate Athletic Association, and its officers, agents, servants, employees, and any person in active concert or participation with them, including its member schools and conferences, who receive actual notice of this Order by personal service or otherwise (hereinafter, the NCAA), are hereby permanently restrained and enjoined from agreeing to fix or limit compensation or benefits related to education that may be made available from conferences or schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid.

2. The compensation and benefits related to education provided on top of a grant-in-aid that the NCAA may not agree to fix or limit pursuant to paragraph 1 of this Order are the following: computers, science equipment, musical instruments and other tangible items not included in the cost of

attendance calculation but nonetheless related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships.

3. The list of compensation and benefits related to education listed in paragraph 2 may be amended, at any time, on motion of any party.

4. Notwithstanding the foregoing paragraphs, the NCAA may adopt, enact, or agree to, now or in the future, a definition of compensation and benefits that are "related to education" for the purpose of complying with this injunction. If the NCAA chooses to adopt, enact, or agree to any such definition, the NCAA may move to amend this injunction to incorporate that definition. Additionally, notwithstanding the foregoing paragraphs, the NCAA may adopt, enact, or agree to, now or in the future, any constitutional provision, bylaw, rule, regulation, interpretation, or policy that regulates how conferences or schools provide education-related compensation and benefits to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid.

5. Notwithstanding the foregoing paragraphs, the NCAA may agree, now or in the future, to fix or limit academic or graduation awards or incentives that may be made available from conferences or schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid. Any limit adopted, enacted, or agreed to by the NCAA under this paragraph shall

not, at any time, be less than the maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined) under Division I Bylaw, Article 16, and listed in Figures 16-1, 16-2, and 16-3 of the 2018-2019 Division I Manual (hereinafter, the athletics participation awards limit). Any limit adopted, enacted, or agreed to by the NCAA under this paragraph shall be increased in the event that the athletics participation awards limit is increased, to ensure that the limit on academic achievement or graduation awards or incentives is never less than the athletics participation awards limit.

6. Notwithstanding the foregoing paragraphs, any NCAA member conference may, individually, fix or limit compensation or benefits related to education that may be made available from that conference or its member schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid. No limit set under this paragraph shall be set pursuant to an agreement with any other conference.

7. Notwithstanding the foregoing paragraphs, any NCAA member conference may, individually, fix or limit academic or graduation awards or incentives that may be made available from that conference or its member schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid. No limit set under this paragraph shall be set pursuant to an agreement with any other conference.

8. Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

9. The Court will retain jurisdiction over the enforcement and amendment of the injunction. If any part of this Order is violated by any party named herein or any other person, Plaintiffs may, by motion with notice to the attorneys for Defendants, apply for sanctions or other relief that may be appropriate.

10. The injunction will take effect in ninety days but will be stayed pending the issuance of a mandate if a notice of appeal is timely filed.

IT IS SO ORDERED.

Dated: March 8, 2019

/s/ Claudia Wilken  
CLAUDIA WILKEN  
United States District Judge