Nos. 14-16601, 14-17068

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

and

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

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

MOTION TO STAY INJUNCTION

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Oral argument in this case was heard on March 17. The district court's permanent injunction—which requires the NCAA to allow each member school to pay certain student-athletes up to the federally-defined cost of attendance plus $5,000 per year "for the licensing or use of … [their] names, images, and likenesses" (NILs), ER7-8—is scheduled to take effect on August 1. On that date, colleges begin sending written offer letters to student-athletes scheduled to enroll after July 1, 2016. ER6.

Although the NCAA (and many schools and students) will be irreparably harmed if the injunction takes effect, even if it is later vacated by this Court or the Supreme Court, the district court has declined to stay the injunction pending appeal. ER106. The NCAA therefore moves this Court to stay the injunction until the Court's mandate issues.

Such a stay is warranted. If allowed to take effect, the injunction would radically alter an essential quality of college sports, amateurism. It would also fundamentally alter the way in which colleges recruit high school students, and thus redefine the process by which those students make one of the most momentous choices of their lives: which college to attend. And, to remain competitive in football and men's basketball, schools may be forced to make NIL payments by cutting participation opportunities, and perhaps even cutting some teams entirely. Finally, it would force the NCAA and its members to devote

substantial resources to overcoming an array of complex legal problems created by the injunction. Much of this harm can be avoided by a stay—and that is the proper course, because the injunction rests on several rulings by the district court that there is a fair prospect this Court will reject.

Plaintiffs oppose this motion.

ARGUMENT

In determining whether to stay an order pending appellate review, a court considers four factors: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009). These factors should be considered flexibly, as "stays are typically less coercive and less disruptive than are injunctions." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Applying these factors here confirms that the injunction should be stayed pending appeal.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

To warrant a stay, an applicant is required to show more than "a mere possibility of relief," but "not … that it is more likely than not that [it] will win on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quotation marks

omitted). Rather, the applicant need only demonstrate a "'substantial case for relief on the merits,'" which is equivalent to a "'reasonable probability'" or "'fair prospect'" of success. *Id.* This standard is easily met here, for all the reasons laid out in the NCAA's merits briefs and during oral argument. Cognizant that this Court has already received full briefing on the appellate arguments in this case, the NCAA provides a very short summary of those arguments here:

- Under *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the NCAA's core amateurism rules, including those challenged here, are procompetitive as a matter of law. *See, e.g.*, *Agnew v. NCAA*, 683 F.3d 328, 341-343 & n.7 (7th Cir. 2012). Indeed, before this case no court had struck down an NCAA amateurism rule as violating the Sherman Act; many courts had refused to do so.

- As two other circuits have concluded, the Sherman Act does not apply to the challenged rules because those rules do not regulate "commercial" activity. *See Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998); *Bassett v. NCAA*, 528 F.3d 426, 428-429 (6th Cir. 2008).

- Plaintiffs cannot show the antitrust injury needed to sustain the injunction: a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969); *see also Marshall v. ESPN Inc.*, 2015 U.S. Dist. LEXIS 72494, *45-47 (M.D. Tenn. June 4, 2015) (finding lack of antitrust injury with similar claims). As to live-game broadcasts, plaintiffs have not identified any state that recognizes publicity rights with respect to live-game broadcasts—and in fact conceded at oral argument that no state has recognized such a right. Arg. Tr. 34:54-35:25. As to videogames, unchallenged NCAA policies that are independent of the rules at issue prevent plaintiffs from being compensated for the use of their NILs. *See id.* at 35:58-40:15. And plaintiffs do not deny that, in light of the district court's finding that "no current or former student-athletes are actually deprived of any compensation for game rebroadcasts or other archival footage," ER85, they lack antitrust injury with respect to archival-footage uses. *See id.* at 35:26-35:59.

- The district court's rule-of-reason analysis was flawed. For example, the court's finding that the challenged rules have the requisite significant anti-competitive effects cannot be reconciled with its own finding of vigorous competition in the college-education market. Nor is there any evidence that the challenged rules reduce output in the college education market. And the court failed to give sufficient weight to the procompetitive benefits of the challenged rules. The alternative rule the court adopted, meanwhile, is neither "substantially less restrictive" nor "virtually as effective in serving the legitimate objective without significantly increased cost." *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (quotation marks omitted); *see also* Areeda & Hovenkamp, *Antitrust Law* ¶1505 (3d ed. 2010) (alternatives must be "very different qualitatively" from the challenged practice). As to the former requirement, the court's rule impermissibly just changes the price point on which schools may agree. *See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000). And as to the latter, the court's rule would not promote the legitimate objective of amateurism, because the contemplated payments would be for the purpose of compensating student-athletes for use of their NILs, and would be paid out of NIL licensing revenue (although the NCAA maintains that there is no such specific revenue). ER7-8, ER100, ER104-105. Neither the NCAA nor any other amateur athletics organization has ever allowed athletes to be paid for use of their NILs.

- Implementing the district court's injunction would eliminate the "ample latitude" that the Supreme Court has said the NCAA must have in adopting eligibility requirements and maintaining a clear line of demarcation between amateur and professional sports. *Board of Regents*, 468 U.S. at 120; *see also Law v. NCAA*, 134 F.3d 1010, 1022 n.14 (10th Cir. 1998) ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."). The result would be an interminable series of lawsuits each demanding additional tinkering in NCAA rules, lawsuits that—if successful—would result in courts incrementally overhauling college sports. Antitrust law does not permit that result.

II. IRREPARABLE HARM

The second traditional stay factor is also satisfied here, because "there is a probability of irreparable injury if the stay is not granted." *Lair*, 697 F.3d at 1214.

First, as explained in the NCAA's merits briefs, the injunction would remove the prohibition on payments to student-athletes beyond their scholarships. By allowing promises of up to $5,000 in deferred payments in addition to full cost-of-attendance, the injunction would require schools that want to remain competitive in football and men's basketball to spend significant amounts that they may be unable to recover if the injunction is later vacated. It would also distort the recruiting process—with effects that similarly could not be undone by a later vacatur. In the face of such promises, some students would make decisions about what college to attend (perhaps the most consequential decision of their life to that point) not based on how they would fit into a school's academic, athletic, and social communities, but based simply on how much money they would be paid. This would undoubtedly result in some student-athletes' having diminished undergraduate experiences and diminished success afterward. *See* NCAA Br. 11-13; NCAA Reply 5-6.

Promises of payments of a share of licensing revenue—even if paid on a deferred basis—would also damage the legitimacy of the athletic contests, as some schools would field teams that adhered to the traditional amateur model while others would not. Even if just one class were recruited with promises of such payments, those students could remain on NCAA teams for years, causing the injunction's effects to linger long after vacatur. Even if the injunction is later

vacated, these fundamental changes would irreparably tarnish the NCAA and the goodwill associated with its role in promoting amateur college athletics. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996) ("By its very nature injury to goodwill and reputation is … often held to be irreparable"); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir.1994) ("[I]njury to goodwill can constitute irreparable harm.").

Other irreversible harms would also result. For example, schools that chose to promise NIL payments would have to decide, as part of their budgeting process, where that money would come from. Some schools might get the money by cutting funding for other aspects of their football and men's basketball programs, such as the overall number of scholarships, coaching staffs, facilities, equipment, and other support, which contribute to the overall student-athlete experience. Other schools might instead make cuts in other sports programs, or even eliminate those teams altogether. Members of those teams would consequently lose their scholarships, perhaps costing them the opportunity to compete in Division I sports, or even the opportunity to attend the college of their choice. These harms could not easily be reversed if the injunction were later vacated.

The NCAA and its members would also have to devote substantial resources to overcoming significant legal and administrative hurdles to implementing the injunction, resulting in costs and confusion that also constitute irreparable harm. It

is unclear, for example, whether Title IX of the Education Amendments Act of 1972 would mean that schools that choose to offer NIL payments to class members must offer comparable payments to an equal number of female student-athletes. It is also unclear how NIL payments would be treated for tax purposes, and in particular whether the IRS would consider them, like athletic scholarships, to be exempt from taxable income to student-athletes because they are "awarded … primarily to aid the recipients in pursuing their studies," "do[] not represent compensation or payment for services," and do not exceed eligible expenses. Rev. Rul. 77-263, 1977-2 C.B. 47; *see also* 26 U.S.C. § 117(b)(1), (c)(1).

Finally, the NCAA and member schools would also have to resolve an array of other difficult questions concerning implementation of the injunction. To take just a few examples: How are NIL payments to be determined? Can those payments be limited to football and men's basketball consistent with Title IX? Would all student-athletes on a team receive the same NIL payments? Given that the injunction is not limited in applicability to scholarship athletes, can "walk-ons" receive deferred payments? Are deferred payments immediately taxable to a student-athlete even though they will not be received for some time? How does the injunction apply to redshirts, transfer students, or athletically eligible graduate students? The resources needed to answer these and other questions, resources that

schools could otherwise devote to their educational mission, will be unrecoverable even if the injunction is later vacated.

III. THE REMAINING FACTORS SUPPORT A STAY

"The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. Because the NCAA satisfies those factors, a stay is warranted. In any event, the remaining factors also counsel in favor of a stay.

To begin with, class members who are former student-athletes would not be harmed at all by a stay because the challenged rules do not currently restrain them in any way. E54, ER305-307. Class members who are current student-athletes, meanwhile, have already decided where to matriculate and whether to play college sports; preserving the status quo (as a stay would do) would thus not disrupt their expectations or otherwise cause them any injury beyond some delay in obtaining the revenue they seek. That delay does not outweigh the harm the NCAA would suffer without a stay. Finally, assuming that future students-athletes are properly included in the harm analysis, consideration of such would have to take into account the fact that some of them would *benefit* from a stay. *See* Dkt. 893 at 19, *Keller v. Electronic Arts, Inc.*, No. 09-1967 (N.D. Cal. Nov, 8, 2013) (explaining that the regime plaintiffs seek would lead to some individuals who are or would otherwise have been student-athletes losing their roster spots).

Lastly, a stay is in the public interest. It makes little sense to mandate fundamental changes to amateur college athletics where there is significant dispute about the legal basis for doing so, and where the injunction is likely to create great confusion among the schools that must comply. In the face of such uncertainty, it is in the public interest to maintain college sports as they have existed for generations, thereby continuing to give both student-athletes and fans—who watch college sports in numbers that vastly exceed interest in comparable non-amateur leagues, like minor league baseball, *see, e.g.*, ER457-458, 519, 523—a product that is meaningfully different from the NFL and NBA. It is likewise in the public interest to continue permitting rules that have long protected student-athletes from commercial pressures, and to ensure that the nation's colleges and universities need not unnecessarily divert their resources and attention away from their educational mission.

* * *

Despite resting on tenuous legal foundations, the district court's injunction would end a decades-old practice and tradition. It thereby threatens college sports as they have long been known and loved by participants and fans alike. Given that, and given that the balance of harms tips sharply in the NCAA's favor, a stay of the injunction is warranted.

CONCLUSION

The motion for a stay should be granted.

Dated: July 17, 2015

Respectfully submitted,

/s/ SETH P. WAXMAN

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CERTIFICATE OF SERVICE

I certify that on this 17th day of July 2015, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Seth P. Waxman
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