

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

IN RE: NATIONAL COLLEGIATE)
ATHLETIC ASSOCIATION) NO. 14-MD-2541 CW
ATHLETIC GRANT-IN-AID CAP)
ANTITRUST LITIGATION) TUESDAY, DECEMBER 18, 2018

OAKLAND, CALIFORNIA

CLOSING ARGUMENTS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

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1 TUESDAY, DECEMBER 18, 2018

9:43 A.M.

2 P R O C E E D I N G S

3 **THE CLERK:** PLEASE BE SEATED. CALLING CIVIL MATTER
4 14-2541 IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
5 ATHLETIC GRANT-IN-AID LITIGATION.

6 **THE COURT:** DO YOU WANT THEIR APPEARANCES?

7 **THE CLERK:** YES. PLEASE STATE YOUR APPEARANCES,
8 COUNSEL.

9 **MR. BERMAN:** GOOD MORNING, YOUR HONOR. STEVE BERMAN
10 ON BEHALF OF THE CLASS.

11 **MR. KESSLER:** GOOD MORNING, YOUR HONOR. JEFFREY
12 KESSLER ON BEHALF OF THE CLASS.

13 **MS. WILKINSON:** GOOD MORNING, YOUR HONOR. BETH
14 WILKINSON ON BEHALF OF THE NCAA.

15 **MR. WILLIAMS:** GOOD MORNING, YOUR HONOR. BART
16 WILLIAMS ON BEHALF OF THE PAC-12 AND THE CONFERENCE
17 DEFENDANTS.

18 **THE COURT:** PAC-12 AND ALL THE CONFERENCE DEFENDANTS?

19 **MR. WILLIAMS:** FOR PURPOSES OF THE TRIAL YES, YOUR
20 HONOR, I DO REPRESENT.

21 **MS. LENT:** GOOD MORNING, YOUR HONOR. KAREN LENT ON
22 BEHALF OF THE NCAA.

23 **THE COURT:** OKAY. AND I GUESS THE COURT CALL PEOPLE
24 HAVE ALREADY STATED THEIR APPEARANCES?

25 **THE CLERK:** THEY HAVE, YOUR HONOR.

1 **THE COURT:** OKAY. SO THIS IS ON TO DISCUSS THE
2 MATTERS THAT WERE RAISED IN THE CLOSING ARGUMENT WRITTEN
3 BRIEFS. I HAVE A NUMBER OF QUESTIONS, AND THEN I JUST WANT TO
4 HEAR GENERALLY ON SOME OF THE ISSUES.

5 THE QUESTIONS ARE NOT IN ANY PARTICULAR ORDER AND I DON'T
6 REALLY WANT TO JUMP AROUND WILDLY, SO I GUESS MAYBE I'LL TRY
7 TO ASK YOU TO TALK ABOUT SOME OF THE ISSUES AND HOPE I
8 REMEMBER TO ASK THE QUESTIONS ABOUT THOSE ISSUES WHEN WE ARE
9 TALKING ABOUT THEM. IF I DON'T, I WILL HAVE TO GO BACK AND
10 ASK RANDOM QUESTIONS JUMPING AROUND LATER.

11 (COURT ADJUSTING MICROPHONE.)

12 THAT'S ALL THE ROPE I'VE GOT RIGHT THERE.

13 AND I DON'T KNOW IF YOU ALL HAVE SORT OF PRESENTATIONS YOU
14 WANT TO MAKE OR IF YOU ARE CONTENT TO SORT OF TALK ABOUT MY
15 QUESTIONS.

16 JUST ONE HOUSEKEEPING MATTER. THE PLAINTIFFS FILED A
17 MOTION TO SEAL PORTIONS OF YOUR CLOSING ARGUMENT BUT THERE WAS
18 NEVER ANY JUSTIFICATION FILED FOR IT I DON'T THINK. SO I
19 EITHER NEED NOT TO SEAL IT OR GET SOME DECLARATIONS AS TO WHY
20 IT SHOULD BE SEALED UNDER THE LOCAL RULE.

21 **MR. KESSLER:** YES, YOUR HONOR. WE FILED IT BECAUSE
22 IT CONTAINED CERTAIN INFORMATION DEFENDANTS HAD DESIGNATED, SO
23 I THINK IT'S UP TO THEM WHETHER THEY ARE GOING TO FILE ANY
24 SUPPORT.

25 **THE COURT:** DO YOU WANT TO TRY TO SUPPORT THAT

1 SEALING OR ARE YOU CONTENT TO HAVE IT FILED UNDER SEAL? IF
2 YOU DON'T KNOW, FILE SOMETHING BY THE END OF THE DAY.

3 **MS. WILKINSON:** THANK YOU, YOUR HONOR. I THINK THAT
4 WOULD BE BEST.

5 **THE COURT:** SO I GUESS IF WE START WITH WHETHER
6 THERE'S AN ANTITRUST VIOLATION OR NOT; IT SEEMS PRETTY CLEAR
7 THAT THERE IS, AND THAT REALLY HASN'T BEEN CONTESTED IN THIS
8 CASE AND WAS RULED ON IN THE LAST CASE.

9 BUT I GUESS THE ISSUE THAT COULD COME UP IS THE BALANCING
10 QUESTION, AND IF, IN FACT, AT SOME POINT, WHETHER IT'S EARLY
11 OR LATE OR NEVER, I HAVE TO BALANCE THE ANTICOMPETITIVE
12 RESTRAINT AGAINST THE PROCOMPETITIVE JUSTIFICATIONS.

13 THE DEFENDANT SORT OF ARGUES THAT IT'S APPLES AND ORANGES
14 OR IT'S TRYING TO WADE THE STREAM, AND HOW ONE WOULD GO ABOUT
15 BALANCING TWO CONCEPTS THAT AREN'T PARTICULARLY MONETIZED.
16 SORT OF LIKE, WELL, THIS IS AN ANTITRUST VIOLATION WORTH HOW
17 MANY DOLLARS BALANCED AGAINST A PROCOMPETITIVE JUSTIFICATION
18 WORTH HOW MANY DOLLARS. WE DON'T HAVE THAT KIND OF CONCEPT IN
19 THIS CASE.

20 SO I'M JUST CURIOUS WHETHER ANYBODY HAS ANY THOUGHTS IN
21 TERMS OF THE ANTITRUST VIOLATION, HOW EGREGIOUS IT IS OR HOW
22 IT COULD BE QUANTIFIED IN SOME KIND OF WAY THAT IF NECESSARY,
23 COULD BE BALANCED AGAINST WHATEVER WE MIGHT FIND WAS A
24 PROCOMPETITIVE JUSTIFICATION.

25 DOES ANYBODY HAVE ANY THOUGHTS THEY'D LIKE TO SHARE ON

1 THAT POINT?

2 **MR. KESSLER:** YOUR HONOR, I WILL GO FIRST IF THAT IS
3 ALL RIGHT.

4 **THE COURT:** ALL RIGHT. YOU NEED TO USE A MIC THOUGH.
5 I AM NOT SURE THAT MIDDLE ONE --

6 **MR. KESSLER:** THIS ONE?

7 **THE COURT:** BECAUSE WE DO HAVE PEOPLE ON THE PHONE,
8 AND THE WAY THEY HEAR IS THROUGH THE MICS.

9 **MR. KESSLER:** SO THE FIRST POINT, YOUR HONOR, WE WILL
10 MAKE IS OBVIOUSLY THE NINTH CIRCUIT, AT LEAST, HAS STATED THAT
11 IF YOU GET THROUGH THE FIRST THREE STEPS, THAT THERE IS
12 BALANCING REQUIRED. DEFENDANTS HAVE SAID NO, THE FIRST THREE
13 STEPS TAKES CARE OF EVERYTHING.

14 OUR POINT IS AT SOMEHOW THERE IS A BALANCING, WHETHER IT'S
15 DONE IN STEP FOUR, AS IS SAID IN THE *TUOLUMNE* CASE OR WHETHER
16 IT'S DONE AS YOU'RE GOING THROUGH THE OTHER TWO PARTS. SO THE
17 QUESTION IS HOW DO YOU DO THE BALANCING.

18 **THE COURT:** AND -- YEAH, THAT IS THE QUESTION.
19 ALTHOUGH, TO GO BACK TO WHAT YOU FIRST SAID, IT SEEMS LIKE, AT
20 LEAST CONCEPTUALLY, AN ARGUMENT COULD BE MADE AND SOME
21 LANGUAGE IN SOME OF THE CASES MIGHT SUPPORT IT, THAT ONE
22 SHOULD BALANCE THE ANTICOMPETITIVE CONDUCT AGAINST THE
23 PROCOMPETITIVE JUSTIFICATION JUST TO SEE WHETHER IT'S
24 MEANINGFUL.

25 IN OTHER WORDS, IF YOU HAD A HORRIBLE, EGREGIOUS, TERRIBLE

1 WORST-CASE-SCENARIO VIOLATION WITH A SLIGHT LITTLE TINY
2 PROCOMPETITIVE JUSTIFICATION, WOULDN'T THAT BE SOMETHING YOU
3 SHOULD CONSIDER AS KIND OF AT THE BEGINNING? WOULD SUCH A
4 PROCOMPETITIVE JUSTIFICATION POSSIBLY EVEN JUSTIFY SUCH AN
5 EGREGIOUS VIOLATION?

6 **MR. KESSLER:** I THINK --

7 **THE COURT:** EVEN IN *BOARD OF REGENTS* THERE IS TALK
8 ABOUT DOES THIS PROCOMPETITIVE JUSTIFICATION JUSTIFY THE
9 VIOLATION.

10 BUT, ANYWAY, IT DOESN'T REALLY MATTER, I GUESS --

11 **MR. KESSLER:** I THINK YOUR HONOR HAS HIT EXACTLY ON
12 THE POINT THAT I WAS TRYING TO MAKE, WHICH IS THAT EITHER IT'S
13 GOING TO BE DONE AT STEP TWO, BECAUSE WE ALREADY HAVE SUMMARY
14 JUDGMENT ON STEP ONE WHERE YOUR HONOR WOULD SAY, HAVE THEY
15 DEMONSTRATED ENOUGH OF A PROCOMPETITIVE REASON THAT COULD
16 JUSTIFY THE ANTICOMPETITIVE EFFECT. THAT'S THE LANGUAGE
17 THAT'S USED IN *BOARD OF REGENTS*. IT IS SUPPOSED TO BE
18 SUFFICIENT TO JUSTIFY IT.

19 AND SO THERE COULD BE BALANCING THERE, OR IT COULD BE DONE
20 AS SUGGESTED IN *AREEDA & TURNER* AND WAS ADOPTED BY THE NINTH
21 CIRCUIT IN AT LEAST TWO CASES SAYING YOU GET TO IT AT THE END
22 IF YOU NEED TO GET IT. BUT WHEREVER YOU DO IT, BECAUSE WE'RE
23 LOOKING AT THIS IS THE RULE OF REASON WHICH IS SUPPOSED TO
24 LOOK AT SORT OF ON A NET BASIS IS THIS SOMETHING THAT IS
25 PROCOMPETITIVE OR ANTICOMPETITIVE ON A NET BASIS, AND IN

1 LOOKING AT IT, HOW DOES IT COME OUT. SO HOW DO YOU DO THAT
2 WHEN YOU ARE DEALING WITH DIFFERENT ITEMS THAT WE DON'T HAVE
3 QUANTIFIED UNITS IN ORDER TO LOOK AT IT.

4 I BELIEVE, YOUR HONOR, YOU START FIRST BY LOOKING AT THE
5 FACT THAT HERE, THE VIOLATION, IF NOT FOR THE UNIQUE STRUCTURE
6 OF THE NCAA, WOULD BE A PER SE UNLAWFUL VIOLATION. THERE'S NO
7 QUESTION THAT THIS IS PRICE-FIXING. IT HAPPENS TO BE SUBJECT
8 TO THE RULE OF REASON BECAUSE OF THE WAY THE SUPREME COURT
9 LOOKED AT THIS IN THE WORLD OF SPORTS, BUT WE KNOW THAT THE
10 EFFECT YOU FOUND IS NOT SOME SMALL INSIGNIFICANT VIOLATION OF
11 THE ANTITRUST LAWS, IT'S AT THE CORE OF WHAT WOULD OTHERWISE
12 BE PER SE UNLAWFUL.

13 AND THE ELIMINATION OF COMPETITION HERE IS VIRTUALLY
14 COMPLETE BECAUSE THEY HAVE A SET OF RULES IN TERMS OF PRICE
15 COMPETITION THAT ABSOLUTELY DICTATE WHAT YOU CAN DO AND WHAT
16 YOU CAN'T DO, AND SO IT'S A COMPLETE ELIMINATION OF PRICE
17 COMPETITION. SO WE BELIEVE THAT'S A VERY SIGNIFICANT AMOUNT.

18 IN FACT, YOUR HONOR ALREADY KNOWS FROM THE DAMAGES PORTION
19 OF THE CASE THAT WHEN YOU WERE LOOKING AT JUST THE DIFFERENCE
20 THE COST OF ATTENDANCE, WE HAD A VERY SIGNIFICANT AMOUNT OF
21 DAMAGES THAT WERE SHOWN. NOW WE'RE LOOKING AT ISSUES EVEN
22 BEYOND COST OF ATTENDANCE WHERE YOUR HONOR CAN SEE THIS WAS A
23 SIGNIFICANT PRICE-FIXING VIOLATION.

24 SO WHAT DO YOU BALANCING THAT AGAINST? WHAT -- HAS WHAT
25 THEY'VE SHOWN, IS IT SUFFICIENT TO JUSTIFY IT? WHAT WE WOULD

1 SUGGEST, YOUR HONOR, IS THAT THE EVIDENCE HERE SHOWS THAT
2 EITHER THERE IS NO SUFFICIENT SHOWING OF A PROCOMPETITIVE
3 EFFECT ON DEMAND, WHICH WE THINK IS THE COMPETITIVE RELEVANT
4 ISSUE, OR IF THERE IS SUCH A SHOWING, IT'S A VERY SMALL MINOR
5 EFFECT ON DEMAND.

6 AND WE KNOW THAT BECAUSE WHAT THE EVIDENCE SHOWS IS UNLIKE
7 THE VIEW OF THE NINTH CIRCUIT ON A DIFFERENT RECORD, WHEN THEY
8 SAID THERE WAS TO BE SOME QUANTUM LEAP IF YOU WENT OVER COST
9 OF ATTENDANCE; IN FACT, IT TURNS OUT IT'S A BABY STEP. IT'S
10 NOT A QUANTUM LEAP. EVEN THOUGH WE HAVE 4,000 CLASS MEMBERS
11 SHOWN TO HAVE RECEIVED VERY SIGNIFICANT AMOUNTS OF MONEY ABOVE
12 COST OF ATTENDANCE, THE IMPACT ON DEMAND IS NOT THERE. THE
13 DEMAND HAS BEEN FINE. THE WITNESSES, 30(B)(6) WITNESSES
14 ADMITTED IT.

15 **THE COURT:** THAT'S ACTUALLY ONE OF MY QUESTIONS THAT
16 COMES UP LATER, WHERE IN THE EVIDENCE IS THIS 4,000 STUDENTS?

17 **MR. KESSLER:** IT IS IN THE RASCHER DECLARATION. WHAT
18 HE DID, IS WAS HE WENT --

19 **THE COURT:** WHAT IS IT BASED ON IN THE RASCHER --
20 WHAT DID RASCHER BASE IT ON?

21 **MR. KESSLER:** HE LOOKED AT FULL COST OF ATTENDANCE
22 PLUS JUST SAF PAYMENTS TO START. THAT ALONE TOOK CARE OF, I
23 BELIEVE, 3,000 OF THE -- IN OTHER WORDS, IT WAS MOSTLY BASED
24 ON SAF PAYMENTS. THIS DIDN'T EVEN COUNT IN THINGS LIKE
25 INCIDENTAL -- YOU KNOW, INCIDENTALS-OF-PARTICIPATION BENEFITS

1 LIKE GIFT SUITES AND OTHER THINGS.

2 **THE COURT:** HOW DOES HE -- THIS IS GETTING INTO
3 SOMETHING I NEED TO ALSO TALK ABOUT LATER, WHICH IS THEIR
4 MOTION TO STRIKE -- I DON'T CARE ABOUT STRIKING CLOSING
5 ARGUMENT, THAT'S IRRELEVANT, BUT THE UNDERLYING ISSUE, I
6 PRESUME, IS AN ARGUMENT THAT THE -- THAT EVIDENCE CAN'T BE
7 CONSIDERED IF IT'S ONLY ADMITTED FOR THE PURPOSE OF EXPLAINING
8 THE EXPERT'S OPINION.

9 THIS MAY COME UNDER THAT CATEGORY. AND THE 4,000
10 STUDENTS, I HEARD WHAT YOU SAID, BUT THEN MY NEXT QUESTION IS,
11 HOW DO WE KNOW THAT 4,000 STUDENTS GOT SAF FUNDS? WHAT I
12 COULD FIND IN THE RECORD TENDED TO BE AGGREGATE SAF FUNDS AND
13 NOT SPECIFIC STUDENTS.

14 AND ONE COULD TAKE THE AGGREGATE AND DIVIDE IT BY THE
15 NUMBER OF STUDENTS, I SUPPOSE, BUT I'M WONDERING WHERE YOU ARE
16 GETTING THAT -- WHERE YOU ARE FINDING THAT EVIDENCE.

17 **MR. KESSLER:** WELL, WHAT RASCHER DID, AND I DO NOT
18 BELIEVE THIS PART OF HIS OPINION IS CHALLENGED UNDER THEIR
19 MOTION FOR THE UNDERLYING FACTS, I DON'T BELIEVE THIS ASPECT
20 IS CHALLENGED, IS HE WENT THROUGH RECORDS, PRIMARILY AT THE
21 POWER 5 CONFERENCES, BUT NOT EXCLUSIVELY, IN THE POWER 5
22 CONFERENCES, AND LOOKED AT WHAT INFORMATION THERE WAS
23 AVAILABLE FOR THE SAF -- FOR THE SAF PAYMENTS ON AN INDIVIDUAL
24 ATHLETE BASIS. HE WAS ABLE TO FIND THAT INFORMATION AND WAS
25 ABLE TO DO CALCULATIONS BASED ON THAT.

1 DO YOU KNOW, STEVE, THE EXACT SOURCE OF IT? I'LL ASK
2 MR. BERMAN WHO MAY KNOW THE EXACT SOURCE OF THAT.

3 **MR. BERMAN:** SO IF YOU LOOK, FOR EXAMPLE, AT RASCHER
4 PARAGRAPH 66, YOUR HONOR. THIS IS JUST ONE EXAMPLE. IT'S AN
5 EXHIBIT FROM THE UNIVERSITY OF FLORIDA MEN'S BASKETBALL TEAM.

6 AND HE WAS ABLE TO GET FROM UNIVERSITY OF FLORIDA'S OWN
7 RECORDS HOW MUCH EACH STUDENT-ATHLETE GOT IN TERMS OF COA,
8 PELL GRANT, AND SAF. HE DID THAT FOR ALL THE SCHOOLS. AND
9 THEN HE ROLLED IT UP TO GET THE 3,000 POWER 5 STUDENTS WHO GOT
10 SAF FUNDS AND THE THOUSAND NON-POWER WHO GOT SAF FUNDS.

11 **THE COURT:** DEFENDANTS ARE GOING TO ARGUE THAT THAT
12 INFORMATION THAT HE GOT, WHILE WE CAN HEAR ABOUT IT BECAUSE IT
13 FORMS THE BASIS OF THE EXPERT OPINION, IT DOESN'T BECOME
14 INDEPENDENTLY EVIDENCE BECAUSE WE DIDN'T HAVE THE GUY FROM THE
15 UNIVERSITY OF FLORIDA COME IN AND SAY, I KEEP THE RECORDS AND
16 HERE'S WHAT THEY ARE.

17 THAT'S THE ARGUMENT THEY ARE MAKING. I DON'T KNOW IF IT
18 IS ABOUT THIS PARTICULAR POINT, BUT IT'S ABOUT A NUMBER OF
19 DIFFERENT POINTS.

20 **MR. BERMAN:** WE WENT THROUGH THAT IN THE SECOND DAY
21 OF TRIAL. WE PUT UP BEFORE YOUR HONOR VARIOUS ITERATIONS OF
22 167, WHICH WERE, FOR EXAMPLE, THE ONE WE ARGUED ABOUT WAS OHIO
23 STATE. WE DID THE SAME THING FOR OHIO STATE. WE SHOWED THE
24 SOURCES OF THE DATA, THEY ARGUED, WE SHOWED THE SOURCES AND
25 YOU ADMITTED THE EXHIBIT.

1 **THE COURT:** OKAY.

2 **MR. BERMAN:** ALL THESE 167'S WERE ADMITTED.

3 **THE COURT:** OKAY. IF YOU LOOK THROUGH ALL OF THEM
4 AND ADD THEM ALL UP, IT WILL COME OUT TO BE 4,000 STUDENTS?

5 **MR. BERMAN:** IF YOU LOOK THROUGH ALL OF THE EXHIBITS
6 REFERRED TO IN RASCHER'S DECLARATION, IT WILL COME OUT TO
7 APPROXIMATELY 3,000 POWER 5 AND 1,000 NON-POWER 5.

8 **THE COURT:** PEOPLE WHO GOT SAF FUNDS THAT BROUGHT
9 THEM ABOVE THE COST OF ATTENDANCE?

10 **MR. BERMAN:** THAT'S CORRECT, YOUR HONOR.

11 **THE COURT:** OKAY. I DON'T WANT TO GET BOGGED DOWN IN
12 THIS --

13 **MR. BERMAN:** IT'S AN IMPORTANT POINT AND I WAS GOING
14 TO MENTION IT.

15 **MR. KESSLER:** AND THIS, YOUR HONOR, IS THE TYPE OF
16 EVIDENCE THAT EXPERTS DO REPORT. THEY LOOK AT DATA --

17 **THE COURT:** RIGHT.

18 **MR. KESSLER:** -- AND THEY REPORT THE RESULTS OF DATA.

19 **THE COURT:** TRUE. BUT IT DOESN'T MAKE THE DATA
20 SUBSTANTIVE EVIDENCE. IT MAKES THE -- IT ALLOWS THE FACT
21 FINDER TO HEAR IT AND IT ALLOWS THE FACT FINDER TO CONSIDER
22 AND ADMIT AND WEIGH THE EXPERT'S TESTIMONY, BUT IT DOESN'T
23 NECESSARILY MEAN THAT THAT EVIDENCE CAN BE CITED AS
24 INDEPENDENT EVIDENCE OF A GIVEN OUTSIDE FACT.

25 **MR. KESSLER:** AND JUST TO CLOSE, YOUR HONOR, THIS

1 WEIGHING POINT. SO WE HAVE OUR BURDEN AND THEY HAVE THEIR
2 BURDEN.

3 ON OUR BURDEN, WE'VE ADDUCED, WE BELIEVE, EVIDENCE THAT
4 YOUR HONOR GRANTED ON SUMMARY JUDGMENT THAT SHOWS THIS
5 SIGNIFICANT ANTICOMPETITIVE EFFECT. THEIR BURDEN WAS TO SHOW
6 A PROCOMPETITIVE EFFECT. AND HOW MUCH OF AN EFFECT DID THEY
7 SHOW?

8 AND SINCE THEIR EXPERT, DR. ELZINGA, CHOSE TO DO NO
9 ECONOMIC ANALYSIS, HE BASICALLY PRESENTED A THEORETICAL
10 ARGUMENT TO YOUR HONOR ABOUT THIS, THEY, IN EFFECT, CHOSE NOT
11 TO DEMONSTRATE, BECAUSE I DON'T BELIEVE THEY COULD HAVE, THAT
12 THERE WAS ANY SIGNIFICANT PROCOMPETITIVE EFFECT THAT WOULD
13 HAVE TAKEN PLACE EVEN THOUGH THERE WAS THIS WEALTH OF DATA
14 AVAILABLE NOW ON THE POST-COA WORLD OF ALL THIS MONEY BEING
15 AVAILABLE.

16 AND WE ARE TALKING, AGAIN, IT SEEMS LIKE AN ANCIENT
17 HISTORY BACK IN THE DAYS OF O'BANNON. THE DEBATE IN O'BANNON
18 WAS THAT \$5,000 WAS GOING TO BE THIS QUANTUM LEAP, AND NOW WE
19 SEE THAT STUDENTS GET MORE THAN \$50,000 IN BENEFITS UNTETHERED
20 TO EDUCATION, FOR PROFESSIONAL LOST EARNINGS INSURANCE OR
21 ITEMS LIKE THAT, AND IT DOESN'T HAVE ANY MOVEMENT THAT THEY
22 HAVE DEMONSTRATED ON DEMAND OR INTEGRATION AT ALL.

23 SO I THINK, YOUR HONOR, AND, AGAIN, I THINK THE TREATISE
24 ON THIS, YOU KNOW, IS VERY GOOD. IT ADMITS HOW HARD IT IS TO
25 DO THIS BALANCE, EVEN THOUGH THE COURTS REQUIRE IT; BUT

1 LOOKING AT IT YOU CAN SEE THAT HERE WE HAVE A VERY SEVERE
2 ANTICOMPETITIVE EFFECT AND AT MOST A SMALL PROCOMPETITIVE
3 JUSTIFICATION THAT, FRANKLY, YOUR HONOR, AND AS WE SAID IN OUR
4 BRIEF, WE DON'T THINK THEY HAVE BARELY DEMONSTRATED ANYTHING
5 AT ALL.

6 **THE COURT:** AND WHEN YOU SAY "THE TREATISE", YOU'RE
7 REFERRING TO AREEDA --

8 **MR. KESSLER:** YES --

9 **THE COURT:** -- CITED BY THE SUPREME COURT?

10 **MR. KESSLER:** I THINK THAT AREEDA IS THE BEST
11 ANALYSIS OF THESE ISSUES.

12 **THE COURT:** AND THAT IS THE TREATISE THAT'S CITED BY
13 THE SUPREME COURT IN *AMERICAN EXPRESS*?

14 **MR. KESSLER:** AND IT ALSO IS THE TREATISE CITED BY
15 THE NINTH CIRCUIT IN THE TWO CASES DISCUSSING THE BALANCING
16 TEST AS WELL.

17 **THE COURT:** SO DOES SOMEONE -- I DON'T KNOW IF YOU
18 ARE ARGUING EVERYTHING OR IF SOMEONE WANTS TO ADDRESS THE
19 BALANCING QUESTIONS THAT MR. KESSLER JUST TALKED ABOUT.

20 **MS. WILKINSON:** THANK YOU, YOUR HONOR. I WILL DO
21 THAT.

22 BUT JUST SO YOU KNOW, AS YOU'RE ASKING YOUR QUESTIONS BACK
23 AND FORTH, I'M ADDRESSING STEP ONE, THREE, AND FOUR.

24 MR. WILLIAMS --

25 **THE COURT:** I'LL TRY TO REMEMBER THAT.

1 **MS. WILKINSON:** YOU DON'T HAVE TO REMEMBER IT.
2 MR. WILLIAMS IS GOING TO ADDRESS STEP TWO AND MS. LENT IS
3 GOING TO ADDRESS THE MOTION TO STRIKE WHEN YOU'RE READY TO
4 HEAR ABOUT MORE OF THAT.

5 **THE COURT:** OKAY.

6 **MS. WILKINSON:** SO I BELIEVE YOUR QUESTION WAS, YOU
7 KNOW, CAN YOU GET TO STEP FOUR AND DO THIS BALANCING WHEN
8 YOU -- IF YOU FOUND SOME KIND OF SMALL PROCOMPETITIVE BENEFIT
9 AND IN THEORY A LARGE VIOLATION. AND YOU SAID THAT YOU
10 BELIEVE THAT WE HAD ALREADY AGREED THAT THERE HAD BEEN AN
11 ANTITRUST VIOLATION.

12 THAT IS NOT TRUE. WE HAVE NOT EVER CONCEDED THAT THERE
13 HAS BEEN AN ANTITRUST VIOLATION. I BELIEVE THAT'S WHAT THE
14 ENTIRE STEP ONE, TWO, AND THREE ARE ABOUT, FOR YOU TO MAKE
15 THAT DETERMINATION.

16 THERE IS AT STEP ONE, I THINK, A FINDING THAT THERE WAS A
17 RESTRAINT. YOU MADE THE FINDING THAT THERE WAS ANTITRUST
18 INJURY, WHICH IS, BUT FOR THAT RESTRAINT, PEOPLE, YOU BELIEVE,
19 WOULD HAVE PAID MORE TO ATHLETES. SO WE DON'T CONCEDE --

20 **THE COURT:** THAT'S NOT THE INJURY, THAT'S THE
21 DEFINITION OF AN ANTITRUST -- OF A RESTRAINT ON TRADE.

22 **MS. WILKINSON:** THAT IS NOT THE --

23 **THE COURT:** IF THAT'S INTERSTATE COMMERCE -- I MEAN,
24 IF YOU WANT TO ARGUE THAT THERE'S NO RESTRAINT ON TRADE HERE,
25 NO AGREEMENT TO RESTRAIN TRADE, I GUESS YOU CAN GIVE ME TWO

1 SENTENCES ON THAT, BUT I --

2 **MS. WILKINSON:** NO, I BELIEVE YOU WERE SAYING, YOUR
3 HONOR, THAT WE HAD CONCEDED THAT THERE WAS AN ANTITRUST
4 VIOLATION. AND THAT'S WHAT I AM TRYING TO MAKE CLEAR --

5 **THE COURT:** LET'S TALK ABOUT WHETHER THERE WAS AN
6 AGREEMENT TO RESTRAIN TRADE THAT AFFECTED INTERSTATE COMMERCE.

7 **MS. WILKINSON:** I THINK WHAT WE SAID AT THE BEGINNING
8 WAS WE AGREED THAT THERE WAS A FINDING OF THAT IN *O'BANNON* AND
9 THAT WOULD APPLY IF THE REST OF *O'BANNON* APPLIED. THAT'S
10 WHERE WE ALSO GOT INTO A DISPUTE --

11 **THE COURT:** DO YOU WANT TO TELL ME THAT THERE IS NO
12 AGREEMENT TO RESTRAIN TRADE THAT AFFECTS INTERSTATE COMMERCE?

13 **MS. WILKINSON:** NO, YOUR HONOR. I THINK IT'S BECAUSE
14 WE WERE -- IT'S NOT ONE OR THE OTHER. YOU WERE TAKING FROM
15 *O'BANNON* --

16 **THE COURT:** I DON'T WANT TO TALK ABOUT THAT.

17 DID THE NCAA AGREE TO RESTRAIN TRADE IN A WAY THAT
18 AFFECTED INTERSTATE COMMERCE?

19 **MS. WILKINSON:** I DON'T BELIEVE WE CONCEDED THAT --

20 **THE COURT:** OKAY. DO YOU CONCEDE IT NOW OR DO YOU
21 WANT TO ARGUE --

22 **MS. WILKINSON:** NO, YOUR HONOR.

23 **THE COURT:** -- WHY DIDN'T THEY? ALL RIGHT. WHY
24 DIDN'T THEY?

25 IN WHAT -- WHAT IS YOUR ARGUMENT AGAINST THE NOTION THAT

1 THE NCAA RESTRAINED TRADE IN A WAY THAT VIOLATED -- THAT
2 AFFECTED INTERSTATE COMMERCE, AGREED TO RESTRAIN TRADE, I
3 SHOULD SAY.

4 (PAUSE IN THE PROCEEDINGS.)

5 **MS. WILKINSON:** YOUR HONOR, AS I UNDERSTOOD BEFORE,
6 YOU EXCLUDED THAT ARGUMENT FROM THE TRIAL. YOU DIDN'T PERMIT
7 US TO MAKE THAT ARGUMENT.

8 **THE COURT:** I'M ALLOWING YOU TO MAKE THAT NOW.

9 **MS. WILKINSON:** WELL, I AM NOT PREPARED TO MAKE THAT
10 ARGUMENT RIGHT NOW, YOUR HONOR.

11 **THE COURT:** OH, OKAY.

12 **MS. WILKINSON:** BECAUSE I DIDN'T -- I THOUGHT WE WERE
13 JUST MAKING THE RECORD; THAT YOU DIDN'T ALLOW US TO DO THAT
14 BECAUSE WHEN I STOOD UP HERE DURING --

15 **THE COURT:** I DON'T WANT TO ARGUMENT ABOUT --

16 **MS. WILKINSON:** NO, I'M JUST SAYING --

17 **THE COURT:** I'M TRYING TO REACH THE TRUTH HERE, SHALL
18 WE SAY. IF YOU WANT TO TELL ME THERE WAS NO AGREEMENT TO
19 RESTRAIN TRADE, I WOULD BE INTERESTED TO HEAR THAT. BUT IF
20 YOU'RE NOT PREPARED TO DO THAT AT THIS TIME, THEN YOU CAN GO
21 ON TO SOMETHING ELSE.

22 **MS. WILKINSON:** YES, YOUR HONOR.

23 I THINK THE PROBLEM IS THAT IT IS THE ANTITRUST VIOLATION
24 THAT YOU WERE SAYING. SO WE DON'T BELIEVE THAT THAT IS
25 ANYTHING THAT'S BEEN CONCEDED OR THAT YOU FOUND. THAT'S WHAT

1 STEP TWO OR THREE IS.

2 YOU WERE TALKING ABOUT WHETHER SOMEONE COULD GO TO -- YOU
3 COULD GO TO STEP FOUR, AND YOU KNOW FROM OUR PAPERS WE DON'T
4 BELIEVE THERE IS A STEP FOUR ESPECIALLY THAT APPLIES IN THIS
5 CASE. THE MOST RECENT CASE FROM THE SUPREME COURT YOU WERE
6 JUST CITING LAID OUT THREE STEPS. YOU, YOURSELF, APPLIED
7 THREE STEPS IN *O'BANNON* AND SO DID THE NINTH CIRCUIT, AND
8 CALLED THAT THE FINAL STEP. SO IN AT LEAST IN THE ARENA OF
9 THE NCAA IN SPORTS, THERE'S NEVER BEEN AN APPLICATION OF A
10 FOURTH STEP.

11 BUT IF YOU ARE TALKING ABOUT THE WEIGHING, WHICH OCCURS
12 THROUGHOUT THIS RULE-OF-REASON ANALYSIS, AT STEP THREE WOULD
13 BE WHERE YOU WOULD DETERMINE IF YOU SAID THERE WAS THIS SMALL
14 PROCOMPETITIVE BENEFIT AND THIS ALLEGEDLY LARGE VIOLATION,
15 THEN IT SHOULD BE EASY FOR PLAINTIFFS TO PROVIDE A LESS
16 RESTRICTIVE ALTERNATIVE THAT WAS VIRTUALLY, YOU KNOW, GAVE YOU
17 THE SAME RESULTS BUT WAS LESS RESTRICTIVE. THAT'S EXACTLY
18 WHERE YOU WOULD MAKE THAT ANALYSIS. AND AS I UNDERSTAND
19 READING YOUR *O'BANNON* DECISION, THAT'S WHAT YOU FOUND THE LAST
20 TIME; THAT THERE WAS A SMALL PROCOMPETITIVE BENEFIT, AND YOU
21 LOOKED AT SOME OF THE LRA'S AND YOU FOUND THAT ONE OF THEM WAS
22 VIRTUALLY AS EFFECTIVE AND WAS LESS RESTRICTIVE.

23 THE NINTH CIRCUIT DISAGREED, BUT YOU DID THAT ANALYSIS
24 THERE. THAT'S THE SAME ANALYSIS -- WE DON'T THINK THAT SHOULD
25 BE THE SAME RESULT -- BUT THAT'S THE SAME ANALYSIS THAT YOU

1 DID THERE THAT YOU SHOULD APPLY HERE. AND THE PROBLEM IS,
2 WHEN YOU GET TO STEP THREE, THEY DON'T PRESENT YOU WITH A LESS
3 RESTRICTIVE ALTERNATIVE THAT IS VIRTUALLY EFFECTIVE AND IS
4 LESS -- AND DOESN'T INCREASE COSTS.

5 **THE COURT:** OKAY. BUT IF YOU WERE FORCED TO ADDRESS
6 THE BALANCE OF THE AGREEMENT TO RESTRAIN TRADE AND THE EFFECT
7 ON CONSUMER DEMAND, HOW WOULD YOU GO ABOUT ARTICULATING THAT
8 SORT OF BALANCE?

9 IF YOU CAN'T SAY ONE IS WORTH A MILLION DOLLARS AND ONE IS
10 WORTH A HUNDRED THOUSAND DOLLARS, HOW WOULD YOU ARTICULATE
11 THAT BALANCING? HOW WOULD YOU DESCRIBE IT OR COME OUT WITH
12 IT?

13 **MS. WILKINSON:** I THINK THAT'S THE PROBLEM, AND
14 AREEDA SAYS THAT. WITHOUT ANY KIND OF QUANTITATIVE ANALYSIS,
15 AND PLAINTIFFS COULD HAVE DONE THAT FOR YOU, THEY COULD HAVE
16 DONE A QUANTITATIVE ANALYSIS --

17 **THE COURT:** SO YOU ARE SAYING YOU JUST CAN'T DO IT --
18 (SIMULTANEOUS COLLOQUY.)

19 **THE COURT:** YOU DON'T HAVE ANYTHING TO OFFER?

20 **MS. WILKINSON:** IT WOULD JUST BE PUTTING YOUR
21 PERSONAL JUDGMENT ABOUT THE WEIGHING. YOU BELIEVE --

22 **THE COURT:** THAT'S KIND OF WHAT JUDGES OFTEN HAVE TO
23 DO IS BALANCE THINGS.

24 **MS. WILKINSON:** NOT UNDER THE RULE OF REASON. THERE
25 IS AN ANALYSIS SET FORTH FOR YOU TO DO, AND THEY ARE SUPPOSED

1 TO, BEFORE YOU WOULD GET TO THAT STEP FOUR THAT YOU BELIEVE
2 COULD OCCUR, THEY ARE SUPPOSED TO GIVE YOU A LESS RESTRICTIVE
3 ALTERNATIVE.

4 **THE COURT:** OKAY. BUT I AM NOT TALKING ABOUT THAT.
5 I'M ASKING YOU TO BALANCE THE AGREEMENT TO RESTRAIN TRADE
6 AGAINST THE EFFECT ON CONSUMER DEMAND AND TELL ME HOW YOU
7 THINK, ASSUMING I HAD TO DO THAT, WHICH I KNOW YOU DON'T
8 THINK, BUT ASSUMING I DID, IF YOU WANTED TO TELL ME ANYTHING
9 ABOUT HOW YOU WOULD DESCRIBE THAT BALANCE AND HOW YOU WOULD
10 SAY PERHAPS THAT ONE WAS GREATER THAN THE OTHER OR ONE WAS
11 MORE EGREGIOUS THAN THE OTHER, OR WHATEVER. IF YOU DON'T WANT
12 TO, THAT'S FINE. I AM ASKING YOU TO DO THAT.

13 **MS. WILKINSON:** I WOULD SAY THE PROCOMPETITIVE
14 BENEFIT CLEARLY OUTWEIGHS IT. BECAUSE YOU'RE TALKING ABOUT A
15 PRODUCT THAT HAS BEEN INCREDIBLY POPULAR FOR DECADES. AND
16 THEY ARE ASKING ON THIS -- BECAUSE OF THIS SUPPOSED
17 ANTICOMPETITIVE ACT, TO TAKE A CHANCE ON WHAT WILL HAPPEN TO
18 THAT PRODUCT IN A BUT-FOR WORLD WHEN YOU DON'T HAVE ANYTHING
19 TO QUANTITATIVELY WEIGH.

20 SO WHEN YOU HAVE A HISTORY OF A PRODUCT THAT'S POPULAR A
21 PRODUCT THAT EVEN PLAINTIFFS CONCEDE IS STILL POPULAR, AND YOU
22 FIND THAT PART OF THAT POPULARITY, THAT CONSUMER DEMAND, AT
23 LEAST PART OF IT IS ATTRIBUTABLE TO A PROCOMPETITIVE BENEFIT,
24 THAT YOU HEARD FROM ALL THE WITNESSES THAT THEY SUPPORT, EVEN
25 THE PLAINTIFFS' EXPERTS TOLD YOU THAT THERE'S SOME NUMBER THAT

1 WOULD AFFECT CONSUMER DEMAND.

2 SO YOU HAVE A PRODUCT THAT YOU KNOW IS POPULAR AND IS
3 SUPPORTED BY THIS PROCOMPETITIVE BENEFIT AND YOU WOULD BE
4 SAYING YOU'RE GOING TO WEIGH SOMETHING THAT HASN'T BEEN
5 QUANTITATED AND SAY THAT THAT IS, THEREFORE, GOING TO OUTWEIGH
6 AND HAVE YOU KIND OF UPEND THE ENTIRE SYSTEM.

7 I THINK THERE'S NO OTHER WAY TO WEIGH THOSE TWO THINGS BUT
8 TO LEAN IN FAVOR OF THE PROCOMPETITIVE PRODUCT -- THE
9 PROCOMPETITIVE BENEFIT AND THE PRODUCT.

10 **THE COURT:** WHAT DO YOU THINK ABOUT *COUNTY OF*
11 *TUOLUMNE*. WE HAVE A COUNTY HERE AND WE PRONOUNCE IT *TUOLUMNE*.

12 **MR. KESSLER:** I APOLOGIZE FOR THAT, YOUR HONOR.

13 **MS. WILKINSON:** WELL, *COUNTY OF TUOLUMNE*, AS YOU
14 KNOW, JUST HAS A PARAGRAPH THERE WITH ALMOST TWO SENTENCES
15 THAT SAID WHEN YOU WEIGH IT. I STILL THINK THAT THOSE -- THE
16 CRITERIA THAT THE HOSPITAL USES TO MAINTAIN THE QUALITY OF THE
17 OB CARE AT THE HOSPITAL OUTWEIGHS THE RESTRAINT.

18 AND THEY REALLY ARE REFERRING BACK TO THE ANALYSIS THAT
19 WAS DONE AT THE THIRD STEP. AND THAT'S ALL THAT THEY SAY.
20 AND THEY DON'T --

21 **THE COURT:** I DIDN'T FOLLOW THAT.

22 THE WAY I READ *TUOLUMNE* IS TO SAY THAT -- THAT YOU WEIGH
23 THE -- OR THAT YOU START WITH THE RESTRAINT ON TRADE, YOU MOVE
24 TO THE PROCOMPETITIVE JUSTIFICATION, AND YOU LOOK FOR A LESS
25 RESTRICTIVE ALTERNATIVE THAT DOESN'T COST MORE AND IS

1 VIRTUALLY AS EFFECTIVE, AND IF YOU DON'T FIND ONE, YOU THEN
2 BALANCE.

3 **MS. WILKINSON:** BUT WHEN THEY --

4 **THE COURT:** HOW DO YOU SQUARE THAT WITH THE NOTION
5 THAT WE SHOULDN'T BALANCE; THAT WE SHOULD JUST STOP RIGHT
6 THERE?

7 **MS. WILKINSON:** WELL, IT'S THE ONLY CASE THAT DOES
8 THAT OUTSIDE --

9 **THE COURT:** BUT IT'S THE NINTH CIRCUIT CASE THAT
10 SEEMS TO BE CONTROLLING AS FAR AS I CAN TELL.

11 **MS. WILKINSON:** WELL --

12 **THE COURT:** HOW WOULD I NOT FOLLOW IT?

13 **MS. WILKINSON:** THE MORE RECENT NINTH CIRCUIT
14 *O'BANNON* CASE DID NOT REFER TO A FOURTH STEP.

15 **THE COURT:** IT MAY NOT HAVE REFERRED TO IT, BUT IT
16 DIDN'T RULE ON IT SINCE IT DIDN'T GET TO THAT POINT. AND YOU
17 DON'T DECIDE WHAT NINTH CIRCUIT LAW TO FOLLOW BASED ON WHICH
18 PANEL DECISION COMES FIRST AND WHICH COMES LATER. IF THERE'S
19 ONE ON POINT AND ONE NOT ON POINT, REGARDLESS OF THEIR TIMING,
20 ONE HAS TO FOLLOW THE ONE THAT'S THE -- THE ONE THAT'S ON
21 POINT.

22 IN *TUOLUMNE* THEY ACTUALLY HAD DO IT WHEREAS IN *O'BANNON*
23 THEY DIDN'T HAVE TO DO IT. THEY REFERRED TO THE FINAL STEP,
24 BUT THAT WASN'T -- DIDN'T PLAY INTO THE DECISION. I HATE TO
25 SAY "DICTA", BUT IT WASN'T SOMETHING THAT HAD TO BE RELIED

1 UPON BECAUSE THEY DIDN'T GET TO THAT STEP.

2 SO, AGAIN, I'M JUST ASKING HOW ONE WOULD DEAL WITH
3 *TUOLUMNE* IN YOUR ANALYSIS.

4 **MS. WILKINSON:** WHEN YOU READ *TUOLUMNE*, WHAT I WAS
5 SAYING IS WHEN THEY LOOK AT THE BALANCE, WHEN THEY TALK ABOUT
6 THE BALANCING, ALL THEY DO IS REFER BACK TO THE SAME THINGS
7 THEY LOOKED AT IN STEP THREE. THEY SAY THAT THOSE PRIVILEGES,
8 MAINTAINING THE CRITERIA FOR WHO CAN DO THE OB WORK, THE
9 SURGERY, THEY SAY THAT THOSE PRIVILEGES ARE IMPORTANT FOR
10 MAINTAINING VERSUS THE IDEA THAT YOU WOULD ALLOW KIND OF A
11 LOWER -- A LESS KIND OF QUALITY SURGEON TO COME IN OR LESS
12 QUALIFIED SURGEON TO COME IN. THEY DON'T GIVE YOU ANY MORE
13 ANALYSIS THAN THAT -- OTHER THAN THAT. THEY DON'T TELL YOU
14 HOW THEY ARE WEIGHING IT --

15 **THE COURT:** RIGHT. I'M NOT, SINCE I DON'T HAVE
16 SURGEONS AND OB'S HERE, I'M NOT SO CONCERNED WITH THE FACTS AS
17 I AM WITH THE NOTION THAT ONE MUST BALANCE AT THAT POINT.

18 **MS. WILKINSON:** BUT THAT'S MY POINT. THE CASE IS NOT
19 INFORMATIVE TO YOU. IT IS VERY FACT SPECIFIC ON THOSE EXACT
20 THINGS. AND WHEN IT LOOKS BACK, IT IS JUST REANALYZING WHAT
21 IT DID IN STEP THREE. IT DOESN'T PROVIDE ANY ADDITIONAL
22 INFORMATION TO YOU ON HOW TO BALANCE THOSE.

23 **THE COURT:** WHAT ABOUT -- DO YOU HAVE ANY COMMENT ON
24 AREEDA AND HOVENKAMP?

25 **MS. WILKINSON:** WELL, AREEDA SAYS THAT YOU NEED TO --

1 IF YOU ARE GOING TO DO THAT KIND OF FOUR STEP, YOU NEED TO
2 HAVE SOME KIND OF QUANTITATIVE BALANCING OR YOU CAN'T DO IT.

3 **THE COURT:** WHAT WOULD YOU DO IF YOU DIDN'T; DOES
4 AREEDA SAY?

5 **MS. WILKINSON:** IT SAYS YOU REALLY CAN'T DO IT
6 WITHOUT THAT. BECAUSE YOU EITHER HAVE ZERO, THEREFORE, AS I
7 SAID, YOU WOULD GO WITH THE PROCOMPETITIVE BENEFIT OR YOU HAVE
8 SOME KIND OF QUANTITATIVE MEASUREMENT. AND OTHERWISE YOU ARE
9 KIND OF MEASURING TWO DIFFERENT THINGS WHICH MAKES THAT
10 BALANCING EVEN HARDER.

11 **THE COURT:** IF WE DIDN'T -- IF WE WEREN'T MEANT TO
12 BALANCE AT SOME POINT, WOULD THE EFFECT ON ANTITRUST LAW MEAN
13 THAT AN EXTREMELY EGREGIOUS ANTITRUST VIOLATION WITH A VERY
14 MINOR PROCOMPETITIVE JUSTIFICATION THAT WAS MINOR BUT THAT
15 SOMEHOW COULDN'T BE FIXED IN ANY WAY THAT COULD BE SAID TO
16 HAVE NO COST OR EQUALLY GOOD, BUT YET AND STILL YOU HAD A VERY
17 BAD VIOLATION WITH A VERY LITTLE JUSTIFICATION, WOULD THAT
18 MEAN THAT ANTITRUST LAW WOULD SAY ANY TEENSY TINESY LITTLE
19 PROCOMPETITIVE JUSTIFICATION WOULD OUTWEIGH OR WOULD ALLOW THE
20 CARTEL, FOR EXAMPLE, TO CONTINUE WITH ITS ANTICOMPETITIVE
21 CONDUCT?

22 **MS. WILKINSON:** NO, BUT I THINK THERE'S TWO THINGS.
23 FIRST OF ALL, THERE'S BALANCING IN THOSE FIRST THREE STEPS.
24 IT IS NOT AS IF THERE IS NO BALANCING AND THEN YOU GO TO STEP
25 FOUR. THOSE THREE STEPS ARE THE BALANCING.

1 BECAUSE YOU ARE LOOKING AT ONE THING, THEN YOU ARE LOOKING
2 AT THE OTHER, AND THEN YOU ARE SAYING, OKAY, HERE IS A LESS
3 RESTRICTIVE ALTERNATIVE. HERE'S THE PROCOMPETITIVE BENEFIT.
4 CAN YOU, LOOKING AT THESE TWO, GET THE SAME OUTCOME, VIRTUALLY
5 THE SAME OUTCOME FOR NO SIGNIFICANTLY INCREASED COST WITH A
6 LESS RESTRICTION. THAT IS --

7 **THE COURT:** WHAT IF YOU CAN'T? WHAT IF THERE'S --
8 IT'S GOING TO COST A LITTLE BIT MORE? IT'S NOT GOING TO BE
9 QUITE AS GOOD, BUT ON THE OTHER HAND, IT'S NOT THAT BAD OF
10 A -- IT'S NOT THAT GREAT OF A PROCOMPETITIVE JUSTIFICATION IN
11 THE FIRST PLACE, AND THE VIOLATION IS REALLY TERRIBLE?

12 **MS. WILKINSON:** WELL, WITHOUT -- THIS IS THE PROBLEM.
13 WITHOUT QUANTITATIVE -- SOMEBODY JUST SAYING, I THINK THIS IS
14 MUCH WORSE THAN THIS; IN THAT THIRD STEP, IF IT'S TRUE THAT
15 THIS ISN'T VERY BENEFICIAL, IT SHOULD BE EASY TO REPLICATE THE
16 LESS RESTRICTIVE ALTERNATIVE.

17 THE REASON THEY CAN'T DO THAT HERE IS BECAUSE THIS IS AN
18 IMPORTANT PROCOMPETITIVE BENEFIT. AND SO THERE'S NO WAY FOR
19 YOU TO SAY THIS IS A SMALL PROCOMPETITIVE BENEFIT, AND EVEN
20 THOUGH THEY CAN'T COME UP WITH ANY KIND OF LESS RESTRICTIVE
21 ALTERNATIVE THAT WILL BE JUST AS EFFECTIVE, THEREFORE, YOU
22 KNOW, I NEED TO LOOK FOR SOMETHING ELSE, AND THIS SUPPOSEDLY
23 BIG VIOLATION NEEDS TO BE REMEDIED. THE LAW IS ALREADY SET UP
24 TO DO THAT AT STAGE THREE -- OR STEP THREE.

25 **THE COURT:** OKAY. I WAS TRYING TO DIVORCE IT FROM

1 THESE FACTS AND GET A SORT OF A POLICY ARGUMENT ABOUT WHAT
2 THAT WOULD MEAN TO ANTITRUST LAW, BUT OKAY.

3 **MR. KESSLER:** YOUR HONOR, IF I MAY JUST, ON ONE
4 SECOND, ON AREEDA?

5 **THE COURT:** I THINK WHAT I WOULD LIKE DO IS, I FEEL
6 LIKE WE ARE FINISHED WITH BALANCING, AND WE'VE ADDRESSED
7 PROCOMPETITIVE JUSTIFICATIONS A LITTLE BIT AS IT PLAYS INTO
8 BALANCING, BUT I WANT TO HEAR FROM BOTH OF YOU A LITTLE BIT,
9 AND I HAVE A FEW QUESTIONS ON THE TWO PROCOMPETITIVE
10 JUSTIFICATIONS THAT WE HAVE HERE, AND SO AS LONG AS
11 MS. WILKINSON IS STANDING UP OR --

12 **MS. WILKINSON:** MR. WILLIAMS IS GOING TO DO STEP TWO.

13 **THE COURT:** I THINK I WOULD LIKE TO HEAR THAT
14 FIRST --

15 **MR. KESSLER:** I WILL TURN IT OVER TO MR. BERMAN ON
16 THE JUSTIFICATIONS. THE ONLY POINT I WANTED TO MAKE, YOUR
17 HONOR, FOR THE RECORD IS THAT, IN FACT, AREEDA DOES NOT SAY
18 THAT IF YOU CAN'T QUANTIFY, YOU DON'T DO THE BALANCE.

19 INSTEAD, WHAT AREEDA SAYS WHEN YOU DON'T HAVE
20 QUANTIFICATION, YOU THEN LOOK AT THINGS LIKE MARKET POWER, THE
21 QUALITY OF THE EVIDENCE, YOU KNOW, YOU HAVE TO EXAMINE THESE
22 VERY THINGS EVEN THOUGH YOU CAN'T QUANTIFY. AND IN THIS CASE
23 WHERE WE HAVE CLEAR MARKET POWER, WE HAVE A MONOPOLY OVER THE
24 SUPPLY HERE, AND WE HAVE THESE EFFECTS, AND THEY HAVE DONE
25 NOTHING TO SHOW ANY QUANTITATIVE OR OTHER TYPE OF SIGNIFICANT

1 PROCOMPETITIVE EFFECT ON DEMAND, WE THINK AREEDA COUNSELS THE
2 BALANCE HAS NOT BEEN MET.

3 THANK YOU, YOUR HONOR.

4 **THE COURT:** OKAY. LET ME TRY TO ASK THE QUESTIONS
5 THAT I HAVE.

6 I WAS CONCERNED ABOUT THE... SOME OF THE FACTS ABOUT THE
7 HISTORY OF THE NCAA WHICH CAME UP IN THE O'BANNON TRIAL, IT
8 CAME UP IN THE O'BANNON OPINION. IT SORT OF STARTED TO COME
9 UP IN THIS CASE AND I HAD ASKED, AS I RECALL IT, TO GET THOSE
10 SAME FACTS TO BE PART OF THE RECORD IN THIS CASE WITHOUT
11 HAVING TO LISTEN TO THEM AGAIN FROM A WITNESS.

12 IT TOOK A LONG TIME TO DO THAT. IN THE END I GOT A
13 STIPULATION AFTER TRIAL WHICH WASN'T IDEAL, BUT THERE IT WAS.
14 AND THEN I WAS A LITTLE DISMAYED TO SEE THE IMPLICATION IN
15 YOUR STIPULATION THAT THE COURT FORCED YOU TO STIPULATE.

16 AND I JUST WANTED TO MAKE CLEAR THE COURT HAD NO INTENTION
17 OF FORCING YOU TO STIPULATE TO SOMETHING THAT WASN'T TRUE. I
18 WANTED YOU TO STIPULATE TO THINGS THAT WERE TRUE SO THAT I
19 COULD GET THEM IN THE RECORD WITHOUT HAVE TO HEAR THEM AGAIN.
20 BUT I DO WANT TO CLARIFY THAT I CERTAINLY DIDN'T MEAN FOR
21 YOU -- THAT I WAS REQUIRING YOU TO STIPULATE TO SOMETHING THAT
22 YOU THOUGHT WAS FACTUALLY UNTRUE.

23 SO IF THERE'S SOMETHING IN THAT STIPULATION THAT YOU THINK
24 IS FACTUALLY UNTRUE, PLEASE GO AHEAD AND TELL ME.

25 **MR. WILLIAMS:** IT WAS A MATTER OF PROCEDURE, REALLY,

1 YOUR HONOR, WITH RESPECT TO THE STIPULATION.

2 OUR POINT WAS THAT WE HAD LIMITED TIME AT THE TRIAL THAT
3 THERE WERE CERTAIN EVIDENCE THAT IS EITHER GOING TO BE
4 ADMITTED OR IS NOT. THE EVIDENCE CONCERNING THE HISTORY WAS
5 LARGELY HEARSAY. WE DID NOT BELIEVE THAT FOR PURPOSES OF
6 PRESENTING OUR CASE THAT IT WAS IN OUR CLIENTS' INTEREST TO
7 PRESENT A HISTORY THAT WAS BASED ON THAT TYPE OF EVIDENCE.

8 WE, THEREFORE, PUSHED BACK ON THAT AND SAID THAT WE DID
9 NOT SEEK TO STIPULATE TO IT, AND WE DID FEEL AS THOUGH --

10 **THE COURT:** YOU ARE NOT IMPLYING THAT YOU WERE FORCED
11 TO STIPULATE TO SOMETHING THAT'S NOT TRUE OR THAT YOU DID, IN
12 FACT, STIPULATE TO SOMETHING IS THAT'S NOT TRUE. YOU ARE NOT
13 SAYING THAT.

14 **MR. WILLIAMS:** WELL --

15 **THE COURT:** IF YOU ARE, THEN PLEASE TELL ME BECAUSE I
16 CERTAINLY DON'T WANT TO RELY ON SOMETHING THAT -- I CAN
17 UNDERSTAND YOU THINK IT SHOULDN'T HAVE COME IN OR IT'S NOT
18 RELEVANT OR IT DOESN'T STAND FOR THE POINT THEY THINK IT DOES,
19 OR THIS OR THAT, BUT I AM CONCERNED WITH THE NOTION THAT YOU
20 STIPULATED TO SOMETHING THAT WASN'T TRUE. SO --

21 **MR. WILLIAMS:** OUR POINT IS THAT WE DO NOT BELIEVE
22 THAT THE FACTS TO WHICH WE WERE ASKED TO STIPULATE MEET THE
23 EVIDENTIARY STANDARD THAT WOULD BE APPROPRIATE AT THE TRIAL;
24 THAT IS, THAT THERE IS NO WITNESS HERE TO TESTIFY REGARDING
25 THAT HISTORY AND, THEREFORE, THAT IT WAS NOT APPROPRIATELY

1 ADMITTED AS EVIDENCE.

2 **THE COURT:** LET'S SAY THEN IF YOU FEEL YOU STIPULATED
3 TO SOMETHING THAT IS FALSE, THAT ISN'T TRUE, YOU CAN FILE
4 ANOTHER DECLARATION OR STIPULATION BY THE END OF THE DAY
5 TODAY.

6 **MR. WILLIAMS:** WE RESPECTFULLY DON'T BELIEVE THAT THE
7 STANDARD IS WHETHER WE WERE ASKED TO STIPULATE TO SOMETHING
8 THAT WAS FALSE; RATHER WE BELIEVE THAT THE CONVERSE IS NOT
9 TRUE --

10 **THE COURT:** RIGHT. I HEARD YOU SAY THAT. AND I SAY
11 AGAIN, IF YOU STIPULATED -- IF YOU FELT YOU WERE FORCED TO
12 STIPULATE TO SOMETHING THAT IS FALSE, THEN YOU LET ME KNOW.

13 **MR. WILLIAMS:** VERY WELL, YOUR HONOR.

14 MAY I RESPOND TO SOMETHING THAT COUNSEL RAISED REGARDING
15 STEP TWO AND THE BURDENS BEFORE THE COURT MOVES ON, IF I MAY?

16 **THE COURT:** I'M NOT -- WELL --

17 **MR. WILLIAMS:** BECAUSE MR. KESSLER MADE A POINT ABOUT
18 BURDENS, AND HE EMPHASIZED THAT... I BELIEVE HE SAID AND I
19 WROTE IT DOWN, THAT THE DEFENDANTS CHOSE NOT TO DEMONSTRATE OR
20 TO QUANTIFY ANY PROCOMPETITIVE EFFECT. AND I WANTED TO
21 RESPOND TO THAT AS A MATTER OF LAW UNDER THE RULE OF REASON
22 SIMPLY TO SAY THAT THAT MISSTATES THE STANDARD.

23 COULD WE GET, DOUG, CAN WE GET IT TURNED ON?

24 **THE CLERK:** SURE.

25 **MR. WILLIAMS:** THERE'S A POINT WE WANTED TO MAKE

1 ABOUT THIS THAT COUNSEL HAS DONE REPEATEDLY THROUGH THE TRIAL
2 WHICH IS TO MISSTATE WHAT THE BURDENS ARE AT STEP TWO, WHICH
3 IS THE BURDEN THAT WE UNDERTAKE.

4 IN THE PLAINTIFFS' CLOSING BRIEF AT PAGE 5, THIS IS THE
5 HEADING THAT THEY HAVE, YOUR HONOR. "DEFENDANTS OFFERED NO
6 CREDIBLE EVIDENCE THAT ELIMINATING THE CHALLENGED RESTRAINTS
7 AND PERMITTING INDIVIDUAL CONFERENCES TO DETERMINE WHETHER TO
8 PERMIT INCREASED COMPENSATION WOULD HARM CONSUMER DEMAND."

9 THAT MISSTATES WHAT THE ACTUAL REQUIREMENT THAT WE HAVE
10 IS.

11 (DISPLAYED ON SCREEN.)

12 UNDER THE NINTH CIRCUIT LAW, HERE IS WHAT O'BANNON SAYS IS
13 NOT -- WHAT O'BANNON SAYS IS NOT OUR BURDEN. THIS IS AT NOTE
14 25 ON PAGE 1079.

15 "WE DO NOT DECIDE, AND THE NCAA, THE DEFENDANT THERE, NEED
16 NOT PROVE WHETHER PAYING STUDENT-ATHLETES \$5,000 PAYMENTS WILL
17 NECESSARILY REDUCE CONSUMER DEMAND. THE PROPER INQUIRY IN THE
18 RULE OF REASON'S THIRD STEP IS WHETHER THE PLAINTIFFS HAVE
19 SHOWN THESE PAYMENTS WILL NOT REDUCE CONSUMER DEMAND RELATIVE
20 TO THE EXISTING RULES."

21 WHAT PLAINTIFFS HAVE DONE CONSISTENTLY IS TO SUGGEST THAT
22 IT IS OUR BURDEN AT STEP TWO TO QUANTIFY THAT SOME CHANGE, THE
23 CHANGE THAT THE PLAINTIFFS SEEK TO BRING ABOUT WILL NOT --
24 WILL HAVE AN EFFECT ON DEMAND. WHEN, IN FACT, AT STEP THREE,
25 IT IS THE PLAINTIFFS' BURDEN TO SHOW THAT IT DOES NOT HAVE

1 THAT IMPACT.

2 **THE COURT:** OKAY. WELL THAT'S -- SOUNDS A LITTLE BIT
3 LIKE ANGELS ON THE HEAD OF A PIN. IT IS YOUR BURDEN TO PROVE
4 A PROCOMPETITIVE JUSTIFICATION.

5 SO LET'S HAVE YOU TELL ME WHAT -- I MEAN, WHAT I WANT TO
6 HEAR FROM YOU AT THIS POINT IS WHAT YOU THINK YOU HAVE PROVED
7 WITH RESPECT TO THE EXISTENCE OF ONE OR TWO PROCOMPETITIVE
8 JUSTIFICATIONS.

9 AND THEN YOU CAN TALK ABOUT THAT, BUT I HAVE A LOT OF
10 QUESTIONS ABOUT IT. SOME BIG AND SOME SMALL. SO MAYBE THE
11 EASIEST THING WOULD BE FOR ME TO ASK MY QUESTIONS FIRST, AND
12 THEN IN THE COURSE OF THAT YOU HAVEN'T BEEN ABLE TO EXPRESS
13 WHAT YOU THINK YOU HAVE PROVED AS YOUR PROCOMPETITIVE
14 JUSTIFICATIONS, THEN YOU CAN EXPAND ON IT.

15 **MR. WILLIAMS:** I AM HAPPY TO, YOUR HONOR.

16 **THE COURT:** OKAY.

17 WELL, I GUESS SOME OF THE ISSUES THEY STARTED TO RAISE
18 ALREADY AND THAT IS THEIR ARGUMENTS RELY TO SOME DEGREE ON THE
19 PAYMENTS OF SAF FUNDS AND THE OTHER THINGS THAT ARE KIND OF
20 LIKE THAT.

21 **MR. WILLIAMS:** THE PELL GRANTS AND THE SAF FUNDS
22 OVERALL BEING OVER THE COST OF ATTENDANCE; IS THAT WHAT THE
23 COURT IS REFERRING TO?

24 **THE COURT:** YES. AND I QUESTIONED THEM ABOUT SOME OF
25 THE EVIDENCE THAT WAS EVIDENCE THAT YOU CONTESTED, AND THEY

1 ANSWERED WHERE THAT EVIDENCE CAME FROM. AND I GUESS I WANT TO
2 HEAR YOUR RESPONSE TO THEIR EXPLICATION OF WHERE THAT EVIDENCE
3 COMES FROM.

4 FOR EXAMPLE, WHETHER 4,000 STUDENTS GOT FUNDS ABOVE THE
5 COST OF ATTENDANCE, WHETHER THE EXAMPLES OF INDIVIDUAL
6 STUDENTS WHO DID GET SAF FUNDS FOR PARTICULAR ITEMS, AND IN
7 SOME INSTANCES HOW MUCH THOSE FUNDS WERE.

8 **MR. WILLIAMS:** RIGHT.

9 **THE COURT:** THOSE SORTS OF QUESTIONS. AND I DON'T
10 KNOW IF YOU WANT TO JUST ADDRESS THE EVIDENTIARY POINTS ABOUT
11 THAT.

12 **MR. WILLIAMS:** SURELY.

13 FIRST OF ALL, AS AN EVIDENTIARY MATTER, MY MEMORY, AND WE
14 ARE CHECKING, IS THAT IT IS TRUE AS MR. BERMAN SAID THAT
15 EVIDENCE CAME IN CONCERNING OHIO STATE UNIVERSITY AND THEIR
16 NUMBERS IN THAT REGARD. I AM NOT SURE, AND I BELIEVE WE ARE
17 CHECKING, WHETHER OR NOT THAT'S TRUE FOR THE UNIVERSITY OF
18 FLORIDA, I BELIEVE, HE MENTIONED, AND WHETHER OR NOT THOSE
19 NUMBERS CAME IN.

20 EVEN IF THEY DID, THOUGH -- MS. LENT CAN ACTUALLY ANSWER
21 THAT PRECISE QUESTION IF SHE MAY.

22 **MS. LENT:** YOUR HONOR, I CAN ANSWER THIS. AND WE DID
23 OBJECT TO THIS IN OUR MOTION TO STRIKE.

24 AT PAGE 25 OF THE CLOSING ARGUMENT, NOTE 157, THIS IS
25 WHERE THE PLAINTIFFS SAY THERE WERE THOUSANDS OF

1 STUDENT-ATHLETES THAT ALREADY RECEIVED ABOVE COST OF
2 ATTENDANCE, THEY ONLY CITE DR. RASCHER FOR THAT PROPOSITION,
3 NOTHING ELSE. AND SO THAT ISN'T EVIDENCE, IT'S JUST RASCHER'S
4 OPINION.

5 **THE COURT:** WHAT DOES RASCHER CITE?

6 **MS. LENT:** RASCHER CITES THINGS NOT ADMITTED INTO THE
7 TRIAL RECORD.

8 **THE COURT:** LIKE WHAT?

9 **MS. LENT:** LIKE DATA THAT CAME FROM THIRD-PARTY
10 SUBPOENAS THAT WERE ISSUED TO SCHOOLS.

11 **THE COURT:** AND WERE THEY RULED UPON BY THE COURT?

12 **MS. LENT:** NO, THEY WERE NOT.

13 **THE COURT:** OKAY. I GUESS COUNSEL SAYS THEY WERE, SO
14 I WILL HAVE TO GO BACK AND CHECK.

15 **MS. LENT:** TO BE SURE, PLAINTIFFS' EXHIBIT 104 AND
16 105 WERE ADMITTED, AND THOSE RELATE TO OHIO STATE ALONE.

17 PLAINTIFFS' EXHIBIT 106, WHICH IS WHAT I THINK MR. BERMAN
18 WAS REFERRING TO, WAS ALSO ADMITTED. THAT REFERRED TO 18
19 OTHER SCHOOLS, BUT THOSE DON'T SHOW THOUSANDS OF
20 STUDENT-ATHLETES RECEIVING ABOVE COST OF ATTENDANCE.

21 THE ONLY OTHER EVIDENCE, AND PLAINTIFFS DON'T CITE TO
22 PLAINTIFFS' EXHIBIT 106 IN THEIR CLOSING ARGUMENT. THAT'S
23 JUST SOMETHING THAT MR. BERMAN REFERENCED RIGHT NOW.

24 AND THEN WITH RESPECT TO OHIO STATE, JUST TO MAKE THIS
25 POINT WHILE WE'RE TALKING ABOUT IT, PAGE 26 OF THE CLOSING

1 ARGUMENT AT NOTE 165, PLAINTIFFS DO CITE THEIR EXHIBITS 104
2 AND 105 ABOUT OHIO STATE, BUT THEY CITE THEM FOR THE
3 PROPOSITION, NOT JUST THAT FOLKS RECEIVED ABOVE THE COST OF
4 ATTENDANCE, BUT THEY SAY WHAT THEY RECEIVED THOSE STUDENT
5 ASSISTANCE FUND AMOUNTS FOR, AND THAT EXPLICATION IS NOT
6 SUPPORTED BY THOSE EXHIBITS.

7 SO THOSE ARE THE KIND OF THINGS THAT WE WERE POINTING OUT
8 IN OUR MOTION TO STRIKE.

9 **THE COURT:** I DON'T KNOW WHO WANTS TO ANSWER THIS,
10 BUT IS THERE ANYWHERE IN THE RECORD WHERE I COULD FIND OUT, I
11 MEAN, WHERE I COULD FIND OUT HOW MANY ATHLETES GOT AND HOW
12 MUCH ON THE AVERAGE OR ON A RANGE DID THEY GET IN THESE FUNDS?

13 **MS. LENT:** IN THE ADMITTED TRIAL RECORD, YOUR HONOR?
14 NO.

15 **THE COURT:** YOU THINK THERE'S NOTHING?

16 **MS. LENT:** I THINK THERE'S NOT.

17 **THE COURT:** WHAT THERE IS AT THE VERY LEAST IS THE
18 AGGREGATE SUMS OF THE SAF MONEY THAT IS MADE AVAILABLE TO
19 SCHOOLS IN A GIVEN YEAR.

20 **MS. LENT:** SURE.

21 **THE COURT:** THAT WE HAVE. IT'S, I DON'T KNOW, \$60
22 MILLION OR \$80 MILLION, OR SOME KIND OF NUMBER LIKE THAT.

23 WE CAN TAKE THAT NUMBER AND WE CAN DIVIDE IT BY THE NUMBER
24 OF SCHOOLS. AND EVEN IF THE SCHOOLS DON'T ALL GET THE SAME
25 AMOUNT, IF WE DON'T -- DO WE EVEN HAVE THE INFORMATION BY

1 SCHOOL, HOW MUCH EACH SCHOOL GETS?

2 **MS. LENT:** NOT IN THE RECORD, YOUR HONOR.

3 **THE COURT:** OR HOW MUCH EACH CONFERENCE GETS?

4 **MS. LENT:** NOT IN THE RECORD.

5 **THE COURT:** SO WE'D HAVE TO DIVIDE IT BY THE NUMBER
6 OF SCHOOLS AND THEN DIVIDE IT BY THE NUMBER OF ATHLETES, AND
7 WE WOULD COME OUT WITH SOMETHING LIKE A THOUSAND DOLLARS PER
8 ATHLETE.

9 ADMITTEDLY THAT'S NOT GREAT AND IF YOU CAN'T TELL ME A
10 MORE ACCURATE WAY OF DOING IT, THEN I WOULDN'T HAVE ONE. BUT
11 AT THE VERY LEAST WE WOULD HAVE SOME KIND OF BALLPARK NUMBER
12 BY KNOWING THOSE FACTS THAT WE DO KNOW, WOULD WE NOT?

13 **MS. LENT:** WELL, NO, YOUR HONOR, BECAUSE THAT'S NOT
14 HOW THE STUDENT ASSISTANCE FUND WORKS.

15 **THE COURT:** I KNOW IT ISN'T. AND IF I HAD THE ACTUAL
16 FACTS, THAT WOULD BE HANDY. BUT IF I DON'T, THAT WOULD GIVE
17 ME A BALLPARK.

18 **MS. LENT:** WELL, IF YOU HAD THE ACTUAL FACTS, SURE,
19 THAT WOULD BE HELPFUL. BUT PLAINTIFFS DIDN'T SUBMIT THOSE
20 FACTS IN THE TRIAL RECORD.

21 **THE COURT:** RIGHT. BUT I DO HAVE THE TOTAL SUMS
22 AND -- OKAY.

23 **MS. LENT:** OKAY.

24 **MR. WILLIAMS:** YOUR HONOR, MAY I DEAL WITH THE
25 QUESTION THAT YOU RAISED ABOUT PELL GRANTS AND THE LOSS OF

1 VALUE INSURANCE, THOSE THINGS THAT MAY HAVE GONE ABOVE THE
2 COST OF ATTENDANCE AT THIS POINT, OR IS THAT WHAT YOU WOULD
3 LIKE TO HEAR ABOUT?

4 **THE COURT:** I DON'T THINK I HAVE ANY QUESTIONS ABOUT
5 THAT. I AM AWARE OF THAT. I KNOW THERE'S AT LEAST -- THERE'S
6 AT LEAST ONE PIECE OF EVIDENCE THAT SHOWS THAT AT LEAST ONE
7 ATHLETE WAS GIVEN A SUM IN THE RANGE OF \$50,000 TO PURCHASE
8 LOSS OF VALUE INSURANCE.

9 NOW THERE'S OTHER TALK ABOUT MORE PEOPLE GETTING THAT THAN
10 JUST THE ONE, BUT AT THE VERY LEAST, LENNON TALKED ABOUT ONE
11 OF THEM. SO WE KNOW THAT HAPPENED AT LEAST ONCE IN THE
12 UNIVERSE.

13 THE PELL GRANTS, I UNDERSTAND THE SITUATION. I THINK IT'S
14 A LITTLE ODD FROM THE PELL GRANT POINT OF VIEW, BUT I
15 UNDERSTAND THE FACTS THERE, UNLESS YOU THINK THERE'S SOMETHING
16 THAT --

17 **MR. WILLIAMS:** HERE'S THE --

18 **THE COURT:** -- IS UNCLEAR.

19 **MR. WILLIAMS:** OUR POINT IS THAT NONE OF THE THINGS
20 THAT COUNSEL MENTIONED TODAY OR THAT'S MENTIONED IN THEIR
21 BRIEF, FOR EXAMPLE, FOLKS RECEIVING PELL GRANTS, PEOPLE
22 RECEIVING ASSISTANCE WITH LOSS OF VALUE INSURANCE, OLYMPIANS
23 GETTING SOME SORT OF AN AWARD, NONE OF THOSE THINGS ARE --
24 THAT ARE REFERRED TO BY THE PLAINTIFFS AS GOING ABOVE THE COST
25 OF ATTENDANCE ARE -- IS INCONSISTENT WITH THE NOTION OF

1 AMATEURISM. NONE OF THEM ARE.

2 FOR EXAMPLE, ON THE PELL GRANTS, THE FACT OF THE MATTER IS
3 THAT THOSE ARE GOVERNMENT GRANTS. THEY ARE INTENDED TO
4 SUPPLEMENT THE POOREST OF FAMILIES IN AMERICA. BOTH THE NINTH
5 CIRCUIT AND YOUR HONOR IN THE PREVIOUS O'BANNON TRIAL
6 RECOGNIZED THAT THERE ARE SOME STUDENT-ATHLETES WHO RECEIVE
7 PELL GRANTS THAT WOULD TAKE THEM OVER AND ABOVE THE COST OF
8 ATTENDANCE. AND, INDEED, THAT WAS THE FINDING OF THE COURT IN
9 O'BANNON AT PAGE -- THE TRIAL TRANSCRIPT AT PAGE 33.

10 MR. RASCHER, WHO TESTIFIED IN THIS TRIAL, CONCEDED THAT
11 THERE ARE PLENTY OF PEOPLE WHO RECEIVE OVER AND ABOVE THE COST
12 OF ATTENDANCE, THAT THAT HAS LONG BEEN THE CASE. IN O'BANNON,
13 IN YOUR HONOR'S OPINION IN THE DISTRICT COURT AT PAGE 1059,
14 RECOGNIZE THAT STUDENT-ATHLETES ARE PERMITTED TO ACCEPT PELL
15 GRANTS EVEN WHEN THOSE GRANTS RAISE THEIR TOTAL FINANCIAL AID
16 PACKAGE ABOVE THEIR COST OF ATTENDANCE.

17 SO THE SUGGESTION THAT WHETHER THE NUMBER IS 3,000 OR
18 1,000 OR 4,000 STUDENTS WHO HAVE RECEIVED SLIGHTLY ABOVE THE
19 COST OF ATTENDANCE BY REASON OF THEIR RECEIPT OF A PELL GRANT,
20 AS A LEGAL MATTER, DOES NOT MAKE A DIFFERENCE.

21 WHAT MAKES A DIFFERENCE IS WHETHER OR NOT --

22 **THE COURT:** BECAUSE IT WAS ALREADY KNOWN IN O'BANNON
23 THAT THAT WAS THE CASE, OR FOR SOME OTHER REASON?

24 **MR. WILLIAMS:** BECAUSE IT WAS KNOWN IN O'BANNON THAT
25 THAT WAS THE CASE AND BECAUSE THE NINTH CIRCUIT SAID THAT

1 STUDENTS SHOULD BE PERMITTED TO RECEIVE UP TO THE COST OF
2 ATTENDANCE, RECOGNIZING THAT SOME OF THOSE STUDENTS, THOSE WHO
3 RECEIVE PELL GRANTS, ARE GOING TO RECEIVE MORE THAN THE COST
4 OF ATTENDANCE. AND THE NINTH CIRCUIT FOUND NO VICE THERE.
5 NOW --

6 **THE COURT:** IT IS A LITTLE ODD, THOUGH, SINCE THE
7 COST OF ATTENDANCE IS MEANT TO COVER THE FULL COST OF
8 ATTENDANCE AND THE PELL GRANT IS MEANT TO MEET AN UNMET NEED,
9 IT SEEMS AS THOUGH IF YOU GOT BOTH, YOU WOULD BE GETTING PAID
10 TWICE FOR THE CASH ITEMS THAT HAD TO DO WITH SOMETHING ABOVE
11 TUITION, ROOM, BOARD, REQUIRED BOOKS.

12 **MR. WILLIAMS:** ACTUALLY, NO, YOUR HONOR. AND I DON'T
13 BELIEVE YOU ARE GOING TO HEAR TODAY THE PLAINTIFFS SUGGESTING
14 THAT ANY STUDENT WHO RECEIVED ABOVE THE COST OF ATTENDANCE
15 SHOULD SOMEHOW GET -- BECAUSE THEY RECEIVED A PELL GRANT, YOU
16 HAVE TO GIVE MONEY BACK.

17 **THE COURT:** NO, NO ONE IS SAYING THAT. BUT THE POINT
18 IS, IT IS, IN FACT, MORE THAN THE COST OF ATTENDANCE BECAUSE
19 ALTHOUGH BOTH ARE MEANT TO COVER COST OF ATTENDANCE, THEY ARE
20 BOTH MEANT TO FULLY COVER COST OF ATTENDANCE. AND IF YOU GET
21 TWO OF THEM, THEN YOU'VE ESSENTIALLY COVERED IT TWICE.

22 NOW, I DON'T DISAGREE THAT IT PROBABLY DOES ACTUALLY
23 REALLY COST MORE, AND THE STUDENTS WHO ARE GETTING THAT
24 PROBABLY NEED IT AND PROBABLY SPEND IT IN LEGITIMATE FASHIONS
25 AND IT'S A SOCIAL GOOD, NOT A BAD THING, BUT THE FACT IS IT'S

1 STILL CASH THAT STUDENTS ARE RECEIVING THAT IS MORE THAN
2 ALLEGEDLY IT COST TO GO TO THE SCHOOL.

3 ANYWAY, I DON'T THINK THERE'S ANY FACTUAL QUESTIONS.

4 THERE ARE A COUPLE OF OTHER --

5 **MR. WILLIAMS:** IT'S NOT --

6 (SIMULTANEOUS COLLOQUY.)

7 **MR. WILLIAMS:** MAY I MAKE A LEGAL POINT?

8 **THE COURT:** -- YOUR COLLEAGUE. I'M BACK ON THE SAF
9 ISSUE.

10 IS THERE ANYTHING ON THE RECORD IN YOUR VIEW THAT SHOWS
11 WHETHER THE SAF MONIES INCREASED AFTER O'BANNON, THE SORT OF
12 SUM TOTAL OF SAF FUNDS?

13 I THINK PLAINTIFFS MAKE THAT CLAIM AND I'M WONDERING
14 WHETHER YOU DISPUTE IT.

15 **MS. LENT:** I'M NOT AWARE OF ANY EVIDENCE THEY CITE TO
16 FOR THAT POINT.

17 **THE COURT:** AND WHETHER THERE'S ANYWHERE IN THE
18 RECORD THAT GIVES EXAMPLES OF SORTS OF THINGS THAT STUDENTS
19 CAN AND HAVE USED SAF FUNDS TO BUY BESIDES THE ONE \$50,000
20 LOSS OF VALUE INSURANCE THAT THERE IS EVIDENCE OF, AND I THINK
21 THERE'S EVIDENCE OF ONE ATHLETE WHO SAYS HE SENT A HUNDRED
22 DOLLARS TO HIS KID BROTHER TO PLAY FOOTBALL.

23 IS THERE ANYTHING ELSE IN YOUR VIEW IN THE RECORD?

24 **MS. LENT:** I JUST WANT TO BE CLEAR ABOUT THOSE TWO
25 EXAMPLES YOU JUST GAVE. THE FIRST ONE, \$50-SOME-THOUSAND TO

1 PURCHASE LOSS OF VALUE INSURANCE, THAT WE OBJECTED TO IN THE
2 CLOSING ARGUMENT. YOU CAN SEE IT IN OUR APPENDIX A.

3 PLAINTIFFS MAKE THAT ASSERTION ON PAGE 26, FOOTNOTE 164 --

4 **THE COURT:** WELL, LENNON TESTIFIED TO IT.

5 **MS. LENT:** WELL, LENNON --

6 **THE COURT:** AND I WILL TELL YOU THAT I DON'T -- IT'S
7 NOT USEFUL TO ME TO READ THINGS THAT WEREN'T ADMITTED IN THE
8 WAY THAT PLAINTIFFS MIGHT HAVE REFERRED TO THEM, BUT TO KNOW
9 PERFECTLY WELL THAT THEY WERE ADMITTED SOMEWHERE ELSE, SUCH AS
10 IN THE MANUALS OR IN SOMEBODY ELSE'S TESTIMONY, AND SO FORTH.

11 SO LENNON TESTIFIED TO THAT.

12 **MS. LENT:** RESPECTFULLY, YOUR HONOR, WE DON'T HAVE
13 ANYWHERE IN THE RECORD THAT LENNON TESTIFIED THAT FLORIDA
14 STATE PROVIDED A QUARTERBACK \$58,914 TO PURCHASE LOSS OF VALUE
15 INSURANCE.

16 **THE COURT:** NO, HE SAID SOME OTHER SIMILAR AMOUNT FOR
17 SOME OTHER SIMILAR STUDENT.

18 **MS. LENT:** WELL, THAT'S THE ASSERTION THAT THE
19 PLAINTIFFS MADE IN THEIR CLOSING ARGUMENT AND THEY CITED TO
20 DR. RASCHER, AND DR. RASCHER CITED TO NOTHING.

21 **THE COURT:** OKAY. WELL, LIKE I SAY, IT'S NOT USEFUL
22 TO ME TO HEAR CRITICISMS OF SOMETHING THAT'S NOT IN THE RECORD
23 WHERE THEY SAY IT IS, WHEN WE ALL KNOW IT IS IN THE RECORD
24 SOMEWHERE ELSE.

25 YOU HAVE EXAMPLES WHERE THAT'S NOT THE CASE AND THAT'S

1 SOMETHING WE NEED TO DEAL WITH, BUT THAT'S FINE. SO WE WILL
2 JUST MOVE ON AT THIS POINT.

3 **MS. LENT:** DO YOU WANT TO HEAR AN ANSWER TO YOUR
4 QUESTION ABOUT WHAT THE SAF FUNDS WERE USED FOR?

5 **THE COURT:** OH, YEAH. DO YOU HAVE ANYTHING IN THE
6 RECORD THAT WOULD GIVE EXAMPLES?

7 **MS. LENT:** SO ON PAGE 27 OF THEIR CLOSING,
8 FOOTNOTE 171, THE PLAINTIFFS CITE TO RASCHER AS SUPPORT FOR
9 THE FACT THAT THE --

10 **THE COURT:** WAIT. NO. WHAT I AM ASKING IS, CAN YOU
11 TELL ME ANYPLACE WHERE I CAN FIND THINGS. DON'T TELL ME WHERE
12 THEY SAID THEY COULD AND THEY COULDN'T. I'M ASKING YOU
13 WHETHER THERE'S ANYWHERE WHERE I CAN FIND IT OUT.

14 AND IF THE ANSWER IS NO, THEN FINE, JUST SAY SO.

15 **MS. LENT:** YOU WANT TO KNOW FROM THE DEFENDANTS WHERE
16 WE CAN GIVE YOU EVIDENCE TO SUPPORT THE PLAINTIFFS'
17 ASSERTIONS?

18 **THE COURT:** WELL, THAT WOULD BE IRONIC, WOULDN'T IT.

19 **MS. LENT:** THAT IS --

20 **THE COURT:** I'M ASKING YOU WHETHER THERE IS ANY
21 EVIDENCE IN THE RECORD OF HOW STUDENTS HAVE SPENT THEIR SAF
22 MONEY.

23 **MS. LENT:** IN THE ADMITTED EVIDENCE IN THE TRIAL? I
24 DON'T BELIEVE SO, YOUR HONOR.

25 **THE COURT:** OTHER THAN THE ONES THAT I MENTIONED

1 EARLIER. OKAY, THANKS. LET ME JUST --

2 **MR. KESSLER:** YOUR HONOR, IF I CAN JUST CORRECT THAT.

3 **THE COURT:** I JUST LOOKED AT THE CLOCK, AND I AM SO
4 FAR FROM BEING THROUGH WITH ALL MY QUESTIONS, AND I WAS HOPING
5 TO LIKE DO TWO HOURS HERE, SO I REALLY NEED TO MOVE ALONG A
6 LITTLE QUICKER THAN I HAVE BEEN MOVING ALONG.

7 IF YOU WOULD JUST GIVE ME A MINUTE TO READ MY QUESTIONS ON
8 THIS POINT.

9 (PAUSE IN THE PROCEEDINGS.)

10 AND THE ONES THAT I'VE ALREADY ASKED, MR. KESSLER OR
11 MR. BERMAN, WHAT THEY ANSWERED, IF YOU HAVE A DIFFERENT ANSWER
12 WHICH I CAN ONLY ASSUME THAT YOU DO, YOU CAN TAKE NOTES AND
13 TELL IT TO ME LATER.

14 WELL, I DON'T KNOW REALLY WHERE THIS FITS IN, BUT IT'S
15 SOMETHING THAT I HADN'T THOUGHT OF BEFORE AND I DIDN'T REALLY
16 REALIZE UNTIL I WAS READING THESE PAPERS.

17 THE AUTONOMY 5 STARTED, I GUESS, ON AUGUST 7TH OF 2014,
18 AND IT SEEMS AS THOUGH EVEN AT THAT TIME, WHICH WAS PRIOR TO
19 THE DISTRICT COURT OPINION IN *O'BANNON* WHICH CAME OUT ON
20 AUGUST 14TH, A WEEK LATER, THE AUTONOMY 5 HAD ALREADY
21 DISCUSSED THE ISSUE OR TAKEN SOME STEPS TOWARDS OR YOU CAN
22 TELL ME WHAT THEY DID ABOUT RAISING THE GIA CAP FROM WHAT IT
23 HAD BEEN TO COST OF ATTENDANCE.

24 AND THEY THEN ULTIMATELY DID THAT IN JANUARY OF 2015 TO GO
25 INTO EFFECT IN AUGUST OF 2015, WHICH WAS BEFORE THE *O'BANNON*

1 INJUNCTION ACTUALLY WENT INTO EFFECT. SINCE I GUESS --

2 (PHONE INTERRUPTION)

3 SOMEBODY NEEDS TO TURN OFF THEIR MUTE BUTTON ON THE PHONE.
4 OR TURN ON THEIR MUTE BUTTON, I GUESS.

5 THE NINTH CIRCUIT, I GUESS, STAYED THE INJUNCTION, AND SO
6 IT ACTUALLY DIDN'T EVEN GO INTO EFFECT UNTIL AFTER THE COA
7 CHANGE WENT INTO EFFECT AT THE BEHEST OF THE AUTONOMY 5
8 PROCEDURE.

9 **MR. WILLIAMS:** MY UNDERSTANDING IS THAT IN JANUARY OF
10 2015 THAT IS WHEN IT ACTUALLY WENT INTO EFFECT. THE
11 AUTONOMY 5 HAD A VOTE AND A RECOMMENDATION TO THE FULL BODY.
12 BUT MY UNDERSTANDING, AND MR. COOPER WILL CORRECT ME IF I'M
13 WRONG, IS THAT IT DIDN'T GO INTO EFFECT UNTIL JANUARY OF 2015.

14 **THE COURT:** IT DIDN'T GO INTO EFFECT UNTIL AUGUST OF
15 2015.

16 **MR. COOPER:** THAT'S CORRECT, YOUR HONOR.

17 **MR. WILLIAMS:** IT WAS VOTED ON BY THE FULL --

18 **THE COURT:** IT WAS VOTED ON IN JANUARY.

19 **MR. WILLIAMS:** IN JANUARY, CORRECT.

20 **THE COURT:** BUT IT HAD -- SOMETHING HAD HAPPENED. IT
21 WASN'T LIKE THEY JUST MADE IT UP IN JANUARY. THEY HAD BEEN
22 TALKING ABOUT IT PRIOR TO AUGUST 7TH IT SEEMS.

23 SO I GUESS THE ONLY REASON I MENTIONED IT IS I HAD
24 PREVIOUSLY BEEN THINKING OF IT AS SOMETHING THAT WAS DONE IN
25 RESPONSE TO THE COURT'S INJUNCTION. PERHAPS THAT'S A LITTLE

1 MANIACAL. IN FACT, IT SEEMS IT WAS DONE ON THEIR OWN BEFORE
2 THAT EVEN HAPPENED; IS THAT RIGHT? AND DOES THAT AFFECT
3 ANYTHING HERE?

4 **MR. COOPER:** IF I MAY, YOUR HONOR, JUST TO ADDRESS
5 THE FACTUAL ISSUE AND THEN I'LL TURN IT BACK OVER TO
6 MR. WILLIAMS.

7 IN FACT, THE AUTONOMY LEGISLATION HAD BEEN IN THE WORKS
8 FOR QUITE SOME TIME. CAME INTO EFFECT IN 2014. AND THE FIRST
9 PROPOSED LEGISLATION UNDER THE NEW AUTONOMY SYSTEM TOOK PLACE
10 IN JANUARY 2015 AS YOU NOTE, AND THAT INCLUDED THE MOVE TO
11 COA.

12 SO IT WAS A PROCESS THAT PRECEDED THE TRIAL IN THIS CASE
13 AND PRECEDED THE COURT'S INJUNCTION AS THE NINTH CIRCUIT
14 NOTED.

15 **THE COURT:** YEAH. SO DO YOU GLEAN ANYTHING FROM
16 THAT....

17 **MR. WILLIAMS:** OTHER THAN --

18 **THE COURT:** CHRONOLOGY?

19 **MR. WILLIAMS:** OTHER THAN THE FACT IT IS CONSISTENT
20 WITH WHAT THE NINTH CIRCUIT'S RULING WAS, NO, IN OUR VIEW,
21 YOUR HONOR. IT WAS A MOVE BY THE NCAA AND ITS MEMBERS TO GO
22 TO THE FULL COST OF ATTENDANCE IN A MANNER THAT WAS CONSISTENT
23 WITH WHAT THE NINTH CIRCUIT'S RULING WAS IN O'BANNON.
24 ULTIMATELY THAT'S WHAT HAPPENED.

25 **THE COURT:** CONSISTENT BUT PREVIOUS TO.

1 **MR. WILLIAMS:** CORRECT.

2 **THE COURT:** OKAY. SO WAS THERE -- ARE THERE OTHER
3 THINGS THAT YOU WOULD LIKE TO SAY ABOUT PROCOMPETITIVE
4 JUSTIFICATIONS?

5 **MR. WILLIAMS:** I DID WANT TO COMMENT ON THE NOTION OF
6 THIS LOSS OF VALUE INSURANCE, YOUR HONOR.

7 A STUDENT-ATHLETE DOES NOT RECEIVE ANY OF THOSE BENEFITS
8 FROM A POLICY UNLESS IT IS TO REIMBURSE FOR SOME HARM THAT
9 OCCURS TO HIM OR HER. THAT IS NOT PAY. IT IS INSURANCE, AS
10 THE NAME SUGGESTS, THAT ENABLES THE STUDENT-ATHLETE TO PAY IF
11 THEY HAVE SOME DIMINISHED RISK. AND SO --

12 **THE COURT:** BUT THE PREMIUM -- I MEAN, I'M GATHERING
13 THAT THE PREMIUM IS \$50,000 OR THEREABOUTS.

14 **MR. WILLIAMS:** THAT'S CORRECT.

15 **THE COURT:** AND THAT THE SAF MONEY WAS USED TO PAY
16 THE PREMIUM FOR AT LEAST ONE STUDENT TO PURCHASE SUCH LOSS OF
17 VALUE INSURANCE.

18 **MR. WILLIAMS:** THAT IS CORRECT, YOUR HONOR.

19 AND OUR POINT IS SIMPLY THAT THAT IS NOT PAYING A STUDENT
20 TO PLAY. WHAT THAT IS IS A WAY OF DIMINISHING THE RISK TO
21 THAT STUDENT SO THAT THE STUDENT CAN CONTINUE THEIR EDUCATION
22 AND PLAY THEIR SPORT WITHOUT TAKING THE RISK THAT THEIR
23 CAPACITY WILL BE DIMINISHED BY THE FACT THAT THEY PLAYED THE
24 SPORT.

25 SO THAT'S THE DISTINCTION THAT WE WANTED TO MAKE.

1 WITH RESPECT TO THE -- TO WHAT WE HAVE DEMONSTRATED ON THE
2 PROCOMPETITIVE JUSTIFICATIONS, AND WHAT'S ON THE SCREEN HERE
3 IS WHAT IS, IN FACT, OUR BURDEN.

4 (DISPLAYED ON SCREEN.)

5 IN *O'BANNON*, THE COURT SAID THE DISTRICT COURT ULTIMATELY
6 FOUND THAT THE NCAA'S CURRENT UNDERSTANDING OF AMATEURISM
7 PLAYS SOME ROLE IN PRESERVING THE POPULARITY OF THE NCAA'S
8 PRODUCT.

9 AND OUR POINT IS, THAT IT IS NOT DANCING ON THE HEAD OF A
10 PIN TO SUGGEST THAT WHAT THE NINTH CIRCUIT REQUIRES IS THAT
11 THE DEFENDANT, AT STEP TWO, PROVIDES SOME EVIDENCE THAT THE
12 PROCOMPETITIVE BENEFIT PROMOTES SOME UNDERSTANDING OF
13 AMATEURISM. THAT IS A VERY DIFFERENT THING THAN HAVING TO
14 QUANTIFY SOMETHING THAT WOULD HAPPEN IN THE BUT-FOR WORLD.

15 THE BUT-FOR WORLD ANALYSIS, AS MS. WILKINSON WILL DISCUSS
16 EVEN MORE THAN SHE HAS ALREADY, IS SOMETHING THAT IS THE
17 BURDEN OF THE PLAINTIFF. OUR BURDEN AT THIS POINT IS TO
18 ESTABLISH, AS THE DEFENDANT NCAA DID IN *O'BANNON*, THAT THERE
19 ARE THESE PROCOMPETITIVE JUSTIFICATIONS.

20 THE ONES THAT WE HAVE SET FORTH ARE THAT THERE IS AN
21 INCREASE IN DEMAND THAT IS OCCASIONED BY THIS CONCEPT OF
22 AMATEURISM. THAT IS THE IDEA. AND AS THE COURT FOUND IN
23 *O'BANNON* AND AS THE COURT SAID IN *O'BANNON*, THAT IS A
24 PROCOMPETITIVE JUSTIFICATION FOR THE EXISTING RESTRAINTS.

25 THE EVIDENCE FOR THAT IS EVIDENCE THAT IS FROM A VARIETY

1 OF SOURCES. ONE OF THOSE SOURCES IS THE LAY OPINION TESTIMONY
2 THAT WE HAVE DISCUSSED SEVERAL TIMES IN THE TRIAL. WE
3 PROVIDED EVIDENCE FROM MULTIPLE WITNESSES WHO TESTIFIED ABOUT
4 THE BENEFITS OF AMATEURISM INCREASING DEMAND. THAT TESTIMONY
5 WAS BASED ON LITERALLY HUNDREDS IF NOT THOUSANDS OF
6 CONVERSATIONS THAT THOSE WITNESSES, MR. SCOTT, MR. GENE SMITH,
7 MR. ARESCO, AND BY DEPOSITION TESTIMONY MR. MARK LEWIS,
8 THOUSANDS OF CONVERSATIONS THAT THEY HAD WITH THE VARIOUS
9 CONSTITUENCIES THAT ARE INVOLVED IN COLLEGE ATHLETICS.

10 THE PLAINTIFFS RESPOND BY SAYING, WELL, THAT'S JUST
11 SELF-SERVING TESTIMONY. THAT'S INAPPROPRIATE. WE BELIEVE
12 THAT'S SIMPLY NOT SO. UNDER NINTH CIRCUIT JURISPRUDENCE AND
13 UNDER FEDERAL RULE OF EVIDENCE 701(B), IT IS PERFECTLY
14 APPROPRIATE IF A FOUNDATION IS LAID TO GIVE LAY OPINION
15 TESTIMONY IF IT IS BASED UPON SOMEONE'S EXPERIENCE.

16 WE CITED MULTIPLE CASES. I WON'T RECITE THEM HERE. THEY
17 ARE DETAILED IN FOOTNOTE 48 OF OUR CLOSING BRIEF, BUT I DID
18 WANT TO MAKE THE POINT ALSO RELATEDLY THAT THERE ARE A COUPLE
19 OF CASES, BOTH IN THE NINTH CIRCUIT, THAT TALK ABOUT THIS
20 ISSUE OF PROCOMPETITIVE EFFECTS, AND THEY BASE THEIR FINDINGS
21 OF PROCOMPETITIVE EFFECTS ON JUST THE VERY SAME TYPE OF
22 EVIDENCE THAT WE ARE TALKING ABOUT HERE. AND THEY ARE BOTH
23 CITED IN OUR BRIEF.

24 ONE IS *CALIFORNIA DENTAL ASSOCIATION VERSUS THE FTC*, NINTH
25 CIRCUIT CASE FROM 2000. BASICALLY THAT CASE WAS ABOUT

1 DENTISTS WHO CLAIM THAT THERE ARE CERTAIN RULES ON ADVERTISING
2 THAT WERE ESSENTIAL TO KEEP PATIENTS FROM BEING HURT AND
3 HARMED BY UNSCRUPULOUS DENTISTS WHO ADVERTISE IN A CERTAIN
4 WAY. ALL OF THE EVIDENCE IN STEP TWO IN THAT CASE, ALL OF IT,
5 WAS BASED UPON TESTIMONY FROM DENTISTS WHO WERE TALKING ABOUT
6 THE REASONS WHY THEY HAD THIS RESTRICTION ON CERTAIN TYPES OF
7 ADVERTISING THAT THEY BELIEVED, THAT THE INDUSTRY BELIEVED
8 WOULD LEAD PEOPLE TO IMPROPER CONDUCT. THAT'S THE *CALIFORNIA*
9 *DENTAL* CASE.

10 IN THE *HAIRSTON* CASE, *HAIRSTON VERSUS THE PAC-10* BEFORE
11 THE CHANGE OCCURRED, IT'S FROM 1996; THAT'S A CASE WHERE THE
12 PAC-10 PROVED PROCOMPETITIVE EFFECTS WITHOUT ANY KIND OF A
13 COMMON METRIC ANALYSIS, IT PROVED THE PROCOMPETITIVE EFFECTS
14 BASED UPON TESTIMONY OF PEOPLE JUST LIKE THE FOLKS WHO
15 TESTIFIED HERE.

16 SO THERE IS NO VICE TO THE NATURE OF THE EVIDENCE THAT WE
17 PRESENTED. IT IS THE SAME SUM OF THE SAME TYPE OF EVIDENCE
18 THAT WAS PRESENTED IN THE *O'BANNON* MATTER.

19 BUT IN ADDITION TO THAT EVIDENCE, CONCERNING THE LAY
20 OPINION TESTIMONY, THERE'S THE TESTIMONY FROM -- THAT TOOK THE
21 FORM OF SURVEYS.

22 IF YOU CAN GO TO SLIDE 7, MR. SOLDRIDGE.

23 (DISPLAYED ON SCREEN.)

24 WE PRESENTED THE EVIDENCE FROM DR. ISAACSON WHERE HE ASKED
25 PEOPLE TWO RELEVANT QUESTIONS -- TWO QUESTIONS RELEVANT TO

1 STEP TWO. ONE OF THOSE QUESTIONS HAD TO DO --

2 **THE COURT:** I'M PRETTY FAMILIAR AND I REMEMBER QUITE
3 WELL WHAT ISAACSON HAD TO SAY. SO I DON'T THINK YOU NEED TO
4 TELL ME THAT.

5 WHAT I WOULD LIKE TO HEAR ABOUT IS WHAT YOU THINK ABOUT
6 INTEGRATION.

7 **MR. WILLIAMS:** OKAY. VERY WELL.

8 **THE COURT:** UNLESS THERE'S SOME TOTALLY DIFFERENT
9 POINT THAT YOU FEEL YOU NEED TO ADDRESS ON THE OTHER THING, I
10 WOULD LIKE, BEFORE YOU SIT DOWN, WHICH YOU WILL NEED TO DO
11 SOON, I WOULD LIKE TO HEAR YOUR THOUGHTS ON INTEGRATION.

12 **MR. WILLIAMS:** YES.

13 FIRST, WHAT ARE WE TALKING ABOUT INTEGRATION. IF YOU
14 WOULD GO TO SLIDE 14, MR. SOLDRIDGE.

15 (DISPLAYED ON SCREEN.)

16 **THE COURT:** I GUESS THE REAL QUESTION IS WHAT ARE YOU
17 TALKING ABOUT IN TERMS OF HOW WOULD YOU ARTICULATE WHAT YOU
18 PURPORT TO BE THE PROCOMPETITIVE JUSTIFICATION RELATED TO
19 SOMETHING THAT WE'VE BECOME ACCUSTOMED TO CALLING INTEGRATION?

20 **MR. WILLIAMS:** IT IS TWO THINGS. FIRST, IT IS THE
21 INTEGRATION OF ACADEMICS AND ATHLETICS. AND SECOND --

22 **THE COURT:** MEANING WHAT? IN WHOSE HEAD?

23 **MR. WILLIAMS:** MEANING THAT --

24 **THE COURT:** IN THE HEAD OF THE ATHLETES? IN THE HEAD
25 OF THE OTHER STUDENTS, IN THE HEAD OF THE PUBLIC?

1 **MR. WILLIAMS:** IT IS BOTH. IT'S THE INTEGRATION
2 BETWEEN ATHLETICS AND ACADEMICS HAS TO DO WITH THE BALANCE,
3 THE EQUILIBRIUM, AS DR. HECKMAN PUT IT, THAT CURRENTLY EXISTS
4 WHERE STUDENT-ATHLETES GET EXCELLENT OUTCOMES WITH RESPECT TO
5 THEIR ACADEMIC SIDE AND EXCELLENT OUTCOMES IN TERMS OF THEIR
6 ATHLETIC SIDE HAVING TO DO WITH LEADERSHIP, BEING ABLE TO DEAL
7 WITH ADVERSITY AND WITH SUCCESS ALL THE SAME WAY. THOSE TYPES
8 OF THINGS. THAT KIND OF INTEGRATION.

9 THE NOTION IS THAT PAYING ATHLETES, THAT IS, REMOVING THE
10 LIMITATIONS ON PAY AND COMPENSATION CAUSES ATHLETES FROM AN
11 ECONOMIC POINT OF VIEW TO SPEND MORE ATTENTION, HAVE MORE
12 FOCUS UPON THE PART THAT IS RESULTING IN THEIR BEING PAID,
13 THAT IS, THE ATHLETIC PORTION OF THEIR COLLEGE EXPERIENCE.

14 SO THE IDEA OF INTEGRATION IS THAT THERE IS A BALANCE,
15 THAT THAT BALANCE IS DISRUPTED IF PEOPLE ARE PAID. THERE WAS
16 TESTIMONY FROM PEOPLE LIKE DR. HATCH, FROM GENE SMITH FROM
17 OHIO STATE TALKING ABOUT THIS ISSUE OF HOW THE STUDENTS SPEND
18 THEIR TIME. AND HOW --

19 **THE COURT:** BUT DIDN'T DR. HECKMAN SAY THAT IF A
20 STUDENT WAS HAVING A GOOD OUTCOME FROM GOING TO COLLEGE AND
21 DOING ATHLETICS THAT HE WOULD HAVE AT LEAST AS GOOD IF NOT A
22 BETTER OUTCOME IF HE HAD A LITTLE MORE MONEY?

23 **MR. WILLIAMS:** NO, THAT WAS NOT DR. HECKMAN'S
24 TESTIMONY. IN FACT, DR. HECKMAN TESTIFIED THAT THERE'S NO
25 SCIENTIFIC EVIDENCE THAT ACADEMIC ACHIEVEMENT PAYMENTS, SUCH

1 AS PAYING STUDENT-ATHLETES FOR THEIR GPA OR THEIR PROGRESS --

2 **THE COURT:** NOT THOSE, JUST HAVING A LITTLE MORE
3 MONEY.

4 **MR. WILLIAMS:** I DON'T BELIEVE THERE'S EVIDENCE FROM
5 DR. HECKMAN TO THAT EFFECT, NO. IN FACT, I THINK HE CITED
6 STUDIES, ONE OF THE ONES THAT HE CITED HE CO-AUTHORED WITH
7 ROLAND FRYER AS AN EXAMPLE OF A LARGE BODY OF ACADEMIC
8 LITERATURE IN ECONOMICS AND EDUCATION THAT SHOWS THAT IF YOU
9 WERE TO TRY TO CHANGE THE INCENTIVES BY PAYING FOR THEIR
10 GRADES, PAYING FOR GETTING THROUGH, THAT THAT WOULD BE
11 DISRUPTIVE AND WOULD NOT BE SUCCESSFUL. INDEED --

12 **THE COURT:** SET ASIDE THE INCENTIVE ANGLE --

13 **MR. WILLIAMS:** YES.

14 **THE COURT:** -- JUST THE NOTION OF HAVING A LITTLE
15 MORE MONEY, HIGHER -- HAVING THE PELL GRANT ON TOP OF THE COA
16 OR HAVING THE SAF FUND, OR WHATEVER, HOW WOULD THAT MAKE THEM
17 LESS ACADEMICALLY ORIENTED?

18 **MR. WILLIAMS:** THE QUESTION IS REALLY THE PURPOSE OF
19 THE PAYMENT AND HOW IT IS RECEIVED.

20 WHAT WE ARE ARGUING IS, IF YOU ARE TAKING AWAY THE CURRENT
21 LIMITATIONS AND YOU PAY THE ATHLETES, YOU PAY THEM A SALARY,
22 YOU GIVE THEM MONEY, BY REASON OF THE FACT THAT THEY ARE
23 COMPETING IN ATHLETICS, THAT HAS ALL OF THE VICES WE DISCUSSED
24 REGARDING PAY FOR PLAY, AND WE BELIEVE THAT THAT IS, FROM AN
25 INTEGRATION STANDPOINT, DISRUPTIVE BECAUSE IT CHANGES THE

1 INCENTIVE OF THE ATHLETE. AND THAT WAS THE NATURE OF THE
2 TESTIMONY.

3 **THE COURT:** WELL CERTAINLY THERE WAS TESTIMONY ABOUT
4 INCENTIVE PAY. BUT IF WE DON'T CALL IT INCENTIVE PAY, IF WE
5 CALL IT A LARGER SCHOLARSHIP, IS THERE ANY EVIDENCE THAT THAT
6 WOULD MAKE PEOPLE LESS ACADEMICALLY ORIENTED?

7 **MR. WILLIAMS:** THERE WAS ACTUALLY TESTIMONY ABOUT
8 BOTH THINGS. THE TESTIMONY ABOUT WHAT THE PROBLEMS WOULD BE
9 WITH JUST GIVING THEM ADDITIONAL MONEY. THAT CAME FROM
10 MR. SCOTT. IT CAME FROM MR. SMITH. MR. SCOTT, THE
11 COMMISSIONER OF THE PAC-12. THEY BOTH TESTIFIED ABOUT THE
12 PROBLEMS WITH PAYING ATHLETES.

13 THEIR NOTION THAT, A, IN CURRENT DAY, THE ATHLETES, ONCE
14 THEY RECEIVED ENOUGH SO THAT THEY GET TO THE COST OF
15 ATTENDANCE, ARE SATISFIED; THAT THEY DON'T HEAR COMPLAINTS
16 FROM ATHLETES ABOUT THAT. THAT -- WHILE THERE WAS A POINT IN
17 TIME WHEN YOU WOULD HEAR COMPLAINTS I CAN'T GET A PIZZA, CAN'T
18 GO TO THE MOVIE, THAT TYPE OF THING, ONCE THE MOVE TO COST OF
19 ATTENDANCE OCCURRED, THOSE COMPLAINTS CEASED.

20 THEIR POINT IS THAT IF YOU PAID THE ATHLETES, IN ADDITION
21 YOU GAVE THEM A SALARY, YOU GAVE THEM MONEY FROM SOME
22 SOURCE --

23 **THE COURT:** I'M NOT ASKING YOU THAT. I'M ASKING YOU
24 THE SCHOLARSHIP IS HIGHER, THE SAF MONEY IS GIVEN. I'M NOT
25 TALKING ABOUT PAYING A MINIMUM WAGE OR INCENTIVE PAYMENTS OR

1 ANYTHING ELSE, BUT JUST HAVING MORE MONEY IN THEIR POCKET, IS
2 THERE SOMEONE WHO SAID THAT THAT WOULD MAKE THEM LESS INCLINED
3 TO WORK ON THEIR ACADEMICS?

4 **MR. WILLIAMS:** YES.

5 **THE COURT:** WHO?

6 **MR. WILLIAMS:** THAT WAS DR. HECKMAN. DR. HECKMAN
7 TESTIFIED ABOUT THAT. AND IN ADDITION, BOTH OF THE SO-CALLED
8 LAY WITNESSES, MR. SMITH AND MR. SCOTT --

9 **THE COURT:** I REMEMBER WHAT YOU SAID ABOUT SCOTT.
10 WAS THERE SOMETHING DIFFERENT THAT SMITH SAID THAT I AM
11 FORGETTING? WHAT DID HE SAY? I DON'T REMEMBER.

12 **MR. WILLIAMS:** MR. SMITH TESTIFIED ABOUT THE -- A
13 COUPLE OF THINGS.

14 FIRST, THAT MANY ATHLETES WHO GET TO SCHOOL HAVE A CERTAIN
15 PERCEPTION THAT THEY ARE GOING TO TURN PRO. REMEMBER THAT
16 THERE WAS THIS DISCUSSION OF CARDALE JONES, A QUARTERBACK AT
17 OHIO STATE UNIVERSITY. MR. JONES IS THAT PERSON WHO AT THE
18 TIME HE CAME, IN HIS POINT OF VIEW, ALL HE WAS THERE TO DO WAS
19 TO PLAY FOOTBALL; WHY DOES HE HAVE TO GO TO CLASS? HE
20 LITERALLY TWEETED THAT OUT. YOU RECALL THAT THAT TWEET CAME
21 INTO EVIDENCE.

22 THE REASON WHY WE THOUGHT THAT THAT WAS IMPORTANT IS THAT
23 IT DEMONSTRATES HOW THE PSYCHE OF MANY STUDENT-ATHLETES IS
24 WHEN THEY COME IN BEFORE THEY LEARN, FIRST, THAT MANY KIDS
25 DON'T GO PRO, SECOND, THAT THE MONEY -- THAT IF THEY WERE PAID

1 MONEY, THEIR INCENTIVE TO GO TO CLASS, THEIR WHOLE FOCUS ON
2 THE ACADEMIC SIDE WOULD CHANGE. THAT'S WHAT GENE SMITH WAS
3 TESTIFYING ABOUT. WHAT HE WAS SAYING IS THAT --

4 **THE COURT:** OKAY. OKAY. IF THAT'S -- I REMEMBER
5 THAT TESTIMONY.

6 **MR. WILLIAMS:** THAT'S THE TESTIMONY.

7 **THE COURT:** ALL RIGHT. IS THERE ANYTHING CRUCIAL
8 THAT YOU THINK YOU NEED TO ADD BEFORE I TURN TO THE OTHER SIDE
9 ON PROCOMPETITIVE JUSTIFICATIONS?

10 **MR. WILLIAMS:** LAST THING I'LL MENTION IS THE NOTION
11 OF A WEDGE THAT WOULD BE INCREASED IF YOU WERE TO SUGGEST THAT
12 THE STUDENT-ATHLETES RECEIVE EVEN MORE.

13 THE EVIDENCE CAME IN FROM A VARIETY OF SOURCES,
14 MS. HARTMAN, MR. SMITH, MR. HATCH -- DR. HATCH, THAT THERE
15 ALREADY IS A PERCEPTION ON MANY CAMPUSES THAT THE
16 STUDENT-ATHLETES ARE FAVORED IN SOME WAY.

17 THE ARGUMENT IS THAT IF YOU PAY THOSE ATHLETES EVEN MORE,
18 A WEDGE IS DRIVEN BETWEEN THOSE ATHLETES AND THEIR BROTHER AND
19 SISTER STUDENTS, THEIR BROTHER AND SISTER TEAMMATES AND,
20 INDEED, WITH FACULTY, STAFF, AND OTHERS WHO WILL BE, FRANKLY,
21 TURNED OFF BY THE NOTION THAT STUDENT-ATHLETES, IN ADDITION TO
22 GETTING A FULL RIDE, IN ADDITION TO GETTING THE FULL COST OF
23 ATTENDANCE, ARE RECEIVING MONEY JUST BY REASON OF THE FACT
24 THAT THEY PLAY THEIR SPORT.

25 **THE COURT:** SO THOSE PEOPLE WILL BE MEAN TO THE

1 ATHLETES AND THE ATHLETES WILL FEEL BAD?

2 **MR. WILLIAMS:** THAT WILL REDUCE THE DEMAND FOR THE --
3 REDUCE THE LIKELIHOOD THAT STUDENT-ATHLETES WOULD WANT TO COME
4 TO A SCHOOL, YES, THAT WOULD HAVE AN IMPACT ON THE QUALITY OF
5 THE EDUCATION AND THE QUALITY OF THE EXPERIENCE.

6 YES, THAT'S THE ARGUMENT.

7 **THE COURT:** STUDENTS ON TEAMS GET VARYING AMOUNTS OF
8 MONEY UNDER THE CURRENT REGIME, I GUESS. WE KNOW THERE'S
9 WALK-ONS WHO DON'T GET ANY MONEY. WE KNOW THERE'S PEOPLE WITH
10 FULL COA SCHOLARSHIPS.

11 I BELIEVE, AND YOU CAN TELL ME, WHETHER THERE ARE OTHER
12 DISPARITIES, LIKE SOME STUDENTS GETTING A PARTIAL SCHOLARSHIP,
13 GETTING A GIA-ONLY SCHOLARSHIP, GETTING ONLY A PARTIAL GIA
14 SCHOLARSHIP; IS THAT NOT TRUE?

15 **MR. WILLIAMS:** I THINK THE WAY THAT IT WOULD WORK OUT
16 IN BASKETBALL AND FOOTBALL, YOUR HONOR, RELEVANT TO THIS CASE
17 IS THAT, YES, THERE ARE SOME STUDENT-ATHLETES WHO RECEIVE PELL
18 GRANTS, FOR EXAMPLE, OTHERS WHO ARE NOT QUALIFIED, SO THERE
19 ARE SOME WHO WOULD RECEIVE FULL COST OF ATTENDANCE BUT NOT A
20 PELL GRANT, SO THERE WOULD BE SOME SLIGHT DISPARITIES.

21 WITH REGARD TO --

22 **THE COURT:** THERE WOULD BE SOME WHO WOULDN'T EVEN GET
23 A FULL COST OF ATTENDANCE, THEY MIGHT GET A HALF A
24 SCHOLARSHIP, OR HALF A GIA, OR SOMETHING LIKE THAT.

25 **MR. WILLIAMS:** FOR FOOTBALL AND BASKETBALL THAT IS

1 SIMPLY NOT THE CASE. THE SO-CALLED HALF SCHOLARSHIPS
2 TYPICALLY INVOLVES OTHER SPORTS, NONBASKETBALL AND
3 NONFOOTBALL.

4 **THE COURT:** THERE ARE WALK-ONS, I TAKE IT, WHO DON'T
5 GET ANY SCHOLARSHIP.

6 **MR. WILLIAMS:** THAT IS CORRECT. THE EVIDENCE ON
7 THAT, I BELIEVE, THIS IS ALSO FROM MR. SMITH, WAS THAT MOST OF
8 THE WALK-ONS SEEK TO GET A FULL RIDE. THAT IS THEIR DESIRE,
9 THEY WANT TO GET A FULL RIDE.

10 **THE COURT:** ONE WOULD ASSUME SO.

11 **MR. WILLIAMS:** AND THE NOTION THERE WAS THAT IF A
12 WALK-ON ATHLETE WERE TO VOICE AN OPINION THAT THEY ARE
13 OUTRAGED OR SOMETHING THAT THEY ARE NOT GETTING PAID, THAT IS
14 PROBABLY THE FASTEST WAY THAT A WALK-ON WOULD NO LONGER BE A
15 WALK-ON AND WOULD NO LONGER BE ON A TEAM. THAT IS WHAT
16 MR. SMITH WAS DRIVING AT.

17 BUT, YES, YOU ARE CORRECT, AS A MATTER OF FACT THERE ARE
18 CURRENTLY SOME STUDENTS, WALK-ONS WHO RECEIVE NO MONEY AND
19 THERE ARE OTHER STUDENTS WHO RECEIVE FULL RIDES. THE NOTION
20 OF TENSION THAT EXISTS BETWEEN THOSE ATHLETES, TENSION IN THE
21 SENSE OF ENVY, TENSION IN THE SENSE OF WANTING TO GET A
22 SCHOLARSHIP, WHICH MANY WALK-ON ATHLETES GET, YES.
23 ARTICULATED EXPRESSIONS OF THAT ATTITUDE, NO.

24 **THE COURT:** SO YOU ARE SAYING THAT SOMEBODY MIGHT
25 THINK, WELL, WHAT COLLEGE SHOULD I GO TO? THIS ONE PAYS MORE

1 SO AT THAT ONE OTHER STUDENTS MIGHT BE MEAN TO ME. AND THIS
2 ONE PAYS LESS, SO THE OTHER STUDENTS AREN'T GOING TO BE MEAN
3 TO ME AT THAT COLLEGE, SO I THINK I WILL GO TO THE ONE THAT
4 PAYS LESS SO THAT I WILL HAVE NO ONE BEING MEAN TO ME?

5 **MR. WILLIAMS:** NO. I DON'T THINK IT'S THIS "MEAN TO
6 ME". I THINK THE NOTION OF DISPARITIES IN PAYMENT HAS TO DO
7 WITH DIVISIONS AMONGST THE PLAYERS ON A TEAM. THAT IS, WHY IS
8 THIS QUARTERBACK --

9 **THE COURT:** I THOUGHT YOU WERE SAYING EVERYBODY GOT
10 THE SAME AMOUNT EXCEPT FOR THE WALK-ONS.

11 **MR. WILLIAMS:** UNDER THE CURRENT REGIME, UNDER THE
12 REGIME THAT THE PLAINTIFFS ARE SUGGESTING WHERE YOU HAVE A
13 MARKET THAT COULD HAVE SOME PLAYERS PAID MORE THAN OTHERS.
14 YOU COULD HAVE THOSE --

15 **THE COURT:** OH, WITHIN THE SAME TEAM YOU'RE SAYING.

16 **MR. WILLIAMS:** CORRECT.

17 AND, INDEED, IN ADDITION TO THAT, IF EVERYONE RECEIVED THE
18 SAME BECAUSE THEY ARE A FOOTBALL PLAYER, BECAUSE THEY ARE A
19 BASKETBALL PLAYER, THAT'S WHERE YOU GET THE WEDGE ISSUES WITH
20 RESPECT TO OTHER STUDENTS, FACULTY, ET CETERA.

21 **THE COURT:** WHICH WOULD AFFECT THE STUDENT'S DECISION
22 BECAUSE THEY WOULD FEAR THAT OTHER PEOPLE WOULD BE -- WOULD
23 HARBOR RESENTMENTS AGAINST THEM, SHALL WE SAY? SO THEY
24 WOULDN'T WANT TO GET MORE MONEY, THEY'D WANT TO GO SOMEWHERE
25 ELSE BECAUSE THEY WOULD BE AFRAID THAT RESENTMENT WOULD BE

1 HARBORED AGAINST THEM.

2 **MR. WILLIAMS:** THAT OVER TIME IT MAKES THE QUALITY OF
3 THE EXPERIENCE WORSE WHICH MAKES THE STUDENTS NOT WANT TO COME
4 TO COLLEGES FOR THAT PURPOSE, AND THAT IT DECREASES THE DEMAND
5 FOR THE SPORT.

6 **THE COURT:** THAT'S WHAT I WANT TO MAKE SURE THAT YOU
7 DON'T GET INTO. BECAUSE TO THAT EXTENT, INTEGRATION IS JUST
8 ANOTHER WAY OF SAYING CONSUMER DEMAND. THEY NEED TO BE
9 SEPARATED. IF THERE'S A SEPARATE ONE CALLED INTEGRATION, IT
10 NEEDS TO BE DISTINGUISHABLE ANALYTICALLY FROM THE ONE THAT'S
11 CALLED CONSUMER DEMAND.

12 **MR. WILLIAMS:** THAT'S FINE. THEY ARE TWO DIFFERENT
13 CONCEPTS, YES.

14 **THE COURT:** SO WE DON'T WANT TO TALK ABOUT CONSUMER
15 DEMAND WHEN WE ARE TRYING TO TEASE OUT WHAT DOES INTEGRATION
16 REALLY MEAN.

17 OKAY. DID YOU WANT TO RESPOND TO ANY OF THAT?

18 **MR. BERMAN:** I THINK ALL OF IT, YOUR HONOR.

19 **MR. KESSLER:** YEAH, YOUR HONOR. AFTER MR. BERMAN
20 GOES, I HAVE A BUNCH OF CITATIONS TO THE RECORD I THINK WILL
21 ADD TO YOUR HONOR'S SPECIFIC QUESTIONS. MR. BERMAN WILL
22 DISCUSS THIS GENERAL ISSUE OF JUSTIFICATION.

23 **THE COURT:** OKAY.

24 **MR. BERMAN:** SINCE WE LEFT OFF WITH INTEGRATION, I'LL
25 START THERE IF THAT'S OKAY, YOUR HONOR.

1 **THE COURT:** OKAY.

2 **MR. BERMAN:** SO THE NINTH CIRCUIT IN *O'BANNON* NOTED
3 THAT IMPROVING EDUCATIONAL EXPERIENCE AND EDUCATIONAL MISSION
4 IS NOT ENOUGH. INSTEAD, THE COURT HELD THAT THE NCAA MUST
5 COME FORWARD WITH ECONOMIC EVIDENCE THAT INTEGRATION CAUSES
6 EITHER AN INCREASE IN DEMAND FOR THEIR PRODUCT OR INCREASE IN
7 CONSUMER WELFARE. THAT WAS THEIR BURDEN.

8 AND I SUBMIT TO THE COURT, ONE, THEY HAVE SUBMITTED NO
9 ECONOMIC EVIDENCE WHATSOEVER THAT AN INCREASE IN COMPENSATION
10 BENEFITS -- IN COMPENSATION OR EDUCATION-TETHERED BENEFITS
11 WOULD CAUSE A DECREASE IN INTEGRATION.

12 FOR ONE REASON, WE DON'T CHALLENGE THE ELIGIBILITY RULES
13 IN TERMS OF ACADEMIC ELIGIBILITY. SO IF THEY ARE WORRIED
14 ABOUT INTEGRATION, THOSE RULES ARE INTACT. THEY CAN EVEN
15 STRENGTHEN THE RULES TO MAKE SO THEY HAVE TO ATTEND MORE
16 CLASSES OR ACHIEVE A CERTAIN GPA.

17 THE ONLY EVIDENCE IN THE RECORD, ECONOMIC EVIDENCE IS THAT
18 AFTER COA CAME INTO PLACE AND SAF AND OTHER INCIDENTALS, THE
19 GRADUATION RATES HAVE GONE UP. AND THAT'S PARAGRAPH 144 OF
20 DR. NOLL'S TESTIMONY. SO IT HAS BEEN A POSITIVE RELATIONSHIP
21 BETWEEN INCREASED BENEFITS AND ACADEMIC RATES. TO ME THAT IS
22 THE ANTITHESIS OF SOME PROCOMPETITIVE BENEFIT FROM
23 INTEGRATION.

24 NOW, YOU ASKED DR. HECKMAN THE VERY QUESTION: WOULDN'T
25 STUDENT-ATHLETES BE BETTER OFF IF THEY RECEIVED MORE PAYMENTS?

1 AND ALTHOUGH MY COLLEAGUE SAID YOU DIDN'T DO IT, IT'S ON
2 PAGE 596 THROUGH 597 OF THE TRANSCRIPT. YOU ASKED HIM THE
3 QUESTION:

4 "DO YOU HAVE ANY ECONOMIC EVIDENCE SHOWING THAT
5 ACADEMIC OUTCOMES WOULD SUFFER WITH MORE MONEY?"

6 AND AFTER TWO OR THREE PAGES OF HEMMING AND HAWING, HE
7 FINALLY SAID THE FOLLOWING:

8 "CLEARLY, IF YOU JUST GIVE THE STUDENT ALONE THE
9 MONEY, JUST GIVE THE STUDENT ANOTHER DOLLAR, ANOTHER
10 PENNY, ANOTHER 10,000, THE STUDENT IS CLEARLY BETTER
11 OFF. NO QUESTION ABOUT IT."

12 SO FROM A CONSUMER WELFARE POINT OF VIEW, FROM THE
13 STUDENT-ATHLETE'S POINT OF VIEW, THEY ARE BETTER OFF. SO THEY
14 FAILED THEIR BURDEN THERE.

15 THAT IS CORROBORATED THAT THEY WOULD BE BETTER OFF WITH
16 MORE MONEY AND THERE WOULD BE NO HARM TO INTEGRATION,
17 MR. ALSTON WAS IN THE COURTROOM, AND HE HEARD DR. HECKMAN SAY
18 IT WOULD BE QUOTE "DANGEROUS TO GIVE THE STUDENT-ATHLETES MORE
19 MONEY".

20 I ASKED MR. ALSTON: WHAT DO YOU THINK ABOUT THAT? AND I
21 THINK, YOUR HONOR, HE FLATLY AND CREDIBLY SAID: NO. QUOTE,
22 "IF HE GAVE PEOPLE MORE MONEY, THEY WOULD PROBABLY FOCUS ON
23 ATHLETICS THE SAME, BUT THEY WOULD ALSO FOCUS ON OTHER THINGS.
24 SO I DON'T THINK GIVING ME MORE MONEY WOULD MAKE THEM MORE
25 FOCUSED ON FOOTBALL."

1 IN FACT, DR. NOLL CITES ECONOMIC LITERATURE. AND THIS IS
2 AT NOLL PARAGRAPH 143 AND HIS REDIRECT AT 366, THAT THE
3 ACADEMIC EVIDENCE SUGGESTS MORE MONEY ACTUALLY IMPROVES,
4 IMPROVES EDUCATIONAL OUTCOMES.

5 SO THE EDUCATIONAL OUTCOME ARGUMENT ON INTEGRATION IS A
6 FAILURE, AND THAT TAKES ME TO THE WEDGE.

7 AGAIN, THEY MUST SHOW SOMETHING OTHER THAN THE SOCIAL
8 PHILOSOPHY THAT THERE MIGHT BE RESENTMENT. THEY HAVE TO SHOW
9 THAT THERE'S A CAUSAL CONNECTION BETWEEN AN IMPROVEMENT IN
10 ECONOMIC WELFARE, MUST EITHER INCREASE DEMAND FOR THE PRODUCT
11 OR QUALITY OF THE PRODUCT. AND THEY HAVEN'T DONE THAT.

12 BECAUSE THE TESTIMONY IS, FOR EXAMPLE, DEFENDANTS'
13 WITNESSES HAVE ADMITTED THAT SINCE WE WENT TO COA, PLUS FAS,
14 PLUS PELL GRANTS, THERE'S BEEN NO HARM TO INTEGRATION AND NO
15 WEDGE. AND THAT IS MR. LENNON'S TRANSCRIPT AT 316 AND
16 MR. SWOFFORD'S TRANSCRIPT AT 67.

17 SO WE HAVE AN INCREASE IN COMPENSATION, NO WEDGE. THAT'S
18 IS REAL LIFE EXPERIENCE.

19 **THE COURT:** WELL, I GUESS THE ARGUMENT IS THAT IF IT
20 WERE A LOT MORE THAN THAT, THEN THERE WOULD BE A WEDGE.

21 **MR. BERMAN:** WELL, THEN THAT GETS TO THIS WHOLE, WHAT
22 I CALL, THE DRACONIAN WORLD THAT THEY CONJURE UP IS GOING TO
23 HAPPEN HERE. AGAIN, THE HEART OF OUR CASE IS THEY ARE NOT
24 GOING TO DO ANYTHING THAT'S GOING TO HURT DEMAND. THEY HAVE
25 ADMITTED THAT.

1 EVERY SINGLE WITNESS GOT ON THE STAND. I ASKED MR. HATCH:
2 YOU WOULD RESPOND TO LESSENING OF THE RULES IN A PRUDENT
3 MANNER? HE SAID: YES.

4 YOU BE CAREFUL ABOUT IT? YES.

5 YOU WOULDN'T DO ANYTHING THAT WOULD REDUCE DEMAND. SO IF
6 THEY THINK THERE'S A LEVEL THAT IS GOING TO CAUSE A WEDGE,
7 THEY WILL NEVER REACH THAT LEVEL. THAT'S WHAT MARKET BEHAVIOR
8 IS ALL ABOUT.

9 SO, WEDGE, THEY HAVE ADMITTED THERE'S BEEN NO HARM. THE
10 CLASS REPRESENTATIVES TESTIFIED THAT THEY WOULD HAVE MORE
11 INTERACTION IF THEY HAD A BIT MORE MONEY. THAT'S MR. ALSTON
12 AT PAGE OF 680 AND MS. HARTMAN AT PAGE 810.

13 AND LET'S NOT SHY AWAY FROM THE FACT, DESPITE WHAT
14 MR. WILKINSON -- WHAT MR. -- WHAT BART SAID, THERE ARE HUGE --

15 **MR. WILLIAMS:** MR. WILLIAMS.

16 **MR. BERMAN:** SORRY. THERE ARE HUGE DIFFERENCES IN
17 EXISTING TEAMS AMONG THE KIDS WHAT THEY ALREADY HAVE. YOU
18 HAVE SOME KID WITH ZERO SAF MONEY, YOU HAVE OTHER KIDS WITH UP
19 TO \$50,000 IN SAF MONEY, YOU HAVE OTHER KIDS WITH 10,000 IN
20 SAF MONEY --

21 **THE COURT:** I'M NOT SURE WE KNOW THAT. I'M NOT
22 SURE --

23 **MR. BERMAN:** I'LL GET TO THAT --

24 **THE COURT:** -- I'LL BE ABLE TO FIND THAT, BUT
25 PERHAPS.

1 **MR. BERMAN:** AND YOU HAVE AN EXAMPLE WHERE MR. JACOBS
2 TESTIFIED THAT HE IS A TEAMMATE WITH A MILLION-DOLLAR SIGNING
3 BONUS. HE COMES IN AND PLAYS FOR FOUR YEARS. HE GOT A
4 SIGNING BONUS FOR MAJOR LEAGUE BASEBALL. COMES IN AND PLAYS
5 FOOTBALL. SO HE'S SITTING NEXT TO A MILLIONAIRE. THIS IS
6 WHAT THEY ARE SO WORRIED ABOUT. WHAT DOES MR. JENKINS SAY TO
7 HIM? THIS IS AT PAGE 735.

8 GOOD FOR YOU BUDDY. I'M GLAD YOU GOT THIS DEAL.

9 NO WEDGE.

10 SO, YOUR HONOR, THEY HAD THE BURDEN ON THE WEDGE, AND I
11 THINK THAT THEY FAILED TO MEET THE BURDEN.

12 AND OVERLAYING ON THIS ISSUE, AND I DON'T ACTUALLY KNOW
13 HOW YOU WORK THIS IN, BUT I THINK THERE'S PLENTY OF EVIDENCE
14 THAT THIS WHOLE ISSUE OF INTEGRATION IS ACTUALLY A MYTH.
15 THERE'S NO INTEGRATION. THERE'S NO INTEGRATION FOR TWO
16 REASONS OR THAT THE NCAA REALLY CARES ABOUT THIS.

17 NUMBER ONE, THE NCAA KNOWS, AND THE EVIDENCE WAS PRETTY
18 CLEAR AT THE TRIAL THAT THE TIME DEMANDS ON THESE KIDS ARE SO
19 GREAT, THEY ARE SPENDING 45, 50 HOURS A WEEK JUST ON THEIR
20 SPORT, AND THEN THEY HAVE TO GO SPEND ANOTHER 40 HOURS OR 30
21 HOURS A WEEK ON SCHOOL, SO THEY HAVE NO TIME TO BE INTEGRATED.

22 AND THAT KIND OF COMES THROUGH IN EXHIBITS 59 AND JOINT
23 EXHIBIT 14 WHERE THE SCHOOLS ARE OUT SURVEYING, AND KIDS ARE
24 SAYING WE ARE PREVENTED FROM TAKING THE CLASSES WE WANT TO
25 TAKE, WE DON'T GET ENOUGH TIME TO SLEEP.

1 SO THE NOTION THAT THE NCAA REALLY CARES ABOUT
2 INTEGRATION, I THINK, IS A FARCE. IF THEY CARE ABOUT
3 INTEGRATION, FOR EXAMPLE, THEY CAN PASS A NATIONAL RULE THAT
4 STUDENT-ATHLETES HAVE TO LIVE IN DORMS WITH OTHERS, BUT THEY
5 DON'T. IT IS LEFT UP TO EACH SCHOOL.

6 THE LAST POINT I WANT TO MAKE ON INTEGRATION, YOUR HONOR,
7 AND THAT IS I THINK THERE IS AN UTTER FAILURE OF PROOF TO MEET
8 THEIR BURDEN ON THE SECOND POINT OF OUR ALTERNATIVES, THAT IS,
9 EDUCATION-TETHERED BENEFITS. THEY PUT IN NO ECONOMIC EVIDENCE
10 THAT IF YOU GAVE A STUDENT-ATHLETE ADDITIONAL GRADUATION
11 TUITION, THAT THAT WOULD BE --

12 **THE COURT:** ADDITIONAL WHAT?

13 **MR. BERMAN:** GRADUATE SCHOOL TUITION.

14 **THE COURT:** AT A DIFFERENT INSTITUTION YOU MEAN?

15 **MR. BERMAN:** OR AT THE SAME INSTITUTION. THAT'S AN
16 EDUCATION-TETHERED BENEFIT THAT WE HAVE BEEN ARGUING FOR, AND
17 THEY HAVE NO ANSWER ECONOMICALLY HOW THAT COULD HURT CONSUMER
18 WELFARE. I MEAN, IT'S BEYOND IMAGINABLE HOW COULD IT HURT
19 FROM AN ECONOMIC STANDPOINT, FROM AN EDUCATION STANDPOINT,
20 WELFARE STANDPOINT TO GIVE A STUDENT-ATHLETE MORE EDUCATION.
21 THEY HAVE NO ANSWER TO THAT.

22 SO THAT TAKES ME BACK TO THE ISSUE OF AMATEURISM, YOUR
23 HONOR. AND, AGAIN, I SUBMIT TO THE COURT WE HAD A HEAVY
24 BURDEN TO SHOW THERE WAS ANTICOMPETITIVE RESTRAINT. YOU SAID
25 THAT IN YOUR ORDER, AND WE SHOWED IT. I SUBMIT TO THE COURT

1 THEY HAVE A HEAVY BURDEN IN SHOWING PROCOMPETITIVE
2 JUSTIFICATION. THEY HAVEN'T DONE IT.

3 AT FIRST I THOUGHT I WOULD JUST BRIEFLY MARCH THROUGH
4 SOMETHING THAT I THOUGHT WAS VERY TELLING IN SHOWING THEIR
5 FAILURE OF PROOF, YOUR HONOR, AND IT IS WHAT'S MISSING? WHAT
6 DIDN'T THEY PUT IN EVIDENCE?

7 FIRST OF ALL, WE KNOW THE NCAA CONSISTS OF SOME 350
8 SCHOOLS WITH VAST RESOURCES. MANY OF THEM HAVE RENOWNED
9 ECONOMIC DEPARTMENTS, HARVARD, STANFORD, BERKELEY, THEY COULD
10 HAVE BROUGHT SOMEONE FROM BERKELEY. THESE ECONOMIC
11 DEPARTMENTS, THEY DO SURVEYS. THEY TEACH GRADUATE STUDENTS
12 HOW TO DO MARKETING SURVEYS. THEY DIDN'T CALL A SINGLE PERSON
13 FROM ANY SCHOOL.

14 I THINK THERE'S A REASON FOR THAT. INSTEAD, RATHER THAN
15 ACTUALLY DO SURVEYS FROM THEIR OWN SCHOOLS, THEY TRY TO GET IN
16 THEIR EVIDENCE THROUGH HEARSAY OF WHAT FANS SUPPOSEDLY TOLD
17 THE NCAA WITNESSES.

18 YOU HEARD THEM TRY TO GET IN THROUGH HEARSAY HOW IMPORTANT
19 AMATEURISM WAS TO BROADCASTERS. AND THEY HAVE BILLIONS OF
20 DOLLARS OF REVENUE TIED UP WITH THESE BROADCASTERS. THEY
21 DIDN'T CALL A SINGLE BROADCASTER. NOT A SINGLE ONE. THEY DID
22 IN O'BANNON, BUT THEY DIDN'T IN THIS CASE.

23 YOU HEARD TESTIMONY ABOUT SPONSORS. THEY HAVE
24 MULTIBILLION DOLLAR CONTRACTS WITH NIKE, UNDER ARMOUR, AND
25 OTHER CONTRACTS THAT WE WENT THROUGH WITH THE WITNESSES. AND

1 THEY, THROUGH HEARSAY, SAID, WELL, THESE SPONSORS SAID THIS
2 WOULD BE BAD IF YOU PAID KIDS. THEY DIDN'T CALL A SINGLE
3 SPONSOR.

4 BOOSTERS. YOU HEARD TESTIMONY ABOUT BOOSTERS WOULDN'T
5 LIKE IT. HEARSAY TESTIMONY. DIDN'T CALL A SINGLE BOOSTER,
6 NOR DID THEY DO A SURVEY OF BOOSTERS.

7 YOU HEARD TESTIMONY THAT FACULTY MIGHT GET UPSET IF
8 PEOPLE -- IF STUDENT-ATHLETES GOT MORE MONEY. AGAIN, A
9 FAILURE TO CALL ANY OF THESE FACULTY MEMBERS OR DO A SURVEY OF
10 FACULTY MEMBERS.

11 AND, FINALLY, WHAT'S MISSING, IF AMATEURISM WAS THE
12 LYNCHPIN OF THE POPULARITY OF FOOTBALL AND BASKETBALL, IT'S
13 NOT MENTIONED IN THEIR CONTRACTS WITH CBS AND ESPN. IT'S NOT
14 DEFINED. THERE'S NOT EVEN A CLAUSE THAT SAYS IF YOU CHANGE
15 THE RULES OF COMPENSATION, WE WANT TO REVISIT THE CONTRACT. A
16 COMPLETE FAILURE OF PROOF.

17 **THE COURT:** WHAT THEY HAVE AND THEY DIDN'T MENTION IT
18 TODAY, BUT WHAT THEY SPENT TIME ON WAS THE EXPERT, THEIR
19 SURVEY PERSON. WAS IT ISAACSON?

20 **MR. BERMAN:** ISAACSON.

21 **THE COURT:** ISAACSON.

22 **MR. BERMAN:** RIGHT.

23 **THE COURT:** I KNOW WHAT YOUR CRITICISM OF ISAACSON
24 ARE, BUT LET'S JUST SAY THAT THERE WERE AT LEAST SOME PEOPLE
25 OUT THERE WHO EXPRESSED THE OPINION THAT THEY DIDN'T THINK

1 ATHLETES SHOULD GET MORE MONEY THAN THEY ARE GETTING NOW. AND
2 THEY MAKE THE ARGUMENT THAT IF YOU'RE -- I DON'T KNOW IF THIS
3 IS THEIR ARGUMENT, OR IF I MADE IT UP, OR READ IT SOMEWHERE
4 ELSE.

5 BUT IF YOU WERE A SODA MANUFACTURER AND YOU'RE THINKING OF
6 CHANGING THE LABEL ON YOUR SODA, YOU FIND OUT THAT SOME AMOUNT
7 OF YOUR CUSTOMERS DON'T LIKE THE CHANGE, AND YOU MIGHT THINK,
8 OH, THEY WILL PROBABLY BUY THE SODA ANYWAY BUT THEY DON'T LIKE
9 THE LABEL CHANGE, WOULD YOU NOT CONSIDER OR BE CAREFUL OR NOT
10 MAKE A LABEL CHANGE THAT SOME CONSIDERABLE NUMBER OF YOUR
11 CUSTOMERS JUST DIDN'T LIKE?

12 **MR. BERMAN:** I HAVE TWO ANSWERS TO THAT. ONE IS, HE
13 DIDN'T ASK THE RIGHT QUESTION. BECAUSE HE ADMITTED LATER IN
14 HIS TESTIMONY, AND HE WAS VERY CLEAR ABOUT THIS, THAT THERE'S
15 A DIFFERENCE BETWEEN SAYING I DON'T LIKE SOMETHING AND
16 CHANGING MY BEHAVIOR.

17 **THE COURT:** RIGHT. BUT LET'S SAY WE DON'T KNOW
18 WHETHER THE PEOPLE WHO DON'T WANT A BLUE LABEL ON COKE-COLA
19 ARE ACTUALLY GOING TO STOP BUYING COCA-COLA, OR ARE THEY JUST
20 GOING TO SAY, DARN, I HATE THIS LABEL, AND BUY IT ANYWAY.

21 **MR. BERMAN:** SO I DON'T THINK THE ANSWER UNDER THE
22 ANTITRUST LAWS IS THE FOLLOWING: SO WE KNOW THAT WE CAN
23 QUANTIFY THE EFFECT OF THE RESTRAINT. IT'S A HUNDRED PERCENT
24 CAP ON COMPETITION. SO WIPED OUT.

25 THEY SAY WE CAN'T QUANTIFY THE EFFECT OF, ON THE OTHER

1 SIDE, WHAT WOULD HAPPEN IF WE WENT FORWARD, BUT THEY COULD
2 HAVE. THEY COULD HAVE HAD AN ECONOMIST COME IN AND SAY, IF WE
3 DO LRA 1, WE ARE GOING TO LOSE DEMAND BY X. THEY COULD HAVE
4 TRIED A SURVEY TO QUANTIFY IT. THEY DIDN'T.

5 SO THEY LEFT YOU IN A QUANDARY WHERE YOU SAY, WELL, WE ARE
6 AFRAID TO CHANGE THE SODA POP LABEL. THAT'S NOT GOOD ENOUGH.
7 IT CAN'T BE GOOD ENOUGH TO SAY I HAVE THIS RESTRAINT, IT'S
8 CAUSING HARM IN THE HUNDREDS OF MILLIONS OF DOLLARS, AND I'M
9 NOT EVEN WILLING TO GO OUT IN THE MARKET AND MAKE AN ATTEMPT
10 LIKE NORMAL COMPETITIVE FIRMS DO. IF YOU HAVE A LITTLE BUMP
11 IN THE ROAD, THAT'S WHAT COMPETITION IS ABOUT. THEN YOU
12 ADJUST YOUR LEVEL.

13 I SUBMIT TO THE COURT, ISAACSON DOESN'T CARRY THE BURDEN
14 THAT THEY HAVE.

15 THEN LET ME TURN, YOUR HONOR, TO --

16 **THE COURT:** I MEAN, I KNOW WHAT YOU ARE GOING TO SAY,
17 BUT THE NOTION THAT -- THAT THERE ARE HIGH LEVELS OF PAY THAT
18 CLEARLY WOULD, OR COULD, OR MORE LIKELY THAT IT WOULD EFFECT
19 DEMAND IF PEOPLE WERE PAYING A MILLION DOLLARS, GETTING INTO
20 BIDDING WARS, AND ALL OF THAT, AND I KNOW YOUR ANSWER IS THAT
21 WON'T HAPPEN BECAUSE THE CONFERENCES WILL OBEY ECONOMIC
22 PRINCIPLES AND SO ON --

23 **MR. BERMAN:** THAT'S MY ANSWER. OKAY? AND WE WERE
24 PRETTY CLEAR ABOUT THAT. AND I KNOW THAT --

25 **THE COURT:** WHAT ABOUT THE AUTONOMY 5? WHAT DO YOU

1 THINK -- DO YOU ATTACH ANY SIGNIFICANCE TO THE AUTONOMY 5,
2 EITHER TO THE POINT THAT I WAS MAKING, ASKING ABOUT EARLIER,
3 THAT THE ECONOMY 5 REALLY WENT TO COA BEFORE THEY HAD TO AND
4 DID IT FOR THEIR OWN REASONS; IS THAT A GOOD THING, BAD THING,
5 DOES IT PLAY INTO THIS IN ANY WAY, AND COULD THE AUTONOMY 5
6 RIGHT NOW INCREASE PAYMENTS SO SUBSTANTIALLY THAT WE CAN
7 PERHAPS LEARN FROM THAT WHAT THE CONFERENCES WOULD DO IF THEY
8 COULD.

9 **MR. BERMAN:** WELL --

10 **THE COURT:** IN OTHER WORDS, COULD THE AUTONOMY 5 NOW
11 SAY FORGET THIS \$450 VISA CARD, LET'S MAKE IT A \$5,000 VISA
12 CARD?

13 **MR. BERMAN:** I'M NEVER LIKE THIS, BUT MR. KESSLER
14 WILL TALK ABOUT THE AUTONOMY 5.

15 IN TERMS OF THE EVIDENCE OF WHAT THEY WOULD DO IN THIS
16 WHOLE MILLION DOLLAR KIND OF FEAR MONITORING THAT'S OUT THERE,
17 I THINK I WOULD LIKE TO REMIND THE COURT --

18 **THE COURT:** WE ARE GOING TO TALK ABOUT -- I THINK I'M
19 GOING TO HAVE TO TAKE A BREAK, BUT WE ARE GOING TO TALK ABOUT
20 THE LESSER RESTRICTIVE ALTERNATIVES. AND THAT IS ADDRESSED OR
21 COULD BE ADDRESSED BY USING TWO INSTEAD OF ONE. WE WILL GET
22 TO THAT.

23 **MR. BERMAN:** TWO FINAL POINTS, YOUR HONOR. TAKE LESS
24 THAN THREE MINUTES.

25 **THE COURT:** ALL RIGHT.

1 **MR. BERMAN:** ONE IS, IN TERMS OF WHAT WOULD REALLY
2 HAPPEN, I THINK THERE WAS A VERY TELLING POINT IN THE TRIAL --
3 FOR ME IT WAS. AND THAT WAS, YOU HAVE ALL THESE LAY WITNESSES
4 GETTING UP SAYING THINGS WILL BE TERRIBLE IF YOU RULE IN THE
5 PLAINTIFFS' FAVOR. AND CHANCELLOR BLANK FROM THE UNIVERSITY
6 OF WISCONSIN GOT UP AND SAID AT PAGE 892 OF THE TRIAL
7 TRANSCRIPT THAT IF CONFERENCES ARE FREE TO SET RULES,
8 WISCONSIN MAY DROP ATHLETICS.

9 THAT'S PRETTY DRAMATIC. AND THE VERY NEXT DAY --

10 **THE COURT:** NOT ATHLETICS. SHE SAID THEY'LL DROP OUT
11 DIVISION I, DIDN'T SHE?

12 **MR. BERMAN:** NO, SHE SAID ATHLETICS. I WENT AND
13 CHECKED IT THIS MORNING.

14 AND WITHIN A DAY OF HER TESTIFYING, WORD GOT OUT THE
15 UNIVERSITY OF WISCONSIN ISSUED A PRESS RELEASE IN WHICH THEY
16 SAID, THIS IS EXHIBIT 1343, IF A CHANGE TO THE STRUCTURE OF
17 COLLEGE ATHLETICS WERE TO OCCUR, YOU DUB WOULD EXPECT TO BE
18 PART OF ANY CONVERSATION WITH THE BIG TEN AND NATIONALLY ABOUT
19 WHAT THAT WOULD MEAN FOR UNIVERSITY ATHLETIC PROGRAMS.

20 SO, IN OTHER WORDS, THAT'S OUR BUT-FOR WORLD. THEY ARE
21 NOT GOING TO GO SIT DOWN AND GO CRAZY. THEY ARE GOING TO SIT
22 DOWN AND TRY AND SAY WHAT IS IT WE NEED TO DO, HAVE NEW RULES,
23 THAT WON'T HURT DEMAND FOR OUR PRODUCT.

24 THE LAST POINT I WANTED TO MAKE, AND THAT GETS INTO THE
25 ISSUE OF WHAT EVIDENCE WE HAVE ABOUT THE 3,000 AND SO FORTH,

1 THE 3,000 ATHLETES WHO GOT SAF FUNDS. I DON'T KNOW IF YOU
2 WANT TO SAVE THAT FOR THE MOTION TO STRIKE --

3 **THE COURT:** GO AHEAD.

4 **MR. BERMAN:** -- LAUNCH INTO IT NOW.

5 SO PARAGRAPH 55 IS THE PARAGRAPH WHERE DR. RASCHER GIVES
6 HIS OPINION THAT THERE WERE 3,000 ATHLETES IN THE POWER 5
7 CONFERENCES THAT RECEIVE COA MONEY -- RECEIVED GREATER THAN
8 COA, AND THAT WAS JUST FROM SAF MONEY. DID NOT INCLUDE PELL
9 GRANTS. SO IT'S JUST SAF MONEY.

10 THIS WAS IN HIS REPORT. AND IN FOOTNOTE 8, HE TELLS YOU
11 WHERE HE GOT THE DATA FOR THIS, INCLUDING, IN FACT, HE ALSO
12 HAS THE DATA THAT ANSWERS ONE OF THE QUESTIONS YOU HAVE THAT
13 SAOF AND SAF COMBINED DISTRIBUTIONS GREW FROM 66 MILLION IN
14 2010 TO 84 MILLION IN 2017.

15 **THE COURT:** WHERE DOES HE GET THAT?

16 **MR. BERMAN:** HE GETS THAT FROM WWW.NCAA.ORG ABOUT
17 RESOURCES, FINANCES, AND DISTRIBUTIONS. HE GETS IT OFF THE
18 NCAA'S RECORDS, AND HE IDENTIFIES ANOTHER RECORD OF THE NCAA,
19 THE DIVISION 1 REVENUE DISTRIBUTION PLAN. SO THE DIVISION 1
20 REVENUE DISTRIBUTION PLAN AND THE MFRS DATA CONTAIN BUSINESS
21 RECORDS WHICH ALLOWED DR. RASCHER TO FIGURE OUT ON AN
22 INDIVIDUAL ATHLETE BASIS, AND HE DETAILS THIS LATER IN HIS
23 REPORT, GOES THROUGH SCHOOL BY SCHOOL EXAMPLES OF WHICH KIDS
24 GOT WHICH SAF MONEY.

25 THE DEFENDANTS, THEY FILED WRITTEN OBJECTIONS TO

1 DR. RASCHER'S REPORT. THEY DIDN'T OBJECT TO THIS. IF THEY
2 HAD OBJECTED TO PARAGRAPH 55, AND SAID THERE'S A LACK OF
3 FOUNDATION OF ANY SORT, THE TIME TO CURE THAT WAS WHEN
4 DR. RASCHER WAS ON THE STAND. I COULD HAVE CURED IT AT THAT
5 TIME. IT'S TOO LATE.

6 SO I SUBMIT TO THE COURT THAT THIS OPINION WHICH WAS NOT
7 OBJECTED TO COMES IN FOR THE TRUTH OF THE MATTER ASSERTED.
8 AND YOU'VE ALREADY ADMITTED EXAMPLES. PLAINTIFFS' 104, 105,
9 AND 106 ARE EXAMPLES OF WHERE HE'S PULLED OUT OF THIS DATA TO
10 MAKE IT A LITTLE MORE UNDERSTANDABLE SOME SNAPSHOTS.

11 SO OHIO STATE, 106, FULL-YEAR ATHLETES WHO RECEIVED SAF
12 ABOVE COST OF ATTENDANCE. HE'S GOT EXAMPLES BY SCHOOL. AND
13 HE ALSO KNOWS FROM THIS DATA WHAT THEY WERE USING THE MONEY
14 FOR.

15 SO PARAGRAPH 82, HE GOES THROUGH AND SAYS, TEXAS A&M MYLES
16 GARRETT GOT 60,000 IN PDTLOV INSURANCE, JOSH REYNOLDS GOT
17 13,950 IN INSURANCE.

18 SO THESE ARE JUST EXAMPLES. AND LATER IN HIS DECLARATION
19 OR TESTIMONY, TRIAL TESTIMONY, HE GIVES AN EXAMPLE OF A
20 MICHIGAN STATE ATHLETE GETTING 45,000 TO PAY A LEGAL BILL.

21 **THE COURT:** YOU KNOW, I THINK MAYBE YOU ARE TOUCHING
22 ON SOMETHING I HAD ANOTHER QUESTION ABOUT, WHICH ARE, THERE
23 ARE SOME CHARTS IN I THINK IT'S RASCHER'S TESTIMONY THAT
24 DOESN'T HAVE DATES ON IT.

25 EXHIBIT 167M, 167N. MAYBE IT SAYS SOMEWHERE WHEN THEY

1 WERE OR --

2 **MR. BERMAN:** 167M AT THE TOP, YOUR HONOR, OHIO STATE
3 ATHLETES COMPENSATED ABOVE FULL GOA, AND IT SAYS (2015-2016.
4 SO HE DOES HAVE A DATE ON THAT ONE.

5 **THE COURT:** WHAT ABOUT N?

6 **MR. BERMAN:** HE DOES NOT HAVE A DATE ON IT, BUT HE
7 DOES TELL YOU WHERE THE INFORMATION CAME FROM.

8 **THE COURT:** DO YOU KNOW -- IS THERE SOME WAY WE CAN
9 FIGURE OUT WHAT THE DATE WAS?

10 **MR. BERMAN:** LET ME ASK. HIS ASSOCIATE IS IN THE
11 COURTROOM. I WILL ASK AT THE BREAK.

12 AND EVEN -- THERE IS A FALLBACK ON THIS DATA. IF IT
13 WASN'T IN EVIDENCE, WHICH I BELIEVE IT IS, YOUR HONOR, THEN
14 THE... AT LEAST THE DATA, IT COMES IN AS SUPPORT FOR HIS
15 OPINIONS THAT STUDENT-ATHLETES WERE GETTING MONEY ABOVE COST
16 OF ATTENDANCE THROUGH SAF.

17 **THE COURT:** WELL, AND ONE COULD, AS I SAID EARLIER,
18 TAKE THE SUM TOTAL AMOUNT, WHICH WE DO KNOW, AND DIVIDE IT BY
19 THE TOTAL OF SCHOOLS AND THE TOTAL OF ATHLETES, AND COME UP
20 WITH A SORT OF WHAT WOULD THE AVERAGE BE IF EVERYBODY GOT THE
21 SAME AMOUNT. AND FIGURE SINCE THEY DIDN'T, SOME PEOPLE GOT
22 MORE AND SOME PEOPLE GOT LESS. ONE COULD FIGURE THAT OUT, I
23 GUESS.

24 ONE WITHOUT ACTUAL EVIDENCE OF WHAT THEY SPENT IT ON SINCE
25 WE KNOW THEY COULD HAVE SPENT IT ON THINGS THAT WEREN'T

1 EDUCATION RELATED, WE COULD GLEAN THAT PERHAPS AT LEAST SOME
2 OF THEM DID, KNOWING WHAT TEENAGERS DO, WHICH IS BUY VIDEO
3 GAMES AS FAR AS I CAN TELL.

4 SO, OKAY. DID YOU -- I DON'T KNOW WHERE THIS MIGHT COME
5 UP AND WHETHER YOU WANT TO ADDRESS IT, DO YOU WANT TO TALK
6 ABOUT THE BYLAWS AND THE RULE CHANGES?

7 **MR. BERMAN:** THAT IS MR. KESSLER.

8 **THE COURT:** WHICH ONES CAME UP WHEN?

9 **MR. BERMAN:** YES.

10 **THE COURT:** DO YOU HAVE ANY COMMENT ON THE PROBATIVE,
11 ANY PROBATIVE EFFECT OF THE AUTONOMY 5?

12 **MR. BERMAN:** MR. KESSLER WILL BE ADDRESSING THAT.

13 **THE COURT:** DID I ALREADY ASK YOU THAT?

14 **MR. BERMAN:** YES.

15 **THE COURT:** WHY DON'T WE TAKE A TEN-MINUTE BREAK
16 THEN.

17 **MR. BERMAN:** THANK YOU, YOUR HONOR.

18 (RECESS TAKEN AT 11:21 A.M.; RESUMED AT 11:35 A.M.)

19 **THE CLERK:** REMAIN SEATED AND COME TO ORDER. COURT
20 IS AGAIN IN SESSION.

21 **THE COURT:** SO WHAT ARE YOU ENVISIONING YOURSELF
22 DOING AT THIS TIME BESIDES ARGUING?

23 **MR. KESSLER:** I FIRST HAVE SOME ANSWERS TO THE
24 COURT'S QUESTIONS ABOUT CITATIONS TO THE RECORD WHERE VARIOUS
25 EVIDENCE IS, AND THEN, SECOND, YOU ASKED QUESTIONS ABOUT

1 CONFERENCE AUTONOMY AND THE RULES CHANGES SINCE O'BANNON, ON
2 THOSE TWO SUBJECTS I WAS THE PERSON WHO WAS GOING TO ADDRESS
3 THOSE SUBJECTS YOU ASKED MR. BERMAN ABOUT. I WILL FIRST DO
4 THE CITATIONS.

5 **THE COURT:** AND THE CONSTRUCT WE ARE IN IS
6 PROCOMPETITIVE JUSTIFICATION STILL.

7 **MR. KESSLER:** I GUESS, YES, ALTHOUGH SOME OF YOUR
8 QUESTIONS COULD ALSO REFER TO LESS RESTRICTIVE ALTERNATIVES.
9 IT COULD GO TO BOTH.

10 **THE COURT:** OKAY.

11 **MR. KESSLER:** FIRST ON THE CITATIONS, TO BE VERY
12 CLEAR, THE HISTORY OF THE AMOUNT OF SAF FUNDS IS SET FORTH IN
13 PLAINTIFFS' EXHIBIT 39. THAT IS THE EXHIBIT. IT TRACES IT
14 FROM 2009, '10, UNTIL 2017-18 AND SHOWS A GROWTH IN THOSE
15 FUNDS FROM 21,500,000 ROUGHLY TO OVER 48 MILLION.

16 **THE COURT:** YEAR BY YEAR?

17 **MR. KESSLER:** YEAR BY YEAR.

18 **THE COURT:** WITH CITATION --

19 **MR. KESSLER:** WITH CITATION. THAT IS FROM THE --
20 THAT IS FROM THE NCAA'S OWN RECORDS ABOUT THOSE PAYMENTS FOR
21 THAT. SO THAT'S AN IMPORTANT CITATION.

22 IT ALSO CONTAINS SIMILAR INFORMATION ON AEF FUNDS, WHICH
23 WERE LIKE SAF FUNDS, WHICH IS ANOTHER SET OF GROWTH. BUT YOU
24 CAN FIND THAT ALL IN PLAINTIFFS' EXHIBIT 39.

25 **THE COURT:** OKAY.

1 **MR. KESSLER:** NEXT IMPORTANT EXHIBIT, JOINT
2 EXHIBIT 21 SHOWS IN 17-18 THE BREAKDOWN OF SAF FUNDS BY USES,
3 HOW MANY WERE USED FOR EDUCATIONAL PURPOSES, HOW MANY WERE
4 USED FOR NONEDUCATIONAL PURPOSES. THAT'S ALL BROKEN DOWN.
5 IT'S A JOINT EXHIBIT IN 17-18 SHOWING YOU EXACTLY HOW THAT WAS
6 DONE.

7 NEXT EXHIBIT. THERE WAS SOME DISCUSSION ABOUT PLAINTIFFS'
8 106. I THINK -- THIS IS IN EVIDENCE.

9 **THE COURT:** IS THAT THE RASCHER CHART?

10 **MR. KESSLER:** YES, BUT -- IT'S A RASCHER CHART BUT IT
11 WAS SEPARATELY PUT INTO EVIDENCE AS AN EXHIBIT THAT WAS
12 ADMITTED, YOUR HONOR.

13 **THE COURT:** 167?

14 **MR. KESSLER:** 106.

15 **THE COURT:** 106.

16 **MR. KESSLER:** IT WAS 167, I BELIEVE, AND IN RASCHER'S
17 CHART, BUT IT CAME IN AS PLAINTIFFS' 106 SEPARATELY. AND THE
18 FACT THAT IT IS IN EVIDENCE IS VERY SIGNIFICANT.

19 THE REASON IT WENT INTO EVIDENCE, YOUR HONOR, IS BECAUSE
20 THESE CALCULATIONS CAME FROM THIRD-PARTY DEPOSITIONS OF THE
21 SCHOOLS TO GET THEIR ACTUAL SAF PAYMENTS. AND THEN
22 DR. RASCHER CALCULATED THIS. SO WHAT HE DID, 106, IS HE
23 AVERAGED IT BY THE NUMBER OF RECIPIENTS WHO GOT THEM. BECAUSE
24 WHAT THE SCHOOL DATA SHOWED IS -- SO 25 FOOTBALL PLAYERS GOT
25 IT, HERE'S THE TOTAL THEY GOT.

1 SO YOU COULD COME UP WITH HOW MUCH ABOVE COST OF
2 ATTENDANCE BECAUSE HE ALSO CHECKED THEY WERE COA ATHLETES, HOW
3 MUCH ABOVE JUST THE SAF PAYMENTS LEAD TO.

4 AND THIS WAS ADMITTED INTO EVIDENCE BECAUSE THE DATA WAS
5 UNDISPUTED. AGAIN, HAD THEY SAID YOU NEED TO AUTHENTICATE THE
6 THIRD-PARTY DISCOVERY, THIS CAME UP WITH THE OHIO STATE, THEY
7 CONCEDED EVENTUALLY THEY HAD NO BASIS TO CHALLENGE THE
8 AUTHENTICITY OF THE UNDERLYING DATA.

9 **THE COURT:** ARE THOSE CHARTS IN 106 CONTAINING A
10 DATE?

11 **MR. KESSLER:** YES. IT'S 2015-16 DATA. THEY WERE ALL
12 FROM THE SAME -- THAT'S 104, 105, AND 106.

13 **THE COURT:** OKAY.

14 **MR. KESSLER:** THOSE DATA.

15 AND JUST FOR EXAMPLE, YOUR HONOR, MIAMI, FLORIDA, FOR
16 EXAMPLE --

17 **THE COURT:** DON'T DO EXAMPLES. I'LL LOOK AT THESE.

18 **MR. KESSLER:** OKAY. NEXT CITATION, YOUR HONOR.

19 WE HAD SEPARATE SAF DATA FOR THE MAC CONFERENCE. THEY
20 HAPPENED TO PRODUCE THAT. THAT WENT INTO EVIDENCE IN
21 PLAINTIFFS' 43. SO YOUR HONOR CAN LOOK AT THEIR WHOLE SET OF
22 DATA FOR ONE CONFERENCE THAT CAME IN THAT WAY. THAT IS IN
23 EVIDENCE IN TERMS OF THAT.

24 NEXT CITATION, YOUR HONOR, IN HIS 30(B)(6) TESTIMONY AT
25 THE TRANSCRIPT FROM 316:4 -- NO, I'M SORRY, NOT 316:4. THE

1 TRANSCRIPT WAS -- YEAH, FROM 316 TO 318, YOUR HONOR --

2 **THE COURT:** YOU ARE TALKING ABOUT LENNON NOW?

3 **MR. KESSLER:** THIS IS MR. LENNON. HE TESTIFIED AT
4 HIS 30(B)(6) ABOUT HOW THE SAF FUNDS COULD BE USED FOR ANY
5 PURPOSE AND THERE WAS NO CAP ON THEM.

6 THIS WAS SIGNIFICANT IN TERMS OF THAT. AND HE GAVE
7 EXAMPLES. AND HE ASKED THAT IT CAN BE USED FOR THIS AND THAT
8 IN TERMS OF THAT.

9 HE ALSO, AT THE TRIAL, ON 1340 OF THE TRIAL TRANSCRIPT,
10 GAVE TESTIMONY SIMILAR TO THAT. SO MR. LENNON COVERED THIS
11 SUBJECT IN BOTH CASES REGARDING THE SAF.

12 IN ADDITION TO THAT, THOSE MAY BE ALL THE SAF CITES I HAD.
13 THE LAST ONE I HAD, YOUR HONOR, ON THESE SAF ISSUES WAS AT
14 LENNON'S DEPOSITION, 153 TO 154, HE FURTHER DISCUSSES THE TYPE
15 OF USES OF THE SAF MONEY THAT IT CAN BE PUT TO, WHICH IS
16 ANOTHER QUESTION THAT YOUR HONOR HAD ABOUT THAT. SO THAT IS
17 ALL FROM THE TRIAL RECORD IN TERMS OF WHAT'S THERE.

18 SECOND, YOUR HONOR, YOU ASKED ABOUT THE QUESTION OF
19 CONFERENCE AUTONOMY. AN EXHIBIT THAT I WOULD VERY MUCH
20 COMMEND TO YOUR HONOR TO LOOK AT, WE DIDN'T SPEND MUCH TIME ON
21 IT IN TRIAL, BUT IT WENT INTO EVIDENCE, IS PLAINTIFFS' EXHIBIT
22 56. PLAINTIFFS' EXHIBIT 56 WAS THE PRESENTATION BY THE
23 POWER 5 CONFERENCES FOR WHY THEY WANTED CONFERENCE AUTONOMY.
24 AND THEY ARE ALL DEFENDANTS IN THIS CASE, SO IT IS A PARTY
25 ADMISSION. THAT'S HOW IT CAME INTO EVIDENCE. AND THIS IS

1 VERY SIGNIFICANT TO THE POINT YOUR HONOR RAISED EARLIER.

2 IT'S TRUE, THIS PRESENTATION WAS IN NOVEMBER OF 2013.
3 OKAY? NONE OF THIS WENT INTO THE O'BANNON RECORD BUT, IN
4 FACT, THESE EVENTS WERE ALREADY IN MOTION PRIOR TO O'BANNON
5 AND ULTIMATELY WERE PUT INTO EFFECT IN 2015. AND THE
6 SIGNIFICANCE OF THAT IS, WE GOT EVIDENCE IN THIS RECORD OF
7 BOTH WHY THEY WANTED AUTONOMY, WHAT THEY WERE GOING TO DO WITH
8 IT, AND THEN WE COULD SEE THE IMPACT -- WE HAVE A REAL LIFE
9 EXPERIMENT OF WHAT HAPPENED, AN ANALOG, IF YOU WILL, WHEN THEY
10 HAVE IT.

11 YOUR HONOR, I WOULD POINT OUT THE FOLLOWING: THIS IS FROM
12 THE SECOND PAGE OF THIS EXHIBIT 56. THIS IS WHAT THEY SAID.

13 "MOST OF OUR INSTITUTIONS ARE BLESSED WITH CONSIDERABLE
14 REVENUE FROM OUR SUCCESSFUL PROGRAMS. HOWEVER, BECAUSE OF
15 EFFORTS TO CREATE A QUOTE 'LEVEL PLAYING FIELD' CLOSE QUOTE,
16 WE CAN SPEND THESE RESOURCES IN ALMOST ANY WAY WE WANT EXCEPT,
17 IN ALL CAPS, TO IMPROVE SUPPORT FOR STUDENT-ATHLETES."

18 THIS WAS THE POWER 5.

19 "TOO OFTEN OUR EFFORTS TO IMPROVE THE LIVES OF
20 STUDENT-ATHLETES HAVE BEEN DEFLECTED BECAUSE OF COST
21 IMPLICATIONS THAT ARE MANAGEABLE BY OUR INSTITUTIONS BUT NOT
22 BY INSTITUTIONS WITH LESS RESOURCES. THIS CANNOT CONTINUE
23 WITHOUT JEOPARDIZING THE ENTIRE ENTERPRISE OF INTERCOLLEGIATE
24 ATHLETICS."

25 SO THE VERY PURPOSE OF CONFERENCE AUTONOMY FROM 2003 AND

1 PRIOR RIGHT UP TO YOUR HONOR'S RULING WAS THE POWER 5
2 CONFERENCES RECOGNIZE THEY HAD THE MONEY THAT OTHERS DIDN'T
3 WHICH THEY WANTED TO USE FOR THEIR STUDENT-ATHLETES' WELFARE
4 AND THEY COULD AFFORD TO DO SO, BUT THEY ARE BEING STOPPED TO.

5 SO THEN WHAT WE KNOW, WHAT WE KNOW NEXT IS CONFERENCE
6 AUTONOMY IS THEN PASSED, OKAY? AND IT GOES INTO EFFECT IN
7 JANUARY, AND THEIR --

8 **THE COURT:** NO, IT WAS PASSED IN JANUARY AND WENT
9 INTO EFFECT IN AUGUST 2015.

10 **MR. KESSLER:** THAT'S CORRECT, YOUR HONOR. THAT'S
11 CORRECT. AND WHAT THAT SAYS, AND THIS IS IN --

12 **THE COURT:** BUT THERE WAS A LOT OF TALK ABOUT IT -- I
13 MEAN IT WASN'T A BRAND NEW THING IN JANUARY. THERE WAS TALK
14 ABOUT IT BY AUGUST 7TH.

15 **MR. KESSLER:** NO QUESTION.

16 **THE COURT:** NOT JUST, OH, LET'S HAVE AUTONOMY, BUT
17 SPECIFICALLY LET'S ALLOW US TO GO TO COA, AS I REMEMBER THE
18 EVIDENCE.

19 **MR. KESSLER:** IT WAS BEYOND COA. THEY WERE TALKING
20 ABOUT MANY -- AND THIS IS IMPORTANT. THEY WERE TALKING ABOUT,
21 IT'S IN THE SAME DOCUMENT, ADDITIONAL HEALTH BENEFITS,
22 ADDITIONAL FOOD. REMEMBER THERE WAS THE ISSUE OF UNLIMITED
23 SNACKS AND GIVING ADDITIONAL FOOD. THEY SPOKE ABOUT OTHER
24 THINGS THEY COULD DO FOR THEIR ATHLETES.

25 AND WHEN YOU LOOK AT THE ACTUAL -- THIS IS JOINT

1 EXHIBIT 24, WHERE THEY FINALLY PUT IN CONFERENCE AUTONOMY.
2 WHAT THEY DO, AND YOUR HONOR SHOULD LOOK AT THIS, THIS IS IN
3 THE RULES 5.3.2.1. THAT'S WHERE THE CONFERENCE AUTONOMY RULES
4 GO IN. THEY ARE GIVEN AUTHORITY IN ALL SORTS OF AREAS,
5 INCLUDING ACADEMIC ACHIEVEMENT PAYMENTS, IRONICALLY, IS ONE OF
6 THE AREAS, WHICH IS WHY I THINK THAT'S HOW YOU GET THE
7 POST-GRADUATE SCHOLARSHIP PROVISION COMES OUT OF THE AUTONOMY
8 CONFERENCES.

9 AND THE IMPORTANCE OF ALL THIS, YOU SAY WHAT'S THE
10 SIGNIFICANCE OF THIS? THE SIGNIFICANCE IS, IT IS RECORD
11 EVIDENCE THAT DIDN'T PREVIOUSLY EXIST THAT THE CONFERENCES, A,
12 BELIEVE THEY HAD THE RESOURCES TO GIVE THESE TO THE ATHLETES,
13 TWO, WENT AHEAD AND DECIDED WHAT TO DO, INCREASE THE WHOLE
14 GROUP OF BENEFITS THAT OTHER CONFERENCES DON'T ALL PROVIDE,
15 AND THEN THERE'S NO IMPACT EACH TIME ON DEMAND THAT IS
16 ADVERSE. THERE'S NO IMPACT ON INTEGRATION THAT IS ADVERSE.

17 SO WE HAVE HERE IS COMPELLING EVIDENCE THAT THE
18 CONFERENCES CAN DO IT, HAVE DONE IT. AND IF THEY WERE GIVEN
19 MORE AUTHORITY TO DO IT IN COMPETITION WOULD BE RESPONSIBLE AS
20 TO HOW THEY COULD DO IT IN TERMS OF THAT.

21 **THE COURT:** WELL, DO YOU THINK -- WELL, DO YOU KNOW
22 WHETHER, I SHOULD PROBABLY ASK THE CONFERENCE PEOPLE THIS, THE
23 AUTONOMY 5 CONFERENCES COULD HAVE GONE FURTHER THAN THEY DID?

24 FOR EXAMPLE, COULD THEY HAVE SAID WE ARE GOING TO ALLOW
25 COA PLUS \$5,000 A YEAR FOR EACH ATHLETE, FOR EXAMPLE. WOULD

1 THAT HAVE BEEN BARRED BY SOME EXISTING RULE THAT THE NCAA HAD?

2 **MR. KESSLER:** SO THERE WERE TWO THINGS.

3 OKAY. ONE IS THEY HAVE TO RUN IT THROUGH ALL FIVE OF THE
4 CONFERENCES. YOU KNOW, IT WASN'T AN INDIVIDUAL CONFERENCE
5 THING. THEY THEN HAVE A METHOD OF PROPOSING IT TO THE NCAA
6 WHO STILL WOULD CONSIDER WHETHER IT WAS CONSISTENT WITH SOME
7 OTHER PRINCIPLE OF THE CONSTITUTION.

8 SO, FOR EXAMPLE, I THINK YOU ASKED THE QUESTION, COULD
9 THEY HAVE A GIFT CARD BE MUCH BIGGER; THE ANSWER IS NO BECAUSE
10 THAT'S IN A SEPARATE ARTICLE OF THE BYLAW 16 WHICH THEY STILL
11 HAD TO COMPLY WITH.

12 **THE COURT:** THAT DIDN'T HAVE THE "A" BY IT. COULD
13 THEY HAVE SAID WE ARE GOING TO DO COA PLUS A THOUSAND DOLLARS,
14 OR ANYBODY WHO DOESN'T GET A PELL GRANT GETS --

15 (SIMULTANEOUS COLLOQUY.)

16 THINGS LIKE THAT, DID THEY HAVE THE AUTHORITY TO DO THAT
17 WITHOUT THE -- IF THE NCAA HAD NOT APPROVED IT?

18 **MR. KESSLER:** THE NCAA STILL HAD A MECHANISM WHERE
19 THEY COULD OVERRIDE CERTAIN THINGS THAT THEY THOUGHT WERE --

20 **THE COURT:** THEY COULD --

21 **MR. KESSLER:** -- INCONSISTENT ABOUT THAT. THAT'S ALL
22 SET FORTH IN THIS -- IN FIVE --

23 **THE COURT:** MR. WILLIAMS, WILL YOU MAKE A NOTE TO
24 YOURSELF TO MAKE SURE THAT'S RIGHT?

25 **MR. KESSLER:** IF YOU LOOK AT 5321, IT GOES THROUGH

1 HERE'S HOW THEY HAD THE PROPOSED CHANGES, HERE ARE THE RIGHTS
2 THE DIVISION I COUNSEL CAN TRY TO OVERRIDE. IN OTHER WORDS,
3 IT'S NOT COMPLETE FREEDOM IN TERMS OF THAT.

4 **THE COURT:** I'M JUST WONDERING IF THERE'S ANY SORT OF
5 LEGAL EFFECT OF THIS AUTONOMY 5 GROUP. IS THE AUTONOMY 5
6 GROUP A SORT OF A -- IS IT CAPABLE OF COMMITTING AN ANTITRUST
7 VIOLATION ON ITS OWN? DOES IT HAVE MARKET POWER?

8 **MR. KESSLER:** YES. OUR VIEW WOULD BE, AND THAT'S WHY
9 WE HAVE OUR INJUNCTION CRAFTED THE WAY WE DO, THAT THE
10 QUESTION ON INDIVIDUAL CONFERENCE REGULATION IS WHETHER OR NOT
11 YOU HAVE MARKET POWER OR NOT. NO ONE CONFERENCE WOULD HAVE
12 MARKET POWER BUT ALL THESE FIVE TOGETHER WOULD.

13 **THE COURT:** HOW DO WE KNOW THAT? IS THERE EVIDENCE
14 OF THAT? IS THERE TESTIMONY ABOUT THAT?

15 **MR. KESSLER:** WELL -- WELL, WE DIDN'T ADDRESS IT
16 SPECIFICALLY, BUT INDIRECTLY, IF YOU LOOK AT THE REVENUE
17 DISTRIBUTION THAT WAS -- IF YOU LOOK AT THE REVENUE
18 DISTRIBUTION THAT WE LOOKED AT, VIRTUALLY ALL OF THESE
19 REVENUES ARE ALL GOING TO THE POWER 5 CONFERENCES, YOU KNOW,
20 IN TERMS OF ALL THE REVENUE DATA WE PUT IN.

21 REMEMBER WE DID THE POWER 5 VERSUS THE AUTONOMY VERSUS THE
22 NONAUTONOMY. YOU CAN SEE THAT ON A FINANCIAL METRIC, THEY SO
23 DOMINATE THE REVENUES. THAT'S WHAT THEY SAID HERE IN THIS
24 DOCUMENT THAT I CITED, 56, THEY BASICALLY SAY WE HAVE MOST OF
25 THE RESOURCES. WE'RE THE ONES WHO ARE MOST ADVERSELY AFFECTED

1 BY ALL OF THIS, AND WE ARE THE ONES WHO DRIVE THIS.

2 **THE COURT:** THE DEFENDANTS THOUGH -- THERE'S 12
3 CONFERENCE DEFENDANTS, NOT JUST THE AUTONOMY 5. SO WE HAVE
4 CONFERENCE DEFENDANTS WHO AREN'T IN THE AUTONOMY 5.

5 **MR. KESSLER:** RIGHT.

6 **THE COURT:** MR. WILLIAMS, ARE YOU REPRESENTING BOTH
7 AUTONOMY 5 AND NONAUTONOMY 5 CONFERENCES?

8 **MR. WILLIAMS:** FOR PURPOSES OF THE TRIAL, YES, I AM,
9 YOUR HONOR.

10 **THE COURT:** OKAY.

11 **MR. KESSLER:** AND THE ARGUMENT THERE, YOUR HONOR,
12 WOULD BE THE NONAUTONOMY DEFENDANTS ARE THERE FOR AGREEING TO
13 THE NCAA REGULATIONS. BECAUSE AS EVERYBODY ELSE, THAT'S
14 REALLY WHY THEY WERE PUT IN AS WELL IN TERMS OF THAT --

15 **THE COURT:** OKAY.

16 **MR. KESSLER:** -- WITH REGARD TO THAT.

17 AND, AGAIN, IF YOU LOOK AT ANOTHER IMPORTANT EXHIBIT ON
18 THIS CONFERENCE AUTONOMY, YOUR HONOR, WHICH IS MR. BOWLSBY'S
19 TESTIMONY. THIS IS IN TWO PLACES. I'M SORRY, I'M LOOKING FOR
20 THE EXHIBIT NUMBER.

21 (PAUSE IN THE PROCEEDINGS.)

22 79, IN PLAINTIFFS' EXHIBIT 79, HERE IT IS, MR. BOWLSBY
23 WROTE THAT THE REASON FOR THESE AUTONOMY CONFERENCES WERE TO
24 DIRECT THEIR SUPPORT TO STUDENTS INSTEAD OF COACHES AND
25 INFRASTRUCTURE.

1 THAT WAS THE WHOLE PURPOSE. AGAIN, I THINK THEY CAN BE
2 TREATED SEPARATELY WITH REGARD TO THAT.

3 SO --

4 **THE COURT:** YOU SHOULD GO ON TO ANY OTHER THINGS --

5 **MR. KESSLER:** I'M GOING TO THE RULES ISSUE.

6 **THE COURT:** -- WITHIN YOUR PURVIEW HERE.

7 **MR. KESSLER:** YES.

8 SO, YOUR HONOR, COVERING THE CHANGE IN THE RULES, THERE
9 ARE THREE POINTS I WOULD MAKE ABOUT THIS.

10 FIRST OF ALL, WE'VE IDENTIFIED, AND I DON'T THINK THEY
11 DISPUTE NOW, THAT THERE WERE TEN POST-O'BANNON RULE CHANGES
12 THAT WE IDENTIFIED THAT COMMITTED NEW BENEFITS ABOVE COST OF
13 ATTENDANCE THAT WE BELIEVE WERE SIGNIFICANT.

14 THEY, IN THEIR CLOSING BRIEF, THEY SAID, WELL, THEY ARE
15 MINOR. BUT, YOUR HONOR, THEY ARE NOT MINOR. THESE CHANGES
16 INCLUDED THE UNLIMITED FOOD CHANGE WHICH HAS LED TO THOUSANDS
17 OF DOLLARS MORE BEING SPENT ON ATHLETES DURING THE YEAR. THE
18 POST-GRADUATE SCHOLARSHIP CHANGE; THAT WAS MADE TO ALLOW NOW
19 FOR THE TWO SCHOLARSHIPS PER SCHOOL. THE HEALTH CARE FOR
20 SPORTS INJURIES AFTER YOU GRADUATE, WHICH WAS A HUGE CHANGE IN
21 TERMS OF THIS. THE LOSS OF VALUE INSURANCE BEING PAID NOT
22 JUST OUT OF SAF, BUT ALSO AS A LOAN AS ANOTHER WAY BEING
23 PERMITTED IN TERMS OF THAT. ALLOWING TO ACCEPT TRANSPORTATION
24 COSTS FROM AGENTS.

25 ALL THESE CHANGES TOGETHER, THE SIGNIFICANCE IS, EVERY ONE

1 OF THESE CHANGE GETS MADE, AND THERE'S NO IMPACT ON DEMAND.
2 THAT'S WHY THEY ARE SIGNIFICANT.

3 IT'S NOT THAT WE ARE SAYING, AS THEY CLAIM, OH, THEY
4 SHOULD BE PUNISHED FOR OFFERING MORE BENEFITS, THAT'S NOT OUR
5 CLAIM. OUR CLAIM IS THIS NEW RECORD OF CHANGES SHOWS THAT
6 THERE'S MUCH ROOM, THERE'S A MUCH LESS RESTRICTIVE
7 ALTERNATIVES TO LET THE CONFERENCES DECIDE TO HAVE ADDITIONAL
8 BENEFITS BECAUSE EVERY TIME THEY MAKE ONE, RATHER THAN IT
9 BEING A QUANTUM LEAP, AS I SAID, IT'S A LITTLE TINY BABY STEP.

10 THE SECOND ONE IS, WE DEMONSTRATED THERE WERE AT LEAST 17
11 BENEFITS RELATED TO EDUCATION WHICH ARE PROHIBITED, AND THIS
12 WAS BROUGHT OUT IN THE TRANSCRIPT OF LENNON DURING THE TRIAL.
13 I ACTUALLY SPENT SOME TIME GOING THROUGH ALL OF THIS DURING
14 THE TRIAL. YOUR HONOR MAY RECALL THAT.

15 AND THIS AS WELL INDICATES WHEN YOU LOOK THROUGH THOSE 17
16 CHANGES -- AND BY THE WAY, IT WAS -- THE TRIAL WAS AT 1559 TO
17 1572 OF THE TRANSCRIPT. THAT'S WHERE WE COVERED THAT.

18 EACH ONE OF THESE WERE JUST EDUCATIONAL-RELATED PAYMENTS
19 AND THEY WERE PROHIBITED. SO WE HAVE THE RECORD AND THESE
20 CHANGES POST O'BANNON. BOTH PROHIBITING BENEFITS THAT ARE
21 RELATED TO EDUCATION, WHICH O'BANNON SEEMED TO SAY EVEN IN THE
22 NINTH CIRCUIT 201 OPINION WERE OKAY, AND ALLOWING ALL SORTS OF
23 PAYMENTS THROUGH SAF AND OTHERWISE UNCAP AN INCIDENTAL...
24 INCIDENTAL-TO-PARTICIPATION BENEFITS THAT HAVE NO RELATION TO
25 EDUCATION.

1 SO THE RECORD IS DIFFERENT ON THE CHANGES. BOTH WAYS, IN
2 TERMS OF THE PREMISES OF O'BANNON, AND NONE OF THAT WAS IN THE
3 RECORD. IT IS ONE THING TO SAY O'BANNON CONSIDERED THAT THERE
4 WERE PELL GRANTS AVAILABLE, THERE IS NO WAY YOU CAN LOOK
5 THROUGH THE O'BANNON OPINION NINTH CIRCUIT OPINION, YOUR
6 HONOR'S OPINION THAT THIS EVIDENCE WAS PRESENTED ABOUT THE
7 AMOUNTS BECAUSE IT DIDN'T HAPPEN. IT HAPPENED POST COA THAT
8 WAS AVAILABLE, ALL THESE OTHER BENEFITS AND THINGS, PLUS THE
9 ONES THROUGH THE WAIVER PROCESS, PLUS THE ONES THROUGH THE
10 INTERPRETATION PROCESS AS WELL.

11 **THE COURT:** IT IS TRUE, THOUGH, THAT SOME OF THE
12 THINGS THAT YOU NOW POINT TO WERE IN EFFECT AT THE TIME OF
13 O'BANNON. SOME MAY BE WERE IN EFFECT AND WEREN'T MENTIONED,
14 OTHERS WERE PERHAPS MENTIONED BY WITNESSES BUT NOT ARGUED OR
15 NOT RULED UPON.

16 WHAT'S YOUR ANALYSIS OF --

17 **MR. KESSLER:** WHAT I WOULD SAY, YOUR HONOR, IS THAT
18 WHAT WASN'T IN THE RECORD BEFORE O'BANNON WAS THE ECONOMIC
19 SIGNIFICANCE, BECAUSE IT DIDN'T HAPPEN YET IN O'BANNON, OF THE
20 PERVASIVE USE OF THESE BENEFITS --

21 **THE COURT:** DO YOU THINK THINGS THAT WERE IN EFFECT
22 IN O'BANNON OR THAT WERE ALLUDED TO IN O'BANNON BUT NOT
23 SPECIFICALLY ARGUED, ARE THOSE THINGS OFF LIMITS?

24 **MR. KESSLER:** NO, I DO NOT THINK THEY ARE OFF LIMITS.

25 **THE COURT:** WHY NOT?

1 **MR. KESSLER:** WELL, BECAUSE, YOUR HONOR, THERE IS NO
2 RULING IN *O'BANNON* ABOUT THEM. IT'S VERY CLEAR.

3 SO, FOR EXAMPLE, THE FACT THAT SAF PAYMENTS, FOR EXAMPLE,
4 WHETHER OR NOT -- SAF WASN'T MENTIONED IN THE *O'BANNON*
5 OPINION. IT MAY HAVE BEEN MENTIONED IN TRIAL, OKAY, IT WASN'T
6 MENTIONED IN YOUR HONOR'S OPINION, SAF SPECIFICALLY, BUT THE
7 FACT THAT THEY WERE USED FOR LOSS OF VALUE INSURANCE, THINGS
8 COMPLETELY UNRELATED TO EDUCATION, NONE OF THAT WAS EVEN IN
9 *O'BANNON*.

10 IN FACT, SAF IN *O'BANNON* WAS DESCRIBED AS THINGS TO HELP
11 STUDENTS MEET THEIR ADDITIONAL EDUCATION-RELATED COST. IT
12 TURNS OUT THAT'S NOT WHAT SAF IS ABOUT AT ALL. AND THERE'S NO
13 CAP AND IT'S USED FOR ALL THESE OTHER USES. THOSE WERE THE
14 CITATIONS I GAVE YOU EARLIER.

15 THE INCIDENTAL TO BENEFIT PARTICIPATION, THERE MAY HAVE
16 BEEN SOME CONCEPT IT COULD BE SOMETHING, BUT GIFT CARDS AND
17 GIFT SUITES AND ALL THESE OTHER BENEFITS THAT WERE DONE WERE
18 NOT MENTIONED AT ALL IN *O'BANNON* OR --

19 **THE COURT:** THE VISA CARD WAS MENTIONED IN THE TRIAL
20 TESTIMONY IN *O'BANNON*.

21 **MR. KESSLER:** IT CERTAINLY WASN'T ANALYZED IN TERMS
22 OF BEING ABOVE COA EFFECT --

23 **THE COURT:** THAT IS TRUE.

24 **MR. KESSLER:** -- BECAUSE THE SCHOOLS WEREN'T ALLOWED
25 TO GO TO COA. THAT'S REALLY -- THE SIGNIFICANCE OF ALL THIS

1 IS, IS THAT WHAT YOUR HONOR'S DECISION DID DO, WHAT THE
2 POWER 5 DID DO IS BY GOING TO COA, COMBINING IT WITH ALL THESE
3 OTHER TYPES OF BENEFITS WHICH LED TO... TO AN EXPOSURE OF THIS
4 IDEA THAT THERE'S A QUANTUM LEAP. IF YOU GO ABOVE COA EVEN BY
5 \$5,000 CLEARLY IS NOT CORRECT. BECAUSE IT'S ALL OVER THE
6 RECORD OF GOING ABOVE THOSE AMOUNTS, AND THERE'S BEEN NO
7 ADVERSE EFFECT.

8 SO NOW WE KNOW. THAT'S WHY IN ANTITRUST CASES, AND YOUR
9 HONOR CITED THE *HARKENS* CASE AND OTHERS, THAT'S WHY WE ALWAYS
10 LOOK AT ANTITRUST CASES FRESH BECAUSE THE FACTS CHANGE AND THE
11 RESTRAINTS INVOLVE, AND HOW THEY ARE BEING UTILIZED IN TERMS
12 OF THAT.

13 THE LAST THING I WANTED TO SAY TO YOUR HONOR ABOUT
14 THESE -- THIS ISSUE OF THE RULES CHANGES AND HOW THEY -- WHAT
15 KIND OF IMPACT THAT THEY HAVE HAD HERE, IS THAT... IS THAT
16 WHEN WE LOOK AT THESE CHANGES, IT ALSO COMES THROUGH THIS LENS
17 OF THE CONFERENCE AUTONOMY. BECAUSE THE CONFERENCE AUTONOMY
18 PUT FORWARD A NUMBER OF THESE CHANGES ON THEIR OWN AND CHANGED
19 THE MAGNITUDE OF THEM.

20 SO, FOR EXAMPLE, EVEN WHERE A RULE DOESN'T CHANGE, THEY'RE
21 NOW PROVIDING GREATER BENEFITS IN THOSE CONFERENCES. AND,
22 AGAIN, THERE'S BEEN NO ADVERSE EFFECT ABOUT THAT.

23 **THE COURT:** WAIT, WHAT, THEY ARE GIVING OUT MORE SAF
24 MONEY? OR WHAT ARE YOU REFERRING TO?

25 **MR. KESSLER:** THEY'RE GIVING OUT LARGER AMOUNTS OF

1 SAF MONEY. THAT'S CLEAR.

2 NUMBER TWO, THINGS LIKE THE NEBRASKA PROGRAM, WHICH WENT
3 INTO EVIDENCE, THAT WAS THE CONFERENCE AUTONOMY, JUST ONE
4 EXAMPLE, OF SAYING NOW WE'RE GOING TO OFFER THIS. THINGS LIKE
5 CHANGING TO A VISA GIFT CARD, WHICH IS THE EQUIVALENT OF CASH.
6 THAT DID NOT EXIST BACK AT THE TIME OF O'BANNON.

7 **THE COURT:** IT DID ACTUALLY.

8 **MR. KESSLER:** IN TERMS OF THAT. I DON'T THINK IT WAS
9 THE CASH CARD, YOUR HONOR. BUT MAYBE YOUR HONOR REMEMBERS
10 BETTER.

11 **THE COURT:** I DON'T REMEMBER IT, BUT IT'S IN THE
12 TRANSCRIPT.

13 **MR. KESSLER:** OKAY.

14 SO THE BOTTOM LINE OF ALL OF THIS, YOUR HONOR, IS WE
15 BELIEVE THAT, AGAIN, WHILE PELL WAS ALLUDED TO AND CERTAINLY
16 DISCUSSED, THAT THE MERE FACT OF PELL ALONE DIDN'T CHANGE THE
17 ANALYSIS, I THINK ANY FAIR READING WOULD BE THAT THE PREMISE
18 OF O'BANNON PREVIOUSLY WAS THAT THERE REALLY WAS NOT ANY
19 OPPORTUNITY FOR MATERIAL COMPENSATION TO THE ATHLETES ABOVE
20 COA THAT WAS GOING TO MAKE ANY DIFFERENCE.

21 AND WHAT WE NOW KNOW IN THIS RECORD THAT'S HAPPENED, IT'S
22 TAKEN PLACE, IT KEEPS CHANGING IN INCREMENT -- THIS IS
23 IMPORTANT, YOUR HONOR, AND THEY NEVER STUDY IT. AND THIS GOES
24 TO A VERY IMPORTANT FACT THAT WASN'T IN O'BANNON.

25 WE HAD MR. LENNON TESTIFY THAT IN HIS 30 YEARS AND ALL OF

1 THESE CHANGES THAT TOOK PLACE, NEVER ONCE CAN HE RECALL ANYONE
2 STUDYING WHAT IMPACT WILL IT HAVE ON DEMAND OR INTEGRATION OR
3 EVEN DISCUSSING IT.

4 AND -- AND HE NEVER ONCE DID THE TYPE OF STUDY THAT
5 MR. BERMAN SPOKE ABOUT AT THE TIME. THERE WAS NO ISAACSON.
6 THEY DIDN'T BRING IN ISAACSON AND SAY YOUR HONOR ASKED THE
7 QUESTION AND WHAT VALUE DOES IT HAVE SOME PEOPLE MAY NOT LIKE
8 THE COLOR OF THE COKE CAN.

9 WELL, COKE, IF THEY DO THAT, DO THAT BEFORE THEY MAKE A
10 CHANGE. THAT'S THE WHOLE PREMISE OF THAT QUESTION. THE NCAA,
11 FOR AT LEAST THE LAST 30 YEARS, NEVER LOOKS AT THAT AT ALL IN
12 ORDER TO DECIDE THEIR CHANGES, BUT THEY DO TALK ABOUT COST.
13 AND THAT'S UNDISPUTED IN THE RECORD.

14 AND WHAT THAT SHOWS, YOUR HONOR, AGAIN, NONE OF THIS IS
15 BEFORE O'BANNON, THAT WITH ALL THESE CHANGES HAPPEN, THEY ARE
16 NOT BEING MOTIVATED BY CONSUMER DEMAND OR INTEGRATION, WHAT
17 THEY ARE BEING MOTIVATED IS WHATEVER THE MAJORITY OF THE
18 CONFERENCES DECIDE IS THE NEW DEFINITION, THE NEW COMP THAT'S
19 ALLOWED, THE NEW CHANGING THING.

20 AND IN THAT ENVIRONMENT, THERE'S NO WAY THEY CAN MEET
21 THEIR BURDEN TO SHOW THAT THESE RULES ARE CALIBRATED TO
22 FURTHER DEMAND OR INTEGRATION AT ALL. AND MR. LEWIS AND
23 MR. LENNON BOTH TESTIFIED AS 30(B)(6), NONE OF THIS HAD ANY
24 ADVERSE EFFECT ON INTEGRATION OR DEMAND.

25 **THE COURT:** OKAY.

1 **MR. KESSLER:** THANK YOU, YOUR HONOR.

2 **THE COURT:** WHAT I WANT TO TURN TO NOW, I THINK, IS
3 LESS RESTRICTIVE ALTERNATIVES, AND AS LONG AS PLAINTIFFS ARE
4 SPEAKING, LET'S START WITH PLAINTIFFS. AND I DON'T KNOW WHICH
5 OF YOU --

6 **MR. KESSLER:** IT'S ME, YOUR HONOR, I'M AFRAID. YOU
7 MAY HAVE HEARD ENOUGH FROM ME, BUT IT IS ME.

8 ON LESS RESTRICTIVE ALTERNATIVES, YOUR HONOR --

9 **THE COURT:** WHAT I WANT TO KNOW IS, IF YOU CAN DO
10 THIS QUITE BRIEFLY AND BULLET-POINT-WISE, WOULD BE WHAT IS THE
11 DIFFERENCE BETWEEN YOUR PROPOSED LESS -- AND I AM JUST GOING
12 TO -- I STRUGGLED WITH THIS FOR A LONG TIME, BUT I'VE KIND OF
13 GIVEN UP. I AM TENDING TO THINK THAT IF WE GET TO THIS, THAT
14 WHATEVER THE LESS RESTRICTIVE ALTERNATIVES ARE, ARE ALSO GOING
15 TO BE THE INJUNCTION. SO WE MIGHT AS WELL JUST TALK ABOUT
16 THEM TOGETHER.

17 AND SO THE QUESTION IS, WHAT IS THE DIFFERENCE BETWEEN
18 YOUR THREE PROPOSALS, WHICH I WILL CALL IT NOW, AND WHY --
19 WHICH ONES ARE PREFERABLE IN WHAT CIRCUMSTANCES, OR WHY IS ONE
20 BETTER THAN THE OTHER, ET CETERA.

21 SO IF YOU COULD -- I DON'T KNOW IF YOU CAN DO THAT, BUT IF
22 YOU CAN SORT OF SUMMARIZE IN BULLET POINTS --

23 **MR. KESSLER:** YES.

24 **THE COURT:** -- WHAT YOU THINK.

25 **MR. KESSLER:** RIGHT.

1 SO BY FAR WE THINK THE BEST PROPOSAL'S OUR FIRST PREFERRED
2 INJUNCTION WHICH SIMPLY ENJOINS THE NCAA FROM JUST ITS
3 COMPENSATION CAPS AND RULES, WE'VE IDENTIFIED WHICH ONES IN
4 THE RECORD, AND IT ALLOWS THE INDIVIDUAL CONFERENCES TO
5 DETERMINE WHAT THE RULES WILL BE.

6 **THE COURT:** YEAH, THAT'S WHAT YOU KEEP SAYING, THAT'S
7 THE CONFERENCE ONE. BUT IT ISN'T. BECAUSE NUMBER TWO ALSO
8 WOULD ALLOW THE CONFERENCES TO DO SUCH LIMITATIONS AS WELL.

9 **MR. KESSLER:** BUT NUMBER TWO ALSO ALLOWS THE NCAA TO
10 OVERRIDE THE CONFERENCES TO SOME DEGREE.

11 **THE COURT:** BUT THE DISTINGUISHING POINT ISN'T THE
12 POWER OF THE CONFERENCES. THE CONFERENCES WOULD HAVE THE SAME
13 POWER UNDER BOTH. SO --

14 **MR. KESSLER:** YES.

15 **THE COURT:** DON'T TALK TO ME ABOUT THE CONFERENCE
16 ONE.

17 **MR. KESSLER:** OKAY. SO THE REASON WHY WE THINK THEY
18 ARE DIFFERENT IS THAT --

19 **THE COURT:** BUT YOU THINK THE -- I DID IT MYSELF.
20 YOU THINK THE FIRST ALTERNATIVE IS PREFERABLE, AND IS IT
21 PREFERABLE IN ALL SITUATIONS? IN OTHER WORDS, DO YOU THINK
22 THAT IT WOULD BE APPROPRIATE WHETHER ONE OR THE OTHER OR BOTH
23 OR NEITHER, FOR THAT MATTER, OF THE PROCOMPETITIVE
24 JUSTIFICATIONS WERE FOUND?

25 **MR. KESSLER:** YES, WE THINK IT IS PREFERABLE -- WELL,

1 IF IT'S NEITHER, THEN YOU NEVER HAVE TO GET TO THE LESS
2 RESTRICTIVE ALTERNATIVE --

3 **THE COURT:** NO, BUT YOU'D GET TO THE INJUNCTION IF
4 YOU BALANCED AND FOUND THAT THE ANTI OUTWEIGHED THE PRO. EVEN
5 IF THERE WAS NO LESS RESTRICTIVE, YOU WOULD END UP HAVING TO
6 ENTER AN INJUNCTION.

7 **MR. KESSLER:** NO MATTER WHICH JUSTIFICATION THEY SHOW
8 OR BOTH --

9 **THE COURT:** OR NEITHER.

10 **MR. KESSLER:** -- WE BELIEVE IT IS MOST PREFERABLE.
11 THE REASON IS IT ANSWERS THE TOUGH QUESTION ABOUT HOW TO GIVE
12 APPROPRIATE LATITUDE, AMPLE LATITUDE TO THE SCHOOLS AND THE
13 CONFERENCES TO DECIDE WHAT THEY NEED TO DO.

14 IT DOESN'T HAVE THE COURT GOING IN AND SAYING THIS RULE
15 SHOULD BE PERMITTED AND THIS ONE SHOULDN'T. IT SAYS
16 CONFERENCES --

17 **THE COURT:** BUT THAT ISN'T THE DIFFERENCE. BECAUSE
18 THE CONFERENCES AND SCHOOLS CAN DO THAT UNDER ALTERNATIVE
19 NUMBER TWO OR EVEN THREE. THE DIFFERENCE IS WHETHER THE NCAA
20 CAN CAP --

21 **MR. KESSLER:** RIGHT.

22 **THE COURT:** -- EDUCATION OR ATHLETIC PARTICIPATION OR
23 NOT.

24 **MR. KESSLER:** RIGHT. RIGHT. SO THE REASON FOR THE
25 DIFFERENCE, NOW I UNDERSTAND YOUR QUESTION BETTER, IS THAT

1 ALTERNATIVE TWO ASSUMES THAT WE'RE WRONG AND THERE IS SOME
2 NATIONAL NEED TO PROHIBIT CASH COMPENSATION UNTETHERED TO
3 EDUCATION RELATED -- EDUCATION-RELATED BENEFITS OR EXPENSES.

4 IN OTHER WORDS, TWO IS SAYING IF WE ARE WRONG, AND THEY
5 HAVE DEMONSTRATED THERE IS A NEED FOR A NATIONAL RULE BECAUSE
6 THE CONFERENCES CAN'T BE TRUSTED, FOR SOME REASON, YOU KNOW,
7 PROFESSOR ELZINGA'S EXTERNALITIES ARGUMENT THAT THE
8 CONFERENCES WILL SOMEHOW NOT ACT IN THE BEST INTEREST OF THE
9 WHOLE; THAT IF YOU ACCEPTED THAT, THAT AT A MINIMUM THAT WOULD
10 ONLY JUSTIFY ALLOWING THE RULE FOR WHERE THE O'BANNON COURT
11 DREW THE LINE, WHICH IS BETWEEN CASH COMPENSATION TETHERED TO
12 EDUCATION-RELATED EXPENSES AND EVERYTHING ELSE, THAT'S THE
13 QUANTUM LEAP.

14 SO THAT UNDER THE SECOND ALTERNATIVE, THE 17 BENEFITS I
15 IDENTIFIED RELATED TO EDUCATION, THAT WOULD BE -- THAT --
16 THOSE WOULD ALL ABOUT PERMITTED IF THE CONFERENCES WANT TO DO
17 THEM OR SCHOOLS WANTED TO OFFER THEM, THE NCAA COULDN'T
18 PROHIBIT THOSE BECAUSE EVEN THE O'BANNON MAJORITY SAID THAT
19 THAT WAS A LINE THAT THEY SAW --

20 **THE COURT:** RIGHT. THE PROBLEM --

21 **MR. KESSLER:** SO THAT'S THE REASON FOR THE DIFFERENCE
22 OF THE ALTERNATIVES.

23 **THE COURT:** THE PROBLEM WITH THAT IS, WHO DEFINES
24 WHAT'S AN EDUCATIONAL BENEFIT?

25 **MR. KESSLER:** WELL, I THINK --

1 **THE COURT:** HOW IS THAT ADJUDICATED?

2 **MR. KESSLER:** THIS IS AN ISSUE OF ANTITRUST LAW, YOU
3 KNOW, IN THAT ANTITRUST LAW THERE'S ALWAYS GOING TO BE ISSUES
4 OF DEFINITION.

5 WHAT WE WOULD PROPOSE TO MAKE IT CLEAR, IF YOUR HONOR
6 WANTED TO, WE HAVE 17 THAT THEY IDENTIFIED, SO WE CAN AT LEAST
7 INDICATE THOSE 17 COULD NOT BE REGULATED. AND IF THERE ARE
8 OTHERS, YOU KNOW, AGAIN, ANY TIME YOU HAVE ANY TYPE OF, YOU
9 KNOW, LESS RESTRICTIVE ALTERNATIVE, THE MARKET PLACE MAY
10 EVOLVE, OTHERS MAY DEVELOP OR NOT, BUT WE CERTAINLY KNOW WHICH
11 ONES ARE THERE. WE TOOK THE SAME APPROACH TO INCIDENTAL --

12 **THE COURT:** WHAT IF WE SAID THE NCAA DEFINES WHAT IS
13 AN EDUCATIONAL BENEFIT? AND THE NCAA DEFINES WHAT IS
14 INCIDENTAL TO ATHLETIC PARTICIPATION?

15 **MR. KESSLER:** THE PROBLEM I HAVE WITH THAT, YOUR
16 HONOR, IS -- WELL, I HAVE A DIFFERENT ANSWER FOR THE SECOND
17 ONE THAN THE FIRST ONE.

18 **THE COURT:** OKAY.

19 **MR. KESSLER:** INCIDENTAL TO BENEFIT PARTICIPATION,
20 THAT'S WHAT OUR INJUNCTION DOES. WE TOOK THE ONES THAT
21 MR. LENNON ON BEHALF OF THE NCAA SAID THESE ARE THE ONES THAT
22 DON'T RELATE TO PRINCIPLES OF AMATEURISM, THAT'S THEIR
23 DEFINITION, AND THE ONLY ISSUE IS WHETHER THEY ARE CAPPED OR
24 NOT.

25 **THE COURT:** I KNOW, BUT THE THING THAT IS AWKWARD

1 ABOUT THAT IS IT SORT OF FREEZES IN TIME A SNAPSHOT OF THE
2 ONES THEY HAPPEN TO HAVE AT THIS MOMENT. WHAT IF THERE'S
3 MORE?

4 **MR. KESSLER:** YOUR HONOR, AND I THINK THERE SHOULD BE
5 GREATER --

6 **THE COURT:** OR MAYBE LESS. IT'S JUST AN ODD
7 FORMULATION --

8 **MR. KESSLER:** THERE SHOULD BE --

9 **THE COURT:** -- I'M TRYING TO FIGURE OUT HOW ONE COULD
10 HAVE A MORE ELEGANT SOLUTION.

11 **MR. KESSLER:** WELL, I WISH I COULD BE --

12 **THE COURT:** SORRY, I DIDN'T MEAN TO CRITICIZE --

13 (SIMULTANEOUS COLLOQUY)

14 **MR. KESSLER:** WHAT I TRIED TO DO IS TO SAY SINCE
15 LENNON HAS 30(B)(6) ADMITTED IT FOR THESE --

16 **THE COURT:** NO, I GET --

17 **MR. KESSLER:** IT IS A MINIMUM --

18 **THE COURT:** I GET WHY YOU ARE DOING IT. MY QUESTION
19 IS, WHAT ABOUT HAVING THE NCAA DEFINE WHAT IS AN
20 EDUCATION-RELATED BENEFIT AND WHAT IS INCIDENTAL TO ATHLETIC
21 PARTICIPATION. AND IF THEY DEFINE SOMETHING IN ONE OF THOSE
22 CATEGORIES, THEN THEY CAN'T LIMIT IT.

23 **MR. KESSLER:** SO ON INCIDENTAL TO BENEFIT
24 PARTICIPATION, I WOULD NOT HAVE A PROBLEM IN SAYING IN
25 ADDITION TO THE ONES THEY HAVE ALREADY DEFINED, THEY CAN ADD

1 TO THE LIST.

2 WHAT I DON'T THINK THEY SHOULD BE ABLE TO DO NOW IS NOW
3 THAT THEY KNOW YOU CAN USE THEM IS GO BACK ON THEIR 30(B)(6)
4 TESTIMONY. IN OTHER WORDS, THEY ARE LOOKED IN AS TO WHAT'S
5 ALREADY IDENTIFIED. AND IF THEY WANT TO ADD TO THEM IN THE
6 FUTURE, OR IF THEY THINK SOME FACTS HAVE CHANGED IN THE
7 FUTURE, THEY CAN MAYBE TRY TO PETITION FOR A CHANGE WHICH
8 SOMETIMES HAPPENS IN AN OLD INJUNCTION --

9 **THE COURT:** OKAY. BUT I ASK YOU AGAIN, WHAT ABOUT
10 HAVING THEM DEFINE IT?

11 **MR. KESSLER:** WELL, AGAIN, ON INCIDENTAL BENEFIT I
12 THINK THEY HAVE ALREADY. I DON'T THINK THEY CAN CHANGE WHAT
13 THEY'VE DONE.

14 **THE COURT:** NO, NO, NO. I MEAN DEFINE IT.

15 **MR. KESSLER:** DEFINE IT GOING FORWARD.

16 **THE COURT:** THEY HAVE SAID THINGS THAT ARE IT.

17 **MR. KESSLER:** RIGHT.

18 **THE COURT:** BUT THEY HAVEN'T -- UNLESS I MISSED IT OR
19 WHATEVER, THEY HAVEN'T DEFINED WHAT IT ACTUALLY MEANS.

20 **MR. KESSLER:** I GUESS I WOULD BE FINE WITH THAT, YOUR
21 HONOR, AS LONG AS THEY CAN'T MANIPULATE THE SYSTEM TO SUDDENLY
22 SAY ALL THE THINGS WE SAID ARE INCIDENTAL TO BENEFITS OF
23 PARTICIPATION ARE NOW COST OF ATTENDANCE. IN OTHER WORDS, IF
24 IT COMES --

25 **THE COURT:** ALL RIGHT.

1 **MR. KESSLER:** -- THAT'S WHAT MY CONCERN IS.

2 **THE COURT:** THE THIRD OPTION --

3 **MR. KESSLER:** YES.

4 **THE COURT:** -- TAKES AWAY THE INCIDENTAL TO ATHLETIC
5 PARTICIPATION THING --

6 **MR. KESSLER:** RIGHT.

7 **THE COURT:** -- ALTOGETHER --

8 **MR. KESSLER:** RIGHT.

9 **THE COURT:** -- AND LIMITS THE LIMIT --

10 **MR. KESSLER:** -- RIGHT.

11 **THE COURT:** -- TO NOT LIMITING EDUCATIONAL EXPENSES.

12 **MR. KESSLER:** RIGHT. THAT'S RIGHT.

13 IT REALLY WAS -- THAT'S WHY WE ORDERED IT IN THAT WAY. WE
14 DON'T BELIEVE THEY JUSTIFIED ANYTHING THAT DOESN'T ALLOW THE
15 FIRST INJUNCTION. BUT WE'RE BASICALLY SAYING, IF YOUR HONOR
16 DISAGREES WITH US, ENTERS FINDINGS AGAINST US, THIS IS THE WAY
17 YOU COULD MOVE DOWN BECAUSE IT WOULD STILL BE MORE
18 RESTRICTIVE.

19 ONE MORE FINAL COMMENT ON THIS.

20 **THE COURT:** WELL, WAIT. I HAVE ANOTHER QUESTION,
21 WHICH IS --

22 **MR. KESSLER:** I'M SORRY.

23 **THE COURT:** PERHAPS THE REASON YOU DELINEATED EACH OF
24 THE EXISTING INCIDENTAL-TO-PARTICIPATION BENEFITS IS BECAUSE
25 YOU COULDN'T THINK OF A WAY TO DEFINE THEM.

1 **MR. KESSLER:** WELL, I THINK, YES. THE NCAA
2 STANDARDS, BECAUSE WHEN YOU COME DOWN TO IT, WHAT MR. LENNON
3 TESTIFIED, AND THIS, I THINK, WAS SOME OF THE MOST POIGNANT
4 TESTIMONY IN THE WHOLE CASE, IS THAT IT COULD CHANGE ON THE
5 VOTE.

6 SO, ONE DAY IT'S INCIDENTAL BENEFIT TO PARTICIPATION TO
7 GIVE TWO SCHOLARSHIPS, YOU KNOW, MAYBE THAT IS EDUCATION
8 RELATED, BUT IT'S THE SAME IDEA. TO ALLOW \$70 BUT THE NEXT
9 DAY IF THEY CHANGE IT TO 90, IT'S OKAY? IF THEY DON'T CHANGE
10 IT TO 90, THEN THAT'S PAY FOR PLAY. IN OTHER WORDS, THERE'S
11 NO PRINCIPLED LINE, AND THIS IS IN THE EVIDENCE, OTHER THAN
12 WHATEVER THE MAJORITY OF MEMBERS VOTE.

13 **THE COURT:** OKAY.

14 **MR. KESSLER:** THEREFORE, THERE WAS NO WAY TO DO IT
15 EXCEPT SAY WHAT HAVE YOU ALREADY DONE. AND, FRANKLY, WHEN
16 THEY WENT THROUGH ALL THIS AND MADE THESE ADMISSIONS THAT
17 THESE WERE ALL INCIDENT BENEFIT PARTICIPATION NOT BASED ON
18 AMATEURISM, I THOUGHT THEY WERE BEING VERY HONEST. THEY
19 COULDN'T FIT THEM INTO THEIR AMATEURISM PRINCIPLES.

20 **THE COURT:** EVEN EDUCATION-RELATED EXPENSES IS NOT
21 SELF-DEFINING.

22 **MR. KESSLER:** THERE COULD BE DEBATES. THE ONE THAT
23 WOULD BE THE BIGGEST DEBATE ABOUT IS THE ACADEMIC INCENTIVE
24 PAYMENTS.

25 **THE COURT:** WELL, I WOULD SAY -- WELL, THERE'S THAT.

1 THERE'S ALSO, FOR EXAMPLE, TUITION AT A GRADUATE SCHOOL OTHER
2 THAN AT YOUR OWN INSTITUTION.

3 **MR. KESSLER:** I THINK THAT'S CLEARLY EDUCATION
4 RELATED --

5 **THE COURT:** YOU'D GET A DISPUTE ON THAT FROM SOMEBODY
6 ELSE.

7 **MR. KESSLER:** SO I GUESS I WOULD INTERPRET WHAT DID
8 THE O'BANNON COURT UNDERSTAND, BECAUSE THAT'S WHERE THAT
9 DISTINCTION CAME FROM.

10 AND WHEN THEY TALK ABOUT THE EDUCATION-RELATED
11 COMPENSATION, THEY SAID IN THE QUANTUM LEAP, THEY WERE
12 DEFINING IT, IT'S HARD, BUT THIS IS WHY. AND I'M GETTING A
13 GOOD NOTE HERE, THIS IS WHY WE THINK LETTING THE CONFERENCES
14 DECIDE IS THE RIGHT ANSWER BECAUSE THEY KNOW INDIVIDUALLY, THE
15 SAME PEOPLE WHO TESTIFIED HERE ARE THE PEOPLE WHO COULD BE
16 VOTING IN THE CONFERENCES WHO SAID THEY WOULD NEVER DO
17 ANYTHING TO HURT DEMAND.

18 AND SO IF YOU WILL LET THE CONFERENCES DECIDE THESE LINES,
19 THE FIRST ONE DOESN'T DRAW IT, THAT IS THE SAFEST WAY AND IT'S
20 THE WAY THAT ANTITRUST INJUNCTIONS ARE GENERALLY PREFERRED TO
21 LESS THAN A REGULATORY APPROACH AND MORE JUST JOIN THE
22 RESTRAINTS, WHICH IS WHAT WE ARE DOING, AND THEN LET THE
23 COMPETITION OF THE CONFERENCES -- WE ARE LUCKY HERE THAT WE
24 HAVE A WHOLE HISTORY OF CONFERENCES DOING THESE THINGS, OF
25 BEING ABLE TO ACCOMPLISH IT, OF KNOWING HOW TO MAKE THESE

1 DECISIONS, AND BECAUSE THEY HAVE DIFFERENT RESOURCES.

2 THIS IS WHY I SAID THAT EXHIBIT IS SO SIGNIFICANT; THEY
3 RECOGNIZE WHAT IS GOOD FOR THE POWER 5 IS NOT GOING TO BE GOOD
4 FOR EVERYBODY ELSE.

5 **THE COURT:** THAT GETS BACK TO MY EARLIER QUESTION.
6 IS THERE -- CAN WE GLEAN ANY EVIDENCE FROM THE EXISTENCE OF
7 THE AUTONOMY 5 THAT THOSE CONFERENCES COULD HAVE ALREADY DONE
8 MORE --

9 **MR. KESSLER:** THEY CERTAINLY --

10 **THE COURT:** -- BUT DIDN'T FOR PERHAPS YOUR REASONING?

11 **MR. KESSLER:** THEY COULD HAVE PROPOSED MANY OTHER
12 ADDITIONAL BENEFITS. IN FACT, THEY ARE NOT IN THE RECORD, SO
13 I CAN'T PUT IT. THEY ARE THINKING OF NEW BENEFITS NOW EVERY
14 DAY. SO THERE IS MANY OTHER THINGS THEY CAN DO.

15 THEY STILL HAVE TO GO THROUGH THE PROCESS. FOR EXAMPLE,
16 DID NOT ALLOW TO GIVE A FEWER SCHOLARSHIP ABOVE FULL COA.
17 THAT'S IN ANOTHER ARTICLE. THEY CAN'T DO THINGS THAT DIRECTLY
18 VIOLATE ANOTHER ARTICLE PROHIBITION.

19 BUT THERE ARE THINGS THAT THEY COULD DO IN TERMS OF
20 INCREASING BENEFITS OTHER THINGS, AND PERHAPS THEY WILL, BUT
21 THE PROBLEM WITH THE FIVE CONFERENCES DOING IT, IS THAT, ONE,
22 ALL FIVE HAVE TO AGREE, AND THAT, WE BELIEVE, IS MARKET POWER
23 AND THEY REALLY CONTROL IT, SO IT'S NOT THE SAME AS A
24 COMPETITIVE LESS RESTRICTIVE ALTERNATIVE AND, NUMBER TWO, THEY
25 HAVE A PROCESS IN THE BYLAWS, AND THAT'S WHAT I POINTED OUT,

1 WHERE THE DIVISION I COULD OVERRIDE IT, AND STOP IT, AND ALSO
2 SUBJECT IT TO THEIR OTHER RULES --

3 **THE COURT:** RIGHT.

4 **MR. KESSLER:** -- IN TERMS OF THAT. BUT I DO BELIEVE
5 THIS HISTORY SHOWS THEY CAN BE TRUSTED TO DO THE RIGHT THING
6 IN TERMS OF --

7 **THE COURT:** I HAVE SOME SPECIFIC QUESTIONS ABOUT LESS
8 RESTRICTIVE ALTERNATIVES. SO IF YOU ARE DONE WITH YOUR
9 GENERAL EXPOSITION --

10 **MR. KESSLER:** I AM.

11 **THE COURT:** -- LET ME LOOK AT MY LIST AND SEE IF I
12 HAVE ANYTHING ELSE.

13 (PAUSE IN THE PROCEEDINGS.)

14 **THE COURT:** OH, YEAH. I WANT TO TALK ABOUT COST.
15 WHAT IS THE STATE OF THE RECORD?

16 **MR. KESSLER:** I COULD BE BULLET POINT ON THAT, YOUR
17 HONOR. I HAVE BULLET POINTS PREPARED. OKAY.

18 FIRST OF ALL, OUR INJUNCTION, OUR LESS RESTRICTIVE
19 ALTERNATIVE ONLY IS ELIMINATING THE NCAA RULES SO IT IS NOT
20 COMPELLING THE CONFERENCES TO INCUR ANY MORE COSTS. AND BY
21 DEFINITION, ELIMINATING RULES IS ONLY GOING TO BE LESS COST
22 NOT MORE ADMINISTRATIVE COST. IN THE RELEVANT, LEGAL CRITERIA
23 IS ADMINISTRATIVE COST. THAT'S WHAT WE ARE LOOKING AT IN
24 TERMS OF THAT, IN TERMS OF THE CASE LAW.

25 SO THE FIRST ONE IS ANY ADDITIONAL COST ARE GOING TO BE

1 BECAUSE OF THE MARKETPLACE DECISIONS, NOT A CONSEQUENCE OF THE
2 LESS RESTRICTIVE ALTERNATIVE. THAT'S POINT NUMBER ONE.

3 **THE COURT:** THAT MAY BE TRUE FOR ALTERNATIVE ONE, BUT
4 WHAT ABOUT FOR ALTERNATIVE TWO OR THREE?

5 **MR. KESSLER:** EVEN ALTERNATIVE TWO AND THREE, YOU
6 KEEP THE NCAA RULES. THAT IS NOT AN INCREASE COST BECAUSE THE
7 RULES ALREADY EXIST. TO THE EXTENT YOU ALLOW ADDITIONAL
8 THINGS IN THE CONFERENCES, THAT'S UP TO THEM TO DECIDE.

9 SO THAT ISSUE IS TO SAY NONE OF THE ALTERNATIVES COMPEL
10 ANYTHING, YOU KNOW, IN TERMS OF WHAT HAS TO BE DONE. IT'S NOT
11 LIKE WHERE YOU HAVE A LESS RESTRICTIVE ALTERNATIVE THAT CAUSES
12 PEOPLE TO DO OTHER THINGS. THAT'S POINT ONE.

13 NUMBER TWO, IS THERE'S NOTHING TO PROHIBIT, IN TERMS OF
14 ENFORCEMENT, WHICH IS WHERE -- THAT'S WHERE THEY MAY IDENTIFY
15 THEY THINK THERE WILL BE MORE COST. LETTING THE NCAA ENFORCE
16 THE NEW CONFERENCE RULES. THEY SEEM TO SUGGEST THAT OUR
17 INJUNCTION WOULD PROHIBIT THAT. THAT WAS NOT THE INTENT OF
18 OUR INJUNCTION.

19 IN OTHER WORDS, IF THE CONFERENCES SET THE RULES AND THE
20 CONFERENCES DECIDE THEY JUST WANT TO USE THE NCAA MECHANISM
21 JUST AS IT IS, BUT TO ENFORCE THEIR RULES, THAT'S OKAY. THAT
22 HAPPENS NOW WITH CONFERENCE AUTONOMY.

23 RIGHT NOW CONFERENCE AUTONOMY, THE RULES ARE ALREADY
24 DIFFERENT. SOME OF THE CONFERENCES ENFORCE THOSE RULES
25 THEMSELVES, AND THAT'S IN THE RECORD, AND SOME OF THEM CHOOSE

1 TO LET THE NCAA ENFORCE THEM UNDER THEIR EXISTING FRAMEWORK.

2 JUST LIKE RIGHT NOW WE HAVE FIVE DIFFERENT VARIATIONS.
3 THERE'S CONFERENCE AUTONOMY, THERE'S THE IVY LEAGUE THAT
4 DOESN'T ALLOW SPORT SCHOLARSHIP. THOSE ARE ALL ENFORCED BY
5 NCAA RULES. THERE'S NO SEPARATE IVY LEAGUE ENFORCEMENT
6 MECHANISM FOR THAT. SO RIGHT NOW THE RECORD IS THE NCAA CAN
7 DO IT.

8 I SAID, IF WE NEED TO CLARIFY THAT IN THE INJUNCTION, WE
9 ARE PERFECTLY HAPPY TO DO THAT. WHAT WE MEANT WHEN WE USED
10 THE WORD "THEY COULDN'T ENFORCE", WE MEANT THEY COULDN'T
11 ENFORCE THEIR EXISTING RULES THAT WERE BEING ENJOINED.

12 **THE COURT:** DIDN'T YOU ALREADY CHANGE THE LANGUAGE OF
13 THE INJUNCTIONS IN RESPONSE TO THEIR CRITICISM --

14 (SIMULTANEOUS COLLOQUY.)

15 **MR. KESSLER:** THEY STILL SEEM TO THINK WE DIDN'T DO
16 IT ENOUGH, SO --

17 **THE COURT:** DID YOU CHANGE THEM?

18 **MR. KESSLER:** WE DIDN'T CHANGE IT IN RESPONSE TO
19 THEIR ARGUMENT IN THEIR CLOSING OPPOSITION BECAUSE WE DIDN'T
20 HAVE A CHANCE. BUT WE WOULD CERTAINLY SUBMIT LANGUAGE THAT
21 WOULD CLARIFY THAT. SO THAT IS POINT NUMBER TWO.

22 POINT NUMBER THREE. WE KNOW THERE'S A NEW ENFORCEMENT
23 MECHANISM COMING, WHICH IS THE RICE COMMISSION RECOMMENDATION.
24 IT'S ALREADY BEEN DONE. THERE'S NO REASON THEY COULDN'T ADOPT
25 THAT TO THIS INDIVIDUAL CONFERENCE AUTONOMY.

1 AND HERE, THIS IS VERY IMPORTANT. THIS CAME UP IN
2 PLAINTIFFS' EXHIBIT 56, WHICH I SAID IS A VERY IMPORTANT
3 EXHIBIT. THEY SPOKE ABOUT AUTONOMY. THESE ARE ENFORCEMENT.
4 THESE ARE THE FIVE CONFERENCES. THIS IS WHAT THEY SAID, YOUR
5 HONOR, ON THE LAST PAGE OF PLAINTIFFS' EXHIBIT 56 IN EVIDENCE.
6 THE FOLLOWING:

7 "WE ALSO BELIEVE OUR INSTITUTIONS HAVE A MORE SIGNIFICANT
8 STAKE IN THE ENFORCEMENT PROCESS." THIS IS THE FIVE AUTONOMY
9 SCHOOLS. "WE HAVE THE STRONGEST STAKE IN FASHIONING AN
10 ENFORCEMENT MECHANISM THAT IS AND IS PERCEIVED TO BE FAIR AND
11 EVENHANDED. THERE ARE OTHER MODELS WHO ARE ENFORCING
12 REGULATORY REGIMES THAT SHOULD BE EXAMINED. WE INTEND TO
13 IMPANEL EXPERTISE FROM OUTSIDE THE NCAA TO HELP US FASHION A
14 MODERN ENFORCEMENT PROCESS AND WE WOULD WANT THE AUTHORITY TO
15 ADOPT IT FOR ENFORCEMENT OF RULES AGAINST OUR FIVE
16 INSTITUTIONS." OUR FIVE POWER AUTONOMY.

17 THIS IS BACK IN 2013, AND THE RICE COMMISSION IS NOW
18 CREATING THAT VERY TYPE OF OUTSIDE PROCESS THAT THEY ARE
19 TALKING ABOUT. SO THERE'S NO REASON THAT VERY PROCESS
20 COULDN'T BE USED TO DO THAT.

21 THIRD, THEY ALREADY -- SOME OF THEM ALREADY HAVE
22 ENFORCEMENT MECHANISMS. WE PUT THAT INTO EVIDENCE. FOOTNOTE
23 222 IN OUR CLOSING AND ALSO MR. HOSTETTER'S TESTIMONY TALKS
24 ABOUT ENFORCEMENT AT THE CONFERENCE LEVEL THAT ALREADY EXISTS,
25 AND ALREADY RESOURCES THERE.

1 NEXT BULLET. ANY REDUCTION OF NCAA COST BY HAVING FEWER
2 RULES CAN BE TRANSFERRED IN FUNDS THERE. THERE DOESN'T HAVE
3 TO BE ANY TOTAL INCREASE IN THE ADMINISTRATION COST.

4 AND, FINALLY, GOING BACK TO 56, WHAT THEY WERE ARGUING
5 AGAIN THERE IS THAT INDIVIDUAL CONFERENCE ENFORCEMENT WILL BE
6 MORE EFFICIENT BECAUSE THEY KNOW IN CRAFTING THE RULES AND
7 WHAT THEY ARE, THIS IS WHAT MR. RASCHER TESTIFIED TO AND
8 DR. NOLL, IS THAT YOU'RE THE ONE SETTING THEM UP, YOU'LL BE
9 ABLE TO ENFORCE WHAT'S IMPORTANT AND WHAT'S NOT IMPORTANT.
10 WHAT MATTERS TO THE CONFERENCE FOR DEMAND OR INTEGRATION AND
11 DOESN'T MATTER IN TERMS OF THAT.

12 AND THEY ARE MUCH CLOSER THERE BECAUSE THEY ALL HAVE
13 COMPLIANCE OFFICERS WHO ARE ADVISING ALREADY THESE SCHOOLS
14 EVERY DAY. SO THEY ARE RIGHT IN THIS PROCESS OF DOING IT.

15 SO ALL THESE THINGS TOGETHER AND INCLUDING DR. RASCHER'S
16 TESTIMONY ON THIS AND LENNON AND DR. NOLL'S, ALL THIS SHOWS IS
17 THERE IS NO SIGNIFICANT -- AND THE TEST IS SIGNIFICANT,
18 SIGNIFICANT INCREASE OF ADMINISTRATIVE COST THAT WOULD FOLLOW
19 FROM THIS BECAUSE THERE'S NO REASON THAT THEY WOULD FOLLOW
20 FROM THIS BASED ON ALL THIS EVIDENCE OF WHAT HAPPENED.

21 **THE COURT:** SO THE SECOND -- UNDER THE SECOND
22 ALTERNATIVE, EVEN THOUGH THE NCAA COULDN'T CAP
23 EDUCATION-RELATED EXPENSES OR EXPENSES INCIDENTAL TO ATHLETIC
24 PARTICIPATION, OR AT LEAST THE ONES THAT WERE ALREADY LISTED,
25 THE CONFERENCES COULD, CAN THEY NOT?

1 **MR. KESSLER:** YES. WE DID NOT SEEK TO ENJOIN THAT
2 ONLY BECAUSE WE BELIEVE SINCE AN INDIVIDUAL CONFERENCE HAS NO
3 MARKET POWER, THAT IT WOULD BE INAPPROPRIATE TO STOP AN
4 INDIVIDUAL CONFERENCE FROM ADOPTING JUST WITHIN A SINGLE
5 CONFERENCE OF EIGHT SCHOOLS OR TEN SCHOOLS OR WHATEVER THAT
6 IS.

7 **THE COURT:** YES, BUT IT MIGHT ALSO BE A FAIL SAFE
8 AGAINST DEMAND REDUCING --

9 **MR. KESSLER:** YES.

10 **THE COURT:** -- TOO HIGH OF PAY.

11 **MR. KESSLER:** EXCELLENT POINT, YOUR HONOR. IF THERE
12 WAS A PROBLEM FROM THAT, THEN YOU WOULD EXPECT THE CONFERENCE
13 TO COME IN AND TO DO SOMETHING ABOUT IT.

14 SO -- AGAIN, THIS IS ONE THING THE TESTIMONY IS CONSISTENT
15 ABOUT. THERE IS NOT A WITNESS IN THE RECORD WHO TESTIFIED
16 THAT THEY KNOW OF ANY SCHOOL OR CONFERENCE THEY CAN IDENTIFY,
17 OKAY, WHO WOULD NOT CONSIDER WHATEVER THE VALID JUSTIFICATIONS
18 ARE, DEMAND, INTEGRATION, WHATEVER THEY ARE IN MAKING THE
19 DECISIONS. SOME OF THEM SAID, WELL, THEY THINK THERE ARE
20 PEOPLE OUT THERE, THEY CAN'T IDENTIFY THEM, BUT THEY COULDN'T
21 IDENTIFY A SINGLE PERSON. THEY WOULDN'T EVEN SAY A WILL DO
22 IT. THERE IS NO A.

23 **THE COURT:** WHY DID YOU PICK 90 DAYS FOR --

24 **MR. KESSLER:** IT COULD HAVE BEEN 120, YOUR HONOR.
25 OUR CONCEPT IS THE CONFERENCES SHOULD BE GIVEN TIME TO DECIDE.

1 SO WE SUGGESTED 90. THAT SOUNDED REASONABLE TO US. IF THE
2 DEFENDANTS CAME BACK AND SAID --

3 **THE COURT:** IF YOU DO A MARKET SURVEY, IT MIGHT TAKE
4 LONGER.

5 **MR. KESSLER:** IF THEY SAY THEY WANT SIX MONTHS, YOUR
6 HONOR, AND THEY SHOW YOUR HONOR THAT'S APPROPRIATE, IN OTHER
7 WORDS, WE ARE NOT WHETTED TO 90 DAYS. IT WAS JUST A CONCEPT
8 THEY SHOULD GIVEN TIME.

9 **THE COURT:** THANKS.

10 SO, ON YOUR SIDE, I DON'T KNOW IF YOU NEED A REPLY ON ANY
11 OF THE PROCOMPETITIVE JUSTIFICATION ISSUES THAT HE STARTED OFF
12 WITH AND ALSO TO RESPOND ON THE LESS RESTRICTIVE ALTERNATIVES
13 AND INJUNCTION ISSUES.

14 **MR. WILLIAMS:** IF WE COULD, BECAUSE OF TIME, I KNOW
15 MS. WILKINSON WOULD LIKE TO RESPOND TO WHAT WAS JUST DONE.
16 AND THEN I CAN BE VERY, VERY BRIEF AT THE END IN RESPONDING TO
17 PROCOMPETITIVE JUSTIFICATIONS.

18 **THE COURT:** OKAY. THAT'S FINE.

19 **MS. WILKINSON:** I DON'T KNOW, YOUR HONOR, IF THESE
20 TWO RESPOND TO STEP TWO AND STEP THREE, BUT I JUST WANT TO
21 MAKE CLEAR FOR THE RECORD THAT YOU, YOURSELF, IN FOOTNOTE 5 OF
22 YOUR DECISION DID REFER TO SAF. CONTRARY TO WHAT COUNSEL
23 SAID, I'M SURE HE DIDN'T MEAN TO MISSPEAK, AND YOU SAID YOU
24 KNEW THAT PEOPLE COULD RECEIVE SAF AND GIA AND IT COULD TOTAL
25 MORE THAN COST OF ATTENDANCE AT THE TIME. AND AS YOU KNOW,

1 YOU ALSO --

2 **THE COURT:** FOOTNOTE 5 OF WHAT?

3 **MS. WILKINSON:** PARDON?

4 **THE COURT:** OF THE O'BANNON FED SUPP CASE?

5 **MS. WILKINSON:** YES, YOU DID.

6 **THE COURT:** OKAY.

7 **MS. WILKINSON:** FOOTNOTE 5.

8 AND YOU ALSO, AS YOU KNOW, MENTIONED PELL GRANTS IN YOUR
9 OPINION AND THE CIRCUIT COURT DISCUSSED THAT AS WELL IN THEIR
10 OPINION. SO THERE WAS NO, YOU KNOW, LACK OF KNOWLEDGE THAT
11 THEY COULD BE AND WERE PAYMENTS ABOVE COA FOR A COMBINATION
12 AND FOR CERTAIN STUDENTS, FOR EDUCATION BENEFITS AND EDUCATION
13 EXPERIENCES.

14 THAT IS NOTHING NEW AS COUNSEL IS TRYING TO ARGUE IN THIS
15 CASE THAN WHAT YOU SAW IN O'BANNON. WHETHER THEY CAN QUANTIFY
16 IT, WHICH I DON'T THINK THEY DID IN THIS RECORD, I AGREE IT'S
17 DIFFERENT. BUT YOU AND THE CIRCUIT COURT WERE AWARE OF THOSE
18 FACTS.

19 **THE COURT:** WELL, THE CIRCUIT COURT DIDN'T HAVE ANY
20 PROBLEM WITH EDUCATION-RELATED EXPENSES. WHAT THEY HAD A
21 PROBLEM WITH WAS DIME ONE, I GUESS, OR DOLLAR ONE IN ADDITION
22 TO EDUCATION-RELATED EXPENSES.

23 **MS. WILKINSON:** RIGHT. WHICH GETS ME TO THE LESS
24 RESTRICTIVE ALTERNATIVE.

25 AS YOU KNOW, THE BURDEN IS ON THE PLAINTIFF. I THINK

1 MR. BERMAN SAID WHEN CHARACTERIZING THE PROCOMPETITIVE
2 BENEFITS, HE SAID THE DEFENDANTS DIDN'T DO A SURVEY OR AN
3 ECONOMIC ANALYSIS OF LRA 1.

4 AND THE IRONY OF THAT IS, OF COURSE THAT'S WHAT THEY WERE
5 SUPPOSED TO DO. WHEN YOU GET TO THE THIRD STEP, THEY HAVE THE
6 BURDEN, AND THEY ARE SUPPOSED TO SHOW THERE WILL NOT BE AN
7 EFFECT ON CONSUMER DEMAND IF YOU PUT IN THIS LESS RESTRICTIVE
8 ALTERNATIVE. AND THEY HAVE TOTALLY FAILED TO DO THAT IN THIS
9 CASE.

10 THEY COULD HAVE DONE ALL THE THINGS THAT MR. BERMAN --

11 **THE COURT:** THEY HAD THEIR PORET SURVEY.

12 **MS. WILKINSON:** WELL, BUT THAT DOESN'T ADDRESS ANY OF
13 THEIR LESS RESTRICTIVE ALTERNATIVES. THE THREE YOU WERE JUST
14 DISCUSSING WITH THEM, ALL HE DID WAS TEST SOME INDIVIDUAL
15 BENEFITS. AND IF THEY WERE IN PLACE, ONE AT A TIME. HE NEVER
16 TESTED WHAT WOULD HAPPEN IF YOU LIFT THE RESTRICTIONS, AND
17 ANYTHING COULD HAPPEN.

18 PLAINTIFFS ARE SAYING, I THINK, AS I UNDERSTAND THEM TO BE
19 SAYING, THEY ARE SAYING TWO THINGS THAT TO ME DON'T REALLY
20 MAKE SENSE AND ARE INCREDIBLY CYNICAL. THEY'RE SAYING
21 AMATEURISM IS A SHAM AND WE DON'T REALLY MEAN IT, AND WE ARE
22 JUST CHEAP. THAT'S WHY WE HAVE THIS QUOTE "CARTEL" BECAUSE WE
23 DON'T WANT TO PAY.

24 BUT THEN THEY ARE TELLING YOU, DON'T WORRY WHEN YOU GET TO
25 THE LESS RESTRICTIVE ALTERNATIVE BECAUSE ALL THE CONFERENCES

1 DO BELIEVE IN AMATEURISM BECAUSE THEY THINK IT AFFECTS
2 CONSUMER DEMAND SO THEY WILL NEVER DO ANYTHING IF YOU LIFT THE
3 RESTRAINTS AND YOU ALLOW THEM TO PAY WHATEVER THEY WANT TO
4 PAY. YOU DON'T HAVE TO WORRY ABOUT THAT. EVEN THOUGH THEY
5 DID NO MODELING OF THAT, THEY HAVE NO ECONOMIC ANALYSIS TO
6 SUPPORT THAT, AND THEY HAVE THAT BURDEN TO SHOW YOU.

7 INSTEAD OF ALLOWING YOU TO SPECULATE ABOUT WHAT MIGHT
8 HAPPEN, LIKE THE CONVERSATION YOU AND MR. KESSLER WERE JUST
9 HAVING, WELL, MAYBE THEY WILL DO THAT. MAYBE THEY WILL LIMIT
10 THE BENEFITS. BUT THERE'S JUST AS MUCH EVIDENCE, IF YOU CALL
11 THAT EVIDENCE, I DON'T, THAT'S SPECULATION, THAT THERE WILL BE
12 PAY TO PLAY AND THERE WILL BE COMPETITION TO PAY IMPROPERLY.
13 BECAUSE WE HAVE ALREADY SEEN IT WITH THE RULES IN PLACE.

14 WE DO HAVE A NATIONAL EXPERIMENT. THE REASON WE HAVE
15 THESE FEDERAL RULES, AS I LIKE TO CALL THEM, BECAUSE WE WANT
16 TO HAVE A NATIONAL LEAGUE IS BECAUSE PEOPLE DO BREAK THE
17 RULES, BECAUSE PEOPLE DO ACT IN THEIR SHORT-TERM INTEREST AND
18 WANT TO WIN.

19 DOES ANYONE REALLY HAVE ANY DOUBT THAT IF YOU LIFT THESE
20 RESTRICTIONS THAT PEOPLE AREN'T GOING TO TRY AND PAY SOME
21 PLAYERS EXTRA MONEY? FOR THE REASONS YOU SAID, YOU JUST WANT
22 TO GIVE THEM EXTRA MONEY. WOULDN'T THEY BE BETTER OFF? WE
23 KNOW, WE ALREADY KNOW PEOPLE TRY TO PAY PARENTS, WE KNOW --

24 **THE COURT:** I THINK WHAT THEY ARE SAYING IS, IF THE
25 CONFERENCES HAD THE ABILITY TO REGULATE PAYMENT, THAT THE

1 CONFERENCES WOULD TAKE CARE TO ALLOW ONLY PAYMENTS THAT THEY
2 DETERMINED WOULD NOT AFFECT DEMAND BECAUSE IT'S IN THEIR
3 INTEREST TO RETAIN CONSUMER DEMAND. I THINK THAT'S THEIR
4 ARGUMENT.

5 **MS. WILKINSON:** THAT'S --

6 **THE COURT:** NOT THAT THEY WON'T RAISE IT AT ALL, THEY
7 WON'T RAISE IT TO A MILLION DOLLAR BIDDING WAR, THEY WILL
8 RAISE IT TO SOME MODEST AMOUNT, LIKE PERHAPS 5,000 PER YEAR IN
9 TRUST THAT WOULDN'T AFFECT DEMAND.

10 **MS. WILKINSON:** THAT'S WHAT THEY ARGUE. DR. ELZINGA
11 SAYS NO PEOPLE WILL ACT IN THEIR OWN SHORT-TERM INTEREST,
12 WHICH WE HAVE SEEN, AND THEY WILL HAVE OTHERS PAY THE LONG
13 TERM COST. SO EVEN THOUGH WE WANT TO MAINTAIN THE VALUE OF
14 THE PRODUCT, PEOPLE WILL WANT TO PAY ATHLETES TO GET THE
15 BETTER ATHLETES TO THEIR UNIVERSITY SO THAT THEY CAN WIN AND
16 SO THEY CAN WIN CHAMPIONSHIPS. WHY DON'T YOU KNOW THAT'S
17 GOING TO HAPPEN? YOU SAW REBECCA BLANK.

18 **THE COURT:** YOU ARE TALKING ABOUT SCHOOLS AND I'M
19 TALKING ABOUT CONFERENCES.

20 **MS. WILKINSON:** WELL, THE SCHOOLS DON'T HAVE TO JOIN
21 ANY PARTICULAR CONFERENCE. YOU ARE ASSUMING THAT EVERYTHING
22 IS --

23 **THE COURT:** SCHOOLS CAN'T MAKE THEIR OWN RULES IF THE
24 SCHOOL WANTS TO BE IN A CONFERENCE. SO IF A CONFERENCE
25 DECIDES THAT WHAT'S NOT DEMAND REDUCING, THEN THE CONFERENCE

1 CAN SAY HERE'S AN AMOUNT THAT IS NOT DEMAND REDUCING, AND IT'S
2 MR. SCHOOL, IF YOU WANT TO BE IN OUR CONFERENCE, YOU HAVE TO
3 OBEY OUR RULES NOW --

4 **MS. WILKINSON:** WHERE IN THE RECORD IS THERE --

5 **THE COURT:** AND A SCHOOL THAT DIDN'T WANT TO OBEY
6 THAT RULE COULDN'T BE IN A CONFERENCE. WHICH, I DON'T KNOW, I
7 GUESS NOTRE DAME ISN'T --

8 **MS. WILKINSON:** RIGHT.

9 **THE COURT:** I DON'T KNOW HOW THAT WORKS. BUT ANYWAY
10 THAT'S THE GENERAL CONCEPT.

11 **MS. WILKINSON:** THAT'S ONE EXAMPLE.

12 WHERE IN THE RECORD DO THEY SHOW YOU THAT LET'S SAY A
13 CONFERENCE IS NOT ONE OF THE AUTONOMY 5, AND THEY WANT TO DO
14 BETTER THAN THEY ARE DOING RIGHT NOW, WHERE DO THEY SHOW YOU
15 IN THE RECORD THAT THEY WON'T DEVELOP RULES WHERE THEY MIGHT
16 PAY PLAYERS? THEY DON'T HAVE ANY ANALYSIS FOR YOU TO SHOW
17 THAT AND THERE'S EVERY INCENTIVE WHEN YOU REMOVE THOSE
18 INSTRUCTIONS, YOUR HONOR, FOR PEOPLE TO DO THAT.

19 **THE COURT:** WELL, THEY MIGHT WELL, BUT THEIR POINT IS
20 THEY WOULD PAY AN AMOUNT THAT WOULD NOT BE DEMAND REDUCING.
21 THEY'D ALSO PAY AN AMOUNT THEY COULD AFFORD, WHICH IS ANOTHER
22 POINT. BUT THEY WOULD PAY AN AMOUNT -- THEY WOULD DO A MARKET
23 SURVEY AND THEY WOULD PAY AN AMOUNT THAT ISN'T DEMAND
24 REDUCING.

25 THEY ARE NOT SAYING NOBODY IS GOING TO PAY DOLLAR ONE

1 MORE. I THINK THEY ARE ASSUMING THAT THEY WILL PAY DOLLAR ONE
2 MORE, BUT IT WON'T BE A MILLION DOLLAR BIDDING WAR.

3 (SIMULTANEOUS COLLOQUY.)

4 **THE COURT:** LET'S MOVE ON. WHAT OTHER ISSUES DO YOU
5 HAVE?

6 **MS. WILKINSON:** YES, YOUR HONOR. CAN I JUST FINISH
7 MY THOUGHT ON THAT, IF YOU DON'T MIND?

8 **THE COURT:** SURE.

9 **MS. WILKINSON:** IT DOESN'T STILL ADDRESS THE IDEA
10 THAT THE CONFERENCE WOULD ACT IN ITS SHORT-TERM INTEREST WHICH
11 MIGHT HURT CONSUMER DEMAND IN THE LONG TERM. THEY DIDN'T
12 ADDRESS THAT.

13 **THE COURT:** THE CONFERENCES -- THE CONFERENCES MADE
14 UP OF SCHOOLS, AND THE SCHOOLS PLAY EACH OTHER. SO IT'S --
15 THERE'S NOTHING THAT COULD BE IN THE CONFERENCE'S SHORT-TERM
16 INTEREST. YOU ARE TALKING ABOUT ELZINGA'S PRISONER DILEMMA
17 NOTION THAT AN INDIVIDUAL SCHOOL COULD GO ROGUE. BUT A
18 CONFERENCE CAN'T GO ROGUE BECAUSE A CONFERENCE HAS A BUNCH OF
19 SCHOOLS IN IT WHO ARE PLAYING EACH OTHER, AND THEY WOULD ALL
20 BE PLAYING BY THE SAME RULE.

21 **MS. WILKINSON:** YOUR HONOR, THEY WANT TO PLAY THE
22 OTHER CONFERENCES OR THEN YOU ARE TOTALLY CHANGING THE
23 PRODUCT.

24 (SIMULTANEOUS COLLOQUY.)

25 **THE COURT:** YES, IN POST-SEASON THEY PLAY EACH OTHER,

1 THAT IS TRUE.

2 **MS. WILKINSON:** IT IS NOT ONLY POST-SEASON. THAT'S
3 NOT ACCURATE AT ALL.

4 THEY PLAY EACH OTHER DURING THE SEASON, PRE-SEASON, AND IN
5 POST-SEASON PLAY. AND YOU ARE -- YOU WOULD BE DESTROYING THE
6 PRODUCT IF YOU'RE SAYING IT'S GOING TO BE THIS CONFERENCE
7 PLAYING THEIR OWN TEAMS AND THIS CONFERENCE PLAYING THE OTHER.

8 YOU HAVE, START WITH MARCH MADNESS, WHERE YOU HAVE ALL THE
9 TEAMS FROM ALL THE CONFERENCES WHO GET INTO THAT TOURNAMENT
10 AND PLAY EACH OTHER. AND THEY PLAY EACH OTHER, SOME OF THOSE
11 TEAMS PLAY EACH OTHER OUTSIDE THE CONFERENCE THROUGHOUT THE
12 BASKETBALL SEASON, AND THE SAME FOR FOOTBALL.

13 SO IF YOU'RE SAYING IT'S JUST WHATEVER IS GOOD FOR THIS
14 CONFERENCE, THEN YOU ARE TALKING ABOUT A PRODUCT THAT IS SO
15 DIFFERENT THERE'S NO WAY THAT IS A LESS RESTRICTIVE
16 ALTERNATIVE THAT IS PRODUCING VIRTUALLY THE SAME EFFECT, THE
17 SAME PRODUCT, AND NOT HARMING THE PRODUCT AS WE HAVE TODAY.

18 THAT IS -- THAT IS JUST -- THAT IS NOT A NATIONAL
19 SCHOLASTIC ACADEMIC LEAGUE OF SPORTS THAT ARE PLAYED, IN THIS
20 CASE, FOOTBALL AND BASKETBALL PLAYED ACROSS THE COUNTRY, WHICH
21 IS WHAT WE HAVE TODAY.

22 THE IDEA THAT YOU WOULD SAY UNDER THESE NATIONAL RULES, AS
23 WE CALL THEM, EVERYONE DOES WHAT THEY ARE SUPPOSED TO DO
24 BECAUSE THEY ARE, IN PART, FORCED TO DO THEM, TO ABIDE BY THE
25 RULES, I WOULD SAY IT'S THE TAX RULES SAYING, OKAY, IF WE TOOK

1 AWAY THE FEDERAL TAX CODE AND WE LET EVERYBODY IN THE STATES
2 DO WHAT'S BEST, THEY WOULD UNDERSTAND THAT IT'S GOOD TO HAVE
3 ROADS AND AIRPORTS AND ALL THOSE THINGS, AND THEY WOULD PAY
4 THEIR PORTION OF THE FEDERAL TAX FROM THEIR RESIDENCE, NOBODY
5 BELIEVES THAT WOULD HAPPEN, YOUR HONOR, BECAUSE PEOPLE ACT IN
6 THEIR OWN INTEREST.

7 SO THE IDEA THAT THIS CONFERENCE WOULD ACT IN THEIR OWN
8 INFERENCE (SIC) AND MIGHT HARM THE OTHER CONFERENCE BECAUSE
9 THEY WANT TO BE BETTER IS SUPPORTED BY DR. ELZINGA AND BY WHAT
10 WE'VE SEEN IN THE NATURAL EXPERIMENT.

11 I WAS JUST SAYING YOU SAW WHAT HAPPENED REBECCA BLANK --

12 **THE COURT:** I AM SORRY?

13 **MS. WILKINSON:** REBECCA BLANK, CHANCELLOR BLANK.

14 **THE COURT:** OH, UH-HUH.

15 **MS. WILKINSON:** WHEN SHE CAME INTO THE COURTROOM,
16 THEY EVEN SAID, IF SHE WERE NOT ALLOWED TO SHARE RESOURCES,
17 WHICH WAS THE CONTEXT OF THE QUOTE YOU WERE READ, SHE MIGHT
18 HAVE TO CONSIDER NOT HAVING SOME SPORTS, THERE WAS AN OUTRAGE
19 IN THE COMMUNITY.

20 SO SHE MAY, AND I BELIEVE SHE TESTIFIED TOTALLY
21 TRUTHFULLY, NEITHER WANT TO PAY ATHLETES, AND PRESIDENT HATCH
22 FELT THAT WAY AND ALL THE PEOPLE, BUT THERE IS OTHER PEOPLE
23 WHO ARE PUTTING PRESSURE ON THEM TO DO SOMETHING QUITE
24 DIFFERENT.

25 AND IF YOU PUT IN AN INJUNCTION IN PLACE THAT ALLOWS FOR

1 ANY OF THE THREE THINGS YOU ARE TALKING ABOUT, WHAT DO YOU
2 THINK THOSE TEAMS ARE GOING TO DO, THOSE INDIVIDUAL SCHOOLS
3 THE MINUTE YOU ANNOUNCE THAT?

4 **THE COURT:** I'M SORRY, ANY OF WHAT THREE --

5 **MS. WILKINSON:** ANY OF THE THREE ALTERNATIVES THAT
6 YOU HAVE BEEN TALKING ABOUT.

7 **THE COURT:** OH.

8 **MS. WILKINSON:** WHAT DO YOU THINK IS GOING TO HAPPEN
9 BETWEEN THE TIME -- LET'S SAY YOU ANNOUNCE THOSE AND, YOU
10 KNOW, THEY ARE AFFIRMED ON APPEAL. AND YOU GIVE US WHATEVER
11 TIME YOU GIVE, WHICH I THINK THERE'S NOTHING IN THE RECORD TO
12 SUPPORT 90 DAYS, THE MOST THEY SAID WAS I THINK PROFESSOR
13 RASCHER SAID IT WOULD TAKE EIGHT TO NINE YEARS FOR THIS TO ALL
14 SETTLE OUT, YOU GIVE US A YEAR, WHAT DO YOU THINK THE SCHOOLS
15 ARE GOING TO DO BETWEEN THAT YEAR?

16 THEY KNOW THE NCAA RULES ARE NOT GOING TO BE IN EXISTENCE
17 ANYMORE. SO THEY ARE GOING TO GO OUT AND TRY AND PROMISE
18 THOSE RECRUITS WHATEVER THEY WANT BECAUSE THERE'S NO INCENTIVE
19 FOR THEM TO STAY FOLLOWING THE RULES WHEN YOU HAVE TOLD THEM
20 THERE'S GOING TO BE NEW RULES THAT THEY DON'T KNOW WHAT
21 THEY'RE GOING TO BE, THEY DON'T KNOW WHO THE CONFERENCE
22 MEMBERS ARE GOING TO BE, THEY DON'T KNOW WHICH CONFERENCE THEY
23 ARE GOING TO BE IN, WHY WOULDN'T THAT JUST INCENT THEM TO DO
24 IT?

25 AND WHY WOULD YOU THINK THEY WOULDN'T BECAUSE YOU DON'T

1 HAVE ANY HISTORY OF SEEING PEOPLE VIOLATE THE RULES? YOU HAVE
2 PEOPLE WHO VIOLATED THE RULES. PLAINTIFFS TRIED TO USE THAT
3 AGAINST US THROUGHOUT THE TRIAL.

4 **THE COURT:** OKAY. I MEAN THAT COULD ALL BE WORKED
5 OUT THAT THE --

6 **MS. WILKINSON:** IT COULD --

7 **THE COURT:** -- THERE WOULD BE ENOUGH TIME, I THINK
8 WHAT I DID IN *O'BANNON*, WHICH ACTUALLY ENDED UP BEING STAYED
9 ANYWAY, WAS TO DELAY IT UNTIL THE NEXT RECRUITING SEASON
10 STARTED, OR SOMETHING LIKE THAT. SO WE COULD CERTAINLY --

11 **MS. WILKINSON:** BUT IT'S BECAUSE --

12 **THE COURT:** -- GET THE NEW RULES FIRST BEFORE ANYBODY
13 COULD RECRUIT BASED ON NO RULES. SO THAT'S NOT AN INSOLVABLE
14 PROBLEM.

15 **MS. WILKINSON:** YOU DON'T HAVE ANY EVIDENCE ABOUT
16 WHAT WILL HAPPEN IN THE BUT-FOR WORLD. THAT'S WHY PEOPLE
17 WON'T KNOW. IT'S NOT JUST BECAUSE YOU CAN GIVE THEM ENOUGH
18 TIME. IN A NORMAL CASE, THEY WOULD KNOW EXACTLY WHICH RULE IS
19 BEING LIFTED AND WHAT'S GOING TO HAPPEN.

20 IF YOU LIFT ALL THE RULES OR YOU LIFT THE RESTRAINTS IN
21 LRA 1, RIGHT, THAT'S UNLIMITED COMPENSATION. SO EVERY SCHOOL
22 KNOWS THAT THEY ARE ALLOWED -- THEY MAY NOT TOTALLY AGREE TO
23 IT, THEY CAN PAY ANYTHING.

24 **THE COURT:** NO. THE CONFERENCES WOULD --

25 **MS. WILKINSON:** YOU'RE NOT GOING TO SAY THAT IN YOUR

1 ORDER. YOU'RE NOT GOING TO SAY IN YOUR INJUNCTION,
2 CONFERENCES, YOU MUST HAVE RULES. YOU JUST SAID THEY CAN DO
3 WHAT THEY WANT. SO WHY WOULD THEY BELIEVE THAT THEY ARE
4 ABSOLUTELY GOING TO AGREE TO \$5,000 FOR A PLAYER OR \$50,000.
5 THAT'S THE PROBLEM WITH THEM NOT GIVING YOU ANY EVIDENCE, YOUR
6 HONOR, BECAUSE THERE'S NOTHING --

7 **THE COURT:** I KNOW WHAT THEIR --

8 **MS. WILKINSON:** -- THERE'S NOTHING YOU'RE GOING TO
9 ORDER IN INJUNCTION NUMBER ONE THAT'S GOING TO SAY THERE'S
10 GOING TO BE ANY LIMITS.

11 **THE COURT:** OKAY. SO DID YOU WANT TO GO ON TO
12 SOMETHING ELSE?

13 **MS. WILKINSON:** SO THERE'S NO EVIDENCE THERE.

14 AND I WANT TO ADDRESS THE COST WITH THAT ONE AND IT
15 APPLIES TO ALL THREE.

16 PLAINTIFFS' CLAIM THAT THERE WOULD, FIRST, I THINK, DON'T
17 WORRY ABOUT THE COST. ALL YOU'RE DOING IS ENJOINING THE
18 RULES. THAT'S WHAT HE SAID, RIGHT? HE SAID DON'T WORRY
19 BECAUSE THEY MAY NOT MAKE UP NEW RULES SO THERE'S NO COST,
20 THERE'S NO ADMINISTRATIVE COST. THE ONLY COST TO PUTTING IN
21 THE INJUNCTION IS SAYING LIFT THE RESTRAINTS.

22 SO THAT JUST SUPPORTS THAT NOBODY IS GOING TO KNOW WHAT
23 THE RULES ARE, BUT THE LAW DOESN'T EVEN SUPPORT WHAT HE JUST
24 SAID.

25 THE CASE WE WERE DISCUSSING EARLIER *TUOLUMNE*, ADDRESSES

1 THIS EXACT ISSUE. AND THEY SAY THAT IF THERE'S THIS LESSER
2 RESTRICTIVE ALTERNATIVE WHERE YOU WOULD HAVE NEW CREDENTIALING
3 FOR THE POSITIONS, THE DEFENDANT SAID, WELL, THAT WILL COST US
4 MONEY TO HAVE THE NEW CREDENTIALS.

5 PLAINTIFFS SAID, OH, NO, DON'T WORRY BECAUSE WE ARE NOT
6 SAYING YOU HAVE TO DO IT, WE ARE JUST SAYING THAT YOU CAN'T
7 HAVE -- THE COURT SAID, NO, EVEN IF IT'S VOLUNTARY, THAT YOU
8 WOULD HAVE TO -- YOU MIGHT WANT TO PUT IN THESE NEW
9 CREDENTIALS, THAT'S GOING TO COST YOU SOMETHING AND THAT
10 INCREASES THE COST AND, THEREFORE, THE LESS RESTRICTIVE
11 ALTERNATIVE INCREASES THE COST AND IS NOT -- DOESN'T MEET THE
12 STANDARD.

13 SO THAT'S EXACTLY WHAT WOULD HAPPEN HERE. EITHER WHAT
14 PLAINTIFFS ARE SAYING IS TRUE, WHICH IS YOU WOULD JUST LIFT
15 THE RESTRAINT UNDER NUMBER ONE, AND THERE WOULD BE NO RULES
16 FORCED AND, THEREFORE, QUOTE NO COST, BUT THEN NO -- THERE
17 WOULD BE NO LIMITATIONS ON COMPENSATION WHATSOEVER. AND --

18 **THE COURT:** WELL, UNLESS THE CONFERENCES PASS THEM.

19 **MS. WILKINSON:** YOU'RE NOT ORDERING IT, YOUR HONOR.

20 **THE COURT:** NO. BUT THEIR ARGUMENT IS THAT MARKET
21 FORCES WOULD LIMIT THE CONFERENCES TO A NONDEMAND INDUCING --
22 NONDEMAND REDUCING AMOUNT.

23 NOW, I UNDERSTAND YOU DON'T AGREE WITH THAT, BUT THAT'S
24 THEIR ARGUMENT. AND THE TIMING WOULD BE SUCH THAT THE
25 CONFERENCES WOULD BE GIVEN ENOUGH TIME TO COME UP WITH SUCH

1 RULES IF THEY WANTED TO BEFORE RECRUITMENT SEASON BEGAN.

2 AND I GUESS COUNSEL'S POINT IS THAT IF THEY -- THAT THE
3 RULES THEY CAME UP WITH WOULDN'T COST ANY MORE TO ENFORCE THAN
4 THE RULES ARE CURRENTLY BEING ENFORCED. WHETHER THAT WAS SORT
5 OF SUBCONTRACTED BACK TO THE NCAA OR SUBCONTRACTED OUT TO THE
6 NEW RICE COMMISSION OR NCAA MONEY THAT USED TO BE SPENT
7 ENFORCING ITS OWN RULES WOULD BE TRANSFERRED TO THE
8 CONFERENCES TO SUPPORT THEIR RULES, OR WHATEVER THE CASE MAY
9 BE.

10 **MS. WILKINSON:** SO LET'S TALK ABOUT THOSE COSTS.

11 **THE COURT:** THEN THERE IS A SECOND ALTERNATIVE.

12 **MS. WILKINSON:** AND WE WILL GET TO THE SECOND
13 ALTERNATIVE, BUT THE COSTS, I THINK, ARE SIMILAR.

14 FIRST OF ALL, EVEN THOUGH THERE ARE A LIMITED NUMBER OF
15 DEFENDANTS HERE, THERE ARE 32 CONFERENCES. SO THAT WOULD ALL
16 BE AFFECTED BY YOUR INJUNCTION. THEY ARE ALL DIVISION I,
17 BASKETBALL AND/OR FOOTBALL.

18 SO YOU WOULD NEED TO HAVE 32 SETS OF RULES MADE UP. YOU
19 WOULD NEED TO HAVE 32 ENFORCEMENT ORGANIZATIONS. YOU WOULD
20 NEED TO HAVE ADDITIONAL COMPLIANCE PEOPLE. IF YOU DO
21 ALTERNATIVE -- I MEAN, LRA NO. 1 WHERE YOU WOULD SAY ALL THE
22 CONFERENCES COULD DO WHAT THEY WANT, YOU SAID EACH INDIVIDUAL
23 CONFERENCE, YOU CAN'T CONTRACT BACK TO THE NCAA BECAUSE YOU
24 JUST TOLD THEM THAT THEY CAN'T ENFORCE THE RULES.

25 **THE COURT:** OH, NO, THEY COULD ENFORCE VALID RULES.

1 **MS. WILKINSON:** BUT NOT --

2 **THE COURT:** ENFORCE THE CONFERENCE RULES.

3 **MS. WILKINSON:** WELL, THE CONFERENCES WOULD ALL HAVE
4 TO AGREE TO SEND THAT BACK TO THE NCAA, WHICH THEY CAN'T DO.
5 THEY ARE NOT ALLOWED TO COME TOGETHER AND AGREE TO THAT.

6 **THE COURT:** THEY HAVE TO -- EACH CONFERENCE WOULD
7 EITHER HAVE TO DECIDE TO DO ITS OWN ENFORCEMENT OR WOULD HAVE
8 TO MAKE SOME SORT OF ARRANGEMENT WITH THE NCAA. THE
9 CONFERENCES ARE ALREADY, I THINK, AT LEAST THE SCHOOLS ARE
10 ALREADY REQUIRED TO DO THEIR OWN ENFORCEMENT AND
11 INVESTIGATION, AND I THINK MAYBE THE CONFERENCES ARE TOO, AT
12 LEAST THE CONFERENCES HAVE COMPLIANCE PEOPLE AS WELL AS --

13 **MS. WILKINSON:** THAT'S INCORRECT, YOUR HONOR. THAT
14 IS JUST WRONG AND THAT'S NOT IN THE RECORD. SCHOOLS AND
15 CONFERENCES DON'T DO THEIR OWN ENFORCEMENT. THEY DO HAVE
16 COMPLIANCE TO HELP THEIR PEOPLE COMPLY WITH THE RULES. THE
17 NCAA DOES THE ENFORCEMENT. YOU CERTAINLY DON'T HAVE
18 EVIDENCE --

19 **THE COURT:** I KNOW YOU HAVE A WITNESS WHO SAID THAT,
20 BUT THE MANUAL SAYS COMPLIANCE AND ENFORCEMENT.

21 **MS. WILKINSON:** YOUR HONOR, THERE'S NO EVIDENCE IN
22 THE RECORD THAT IN THE 32 CONFERENCES THEY ALL HAVE
23 ENFORCEMENT TEAMS THERE AND DO THEIR OWN ENFORCEMENT. OR THAT
24 EVEN IN THE DEFENDANTS -- THAT ALL OF THE DEFENDANTS HAVE
25 THAT.

1 SO YOU HAVE TO HIRE THOSE PEOPLE. YOU WOULD HAVE TO HIRE
2 ALL THE PEOPLE TO WRITE ALL THESE RULES. THE ENFORCEMENT AND
3 IF YOU SENT IT BACK TO THE NCAA, EVEN THOUGH I DON'T SEE HOW
4 YOU CAN DO THAT, YOU'RE GOING TO HAVE TO PAY THE NCAA TO DO
5 THAT, AND NOW THEY'RE GOING TO HAVE 32 SETS OF RULES THEY'LL
6 HAVE TO KNOW. THAT IS GOING TO BE MORE COSTLY BY DEFINITION.

7 YOU ARE NOT GOING TO HAVE ONE MANUAL. PART OF THE REASON
8 YOU HAVE THESE NATIONAL RULES IS SO YOU DON'T HAVE 32 SETS OF
9 RULES. YOU HAVE A CENTRAL ENFORCEMENT GROUP THAT WOULD HAVE
10 TO GO OUT AND LEARN 32 DIFFERENT RULES AND APPLY THEM EVERY
11 TIME THEY WENT TO A DIFFERENT CONFERENCE.

12 THAT'S NOT EFFICIENT, AND THAT'S CERTAINLY GOING TO BE
13 MUCH MORE COSTLY. AND PLAINTIFFS HAVEN'T PUT ANYTHING IN THE
14 RECORD, NO NUMERICAL ANALYSIS TO SHOW YOU WHY THAT IS ACTUALLY
15 NOT GOING TO BE MORE COSTLY.

16 IF YOU GET TO THE SECOND LESS RESTRICTIVE ALTERNATIVE, WE
17 WILL GO TO COST FIRST, YOU HAVE THE SAME PROBLEM. YOU KEEP
18 THE NCAA, RIGHT, IN PLACE TO ALREADY ENFORCE THE RULES THEY
19 ARE ALLOWED TO ENFORCE, AND THEN THE RULES THAT THEY ARE NOT
20 ALLOWED TO, AS YOU SAY THE CONFERENCES CAN, THE CONFERENCES
21 WOULD HAVE THE SAME ISSUE.

22 **THE COURT:** WELL, THE CONFERENCES WOULDN'T NEED TO --
23 THEY COULD, BUT WOULDN'T NEED TO LIMIT EXPENDITURES BECAUSE IN
24 THE SECOND ALTERNATIVE THE NCAA WOULD RETAIN THE ABILITY TO
25 LIMIT EXPENDITURES OTHER THAN THOSE THAT WERE EDUCATION

1 RELATED AND POSSIBLY OTHER THAN THOSE WHICH WERE INCIDENTAL TO
2 ATHLETIC PARTICIPATION.

3 **MS. WILKINSON:** BUT YOU WERE JUST TALKING TO COUNSEL
4 ABOUT HOW THE CONFERENCES COULD MAKE THOSE LIMITS.

5 **THE COURT:** COULD.

6 **MS. WILKINSON:** THEY WOULD -- I MEAN, AGAIN,
7 FOLLOWING PLAINTIFFS' ARGUMENT THAT THEY WOULD WANT TO PROTECT
8 DEMAND, THEY WOULD THEN WANT TO, AND THAT WOULD COST THEM
9 MONEY TO DO THAT.

10 **THE COURT:** IT WOULDN'T BE NECESSARY IN THAT INSTANCE
11 BECAUSE THE NCAA WOULD STILL BE ABLE TO LIMIT ANYTHING OTHER
12 THAN EDUCATION-BASED EXPENSES OR INCIDENTAL TO ATHLETIC
13 PARTICIPATION EXPENSES.

14 I WAS INTERESTED IN HEARING FROM YOU WHAT YOU WOULD THINK
15 ABOUT HAVING THE NCAA DEFINE WHAT EDUCATION-RELATED EXPENSES
16 WERE, AND DEFINE WHAT IS AN INCIDENTAL TO ATHLETIC
17 PARTICIPATION EXPENSE AND WHAT, HOW -- HOW YOU WOULD ENVISION
18 IT BEING DEFINED IF THEY WERE ABLE TO DEFINE IT.

19 **MS. WILKINSON:** THAT'S WHAT THEY DO RIGHT NOW, YOUR
20 HONOR.

21 WHAT YOU ARE TALKING ABOUT, AND YOU SAID IT, WHY DON'T
22 PLAINTIFFS DO IT ANY MORE? THEY HAVE DEFINED THOSE
23 GENERALLY -- AND THEN YOU NEED THE MANUAL TO GO THROUGH AND
24 SAY WHAT SPECIFIC ONES ARE EDUCATION PAYMENTS -- EDUCATION
25 EXPENSES, EXCUSE ME, NOT EDUCATION RELATED. THAT'S MUCH

1 BROADER. EVEN THE NINTH CIRCUIT SAID EDUCATIONAL EXPENSES.

2 AND YOU'RE RIGHT, IT'S NOT OBVIOUS WHAT THOSE ARE, AND
3 THEY DO CHANGE OVER TIME JUST LIKE BENEFITS INCIDENTAL TO
4 PARTICIPATION. WHEN YOU ASK COUNSEL, HE SAID, OH, YEAH, THOSE
5 MIGHT CHANGE. THAT'S EXACTLY WHY THE NCAA HAS CHANGES IN ITS
6 MANUAL --

7 **THE COURT:** BUT I'M THINKING MORE OF A DEFINITION,
8 LIKE A DICTIONARY DEFINITION, NOT A DEFINITION BY SAYING
9 HERE'S 17 THINGS, BUT A DEFINITION THAT DEFINES IN WORDS WHAT
10 YOU MEAN BY INCIDENTAL TO ATHLETIC PARTICIPATION.

11 **MS. WILKINSON:** THE MANUAL DOES HAVE THAT. IT HAS
12 MORE GENERAL LANGUAGE WHEN YOU READ THE BEGINNING OF THE
13 MANUAL AND TALKING ABOUT THOSE DIFFERENT SECTIONS, AND THEN IT
14 LAYS OUT THOSE SPECIFICS --

15 **THE COURT:** SO WHAT DOES INCIDENTAL TO ATHLETIC
16 PARTICIPATION MEAN?

17 **MS. WILKINSON:** THOSE EXPENSES THAT ATHLETES, WHEN
18 THEY ARE PARTICIPATING IN THEIR SPORT, NEED TO PLAY THEIR
19 SPORT AND PARTICIPATE, WHICH INCLUDES THE ACKNOWLEDGMENTS OF
20 THEIR SUCCESS. SO WHAT --

21 **THE COURT:** WHAT SPECIFIC?

22 **MS. WILKINSON:** YOUR UNIFORMS, YOUR TRANSPORTATION,
23 RIGHT, YOUR PRACTICE SQUAD, YOUR PHYSICAL FITNESS, YOUR
24 TRAINERS, THOSE KIND OF THINGS ARE ALL INCIDENTAL TO
25 PARTICIPATION.

1 NOW, WOULD YOU DECIDE WHETHER A YOGA INSTRUCTOR NOW IS
2 INCIDENTAL TO PARTICIPATION OR NOT? YOU COULD DEFINE IT ANY
3 WAY YOU WANT, BUT YOU WOULDN'T BE ABLE TO ANSWER MY QUESTION
4 OR YOU COULDN'T ANSWER THAT QUESTION UNLESS YOU DECIDED
5 YOURSELF IS A YOGA INSTRUCTOR TODAY INCIDENTAL TO
6 PARTICIPATION.

7 PEOPLE COULD ARGUE IT IS. BUT THAT'S A NEW KIND OF
8 THERAPY. IT'S VERY IMPORTANT TRAINING. ATHLETES SAY IT
9 REALLY HELPS THEM. SO HOW WOULD YOU RULE?

10 YOU WOULD HAVE TO -- THAT'S WHAT THEY HAVE TO DO EVERY
11 DAY. THEY HAVE TO DECIDE THAT. AND 15 YEARS AGO NOBODY WOULD
12 HAVE THOUGHT YOGA WAS INCIDENTAL TO PARTICIPATION. SO THEY
13 HAVE THOSE VERY GENERAL DEFINITIONS THAT I THINK ARE PRETTY
14 SELF-EXPLANATORY, BUT THE COURT IS RIGHT, THAT DOESN'T ANSWER
15 THE SPECIFIC QUESTIONS, WHICH IS WHY THEY HAVE THIS LONG
16 MANUAL. YOU DIDN'T WANT THE WHOLE THING INTO EVIDENCE AND WHY
17 THERE'S HUNDREDS OF PAGES, 400 PAGES THERE BECAUSE EVERY TIME
18 YOU WANT TO SAY THIS IS AN EDUCATIONAL EXPENSE OR NOT, SOMEONE
19 COMES UP WITH AN IDEA, WELL, DO YOU THINK THIS IS OR NOT. IT
20 DOESN'T MATTER WHETHER THEY ARE PAID OVER COA, IF IT IS FOR A
21 LEGITIMATE EXPENSE, IT'S THE PURPOSE OF THE PAYMENT.

22 SO WHEN THE COURT WAS SAYING, THE NINTH CIRCUIT WAS SAYING
23 YOU CAN'T PAY OVER A DOLLAR, THAT'S A QUANTUM LEAP, THEY MEANT
24 FOR WHAT PURPOSE. AND THAT'S WHAT THEY SAID, IF YOU PAY THE
25 PLAYERS, THEN A DOLLAR MATTERS. IF YOU DON'T, IF IT'S FOR

1 TRUE EDUCATIONAL EXPENSES, THEN THAT'S PERFECTLY FINE. IT CAN
2 BE OVER COA.

3 THERE'S NO MAGIC NUMBER THAT THE NINTH CIRCUIT RECOGNIZED
4 OR I THINK THE COURT DID, BECAUSE YOUR HONOR RECOGNIZED THAT
5 PEOPLE MIGHT GET ABOVE COA.

6 THE POINT IS WHAT ARE YOU PAYING THEM FOR? IF YOU'RE
7 TRYING TO MAKE THEM FIT IN AT SCHOOL, BE ABLE TO BE EDUCATED
8 AND BE STUDENTS AND ATHLETES, THEN THAT'S FINE. WHAT THAT
9 MEANS IN DETAIL IS MICROMANAGING AND IS WHERE THEY ARE ALLOWED
10 TO HAVE AMPLE LATITUDE.

11 WHAT YOU HAVE BEEN TALKING ABOUT IS GETTING RIGHT IN THE
12 BUSINESS OF WHAT IS AMPLE LATITUDE. IF YOU LOOK AT THE 17
13 THINGS THAT PLAINTIFF SAYS, I THINK, UNDER THE SECOND LRA,
14 WANTS YOU TO ALLOW, APPAREL EQUIPMENT AND SUPPLIES. WELL,
15 THAT'S ALREADY ALLOWED.

16 **THE COURT:** ARE YOU LOOKING AT ATTACHMENT A NOW?

17 **MS. WILKINSON:** YES, THEIR APPENDIX C. THESE ARE THE
18 17 THINGS I THINK THAT THEY SAY --

19 **THE COURT:** NO.

20 **MR. KESSLER:** NO.

21 **THE COURT:** IF YOU ARE PERHAPS LOOKING AT ATTACHMENT
22 A TO THEIR SECOND LESS RESTRICTIVE ALTERNATIVE, THE WAY THEY
23 COME UP WITH THOSE ARE THE ONES THAT YOU CURRENTLY HAVE --

24 (SIMULTANEOUS COLLOQUY)

25 **COURT REPORTER:** EXCUSE ME.

1 **THE COURT:** OH, THE 17 THAT LENNON TESTIFIED ABOUT
2 FOR EDUCATION.

3 **MS. WILKINSON:** YES.

4 **THE COURT:** YES. WELL, THAT'S DIFFERENT.

5 **MS. WILKINSON:** RIGHT. THESE ARE THINGS THAT ARE
6 ALREADY PERMITTED, AND THEY ARE JUST SAYING MAKE THEM
7 UNLIMITED. SO APPAREL, EQUIPMENT, AND SUPPLIES, THAT'S WHAT
8 THE SECOND --

9 **THE COURT:** I DON'T THINK --

10 **MS. WILKINSON:** -- LESS RESTRICTIVE ALTERNATIVE. IT
11 SAYS UNLIMITED EXPENSES --

12 **THE COURT:** I THINK WE ARE TALKING ABOUT TWO
13 DIFFERENT THINGS HERE. LESS RESTRICTIVE ALTERNATIVE TWO SAYS
14 THAT THE NCAA CAN'T LIMIT EXPENSES RELATED TO EDUCATION.

15 **MS. WILKINSON:** NO, YOUR HONOR, THAT'S NOT WHAT IT
16 SAYS.

17 **THE COURT:** AND ALSO SAYS THE NCAA CAN'T LIMIT
18 SPECIFIC EXPENSES... WHAT DO THEY CALL IT, RELATED TO ATHLETIC
19 PARTICIPATION. AND THE ONES THAT THEY LIST IN THE ATTACHMENT
20 A, WHICH I THINK IS 16 OF THEM, ARE THE ONES THAT ARE ALREADY
21 IN EXISTENCE AND THAT'S WHY THEY PICKED THEM.

22 I'M NOT CRAZY ABOUT IT BECAUSE IT SEEMS A LITTLE ODD TO
23 HAVE SUCH A DETAILED LIST AS PART OF AN INJUNCTION, BUT THAT'S
24 HOW THEY PICKED IT. I'M GUESSING BECAUSE THEY COULDN'T THINK
25 OF ANOTHER WAY TO DEFINE WHAT RELATED TO ATHLETIC

1 PARTICIPATION MEANS BECAUSE I'VE NEVER HAD A CLEAR PICTURE OF
2 WHAT IT DOES MEAN.

3 I WOULD RATHER HAVE SOMETHING THAT DEFINES IT RATHER THAN
4 SAYS, WELL, WE'LL JUST GO WITH THE 16 THAT EXIST NOW AND SET
5 THOSE IN STONE FOREVER. IF YOU HAVE A DIFFERENT WAY OF
6 EXPLAINING IT, I WOULD BE INTERESTED TO HEAR THAT.

7 **MS. WILKINSON:** FIRST OF ALL, YOUR HONOR, I DON'T --
8 LRA 2 SAYS THAT THE NCAA WILL ONLY BE PERMITTED TO PROHIBIT --

9 **THE COURT:** DON'T READ TOO FAST, SHE WON'T BE ABLE TO
10 GET IT.

11 **MS. WILKINSON:** I'M SORRY.

12 THE NCAA IS ONLY ALLOWED TO PROHIBIT CASH SUMS UNTETHERED
13 TO EDUCATIONAL EXPENSES.

14 **THE COURT:** RIGHT.

15 **MS. WILKINSON:** WHICH MEANS --

16 **THE COURT:** GO ON.

17 **MS. WILKINSON:** AND UNLIMITED BENEFITS, ALLOWS
18 UNLIMITED BENEFITS.

19 **THE COURT:** OKAY. I'VE LOST TRACK OF WHAT YOU'RE
20 ARGUING NOW. WHAT ARE YOU SAYING?

21 **MS. WILKINSON:** YOU WERE SAYING THEY COULDN'T DO
22 THAT. UNDER -- THEY DON'T JUST SAY THEY GET TO -- THEY CAN
23 REGULATE BENEFITS AND EDUCATION. THEY ARE SAYING THAT WE
24 CANNOT REGULATE BENEFITS UNDER LRA 2.

25 SO SOMEONE COULD GET A CAR AS A BENEFIT FOR WINNING A

1 CHAMPIONSHIP VERSUS A \$500 GIFT CARD.

2 **THE COURT:** THAT'S NOT WHAT IT'S INTENDED TO MEAN. I
3 DON'T KNOW --

4 **MS. WILKINSON:** WE HAVE TO GO WITH WHAT IT SAYS.
5 THAT'S EXACTLY WHAT IT SAYS.

6 **THE COURT:** I DON'T THINK SO. BUT --

7 **MS. WILKINSON:** YOU DON'T HEAR THEM SAYING THAT
8 LRA 2 --

9 **THE COURT:** THEY KNOW BETTER THAN TO JUMP UP.

10 **MR. KESSLER:** I AM ONLY GETTING UP IF YOUR HONOR ASKS
11 ME TO.

12 **MS. WILKINSON:** IT DOESN'T, YOUR HONOR. IT
13 DOESN'T -- AND YOU KNOW HOW YOU KNOW IT'S TRUE IS THEIR
14 ALTERNATIVE TO LRA 2 SAYS, OKAY, YOU CAN LIMIT BENEFITS. SO
15 LRA 2 DOES NOT ALLOW THE NCAA TO LIMIT BENEFITS. AND THEY PUT
16 IN A NOTE AT THE END OF THEIR BRIEF, OH, WELL, IF YOU WANT TO
17 CONSIDER AN ALTERNATIVE TO LRA 2, YOU COULD ALLOW THE NCAA TO
18 CAP BENEFITS.

19 **THE COURT:** HOLD ON. I'M JUST NOT FOLLOWING YOU AT
20 ALL SO I JUST NEED -- YOU ARE NOT READING IT THE WAY I READ
21 IT.

22 **MS. WILKINSON:** I'M READING IT THE WAY THEY WROTE IT,
23 YOUR HONOR.

24 **THE COURT:** WELL, I SAID YOU ARE NOT READING IT THE
25 WAY I READ IT, SO THERE MUST BE OTHER WAYS OF READING IT

1 BESIDES THE WAY YOU'RE READING IT BECAUSE I AM READING IT
2 DIFFERENTLY. SO I'M GOING TO TRY AND READ IT AGAIN AND FIGURE
3 OUT WHETHER IT'S AMBIGUOUS OR WHETHER YOU'RE RIGHT AND I'M
4 WRONG, OR I'M RIGHT AND YOU'RE WRONG, WHATEVER. GIVE ME A
5 MINUTE.

6 YOU ARE TALKING NOW ABOUT NO. 2.

7 **MS. WILKINSON:** YES, YOUR HONOR.

8 **THE COURT:** PROPOSED ORDER GRANTING ALTERNATIVE
9 INJUNCTION. IT'S DOCUMENT 868-3? IS THAT THE ONE, PAGE 60 TO
10 63?

11 **MS. WILKINSON:** I DON'T HAVE THAT VERSION, YOUR
12 HONOR.

13 YOUR HONOR, CAN I READ A SENTENCE FROM THEIR BRIEF WHEN
14 YOU'RE READY THAT MAKES MY POINT?

15 **THE COURT:** YOU WANT TO GET OFF THE QUESTION OF WHAT
16 THIS INJUNCTION CALLS FOR --

17 **MS. WILKINSON:** NO, I WANT TO SHOW YOU WHY THIS IS
18 EXACTLY WHAT IT MEANS.

19 BECAUSE IN THEIR BRIEF AT PAGE 42 AND 43, THEY ARE TALKING
20 ABOUT THERE ARE TWO INJUNCTIONS AND THEN AN ALTERNATIVE. AND
21 THEY ARE SAYING, THEY ARE ANSWERING YOUR QUESTION ABOUT
22 INJUNCTIVE RELIEF OPTIONS.

23 PLAINTIFFS BELIEVE THAT FULL CONFERENCE AUTONOMY IS BY FAR
24 THE MOST APPROPRIATE RELIEF AND BEST OPTION FOR CLASS MEMBERS
25 AND THE PUBLIC INTEREST WHICH FAVORS COMPETITION. THAT SAID,

1 ONE ADDITIONAL POSSIBILITY WOULD BE TO MODIFY PLAINTIFFS'
2 ALTERNATIVE INJUNCTION, WHICH IS THE NUMBER TWO, TO ELIMINATE
3 THE PROHIBITION ON THE NCAA OF CAPPING INCIDENTAL TO
4 PARTICIPATION BENEFITS.

5 SO THEY ARE ACKNOWLEDGING THAT THE SECOND LRA DOES NOT
6 ALLOW THE NCAA TO CAP ANY INCIDENTS -- INCIDENTAL TO
7 PARTICIPATION BENEFITS.

8 **THE COURT:** OH.

9 **MS. WILKINSON:** SO THEY KIND OF MADE UP A THIRD ONE
10 NOW WHICH THEY CALL THIS ALTERNATIVE?

11 **THE COURT:** THE THIRD ONE IS MORE -- IS NARROWER AND
12 MORE LIMITED IN THAT IT DOESN'T ALLOW -- IT ALLOWS THE NCAA TO
13 CAP INCIDENTAL TO ATHLETIC PARTICIPATION BENEFITS WHERE NUMBER
14 TWO --

15 **MS. WILKINSON:** DOES NOT.

16 **THE COURT:** -- DOESN'T ALLOW THEM TO CAP THAT, NOR
17 DOES IT ALLOW THEM TO CAP THE EDUCATIONAL EXPERIENCES.

18 **MS. WILKINSON:** RIGHT.

19 **THE COURT:** OKAY.

20 **MS. WILKINSON:** NOT EVEN EDUCATIONAL EXPENSES. THE
21 PROBLEM WITH LRA 2 --

22 **THE COURT:** I'VE LOST THE THREAD HERE. WHERE ARE WE
23 GOING WITH THIS?

24 WHAT I WOULD LIKE TO HEAR IS WHAT DO YOU THINK OF THESE
25 THREE INJUNCTIONS, AND UNDERSTANDING THAT YOU DON'T AGREE WITH

1 ANY OF THEM AND DON'T THINK ANY SHOULD EVER BE IMPOSED, ASK
2 YOU WHAT IS THE DIFFERENCE BETWEEN THEM, WHICH ONE WOULD BE
3 BETTER, OR WHAT WOULD YOU PROPOSE INSTEAD, THAT SORT OF THING.

4 **MS. WILKINSON:** I DEALT WITH NUMBER ONE. I THINK
5 THAT THAT DOESN'T WORK AND WILL ALLOW UNLIMITED PAY AND
6 DOESN'T HAVE ANY RULES THAT ARE FORCED --

7 **THE COURT:** YES --

8 (SIMULTANEOUS COLLOQUY)

9 **MS. WILKINSON:** NUMBER TWO, I WAS TRYING TO EXPLAIN
10 TO YOU THAT IT ALLOWS UNLIMITED BENEFITS AND YOU SAID TO ME,
11 NO, IT DOESN'T. THAT'S WHY I WAS SAYING THAT'S THE
12 DIFFERENCE. YOU SAID WHAT IS THE DIFFERENCE.

13 NUMBER TWO ALLOWS ONLY CAPS OF CASH PAYMENTS THAT ARE
14 UNTETHERED TO EDUCATION. SO THAT MEANS EVERYTHING ELSE IS
15 FAIR GAME, WHICH IS ANY EDUCATIONAL RELATED --

16 **THE COURT:** WELL, NO, IT DOESN'T. IT ALLOWS ONLY --
17 IT DISALLOWS ONLY LIMITS ON THE 16 PREVIOUSLY ARTICULATED
18 BENEFITS INCIDENTAL TO ATHLETIC PARTICIPATION. AND THE 16 --

19 **MS. WILKINSON:** IT DOESN'T, YOUR HONOR.

20 **THE COURT:** YES, IT DOES. AND THE 16 THINGS ARE IN
21 ATTACHMENT 1. I ALWAYS THOUGHT IT WAS ATTACHMENT A. AND
22 MAYBE IT'S NOT 16 THINGS. I CAN COUNT THEM. 16.

23 **MS. WILKINSON:** BUT THE --

24 **THE COURT:** SO THOSE ARE THE ONES THAT THE NCAA
25 CANNOT LIMIT.

1 **MS. WILKINSON:** NO, YOUR HONOR, IT DOESN'T. THAT'S
2 WHAT THEY SAY, THEY CAN'T LIMIT ANY BENEFITS INCIDENTAL TO
3 PARTICIPATION. THEY ARE JUST GIVING YOU ATTACHMENT NO. 1 TO
4 SHOW YOU EXAMPLES OF THE ONES THEY SAY WE HAVE ALREADY
5 ACKNOWLEDGED ARE NOT RELATED TO AMATEURISM AND THEY ARE SAYING
6 THOSE ARE EXAMPLES. THE INJUNCTION --

7 **MR. KESSLER:** THAT IS NOT CORRECT.

8 TO PROVIDE CERTAINTY, WE SAID WE WOULD LIMIT THIS TO JUST
9 THE ONES THAT MR. LENNON IDENTIFIED IN HIS 30(B)(6)
10 DEPOSITION. YOUR HONOR ASKED SHOULD WE ADD TO THAT AND I SAID
11 THAT WOULD BE FINE BUT WE WANTED TO GIVE CERTAINTY. THAT'S
12 ALL THAT WE ALLOWED ON INCIDENTAL TO BENEFIT PARTICIPATION
13 BENEFITS NOT BEING CAPPED IN THAT ALTERNATIVE.

14 **THE COURT:** IT'S JUST THE 16.

15 **MS. WILKINSON:** THAT'S DIFFERENT FROM WHAT THEY SAID
16 IN THEIR BRIEF, YOUR HONOR. MAYBE THAT'S IN RESPONSE TO YOUR
17 QUESTIONS, BUT THAT'S NOT WHAT THEY SAY IN THEIR BRIEFS.

18 **THE COURT:** NOW WE HAVE A JUDICIAL ADMISSION THAT
19 THAT'S WHAT IT MEANS. SO YOU CAN MOVE ON.

20 **MS. WILKINSON:** IF THERE'S NO LIMIT TO THOSE 16, YOUR
21 HONOR, THAT MEANS PEOPLE CAN GIVE HUGE AMOUNTS FOR THOSE
22 BENEFITS THAT COULD BE BASICALLY A SUBSTITUTION FOR PAY.

23 SO, ONE OF THOSE 16, MR. BISHOP IS POINTING OUT TO ME, IS
24 PARTICIPATION AWARDS. SO YOU COULD HAVE UNLIMITED
25 PARTICIPATION AWARDS OR YOU COULD HAVE UNLIMITED EXPENSES FOR

1 SPOUSES AND CHILDREN TO ATTEND POST-SEASON BOWL GAMES.

2 WHAT DOES THAT MEAN? YOU COULD FLY THEM AROUND IN A
3 PRIVATE PLANE. YOU COULD PUT THEM UP IN THE FOUR SEASONS.
4 YOU COULD DRIVE THEM AROUND IN A LIMOUSINE. ALL OF WHICH YOU
5 CAN TALK ABOUT IN RECRUITING AS A QUOTE "BENEFIT".

6 THERE'S A REASON THAT THOSE ARE LIMITED. BECAUSE AT A
7 CERTAIN NUMBER, WHICH IS NOT A MAGIC NUMBER, BUT PEOPLE CAN
8 TURN THAT INTO PAY TO PLAY. SO IT DOESN'T MAKE SENSE TO HAVE
9 UNLIMITED EXPENSES FOR SPOUSE AND CHILDREN TO ATTEND THE
10 POST-SEASON BOWL EVEN THOUGH IT'S A GREAT THING TO ALLOW THOSE
11 FOLKS TO COME, BUT THERE SHOULD BE SOME LIMITS. SAME WITH
12 PARTICIPATION AWARDS OR EVEN APPAREL, EQUIPMENT, AND SUPPLIES.

13 **THE COURT:** OKAY. THEN NUMBER THREE?

14 **MS. WILKINSON:** SO NUMBER THREE ALLOWS, IF I
15 UNDERSTAND IT NOW, CAPPING THOSE. IN SOME WAY, ALLOWS THEM TO
16 CAP THOSE AND I GUESS EVERY OTHER BENEFIT INCIDENTAL TO
17 PARTICIPATION BECAUSE NOW WE ARE ONLY TALKING ABOUT 16.

18 WHAT DOES THAT LEAVE? THAT LEAVES DEFINING EDUCATIONAL
19 PAYMENTS. THEY MADE IT MUCH BROADER THAN EDUCATIONAL
20 EXPENSES, AND I DON'T THINK ANYONE WOULD AGREE -- IT'S WHAT
21 YOU SAID, YOUR HONOR, HOW WOULD YOU EVEN DEFINE THAT?

22 SAYS "EDUCATION RELATED". IT DOESN'T SAY EXPENSES. SO
23 YOUR HONOR RAISED IT, WELL WHAT ABOUT A GPA BONUS OR A
24 GRADUATION BONUS?

25 **THE COURT:** EDUCATED-RELATED EXPENSES OR BENEFITS.

1 **MS. WILKINSON:** RIGHT. SO WHAT IS A GPA BONUS?
2 THAT'S NOT AN EDUCATIONAL EXPENSE. NOBODY GIVES IT TO A
3 NONATHLETE STUDENT. AND WOULD THAT BE ALLOWED UNDER THAT IF
4 YOU MADE THAT THE INJUNCTION, OF COURSE WE DON'T THINK YOU
5 SHOULD, WHO WOULD KNOW WHETHER THAT ONE IS ALLOWED OR NOT? OF
6 COURSE WE DON'T THINK IT IS. WE DON'T THINK IT IS RIGHT
7 NOW --

8 **THE COURT:** PERHAPS THE NCAA COULD DEFINE
9 EDUCATION-RELATED EXPENSES AND BENEFITS AND EVEN PERHAPS
10 INCIDENTAL TO ATHLETIC PARTICIPATION BENEFITS.

11 **MS. WILKINSON:** THEY DO. THEY ARE IN THE MANUAL,
12 YOUR HONOR. THIS IS -- THIS SPECIFIC QUESTION, HOW WOULD THEY
13 DEFINE THAT. LET'S SAY THEY SAID ANYTHING THAT IT COST TO GO
14 TO SCHOOL AND BE A STUDENT.

15 A GPA BONUS, A GRADUATION BONUS DO NOT QUALIFY UNDER THAT
16 DEFINITION. WE CAN PULL OUT A DICTIONARY, WE CAN LOOK THAT
17 UP, NOBODY THINKS THAT FALLS WITHIN AN EDUCATIONAL EXPENSE.
18 BUT THEY'RE ARGUING THAT THAT'S SOMETHING THAT SHOULD BE
19 PERMITTED.

20 SO YOU WOULD -- EVEN IF YOU DEFINED IT, NO ONE IS GOING TO
21 DEFINE IT THAT WAY. YOU HEARD THE PEOPLE FROM THE NCAA. NO
22 ONE THINKS THAT IS A GOOD THING TO DO.

23 **THE COURT:** SO WHAT -- DO YOU HAVE ANY SUGGESTIONS?

24 **MS. WILKINSON:** MY SUGGESTION, YOUR HONOR, IS IF YOU
25 BELIEVE WHAT PLAINTIFFS ARE SAYING, THAT IN THE END, IF YOU

1 GAVE THIS TO THE CONFERENCES, THEY ARE GOING TO COME BACK AND
2 DO BASICALLY WHAT THEY ARE DOING RIGHT NOW, WHICH ARE THINGS
3 THAT DON'T HURT CONSUMER DEMAND, THEN THERE'S NO NEED FOR ANY
4 INJUNCTION BECAUSE THAT'S WHAT THEY HAVE BEEN DOING.

5 IN THE LAST FEW YEARS, THEY HAVE BEEN RELAXING THE
6 RESTRICTIONS NOT INCREASING THEM.

7 **THE COURT:** WHO HAS?

8 **MS. WILKINSON:** THE NCAA. THEY HAVE BEEN RELAXING
9 THE RESTRICTIONS AND GIVING THESE STUDENT-ATHLETES MORE THINGS
10 THAT QUALIFY AS EDUCATION EXPENSES AND BENEFITS INCIDENTAL TO
11 PARTICIPATION. THEY'VE MADE THAT DECISION, AND THEY HAVE MADE
12 IT THE RIGHT WAY BECAUSE, AT LEAST ACCORDING TO THE
13 PLAINTIFFS, THERE HASN'T BEEN AN IMPACT ON CONSUMER DEMAND.
14 SO WHY WOULD YOU GET IN THE MIDDLE OF THAT?

15 THAT'S EXACTLY WHAT THEY ARE DOING. THEY ARE DOING IT TO
16 BENEFIT ALL THE STUDENTS. YOU HAVE A NATIONAL REGULATORY
17 SCHEME THAT KEEPS THE PRODUCT IN PLACE AND POPULAR. SO WHY
18 WOULD YOU ISSUE AN INJUNCTION TO GET BACK TO THAT WHERE YOU
19 HAVE ALL THIS ADDITIONAL COST IF YOU THINK THAT'S WHERE THEY
20 ARE GOING TO GET TO BEGIN WITH.

21 IF THE DIFFERENCE IS, I THINK WHAT YOUR HONOR SAID, AND I
22 UNDERSTAND WHY, YOU'D JUST LIKE TO GIVE THEM SOME MORE?
23 THAT'S AMPLE LATITUDE. THEY ARE GETTING SOME MORE NOW. IF
24 YOU JUST WANT THEM TO GET SOME MORE, FOR WHAT? FOR BEING A
25 STUDENT? THOSE ARE STUDENT EXPENSES.

1 **THE COURT:** I'M NOT FOLLOWING YOU. WHO WANTS TO GIVE
2 WHO MORE?

3 **MS. WILKINSON:** YOU. YOU WERE SAYING --

4 **THE COURT:** I WANT TO GIVE SOMEONE MORE?

5 **MS. WILKINSON:** WHAT IF THE COURT JUST WANTS TO GIVE
6 SOME MORE MONEY? NOT A LOT MORE MONEY, BUT GIVE MORE MONEY.

7 THAT'S WHAT YOU SAID. YOU WERE TALKING ABOUT ALTERNATIVE
8 NUMBER TWO, AND THEN YOU WERE TALKING ABOUT WHAT IF YOU JUST
9 WANTED TO GIVE MORE, NOT UNLIMITED, NOT PAYMENTS, FOR TO PLAY,
10 WHAT IF YOU WANTED TO GIVE MORE, WHICH IS, ISN'T THAT WHAT
11 ALTERNATIVE TWO IS, LRA 2? YOU CAN GIVE MORE FOR EDUCATION?

12 **THE COURT:** I'M NOT FOLLOWING YOU.

13 **MS. WILKINSON:** YOUR HONOR --

14 **THE COURT:** YOU'RE TALKING ABOUT SOMETHING I SAID
15 MOMENTS AGO?

16 **MS. WILKINSON:** YES, YOUR HONOR.

17 WHETHER IT'S YOU OR THE INJUNCTION PERMITTING THE --
18 FORCING THE NCAA TO GIVE MORE, RIGHT, HOW MUCH MORE? NOT
19 UNLIMITED, AS I HEARD THE COURT SAYING, HOW MUCH MORE IS A
20 DECISION FOR THE NCAA UNLESS THEY ARE --

21 **THE COURT:** OKAY. SO DO YOU HAVE ANY SUGGESTIONS?

22 **MS. WILKINSON:** I GAVE YOU MY SUGGESTION, YOUR
23 HONOR --

24 **THE COURT:** DON'T DO ANYTHING.

25 **MS. WILKINSON:** OF COURSE.

1 **THE COURT:** YOU HAVE NO OTHER SUGGESTION, NOTHING
2 THAT YOU THINK MIGHT IMPROVE THIS INCREMENTALLY OR THAT WOULD
3 MAKE IT MORE CLEAR, OR ANYTHING AT ALL?

4 **MS. WILKINSON:** WELL, YOUR HONOR HAS RAISED A LOT OF
5 THE PROBLEMS. THERE'S NOT EVIDENCE IN THE RECORD FOR YOU TO
6 RELY ON THAT. THERE'S NOT DEFINITIONS OTHER THAN WHAT YOU
7 ALREADY HAVE AND DON'T WANT TO USE FROM THE MANUAL. AND NOW
8 WE HAVE HAD 16 BENEFITS. OF COURSE, I DON'T THINK BENEFITS
9 SHOULD BE UNLIMITED IN ANY FASHION.

10 **THE COURT:** SO I MAY HAVE SOME OTHER SPECIFIC
11 QUESTIONS IF YOU WILL GIVE ME A MINUTE.

12 **MR. KESSLER:** I HAVE TWO MINUTES, YOUR HONOR --

13 **THE COURT:** MR. WILLIAMS HAS SOMETHING AS WELL.

14 **MR. WILLIAMS:** IT WILL TAKE THREE MINUTES WHENEVER
15 THE COURT WOULD LIKE.

16 **THE COURT:** LET ME JUST LOOK AT MY LIST HERE.

17 (PAUSE IN THE PROCEEDINGS.)

18 **THE COURT:** WELL, THIS ONE IS FOR PLAINTIFFS. I'LL
19 SAY IT AND YOU CAN TELL ME WHEN YOU COME BACK.

20 I'M WONDERING WHETHER THERE'S EVIDENCE THAT THE SCHOOLS
21 INCREASED THEIR COST OF ATTENDANCE NUMBERS AFTER O'BANNON. I
22 THINK THAT THERE WERE ALLEGATIONS THAT THEY DID, BUT I DON'T
23 KNOW IF THERE'S ANY EVIDENCE.

24 **MS. WILKINSON:** YOUR HONOR, CAN I MENTION THAT FROM
25 OUR PERSPECTIVE, WHICH IS --

1 **THE COURT:** ALL THREE.

2 **MS. WILKINSON:** I THINK NUMBER ONE WOULD TAKE YEARS
3 BECAUSE OF WHAT YOU SAID, THEY WOULD HAVE TO DO SOME KIND OF
4 SURVEY, THEY WOULD HAVE TO COME TOGETHER, HAVE VOTES,
5 DISCUSSIONS, FIGURE OUT THE ENFORCEMENT MECHANISM. AND FOR
6 LRA 2 OR MODIFICATION OF IT, WHICH I WILL CALL NO. 3, YOU ARE
7 GOING TO HAVE THE SAME ISSUE IF YOU'RE GOING TO HAVE THE
8 CONFERENCES ARE ABLE TO DO SOME OF THAT AS WELL AS THE -- BUT
9 NOT TO THE SAME EXTENT, BUT YOU ARE GOING TO HAVE THE SAME
10 ISSUES WITH THE CONFERENCES AND THE NCAA.

11 IF IT'S REDEFINING WHAT YOU JUST SAID WHAT ARE EDUCATION
12 EXPENSES AND WHAT ARE BENEFITS INCIDENTAL TO PARTICIPATION, I
13 MEAN, I DON'T SEE HOW, SINCE THEY HAVE SPENT YEARS WORKING ON
14 THE MANUAL THAT THAT WOULD BE DONE ANY TIME SOON, BUT I GUESS
15 THE EASIEST THING WOULD BE, WHICH WE WOULD ASK YOU FOR IN ANY
16 EVENT, IS A STAY PENDING APPEAL WHICH SEEMS ONLY APPROPRIATE.

17 **THE COURT:** OKAY. MR. WILLIAMS YOU HAD --

18 **MR. WILLIAMS:** YES, YOUR HONOR, THREE POINTS.

19 THE FIRST POINT ANSWERS THE QUESTION WITH RESPECT TO WHAT
20 THE CONSTITUTION PROVIDES WITH REGARD TO AUTONOMY. AND I
21 BELIEVE THAT FOR THE MOST PART WHAT MR. KESSLER SAID WAS
22 ACCURATE, BUT I JUST WANTED TO POINT OUT FOR THE COURT,
23 ARTICLE 2.13 OF THE CONSTITUTION TALKS ABOUT THE PRINCIPLE
24 GOVERNING FINANCIAL AID. AND IT HAS AN ASTERISK NEXT TO THE
25 RULE RAN THAN AN A, AND THE IMPORTANCE OF THAT IS YOU NEED AN

1 A NEXT TO IT FOR IT TO BE CHANGED ONLY BY THE AUTONOMY 5. SO
2 THIS IS SOMETHING THAT WOULD REQUIRE THE ENTIRE TWO-THIRDS OF
3 THE ENTIRE MEMBERSHIP.

4 **THE COURT:** WHAT DOES THE ASTERISK MEAN?

5 **MR. WILLIAMS:** THE ASTERISK MEANS THAT IT IS
6 MEMBERSHIP -- TOTAL MEMBERSHIP KIND OF ISSUE AS OPPOSED TO AN
7 AUTONOMY TYPE OF ISSUE.

8 SO THE POINT BEING, WHAT IT SAYS IS:

9 A STUDENT-ATHLETE MAY RECEIVE ATHLETICALLY RELATED
10 FINANCIAL AID ADMINISTERED BY THE INSTITUTION WITHOUT
11 VIOLATING THE PRINCIPLES OF AMATEURISM PROVIDED THE AMOUNT
12 DOES NOT EXCEED THE COST OF EDUCATION AUTHORED BY THE
13 ASSOCIATION. HOWEVER, SUCH AID, AS DEFINED BY THE
14 ASSOCIATION, SHALL NOT EXCEED THE COST OF ATTENDANCE AS
15 PUBLISHED BY EACH INSTITUTION. ANY OTHER FINANCIAL ASSISTANCE
16 EXCEPT THAT RECEIVED FROM ONE UPON WHOM THE STUDENT-ATHLETE IS
17 NATIONALLY OR LEGALLY DEPENDENT SHALL BE PROHIBITED UNLESS
18 SPECIFICALLY AUTHORIZED BY THE ASSOCIATION.

19 SO THE FINANCIAL AID LIMITATION IS NOT SOMETHING THAT CAN
20 BE CHANGED BY THE AUTONOMY 5. THAT WAS POINT ONE I WANTED TO
21 CLARIFY. AND I BELIEVE MR. KESSLER STATED THAT ROUGHLY THE
22 SAME WAY I JUST DID.

23 THE SECOND POINT IS IN RESPONSE TO MR. KESSLER ON THIS
24 TOPIC OF THE ONE DOLLAR MORE WHEN MR. HECKMAN WAS
25 TESTIFYING -- DR. HECKMAN, PARDON ME, WAS TESTIFYING. AND

1 YOUR HONOR CORRECTLY NOTED THAT AFTER A COLLOQUY BETWEEN THE
2 COURT AND DR. HECKMAN, DR. HECKMAN SAID, THEN THE STUDENT
3 WOULD CLEARLY BE BETTER OFF, NO QUESTION ABOUT IT. BUT THE
4 IMPORTANCE IS THE ASSUMPTION THAT THE COURT TOLD MR. HECKMAN
5 TO MAKE BEFORE HE GAVE THAT TESTIMONY.

6 THE ASSUMPTION THE COURT SAID, YOUR HONOR SAID, NO, I'M
7 JUST TALKING ABOUT THE STUDENT THEMSELVES, NOT ALL OF THE
8 EQUILIBRIUM AND THE ASSOCIATED CHANGES THAT MAY OR MAY NOT
9 HAPPEN. I'M ASKING ABOUT THE STUDENT HIM OR HERSELF.

10 DR. HECKMAN: IN ISOLATION FROM ALL THE REST OF THE
11 SYSTEM?

12 THE COURT: YES.

13 THEN HE SAID, AND ONLY THEN DID HE SAY CLEARLY, ALL OTHER
14 THINGS BEING EQUAL, THE IMPACTS ON THE STUDENT INDIVIDUALLY
15 FROM THE EFFECTS ON THE SYSTEM, THE BENEFITS TO THE STUDENTS,
16 DETRIMENTS, ET CETERA, IF YOU ARE ASKING ME TO ASSUME THAT
17 NONE OF THOSE THINGS -- ALL OF THOSE THINGS ARE EQUAL AND
18 THERE IS NO CHANGE, THEN, YES, IF YOU PAY A STUDENT MORE
19 MONEY, THE STUDENT HAS ONE MORE DOLLAR.

20 BUT THAT RESPECTFULLY MISSES THE POINT OF WHAT DR. HECKMAN
21 WAS SAYING ON THE EQUILIBRIUM.

22 FINAL POINT. COUNSEL'S POINT WHEN HE GOT UP HERE WAS TO
23 SAY THAT THERE IS NO EVIDENCE THAT THERE WOULD BE ANY -- THAT
24 THERE HAS BEEN ANY CHANGE IN DEMAND EVEN AFTER THE CHANGES
25 THAT MR. KESSLER WENT THROUGH AND HE TICKED OFF FOUR CHANGES

1 THAT HE SAYS HAVE OCCURRED, ALL OF WHICH ARE GETTING MORE
2 FOOD, ET CETERA. HE SAID THERE IS NO EVIDENCE OF A CHANGE IN
3 DEMAND EVEN THOUGH THOSE THINGS HAVE HAPPENED.

4 SO TWO FINAL POINTS. IF WE CAN TURN THIS ON, IF WE COULD.
5 (DISPLAYED ON SCREEN.)

6 THE FIRST ONE IS THEIR NATURAL EXPERIMENT RESTS ON THE
7 FALSE ASSUMPTION THAT FANS ARE AWARE OF THE CHANGES IN THE
8 RULES.

9 AND EVEN DR. NOLL TESTIFIED THAT CONSUMERS CONCEIVABLY
10 MIGHT BE SLOW LEARNERS WHO EVENTUALLY WILL REALIZE THAT
11 COLLEGE ATHLETES ALREADY ARE BEING PAID SUBSTANTIALLY MORE
12 THAN THEIR EDUCATIONAL COSTS, AND THERE IS NO WAY TO TEST THIS
13 CONJECTURE, I.E., THE SPEED WITH WHICH FANS BECOME AWARE OF
14 THE MOVE TO COA OTHER THAN TO WAIT FOR MORE YEARS OF DATA.

15 THAT IS WHAT DR. NOLL SAID. ALL HE SAID WAS, THERE IS A
16 LOT OF PUBLICITY ABOUT THE MOVE TO COA, BUT THERE IS NO
17 EVIDENCE IN THE RECORD BEFORE YOUR HONOR TO INDICATE THAT
18 CONSUMERS ARE AWARE THAT THERE WAS A MOVE FROM GIA TO THE COST
19 OF ATTENDANCE.

20 SECOND FALSE ASSUMPTION AND I WILL SIT DOWN. THE NATURAL
21 EXPERIMENT RESTS ON THE FALSE ASSUMPTION THAT INCREASED
22 TELEVISION REVENUE EQUATES TO INCREASED CONSUMER DEMAND. AND
23 THE VERY FIRST WITNESS IN THE CASE WAS DR. RASCHER. I
24 CROSS-EXAMINED HIM AND ESTABLISHED THAT THE ONLY REASON THAT
25 THE REVENUES HAD INCREASED IS BECAUSE THERE ARE CONTRACTS THAT

1 HAVE EVER INCREASING REVENUES. THOSE CONTRACTS, ALL BUT TWO,
2 THAT'S THE RECORD, I THINK THERE WERE ABOUT 10 OR 15, ALL BUT
3 TWO PREDATED THE MOVE TO COST OF ATTENDANCE AND HAD ESCALATING
4 REVENUES.

5 FROM THAT, PLAINTIFFS ARGUE NOW, WELL, SEE, THERE HAS BEEN
6 EVER INCREASING DEMAND. SO THE INCREASING DEMAND MEANS, THEY
7 SAY, THAT THE MOVE TO COST OF ATTENDANCE HASN'T HAD ANY
8 IMPACT.

9 THAT DOES NOT FOLLOW LOGICALLY. YOU RECALL THAT I ASKED
10 HIM IF TIME MOVES IN ONE DIRECTION, AND YES IT DOES. SO IF
11 THEY CHANGE THAT RULE PRIOR -- IF THEY IMPLEMENTED THESE
12 CONTRACTS PRIOR TO THE MOVE TO COST OF ATTENDANCE, ONE CANNOT
13 ARGUE THAT ONE IS RELATED TO THE OTHER.

14 AND I THINK COUNSEL GAVE ME A NOTE. I THINK I MISSPOKE.
15 THE ASTERISK REQUIRES A SUPER MAJORITY, WHICH IS TWO-THIRDS TO
16 CHANGE. SO I WAS CORRECT SAYING TWO-THIRDS, I WAS INCORRECT
17 SAYING THAT IT REQUIRES ALL OF THE MEMBERS.

18 THOSE ARE THE ONLY POINTS I WANTED TO MAKE.

19 **THE COURT:** ACTUALLY THAT REMINDS ME OF A VERY RANDOM
20 QUESTION THAT I HAD THAT I DIDN'T ASK BEFORE AND MAYBE NO ONE
21 KNOWS THE ANSWER AND MAYBE IT'S NOT IN THE RECORD BUT I'M JUST
22 CURIOUS, HOW THESE MEDIA COMPANIES TRANSLATE -- HOW THEY
23 DECIDE HOW MUCH TO PAY FOR MEDIA RIGHTS? DO THEY LIKE LOOK AT
24 NIELSEN RATINGS? HOW DO THEY KNOW HOW MANY PEOPLE ARE
25 WATCHING THE GAMES? THEIR INCOME IS BASED ON ADVERTISERS.

1 ADVERTISERS ARE THINKING WHO'S GOING TO BUY MY CAR OR MY BEER,
2 WHATEVER IT IS. SOMEBODY WAS SAYING THE NIELSEN RATINGS
3 WEREN'T SO GREAT ANYMORE BECAUSE THERE ARE SO MANY CHANNELS.

4 **MR. KESSLER:** IT'S NOT IN THE RECORD, YOUR HONOR.
5 IT'S CURIOUS BUT IT'S NOT IN THE RECORD.

6 **THE COURT:** DO YOU KNOW THE ANSWER?

7 **MR. WILLIAMS:** I DON'T KNOW BUT IT'S NOT IN THE
8 RECORD. WHAT I DO KNOW AND WHAT IS IN THE RECORD IS THE
9 COMMISSIONER ARESKO TESTIFIED THAT IT IS IMPORTANT, BASED UPON
10 HIS EXPERIENCE WITH ESPN AND CBS, IT IS IMPORTANT TO THOSE
11 NETWORKS THAT THE STUDENTS ARE NOT PAID, THAT WE ARE TALKING
12 ABOUT AMATEUR SPORTS.

13 **THE COURT:** THAT'S OFF POINT. MY QUESTION IS HOW
14 THESE MEDIA COMPANIES EVALUATE OR HOW, REALLY MORE TO THE
15 POINT, HOW ADVERTISERS EVALUATE HOW MANY PEOPLE ARE WATCHING
16 THESE SHOWS.

17 **MR. KESSLER:** SO, YOUR HONOR, JUST OUT OF CURIOSITY
18 BECAUSE I HAPPEN TO HAVE CLIENTS IN THAT INDUSTRY, SO THIS IS
19 NOT EVIDENCE, BUT THEY LOOK AT THE COMPARATIVE RATINGS
20 COMPARED TO EVERYTHING ELSE, HOW MUCH IS RECORDED VERSUS HOW
21 MUCH PEOPLE WATCH, WATCH THE COMMERCIALS. THERE'S AN ADDED
22 PREMIUM FOR LIVE PROGRAMMING. THEY LOOK AT SEPARATE
23 DEMOGRAPHICS BECAUSE THERE ARE CERTAIN GROUPS THAT ARE VERY
24 HARD TO REACH AND CERTAIN SPONSORS WANT THOSE. IT'S A VERY
25 COMPLICATED PROCESS --

1 **THE COURT:** HOW DO THEY GET IT? IT'S NOT NIELSEN
2 RATINGS. THEY GET IT OUT OF YOUR CABLE BOX I GUESS.

3 **MR. KESSLER:** THEY HAVE SERVICES THAT RATE OVER THE
4 TOP, WHICH IS WHAT THAT'S CALLED, OUT OF CABLE BOXES, ALL
5 THOSE ARE METERED AND MONITORED. THERE'S STREAMS OF DATA AND
6 THEN THEY CONCLUDE HOW MUCH IT IS WORTH, BUT THAT'S NOT
7 EVIDENCE.

8 **THE COURT:** IT IS NOT NIELSEN RATINGS.

9 **MR. KESSLER:** NIELSEN IS PART OF IT. NIELSEN IS
10 STILL IN BUSINESS AND THEY HAVE EXPANDED TO OTHER THINGS AS
11 WELL.

12 **THE COURT:** OKAY.

13 **MR. KESSLER:** VERY QUICKLY. I KNOW WE ARE RUNNING
14 OUT OF TIME.

15 FIRST, ON THE FOOTNOTE THAT MS. WILKINSON CITED WHERE YOU
16 RECOGNIZED SAF, IT IS TRUE, BUT LOOK AT WHAT YOUR HONOR SAID.
17 YOU WERE UNDER THE IMPRESSION THAT THE MONEY WOULD BE USED
18 ONLY FOR SPECIAL UNEXPECTED FINANCIAL NEED. THAT IS WHAT YOU
19 CITED IN THE FOOTNOTE. THIS IS FOR PELL AND SAF, AND COULD
20 INCLUDE MONEY FOR THINGS LIKE NEEDED CLOTHING, SUPPLIES,
21 COMPUTER, OR ACADEMIC NEEDS, NOT PAYMENTS COMPLETELY UNRELATED
22 TO THE COST OF ATTENDANCE AND OTHER THINGS. THAT WASN'T IN
23 YOUR O'BANNON DECISION AT ALL. SO THERE WAS SOME MENTION OF
24 SAF, BUT NOT THIS TYPE OF SAF.

25 SECOND, THE PHRASE EDUCATION-RELATED COMPENSATION, WHICH

1 WE USE COMPENSATION AND BENEFITS IN THE SECOND ALTERNATIVE
2 ORDER IS NOT SOMETHING WE MADE UP. IT COMES FROM O'BANNON.
3 SO WHAT O'BANNON SAID IS THE FOLLOWINGS -- THIS IS WHAT I WILL
4 CALL THE PREGNANT SENTENCE IN O'BANNON.

5 THE DIFFERENCE BETWEEN OFFERING STUDENT-ATHLETES
6 EDUCATED-RELATED COMPENSATION AND OFFERING THEM CASH SUMS
7 UNTETHERED TO EDUCATIONAL EXPENSE IS NOT MINOR, IT IS A
8 QUANTUM LEAP.

9 SO WHAT WE WERE TRYING TO CAPTURE IS WHAT THE O'BANNON
10 COURT MEANT BY EDUCATED-RELATED COMPENSATION WHICH WASN'T JUST
11 LIMITED TO EXPENSES, AND WE DO THINK IT INCLUDES THINGS LIKE
12 ACADEMIC INCENTIVES WHICH, BY THE WAY, ARE GIVEN TO
13 NONATHLETES.

14 THERE ARE LOTS OF THINGS WHERE THE PERSON WITH THE
15 GREATEST GPA IN DEPARTMENTS MIGHT GET A CASH AWARD OR GET A
16 SCHOLARSHIP TO SOMEONE ELSE. THAT'S DONE IN ACADEMIA ALL THE
17 TIME, YOU KNOW, IN TERMS OF -- IT'S NOT AN UNKNOWN. THAT'S IN
18 THE RECORD. IT WAS COVERED, YOUR HONOR.

19 SECOND, YOUR HONOR, YOU GOT ASKED -- WE HEARD QUESTIONS
20 ABOUT WHAT WAS SHOWN FOR THE LESS RESTRICTIVE ALTERNATIVES,
21 THE MODELING. OKAY? WHAT WAS SHOWN IS THAT THE HISTORY OF
22 HOW POWER 5 AUTONOMY, THE PRE '57 HISTORY OF NO NCAA
23 REGULATION, THE FACT THAT RIGHT NOW THERE ARE FIVE DIFFERENT
24 CONFERENCE COMPENSATION MODELS SO THERE IS NO STANDARD. THE
25 IVY LEAGUE DOESN'T EVEN ALLOW SCHOLARSHIPS AT ALL TO ATHLETES

1 IN TERMS OF THAT, WHILE YOU HAVE THE POWER 5 ALLOWING ALL
2 THESE BENEFITS THAT OTHER CONFERENCE DON'T ALLOW.

3 SO THERE'S THIS VAST DIFFERENCES NOW AND STILL WE HAVE
4 NCAA ENFORCEMENT -- IT'S DONE, THE NCAA ENFORCES ALL THOSE
5 RULES, SOME OF THE CONFERENCES DO ENFORCE ON THEIR OWN.

6 MS. WILKINSON WAS NOT CORRECT, FOR EXAMPLE, THE SEC WHICH
7 WAS INTRODUCED INTO EVIDENCE HAS ITS OWN ENFORCEMENT STRUCTURE
8 AS DO SOME OF THE OTHER CONFERENCES. SOME DON'T. SOME LET
9 THE NCAA ENFORCE. THAT'S EXACTLY WHAT WOULD HAPPEN IN THIS
10 LESS RESTRICTIVE ALTERNATIVE.

11 IN OTHER WORDS, WHAT OUR ECONOMIST DID IS LOOK AT WHAT
12 ALREADY EXISTS, AND THIS WAS REFERRED TO IN *O'BANNON* AS
13 ANALOGS. YOU LOOK AT -- ANALOGS. THEY SAID ARE THERE ANALOGS
14 FOR THE LESS RESTRICTIVE ALTERNATIVES. THE ANALOGS HERE IS
15 THE HISTORY OF CONFERENCES DIFFERENCES. RIGHT NOW THERE IS NO
16 NATIONAL RULES. THERE ARE NATIONAL CAPS, BUT WITHIN THAT
17 THERE'S TREMENDOUS VARIATION.

18 MS. WILKINSON SAID THERE WILL HAVE TO BE 32 CONFERENCE
19 RULES, THERE ARE 32 CONFERENCE RULES NOW. THE IVY LEAGUE
20 RULES ARE DIFFERENT FROM THE PATRIATE LEAGUE RULES. NEITHER
21 ONE ARE DEFENDANTS HERE. THERE ARE DIFFERENT RULES, YOU KNOW,
22 FOR THE POWER 5 VERSUS THE NONAUTONOMY CONFERENCES.

23 AND ALL OF THOSE DIFFERENCES EXIST UNDER A SINGLE
24 ENFORCEMENT STRUCTURE WHICH COULD CONTINUE OR A COMBINATION.
25 ALL THAT WAS APPLIED WITH ECONOMIC PRINCIPLES BY OUR

1 ECONOMIST. WE THINK WE MADE OUR SHOWING WITH REGARD TO THAT.

2 FINALLY, YOUR HONOR, AND I THINK THIS IS FINALLY, DR. NOLL
3 TESTIFIED; YOU ASKED THIS QUESTION. IS THERE EVIDENCE OF
4 SCHOOLS INCREASING THE COST OF ATTENDANCE CALCULATIONS SINCE
5 O'BANNON? THAT WAS A QUESTION YOU HAD.

6 TRANSCRIPT 354 TO 355 THAT EVIDENCE CAME IN ABOUT ALABAMA
7 AND OTHERS WITHOUT OBJECTION. SO THAT IS IN FACT IN THE
8 RECORD REGARDING THAT.

9 AND, FINALLY, MR. PORET, YOUR HONOR, MENTIONED MR. PORET.
10 MR. PORET DOES PROVIDE EVIDENCE THAT THERE ARE A VARIETY OF
11 BENEFITS THAT COULD BE OFFERED BEYOND WHAT'S ALLOWED NOW FOR
12 WHICH THERE WAS NO ADVERSE REACTION FROM CONSUMERS.

13 WHAT THAT SHOWS IS IF THE CONFERENCES COULD LOOK AT THIS
14 AND IF YOU LOOK BACK AT THAT STATEMENT BY THE FIVE
15 CONFERENCES, MS. WILKINSON SAID WHO DECIDES? WELL, THE
16 CONFERENCES SHOULD DECIDE BECAUSE THEY HAVE DIFFERENT RESOURCE
17 LEVELS.

18 RIGHT NOW UNDER THE CURRENT CARTEL ARRANGEMENT, WHICH IS
19 WHAT IT IS, IS THAT IT'S A VOTE OF A MAJORITY OF CONFERENCES
20 MOST OF WHOM DO NOT HAVE THE REVENUES OF THE FIVE POWER
21 CONFERENCES. AND A SCHOOL LIKE NOTRE DAME WHO IS INDEPENDENT
22 DOES PLAY BY CONFERENCE RULES.

23 SO, FOR EXAMPLE, NOTRE DAME IS IN THE BIG TEN CONFERENCE
24 FOR EVERYTHING BUT FOOTBALL. IT SHOWS IT TO BE INDEPENDENT OF
25 FOOTBALL BECAUSE IT HAS -- WELL, IT PLAYS ACCORDING TO BIG TEN

1 RULES. IT MAY NOT BE A FULL CONFERENCE MEMBER, THE POINT HERE
2 IS, THE CONFERENCES ARE EMPOWERED TO SAY IF YOU WANT TO PLAY
3 WITH MY SCHOOLS, YOU HAVE TO ABIDE BY CERTAIN RULES AS WELL.
4 THEY CAN DO THAT. SO THERE'S NO WAY ANYONE IS GOING TO ESCAPE
5 CONFERENCE RULES IF THEY DECIDE TO MAKE THAT.

6 UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS, I KNOW WE
7 HAVE GONE OVER TIME. I THINK I ANSWERED WHAT I THINK I NEED
8 TO ANSWER.

9 **THE COURT:** IF I HAVE FURTHER QUESTIONS I AM NOT
10 GOING TO BE ABLE TO ASK THEM.

11 SO, I'LL ISSUE A WRITTEN ORDER. AND I CAN'T THINK OF
12 ANYTHING ELSE THAT NEEDS TO BE DONE AT THIS POINT.

13 I HOPE YOU ALL HAVE HAPPY HOLIDAYS AND THANKS AGAIN FOR
14 YOUR WORK ON THIS CASE.

15 **ALL COUNSEL:** THANK YOU, YOUR HONOR.

16 **MR. KESSLER:** THANK YOU FOR ALL THE TIME YOU DEVOTED.
17 WE APPRECIATE IT.

18 **MS. WILKINSON:** THANK YOU, YOUR HONOR.

19 (PROCEEDINGS CONCLUDED AT 1:21 P.M.)
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CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

FRIDAY, DECEMBER 28, 2018