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United States District Court, N.D. California.

The BRANDR GROUP, LLC, Plaintiff,
v.
ELECTRONIC ARTS INC., Defendant.

Case No. 23-cv-02994-HSG
|
Signed June 30, 2023

Attorneys and Law Firms

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ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER

Re: Dkt. No. 7

HAYWOOD S. GILLIAM, JR., United States District Judge

***1** Pending before the Court is Plaintiff The Brandr Group, LLC's application for a temporary restraining order. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). For the reasons detailed below, the Court **DENIES** the application.

I. BACKGROUND

On June 20, 2023, Defendant Electronic Arts Inc. removed this action from San Mateo Superior Court. Dkt. No. 1. In the complaint, Plaintiff alleges that Defendant is interfering with its contractual relationship with certain colleges and their student athletes by soliciting them to participate in Defendant's upcoming *EA Sports College Football* video game. Dkt. No. 1-1, Ex. 1 ("Compl."). Plaintiff states that it has become a leader in the "collegiate group licensing" industry since 2021 when the National Collegiate Athletic Association ("NCAA") permitted student athletes to be compensated for the use of their own name, image, and likeness ("NIL"). *Id.* at ¶¶ 2–3, 23–26; *see also* *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2160–2166 (2021); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1057–79 (9th Cir. 2015). As relevant here, Plaintiff further contends that it has entered into exclusive "Group Rights Licensing Agreements" with multiple colleges and their football players "to facilitate co-branding experiences" for them. *See, e.g.*, Compl. at ¶¶ 8, 19–20, 27–48. Under these agreements, Plaintiff urges that entities such as Defendant must negotiate directly with or otherwise obtain consent from Plaintiff to use the NIL of three or more student athletes from one specific sport or six or more student athletes from multiple sports in combination with a school's intellectual property (*e.g.*, the school's brand, logos, stadiums, mascots, or fight songs). *See id.* at ¶¶ 27–48, 61, 86, 91, 141–42, 155–56, 176. Plaintiff does not consent to the licensing of its clients' IP or NIL, and suggests that Defendant is misleading schools and students about their contractual obligations. *See id.* at ¶¶ 81–82, 89, 92–93, 95, 130, 149, 163. Plaintiff further alleges that it has heard from its partner schools that Defendant is "pressuring" schools who have not yet opted into the video game to do so by June 30, 2023. *See id.* at ¶¶ 92, 81–82, 120.

Based on these facts, Plaintiff brings causes of action for (1) tortious interference with contract; (2) violation of California's statutory right of publicity, California Civil Code § 3344; (3) violation of the common law right of publicity; (4) violation of California's Unfair Competition Law ("UCL"), Business and Professions Code §§ 17200, *et seq.*; and (5) declaratory relief. *Id.* at ¶¶ 125–179.

On June 22, 2023, Plaintiff filed an application for a temporary restraining order ("TRO"). Dkt. No. 7. Plaintiff argues that such emergency relief is necessary at the outset of this litigation because Defendant has imposed an artificial deadline of June 30, 2023, for schools to enter into agreements to participate in the upcoming video game. *See id.* at 1, 8, 19. Doing so, Plaintiff asserts, wrongfully cuts Plaintiff out of the negotiation process and threatens to drive it out of business entirely. *Id.* at 19–22. Plaintiff accordingly seeks to enjoin Defendant from (1) directly or indirectly soliciting Plaintiff's (as yet unidentified) clients for their participation in the video game; (2) directly or indirectly interfering with Plaintiff's contractual rights under its Collaboration Agreements and Group Licensing Authorization and Assignment Agreements;

and (3) directly or indirectly using, appropriating, or incorporating the NIL of Plaintiff's clients without Plaintiff's express authorization and consent. *Id.* at 1–2. Defendant opposes the requested issuance of a TRO. *See* Dkt. No. 16.

II. LEGAL STANDARD

***2** Under Federal Rule of Civil Procedure 65, a temporary restraining order may enjoin conduct pending a hearing on a preliminary injunction. *See* Fed. R. Civ. P. 65(b). The standard for issuing a temporary restraining order and issuing a preliminary injunction are substantially identical. *See* *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839, n.7 (9th Cir. 2001). A plaintiff seeking preliminary relief must establish: (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *See* *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Preliminary relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22. A court must find that "a certain threshold showing" is made on each of the four required elements. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Under the Ninth Circuit's sliding scale approach, a preliminary injunction may issue if there are "serious questions going to the merits" if "a hardship balance [also] tips sharply towards the [movant]," and "so long as the [movant] also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for* *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

III. DISCUSSION

Plaintiff asserts that it meets all four requirements for a TRO because Defendant "brazenly violated [its] rights" by encouraging schools to enter into agreements with Defendant by June 30, 2023, to participate in the video game, and "threatening that they will be excluded from the highly anticipated game if they do not comply" by then. *See* Dkt. No. 7 at 1. The Court finds that Plaintiff has not established that such an "extraordinary remedy" is warranted in this case.

A. Irreparable Harm

As an initial matter, Plaintiff has not shown that it is likely to suffer any immediate or irreparable harm absent a TRO. A TRO is intended to preserve the status quo and prevent irreparable harm until a hearing can be held on a preliminary injunction. *See* *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) ("[A] TRO should be restricted to ... preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer." (quotation omitted)); *see also* Fed. R. Civ P. 65(b). But Plaintiff has not shown the immediacy of any alleged harm if the Court does not grant it interim relief. *See* *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.").

In its application, Plaintiff contends that absent a TRO, Defendant will continue to interfere with its contractual agreements with colleges and student athletes. Specifically, Plaintiff states that Defendant has given schools an "artificial June 30 deadline" to sign an agreement to participate in the video game. *See* Dkt. No. 7 at 1, 18–19. Thus, Plaintiff reasons, more schools may enter into agreements with Defendant given this time pressure and the risk of missing an opportunity to participate in the video game. *Id.* Plaintiff further suggests that after this June 30 date, Defendant "will turn its focus to signing [its] Client Athletes." *Id.* at 19. Plaintiff offers little support for these suppositions. In a declaration, the President of The Brandr Group simply states that he learned of this June 30 deadline "based upon reports to [Plaintiff] by multiple Partner Schools ...." Dkt. No. 7-1 ("Haynes Decl.") at ¶ 31.

However, in its opposition, Defendant clarifies that the June 30 date is not a deadline at all. *See* Dkt. No. 16-3 ("Moss Decl.") at ¶ 8; Dkt. No. 16-1 ("O'Brien Decl.") at ¶ 15. Instead, it is "a target date" for schools to indicate their interest in being a part of the game to allow game designers ample time to render the schools' intellectual property—such as the stadiums and jerseys—as realistically as possible. *See id.* Schools may still opt in or opt out after this June 30 date. *Id.* And even if this date puts some pressure on schools, the game itself is intended to be based on the 2024 football season, and Defendant does not anticipate releasing the game until summer 2024. *See* O'Brien Decl. at ¶¶ 6, 13. Moreover, Plaintiff's theory of liability turns on Defendant soliciting both colleges *and* students for the video game. But Defendant has not reached out to any student athletes to participate in the game yet. *See id.* at ¶ 13. Because schools generally do not set their rosters until spring, Defendant anticipates that it likely will not identify eligible students until 2024. *Id.* Given this runway, Plaintiff has not demonstrated the threat of any immediate harm.

***3** Even putting aside such immediacy problems, Plaintiff has not demonstrated any likelihood of irreparable harm either. Mere financial injury "will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984) (concluding that plaintiff's harm would be easily calculable in damages); *see* *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). For these reasons, preliminary injunctions are rarely issued for breach of contract claims. *See* *Telephia Inc. v. Cuppy*, No. C 04-03508 SI, 2005 WL 588441, at *3 (N.D. Cal. Mar. 11, 2005) ("[A] claim for breach of contract can be compensated by money damages, and does not warrant the issuance of a preliminary injunction."); *ConWest Res., Inc. v. Playtime Novelties, Inc.*, No. C 06-5304 SBA, 2006 WL 3346226, at *8 (N.D. Cal. Nov. 17, 2006) ("[A] preliminary injunction will not issue based on a breach of contract claim.").

Here, the Court finds that Plaintiff's alleged injuries are monetarily compensable and otherwise speculative. Although Plaintiff asserts that Defendant is interfering with its contractual rights with certain schools and student athletes, it provides little explanation as to why—even if true—any resulting harm is irreparable. Dkt. No. 7 at 18–22.

At the outset, Plaintiff appears to suggest that a TRO or preliminary injunction is appropriate any time there is an alleged breach of contract or tortious interference claim. *See id.* at 19 (arguing that injunctions are appropriate to "restrain[ ] continued interference"). As noted above, however, courts generally find such claims to be compensable by monetary damages such that preliminary injunctions are unwarranted. *See, e.g.*, *Telephia*, 2005 WL 588441, at *3; *ConWest*, 2006 WL 3346226, at *8. Plaintiff makes no effort to explain why alleged harms stemming from tortious interference are inherently irreparable. Instead, Plaintiff cites a decades-old case from the California Supreme Court, *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 34 (Cal. 1941). The case is inapposite.

In *Imperial Ice*, the California Supreme Court addressed a dispute between competing ice companies. S.L. Coker entered into a covenant not to compete with the plaintiff, agreeing that he would not sell ice in Santa Monica. *Id.* at 34–35. Despite this agreement, a third-party company —owned by Messrs. Rossier and Matheson—supplied Mr. Coker with ice, who then sold it in Santa Monica. *Id.* The plaintiff sought an injunction to prevent Mr. Coker from violating his agreement and to prevent Messrs. Rossier and Matheson from inducing Mr. Coker to violate his agreement. *Id.* The case did not involve a request for a TRO or preliminary injunction at all. Rather, the court simply recognized a common law tortious interference claim. *Id.* at 38–39 ("In California ... an action will lie for unjustifiably inducing a breach of contract."). The court explained that "[c]ontractual stability is generally accepted as of greater importance than competitive freedom." *Id.* at 36.

Plaintiff urges that the Ninth Circuit in *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1187 (9th Cir. 2022), recognized that preliminary injunctions are appropriate to prevent continuing contractual interference. *See* Dkt. No. 7 at 19. But as explained in more detail below, the Ninth Circuit did not adopt a uniform rule that preliminary injunctions are always appropriate when the plaintiff brings such claims. Rather, the Court engaged in a detailed analysis of the four *Winter* factors—including irreparable harm—to determine whether a preliminary injunction was appropriate. *See* *hiQ Labs*, 31 F.4th at 1188–1202.

***4** Plaintiff also asserts that because this case arises from the "unauthorized" use of student athletes' NILs, "irreparable harm is established." *See* Dkt. No. 7 at 20. But Plaintiff fails to show that any such categorical rule exists. The only authority Plaintiff cites is a single non-binding district court case regarding the intellectual property rights of the estate of Christopher Wallace, professionally known as Notorious B.I.G. *See* *Notorious B.I.G. LLC v. Yes. Snowboards*, No. LACV1901946JAKKSX, 2022 WL 2784808, at *9 (C.D. Cal. June 3, 2022). In that case, the court analyzed all the *Winter* factors to determine whether a preliminary injunction was appropriate. *See id.* at *3–10. The plaintiff had licensed the exclusive right to manufacture and sell various products with Wallace's NIL, such as apparel and posters. *Id.* at *1–2. The pro se defendant was a professional photographer who sold his own posters, prints, and NFTs with Wallace's NIL without a license. *Id.* The plaintiff argued that defendant's sales diminished the value of its exclusive rights and its business, which it had built over the course of twenty years. *Id.* The court explained that such injuries were financial and thus not irreparable. *Id.* *9. However, the court concluded that the plaintiff had provided sufficient evidence that it had carefully curated "Wallace's legacy and the reputation of the Wallace brand" over the years, and this brand was put at risk due to the defendant's conduct. *See id.* The court did not detail how the defendant's conduct would have harmed the Wallace legacy and brand, or by extension the plaintiff's rights, if not enjoined. *Id.* at *9–10.

But even if the Court found this reasoning persuasive, such concerns are not implicated here. There is simply no evidence in the record that the value of the students' NILs would be diminished by their use in the game. To the contrary, Plaintiff devotes substantial space in the complaint to explaining the popularity of Defendant's video games and the desire of athletes and schools to participate in them. *See, e.g.*, Compl. at ¶ 6 ("The Game presents an exciting opportunity for young college football players to participate in what has historically been a tremendously popular and successful video game ...."); *id.* at ¶ 82 ("[S]chools do not want to miss out on the opportunity for its student-athletes to participate in the Game."). Plaintiff had also previously engaged in discussions with Defendant about the game. *See id.* at ¶¶ 10–11, 65–71.

Moreover, unlike the plaintiff in *Notorious B.I.G.*, Plaintiff has not established that it actually has an exclusive right to either the schools' IP or the students' NILs. As Defendant explains, and Plaintiff's application does not contest, the Collegiate Licensing Company ("CLC") is the exclusive licensing agency for over 700 schools. *See* Dkt. No. 7-3 ("Moss Decl.") at ¶¶ 2–3. As such, CLC negotiates and executes agreements to license its schools' IP. *Id.* at ¶ 4. Plaintiff's agreement with schools (entitled the "Group Rights Collaboration Agreement") does not grant Plaintiff the right to use or license any of the schools' IP. *See* Dkt. No. 7-4, Ex. 2 at 40–42. Rather, Plaintiff and the schools simply "agree to work in collaboration to make available a Group Licensing Program ...." *Id.* at 40. And as part of this program, the schools through their "third-party licensing agency" will also make their IP "available for use in the Program at market rates for co-branded products." *Id.* at 41. The sample student agreement that Plaintiff provides (entitled "Current Student-Athlete Group Licensing Authorization & Assignment") also explicitly states that "this agreement does <u>not</u> restrict or prevent any of [a student's] existing or future, individual NIL agreements." *See* Dkt. No. 7-4, Ex. 1 at 37 (emphasis in original). [1] Nor does it "restrict any of [a student's] existing group NIL agreements nor any future NIL agreements that do not also include the university's co-branded IP." *Id.*

1 For ease of reference, the Court refers to the PDF pagination for exhibits unless otherwise noted.

What appears to be at stake here, then, is simply the possible monetary benefit that Plaintiff could receive from creating co-branding licensing opportunities that package a school's IP and students' NIL rights together. Plaintiff attempts to couch the loss of this co-branding opportunity as irreparable harm. But this too falls short.

For example, Plaintiff suggests that it will suffer irreparable harm from "the lost opportunity to negotiate fair compensation" for use of its student athletes' NILs in the video game. [2] *See* Dkt. No. 7 at 20. More specifically, Plaintiff points out that it "is entitled to a percentage of the Client Athletes' proceeds, specifically from Group Licensing Programs involving video games," and repeatedly asserts that Defendant is not planning to pay a fair market rate for use of students' NILs. *Id.*; *see also* Compl. at ¶¶ 11, 99, 101. Plaintiff further alleges that it "is well-positioned to influence the amount of compensation to be paid by [Defendant] to not only its Client Athletes, but to all other student-athletes who may wish to participate in the Game." Compl. at ¶ 114. However, Plaintiff argues that absent a TRO, Defendant "will have free reign to solicit [Plaintiff's] Partner Schools and Client Athletes for their participation in the Game in direct violation of [Plaintiff's] Group Licensing rights ...." Dkt. No. 7 at 19. Setting aside for now whether Defendant is actually engaged in a "Group Licensing Program," Plaintiff at least argues that it will not be properly compensated if Defendant continues soliciting schools or their student athletes to participate in the video game.

2 To the extent Plaintiff suggests that the Court should consider the financial or reputational harm to student athletes, *see* Dkt. No. 7 at 20, that type of alleged harm to third parties is not relevant to whether *Plaintiff* has shown that it is likely to suffer irreparable injury.

***5** Although Plaintiff has arguably identified potential harm that it will suffer from its exclusion from the game negotiations, this does not constitute *irreparable* harm. *See* Sampson, 415 U.S. at 90 ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”). Any purported damage from the schools' and students' participation in the game, or the undervaluing of their NILs (and Plaintiff's resulting payment), appears entirely compensable. Plaintiff can estimate the fair market value for using the NILs in the game, as well as the amount of money Plaintiff would have been entitled to from the game if it had vigorously represented its clients as it wants to do here.

Lastly, Plaintiff suggests that Defendant's conduct threatens the continuing value of its own contractual rights. *See* Dkt. No. 7 at 19–21. According to Plaintiff, Defendant's negotiations “if left unchecked, threaten[ ] to diminish, if not completely destroy, [Plaintiff's] exclusive group license for video games for its school partners and their players.” *Id.* at 21. Additionally, Plaintiff contends that Defendant's conduct could have “a far-reaching impact” because it could set a precedent for Defendant and other prospective licensees to disregard Plaintiff's contractual rights. *Id.* at 19. In other words, Plaintiff suggests that the alleged interference with one agreement could implicate all its current and future agreements. If such extrapolation were enough on its own, any breach of contract claim could establish irreparable harm for purposes of a TRO or preliminary injunction. The Court is not aware of any case that stands for such a sweeping proposition. Plaintiff also offers no support for its theory that such harm is likely here.

As the Ninth Circuit has cautioned, “[s]peculative injury cannot be the basis for a finding of irreparable harm.” *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Plaintiff argues that it may be driven out of business by or lose goodwill because of Defendant's conduct. In a single sentence, Plaintiff concludes that “there is a threat that [Defendant's] misconduct will spill over into [its] other businesses.” *See* Dkt. No. 7 at 22. In support of this assertion, Plaintiff cites to the declaration from the President of The Brandr Group who simply says the company has “developed a strong reputation as a leader in facilitating Collegiate Group Licensing Programs ....” Haynes Decl. at ¶ 43. Far from demonstrating the likelihood of irreparable harm, Mr. Haynes declaration appears to highlight the strength, breadth, and resilience of Plaintiff's business. The sample student agreement that Plaintiff attaches to the complaint further underscores this, noting that Plaintiff “works on behalf of many former college athletes,” “represents groups of players through the NFLPA, NBPA and MLBPA,” “created a collegiate group rights programs for retired NBA players,” and “has done projects for the US Women's National Soccer Team.” *See* Dkt. No. 7-4, Ex. 1 at 36.

Plaintiff has not provided any support for the idea that Defendant's conduct will affect its ability to enter into other group licensing ventures with its college and student athlete clients or that it will have any effect on other aspects of its business. The Court agrees with Defendant that at most, Plaintiff has identified “the loss of a single opportunity for [Plaintiff] to license the NILs of student-athletes and Marks and Indicia of schools together for a single unreleased video game.” Dkt. No. 16 at 12. This does not constitute irreparable harm.

Plaintiff's own authorities highlight the inadequacy of Plaintiff's irreparable harm showing here. In *hiQ Labs*, the Ninth Circuit upheld a preliminary injunction which prohibited LinkedIn from denying hiQ Labs, a data analytics company, access to publicly available data from LinkedIn member profiles. 31 F.4th at 1184–85. HiQ Labs would scrape this user data—such as name, job title, work history, and skills—to create “people analytics,” which it sold to business clients. *Id.* at 1187. LinkedIn sent hiQ Labs a cease-and-desist letter, and hiQ eventually sought a preliminary injunction in federal court to preclude LinkedIn from blocking it from accessing the user data. *Id.* at 1187–88. In evaluating irreparable harm, the Ninth Circuit explained that the “[t]he threat of being driven out of business is sufficient to establish irreparable harm.” *Id.* at 1188 (quotation omitted). In finding such harm, the Court credited hiQ Labs' explanation that scraping data from LinkedIn was its entire business, there was no viable alternative to this data, and hiQ Labs would not be able to fulfill its current agreements with its business clients without this data. *Id.* at 1189. The CEO further explained that its financing stalled and employees had left the company given the uncertainty of the business's future in light of the lawsuit. *Id.* Plaintiff, in contrast, has made no effort to explain how it could be driven out of business. Nothing in the record before the Court suggests that its entire business model somehow depends on brokering a deal related to a single video game.

***6** Plaintiff's failure to demonstrate irreparable harm is fatal to its application for a TRO. *See, e.g.*, *Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 679 (9th Cir. 2011) (“Because Amylin has failed to carry its burden of showing a likelihood of irreparable harm, we need not address the remaining factors necessary for injunctive relief.”).[3]

3 As an unpublished Ninth Circuit decision, *Amylin* is not precedent, but may be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

B. Likelihood of Success on the Merits

Even assuming Plaintiff could establish some showing of irreparable harm, it has not shown a likelihood of success on the merits, or serious questions going to the merits, of its claims. All Plaintiff's claims turn on the theory that it has contractual agreements with certain schools and student athletes to manage their “Group Licensing Programs.” *See* Dkt. No. 7 at 11–17. Plaintiff further contends that Defendant's video game, which may include both school IP and student NILs, implicates these contractual agreements. Considering the plain language of the sample agreements that Plaintiff provides, Plaintiff appears to overstate the scope of its rights and the reach of these agreements.

First, Plaintiff points to a sample collaboration agreement with Michigan State University. Under this agreement the school acknowledges that it “intends to make available a Group Licensing Program for its current student-athletes in conjunction with the University's official marks, logos or other intellectual property.” *See* Dkt. No. 7-4, Ex. 2 at 40. As explained above, Plaintiff and the schools therefore “agree to work in collaboration to make available a group Licensing Program ....” *Id.* Under the collaboration agreement, the school further:

> recognizes TBG as [the University's] exclusive agent to develop, implement and manage the Group Licensing Program among its current Athletes. During such time, [the University] shall not engage any other third party, without the express written consent of TBG, to develop, implement or manage any similar program involving a group of any size of current or former [University] Athletes.

Id. at 42. “Group Licensing Program,” in turn, is defined as “those licensing or sponsorship programs in which a collegiate licensee or collegiate sponsor uses the Athlete Attributes of three (3) or more current [University] Athletes from one sport or six (6) or more from multiple sports, in combination with University trademarks and logos.” *Id.* at 40–41.

Second, Plaintiff's sample group licensing agreement with student athletes reads in relevant part:

> The undersigned, an Athlete enrolled at [the University], hereby grants and assigns to TBG and its licensing affiliates during the term only of this Agreement, the worldwide right to use and to grant to licensees and sponsors the right to use all or any combination of the undersigned's name, nickname, initials, autograph/ signature, facsimile, voice, caricature, photograph, portrait, picture, image, likeness, jersey number, statistics, data, biographical information or any other identifiable feature (collectively known as “Athlete Attributes”) in *Collegiate Group Licensing Programs* of any kind.

Dkt. No. 7-4, Ex. 1 at 36 (emphasis added). The agreement defines “Group Licensing Agreement” as it does in the school collaboration agreement. *See id.*

***7** At bottom, the parties dispute the meaning of “Group Licensing Program” and its application to Defendant's licensing efforts for its video game. At least under California law,[4] when interpreting contracts, the overarching goal is to effectuate the parties' intent. Cal. Civ. Code § 1636 (“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting.”). The plain language governs. Cal. Civ. Code § 1638 (“The language of a contract is to govern its interpretation, if the language is clear and explicit.”); *see also* Cal. Civ. Code § 1639 (“When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.”). However, “[i]f the terms ... are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." *See id.* at § 1649. Therefore, when interpreting a contract, the Court must first determine whether its language is ambiguous or reasonably susceptible to more than one interpretation.

4 Plaintiff notes that "[g]enerally, each agreement provides that it is governed by the law of the state where the respective Partner School is located." *See* Dkt. No. 7 at 18.

Plaintiff, for its part, seems to simply assume that Defendant's conduct is covered because it intends to use schools' IP and more than three students' NILs in the same game. *See, e.g.*, Dkt. No. 7 at 12 (noting that the game would "feature whole teams of collegiate football programs"). Critically, it does not explain why provisions about group licensing programs would be implicated by separate license agreements between Defendant and the schools on the one hand and Defendant and individual students on the other. Even if the IP and NILs are used in the same game, the record suggests that such rights are not licensed together, nor are they apparently contingent on each other. Defendant explains that "whether or not a school opts in by June 30 will have no effect on whether any student-athlete from that school is also included in the game." *See* O'Brien Decl. at ¶ 15.

The agreements explicitly define a Group Licensing Program as "*licensing or sponsorship programs* in which a collegiate licensee or collegiate sponsor uses the Athlete Attributes of three (3) or more current [University] Athletes from one sport or six (6) or more from multiple sports, *in combination with University trademarks and logos*." *Id.* at 40–41 (emphasis added). Plaintiff's rights are therefore only implicated when licensing or sponsoring programs use both student NILs and school IP. Neither the agreements nor the parties directly explain what constitutes a "licensing or sponsorship program." The surrounding language, however, provides context.

The student agreements, for example, state that "[t]he focus of the Collegiate Group Licensing Programs will be co-branded licensing opportunities involving groups of Athletes' NIL along with [the University's] IP." *See* Dkt. No. 7-4, Ex. 1 at 36. They further provide that Plaintiff shall represent a student athlete's "*group NIL rights* only in any *co-branded licensing* that also includes the University's IP." *Id.* at 37 (emphasis added). Licensing programs therefore appear to require "co-branded licensing opportunities" where the rights of schools and students are licensed together. In keeping with this narrow definition, the student group licensing agreements also explicitly state that "this Agreement does NOT limit an Athlete's right to grant the use of his/her individual Athlete Attributes or individual NIL for publicity, advertising, or other commercial purposes ...." *Id.* Nor does it "limit the Athlete's right to join with other Athletes to grant the group use of their NIL for publicity, advertising or other commercial purposes *IF any such other group NIL grant does not involve any use or co-branding* of any kind of [the University's] own IP or property (such as trademarks, logos, jerseys, names, nicknames, etc.)." *Id.* (emphasis added).

***8** Here, even as alleged, Defendant is not obtaining group NIL grants or co-branded licenses. It is explicitly licensing with colleges and students separately. The Court understands that Plaintiff believes "that there is significant value to athletes when [licensing] negotiations are handled as a group." Dkt. No. 7 at 17–18. But this purported value cannot overcome the plain language of the agreements at issue in this case. There is simply nothing in the record before the Court suggesting that schools and students must coordinate the licensing of their rights together and with the help of Plaintiff. Plaintiff bears the burden of making a "clear showing" that it is entitled to a TRO, but it has failed to establish that such extraordinary relief is warranted here. *See* *Winter*, 555 U.S. at 20.

IV. CONCLUSION

Accordingly, the Court **DENIES** the application for temporary restraining order. The Court further **ADVANCES** the telephonic case management conference to August 15, 2023. The parties shall submit a joint case management statement by August 8, 2023.

IT IS SO ORDERED.

All Citations

Slip Copy, 2023 WL 4297571

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Distinguished by Williams v. Gaye, 9th Cir.(Cal.), March 21, 2018

841 F.3d 1062
United States Court of Appeals, Ninth Circuit.

Robin ANTONICK, an Illinois Citizen, Plaintiff–Appellant,
v.
ELECTRONIC ARTS, INC., a California corporation, Defendant–Appellee.

No. 14-15298
|
Argued and Submitted March 16, 2016, San Francisco, California
|
Filed November 22, 2016

Synopsis
Background: Software developer brought action against video game manufacturer, seeking contract damages for unpaid royalties. Following jury finding that games were derivative works under contract, the United States District Court for the Northern District of California, Charles R. Breyer, Senior District Judge, 2014 WL 245018, granted judgment as a matter of law to manufacturer. Developer appealed.

Holdings: The Court of Appeals, Hurwitz, Circuit Judge, held that:

[1] developer failed to provide evidence that copyrighted video game was substantially similar to allegedly infringing work, and

[2] developer was not entitled to royalties for games created for different platform under contract with video game manufacturer.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

West Headnotes (8)

[1] **Copyrights and Intellectual Property** Copying, access, and similarity in general

Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had access to the plaintiff's work and that the two works are substantially similar.

12 Cases that cite this headnote

[2] **Copyrights and Intellectual Property** Intrinsic and extrinsic similarity

The Ninth Circuit employs a two-part test for determining whether one work is substantially similar to another for copyright infringement purposes; a plaintiff must prove both substantial similarity under the "extrinsic test," which is an objective comparison of specific expressive elements, and substantial similarity under the "intrinsic test," which is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

10 Cases that cite this headnote

[3] **Copyrights and Intellectual Property** Computer-related works

There was no evidence of source code of software developer's video game or manufacturer's accused video game, as required for developer to show that copyrighted video game was substantially similar to allegedly infringing work, in developer's action seeking contract damages for unpaid royalties for derivative works pursuant to contract, arising from copyright infringement.

1 Case that cites this headnote

[4] **Copyrights and Intellectual Property** Substantial similarity in general

For copyright infringement purposes, if the range of possible expression is narrow, the copyrighted work is entitled to thin protection, and a plaintiff must show virtual identity between the copyrighted work and the allegedly infringing work; if the range of possible expression is wide, the work is entitled to broad protection and the plaintiff must show only substantial similarity.

3 Cases that cite this headnote

[5] **Copyrights and Intellectual Property** Copyright Infringement

Expert testimony cannot satisfy a copyright infringement plaintiff's burden of proof under the intrinsic test, which depends on the response of the ordinary reasonable person.

4 Cases that cite this headnote

[6] **Copyrights and Intellectual Property** Technology and software licenses

Developer of computer code for video game was not entitled to royalties for games created for different platform under contract with video game manufacturer; new platform was not in the same "microprocessor family" as older platform under contractual definition, because it used a larger instruction set, instruction size, and data size, although processors could use the same instruction set, instruction size, and data size.

[7] **Copyrights and Intellectual Property** Technology and software licenses

Software developer was not entitled to royalties from video game manufacturer based on actual video game sales for alleged breach of contract provision providing developer opportunity to develop new game on same platform, where fact-finder would have had to speculate on whether developer could have developed such a work, how well developer's version of game would have sold, and what royalty rate the parties would have agreed upon.

[8] **Copyrights and Intellectual Property** Technology and software licenses

There was no evidence that software developer suffered damages from video game manufacturer's alleged use of development aids to create non-derivative works without license, as required for developer's claim that manufacturer breached contract giving manufacturer license to create derivative works using certain tools designed by developer, and providing that parties would "negotiate in good faith" for further licenses if manufacturer wanted to use aids to create non-derivative works.

Attorneys and Law Firms

***1064** David Nimmer (argued), Irell & Manella LLP, Los Angeles, California; Stuart McKinley Paynter (argued), Jennifer L. Murray, and Sara Willingham, The Paynter Law Firm PLLC, Washington, D.C.; Robert B. Carey and Leonard W. Aragon, Hagens Berman Sobol Shapiro LLP, Phoenix, Arizona; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, Washington; Walter H. Sargent, Walter H. Sargent P.C., Colorado Springs, Colorado; Peter S. Menell, Berkley, California; for Plaintiff–Appellant.

Eric H. MacMichael (argued), Tia A. Sherringham, R. Adam Lauridsen, Steven A. Hirsch, and Susan J. Harriman, Keker & Van Nest LLP, San Francisco, California, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of California, Charles R. Breyer, Senior District Judge, Presiding, D.C. No. 3:11–cv–01543–CRB.

Before: Andrew J. Kleinfeld, Johnnie B. Rawlinson, and Andrew D. Hurwitz, Circuit Judges.

OPINION

HURWITZ, Circuit Judge:

In this case, the plaintiff claimed copyright infringement. But the contents of the copyrighted work and the allegedly infringing works were never introduced into evidence. The district court held that the claim failed as a matter of law. We agree, and affirm.

I. Background

Robin Antonick developed the computer code for the original *John Madden Football* game for the Apple II computer ("Apple II Madden"). Electronic Arts, Inc. ("EA") released Apple II Madden in 1988. Apple II Madden, the first football video game with 11 players on each side, was an instant hit, the best seller of any sports video game of its time. Antonick subsequently programmed Madden games for the Commodore 64 and IBM-compatible computers ("IBM Madden").

In 1989, Antonick began working for EA on Madden games for the Nintendo and Sega Genesis entertainment systems. But in August 1990, EA told him to stop—Nintendo was becoming obsolete, and EA had decided on a new direction for the Sega game, hiring Park Place Productions to create a version with "more of an arcade style." In November 1990, EA released its first version of Sega Madden. In late 1991 or early 1992, EA released Antonick's last Madden game, an update of IBM Madden.

Each year from 1992 to 1996, EA released Madden games for Sega Genesis and Super Nintendo ("Super Nintendo Madden"). The Madden games have remained incredibly lucrative, selling millions of copies and even attracting a loyal fan base among professional football players.

***1065** Antonick's 1986 contract with EA defined "a custom computer software program known as John Madden Football" designed for the "Apple [II] Family of Computers" as the "Work," and provided that Antonick would receive royalties on any "Derivative Work," defined as "any computer software program or electronic game which ... constitutes a derivative work of the Work within the meaning of the United States copyright law." Antonick received no royalties for Sega Madden or Super Nintendo Madden, which EA assured him were not Derivative Works.

In 2011, Antonick brought this diversity action against EA, seeking contract damages in the form of unpaid royalties for Sega Madden and Super Nintendo Madden. The district court bifurcated the trial. In Phase I, the jury found that the statute of limitations did not bar Antonick's claims. Phase II involved the merits of Antonick's claims. Antonick produced evidence that Park Place was rushed and inadequately staffed, and argued that it copied his code to meet the demanding deadline for the first Sega Madden. Antonick's expert, Michael Barr, opined that Sega Madden was substantially similar to certain elements of Apple II Madden. In particular, Barr opined that the games had similar formations, plays, play numberings, and player ratings; a similar, disproportionately wide field; a similar eight-point directional system; and similar variable names, including variables that misspelled "scrimmage." [1] But neither the source code for Apple II Madden—the "Work"—nor the source code of any allegedly infringing works were introduced into evidence. Nor were images of the games at issue introduced. [2]

1 Barr was only able to examine a partial draft version of the Apple II Madden source code, because the complete final version could not be found. The draft version he examined was not introduced into evidence.

2 EA showed the jury a video of Sega Madden, but the jury did not view a video of Apple II Madden.

Nonetheless, the jury found that the Sega Madden games were Derivative Works under the 1986 contract. The district court then granted judgment as a matter of law ("JMOL") to EA, holding that Antonick had not provided sufficient evidence of copyright infringement, because neither the source code used for Apple II Madden nor Sega Madden was in evidence.

II. Discussion

A. The Sega Claims

[1] Although this is a contract case, because royalties are available to Antonick under the 1986 contract only for a derivative work of Apple II Madden "within the meaning of the United States copyright law," he had to prove copyright infringement to prevail on his contract claims. Antonick was thus required to prove that EA "copied protected elements of the work." *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 636 (9th Cir. 2008) (citations omitted). "Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.' " *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (citation omitted).

[2] "The Ninth Circuit employs a two-part test for determining whether one work is substantially similar to another." *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) (citation omitted).

> [A plaintiff] must prove *both* substantial similarity under the "extrinsic test" and substantial similarity under the "intrinsic ***1066** test." The "extrinsic test" is an objective comparison of specific expressive elements. The "intrinsic test" is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

Id. (citations and question marks omitted). The district court granted JMOL to EA under the "intrinsic test" because "the jury had no evidence of Apple II Madden or Sega Madden as a whole to enable it to make this subjective comparison."

[3] The district court was correct. Antonick's claims rest on the contention that the source code of the Sega Madden games infringed on the source code for Apple II Madden. But, none of the source code was in evidence. The jury therefore could not compare the works to determine substantial similarity. *See* *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1987) ("There can be no proof of 'substantial similarity' and thus of copyright infringement unless Seiler's works are juxtaposed with Lucas' and their contents compared.") (applying the best evidence rule in a copyright action); *id.* ("[P]roof of the infringement claim consists of the works alleged to be infringed."); *accord* *Airframe Sys., Inc. v. L–3 Commc'ns Corp.*, 658 F.3d 100, 107 (1st Cir. 2011) ("Having presented no evidence sufficient to prove the content of its registered source code versions, Airframe cannot show that any of its registered works is substantially similar to the allegedly infringing M3 program."); *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 146 (5th Cir. 2004) (per curiam) ("Without providing its own source code for comparison, GUS did not satisfy the requirement that the infringed and infringing work be compared side-by-side."). And, absent evidence of the copyrighted work and the allegedly infringing works, the record is insufficient to allow appellate review of the jury's verdict. *See, e.g.*, *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1448, 1451 (9th Cir. 1988) (granting JMOL to copyright defendant because no reasonable jury could have found substantial similarity); *cf.* *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990) ("We have frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.").

Antonick argues there was no need to introduce the source code (or even the games at issue), because Park Place had access to the Apple II Madden code and a motive to copy it, and his expert and others testified to the similarity of the works. These arguments fail for three reasons.

[4] First, the evidence at most demonstrates access and a possible motive to copy; it does not establish that the "protected portions of the works are substantially similar." *Jada Toys*, 518 F.3d at 637.[3] Access alone cannot establish copyright infringement. *Shaw*, 919 F.2d at 1361.

3 If the range of possible expression is narrow, the copyrighted work is entitled to thin protection, and a plaintiff must show virtual identity between the copyrighted work and the allegedly infringing work. *See* *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010). If the range of possible expression is wide, the work is entitled to broad protection and the plaintiff must show only substantial similarity. *Id.*
The district court held that "[d]ue to the narrow range of possible expression for a football video game and the fact that only two of the ten similar elements are protectable," Antonick's work was entitled only to thin protection, requiring him to show virtual identity of the works as a whole. Antonick disputes that conclusion, arguing that he needed to show only substantial similarity. We need not resolve that dispute, because we conclude that Antonick, having presented insufficient evidence of the works as a whole, loses under either standard.

***1067** **[5]** Second, our law is clear that expert testimony cannot satisfy a plaintiff's burden of proof under the intrinsic test, which "depend[s] on the response of the ordinary reasonable person." *Brown Bag Software v. Symantec*

Corp., 960 F.2d 1465, 1475 (9th Cir. 1992) (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)). [4] Barr's testimony may have been enough to establish substantial similarity under the extrinsic test, but it cannot satisfy Antonick's burden of production under the intrinsic test. *Id.*

4 Antonick's contrary cases are from other circuits; of the two Ninth Circuit cases he cites, one is a memorandum disposition holding expert testimony admissible in a case in which the relevant works themselves were in evidence, *Lucky Break Wishbone Corp. v. Sears Roebuck & Co.*, 373 Fed.Appx. 752, 755–56 (9th Cir. 2010), and the other concerned a special master's report, not expert testimony, *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1176 (9th Cir. 1989).
Antonick is not alone in contending that experts should be allowed to help juries assess the holistic similarity of technical works such as computer programs. *See* *Brown Bag*, 960 F.2d at 1478 (Sneed, J., concurring); *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992). But, given our precedents, that argument must be addressed to an en banc court.

Third, the lay testimony was about how the games appeared, not how they were coded—and Antonick does not assert a copyright interest in Apple II Madden's audiovisual appearance, only in its coding.

Antonick argues that copying was shown by testimony of Michael Kawahara, an Apple II Madden assistant producer. When asked whether he recognized any of the plays in Sega Madden from Apple II Madden, Kawahara answered affirmatively, stating that "[it] was—well, since the interface was—well, it was the same as we used in the Apple II. It was very easy to look at all of the plays in the Genesis version and they looked identical ... to the original Apple II version." This comment, however, does not establish that the source code for the two games were substantially similar. Kawahara had no programming responsibilities for Apple II Madden; did not understand the Apple II Madden code; did not see the Sega Madden code; and admitted that he had no knowledge about differences in the games' codes.

Antonick also cites a statement by Richard Hilleman, an EA representative, that it was "possible" he had told an interviewer that "the Sega game took the system's approach from Mr. Antonick's game and just simply put a different aesthetic on top of it." But, an "approach" is an idea that cannot be copyrighted—only its expression in code is protectable—and Sega Madden could have used Apple II Madden's "approach" to football video games without violating the copyright laws. *See* *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037–38 (9th Cir. 2015) ("[R]ecognizing this vital distinction between ideas and expression, courts have routinely held that the copyright for a work describing how to perform a process does not extend to the process itself.").

Finally, Antonick argues that EA's post-verdict Rule 50(b) motion for JMOL regarding the intrinsic test should not have been considered because the pre-verdict Rule 50(a) motion argued only that the evidence was insufficient to show substantial similarity between the two elements of the code that the district court had ruled protectable, rather than discussing similarity of the works as a whole. *See* *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) ("Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) ***1068** motion."). But, both motions argued that the failure to place the source code in evidence was fatal to Antonick's claim that EA had copied his work. That preserved the argument. *Id.* ("Rule 50(b) 'may be satisfied by an ambiguous or inartfully made motion' under Rule 50(a).") (quoting *Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989)).

B. The Super Nintendo Claims

[6] Antonick sought royalties for the Super Nintendo Madden games under Amendment 1 to his contract, which provided for royalties for derivative works for platforms in the "Same Microprocessor Family" as the Apple II. The Amendment defined "Microprocessor Family" as "a single microprocessor and all related microprocessors that utilize the same instruction set and have the same instruction and data word size."

Antonick's expert, Garry Kitchen, testified that the Apple II used the 6502 processor, which had an 8–bit data word size and 56 instructions of up to 3 bytes in length. The Super Nintendo used the more advanced 5A22 processor, which in its native mode used a 16–bit data word size and at least 92 instructions of up to 4 bytes in length; but which could also act as a 6502 processor for purposes of backwards compatibility. Kitchen testified that this backwards compatibility meant that the microprocessors were in the same "family," as the industry uses the term. He acknowledged that Super Nintendo Madden was designed to use that system's advanced capabilities, utilizing a larger instruction set, longer data word sizes, and longer instructions than Apple II Madden.

After Kitchen's testimony, the district court dismissed the Super Nintendo claims, holding that the Super Nintendo was not in the same Microprocessor Family as the Apple II under the contractual definition, because it used a larger instruction set, instruction size, and data size. Antonick argues that the two processors were in the same family as a practical matter because they *could* use the same instruction set, instruction size, and data size. Antonick's factual premise may well be correct. But we deal here with contract interpretation, and the word "could" is not in the contractual definition. Instead, the contract requires that, to be in the same family, two processors must "utilize the *same* instruction set and have the *same* instruction and data word size." The Apple II and Super Nintendo processors have different instruction sizes and data word sizes.[5] The district court therefore did not err in dismissing the Super Nintendo derivative work claims.

5 Arguably, the chips "utilize the same instruction set" because the 6502 uses a subset of the 5A22's instructions.

[7] Antonick argues in the alternative that EA breached the contract by failing to give him the opportunity to develop the Super Nintendo Madden game. The contract provided that, if Antonick developed any Derivative Works for new microprocessor families, he would be entitled "to written notice and the opportunity to develop additional Derivative Works for the New Microprocessor Family." Antonick developed a Madden game for the Apple II GS, which he argues, and EA does not appear to deny, is in the same microprocessor family as the Super Nintendo. As damages, he seeks royalties based on the actual Super Nintendo game sales.

The district court dismissed this claim because a fact-finder would have to speculate on whether Antonick could have developed such a work, how well an Antonick-developed Super Nintendo game would have sold, and what royalty rate the parties would have agreed upon; Antonick's ***1069** expert report did not address these issues. The district court was correct; the jury could not have determined Antonick's damages from the alleged breach to a "reasonable certainty." *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal.4th 747, 149 Cal.Rptr.3d 614, 288 P.3d 1237, 1254 (2012). Moreover, even if the district court erred, there was no harm, because Antonick's failure to introduce any source code precluded a finding that Super Nintendo Madden was a Derivative Work.

C. The Development Aids

[8] The contract also gave EA a license to create derivative works using certain tools designed by Antonick ("Development Aids"), and provided that the parties would "negotiate in good faith" for further licenses if EA wanted to use the aids to create non-derivative works. Antonick alleges that EA used the aids to create non-derivative works without seeking that license.

The district court dismissed this claim because Antonick offered no evidence of purported damages. Antonick did not show the value of similar licenses or the benefit that EA received from using the Development Aids. Instead, Antonick cited only the report of his damages expert, which simply made generic royalty calculations based on existing sales without explaining how those calculations were relevant to the Development Aid claim. The district court correctly kept this unsubstantiated claim from the jury. *See* *Amelco Elec. v. City of Thousand Oaks*, 27 Cal.4th 228, 115 Cal.Rptr.2d 900, 38 P.3d 1120, 1130, 1132 (2002).

CONCLUSION

The judgment of the district court is **AFFIRMED**.

All Citations

841 F.3d 1062, 2016 Copr.L.Dec. P 31,015, 16 Cal. Daily Op. Serv. 12,272, 2016 Daily Journal D.A.R. 11,551

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705 Fed.Appx. 26
This case was not selected for publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

Jordan WYCKOFF, Individually and on behalf of all others similarly situated, Darwin Cox, Plaintiffs-Appellants,
v.
OFFICE OF the COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, Allan H. Selig, Robert D. Manfred, Jr., Kansas City Royals Baseball Corp, Miami Marlins, L.P., San Francisco Baseball Associates LLC, Boston Red Sox Baseball Club L.P., Angels Baseball LP, Chicago White Sox Ltd., St. Louis Cardinals, LLC, Colorado Rockies Baseball Club, Ltd., The Baseball Club of Seattle, LLLP, The Cincinnati Reds, LLC, Houston Baseball Partners LLC, Athletics Investment Group, LLC, Rogers Blue Jays Baseball Partnership, Cleveland Indians Baseball Co., L.P, Cleveland Indians Baseball Co., Inc., Padres L.P., San Diego Padres Baseball Club, L.P., Minnesota Twins, LLC, Washington Nationals Baseball Club, LLC, Detroit Tigers, Inc., Los Angeles Dodgers LLC, Los Angeles Dodgers Holding Company LLC, Sterling Mets L.P., Atlanta National League Baseball Club, Inc., AZPB L.P., Baltimore Orioles, Inc., Baltimore Orioles Limited Partnership, The Phillies, Pittsburgh Associates, L.P., Tampa Bay Rays Baseball Ltd., Rangers Baseball Express, LLC, Rangers Baseball, LLC, Chicago Cubs Baseball Club, LLC, Milwaukee Brewers Baseball Club, Inc., Milwaukee Brewers Baseball Club, L.P., New York Yankees P'Ship, Defendants-Appellees. [1]

1 The Clerk of Court is respectfully directed to amend the caption as above.

16-3795-cv
|
August 31, 2017

Synopsis
Background: Professional baseball scouts brought putative class action against the Commissioner of Major League Baseball, alleging violations of the Sherman Act, New York's antitrust statute, and wage and hour mandates under Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of New York, Paul G. Gardephe, J., 211 F.Supp.3d 615, dismissed the action. Scouts appealed.

[Holding:] The Court of Appeals held that baseball exemption under the Sherman Act applied to insulate scouts' claims from antitrust scrutiny.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (1)

[1] **Antitrust and Trade Regulation** Sports

Baseball's antitrust exemption under the Sherman Act applied to professional baseball scouts' claims against Commissioner of Major League Baseball and owners of 30 professional baseball clubs alleging that Major League Baseball franchises reduced competition, and consequently wages, for scouts by agreeing not to recruit each other's scouts, and thus scouts' claims were insulated from antitrust scrutiny; despite their contentions otherwise, scouts were involved in the business of baseball, since they assessed baseball players and projected players' abilities to perform at major league level, such information was important and valuable to franchises because it guided their decisions on ranking players to be acquired, and because of this, scouts who were good at evaluating baseball players had great value. Clayton Act § 27, 15 U.S.C.A. § 26b; Sherman Act § 1, 15 U.S.C.A. § 1.

1 Case that cites this headnote

Appeal from the United States District Court for the Southern District of New York (Gardephe, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Attorneys and Law Firms

Appearing for Appellants: Garrett R. Broshuis, Korein Tillery, LLC (Robert L. King, George A. Zelcs, on the brief), St. Louis, MO. Judith S. Scolnick, ***28** Peter A. Barile, III, Christopher M. Burke, Scott + Scott, Attorneys at Law, LLP, New York, NY, and San Diego, CA. Michael Dell'Angelo, Patrick F. Madden, Berger & Montague, P.C., Philadelphia, PA.

Appearing for Appellees: Elliot R. Peters, Keker & Van Nest LLP (John W. Keker, R. Adam Lauridsen, Thomas E. Gorman, on the brief), San Francisco, CA. Elise M. Bloom, Adam M. Lupion, Proskauer Rose LLP, New York, NY.[2]

2 Appearing for Appellees other than Baltimore Orioles Limited Partnership and Baltimore Orioles, Inc.

Present: ROSEMARY S. POOLER, GERARD E. LYNCH, Circuit Judges. BRIAN M. COGAN,[3] District Judge.

3 Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

SUMMARY ORDER

Plaintiffs-Appellants Jordan Wyckoff, individually and on behalf of other professional baseball scouts, and Darwin Cox (collectively, "Plaintiffs"), appeal from the November 3, 2016 judgment of the United States District Court for the Southern District of New York (Gardephe, *J.*). That judgment dismissed Plaintiffs' purported class action suit alleging violations of the Sherman Act, New York's Donnelly Act, and the Fair Labor Standards Act by the Office of the Commissioner of Baseball, doing business as Major League Baseball, its current and former Commissioner, and its 30 professional baseball clubs (the "Franchises") (collectively, "Defendants"). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Plaintiffs argue primarily that Defendants conspired to decrease competition in the labor market for professional baseball scouts in violation of the Sherman Act and New York's Donnelly Act. Moreover, they argue that the district court erred by ignoring factual allegations indicating that the professional baseball scouts' claims fall outside professional baseball's long-recognized exemption from antitrust regulation. We disagree and affirm the district court's decision.

This Court reviews a district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 99-100 (2d Cir. 2015). When reviewing the dismissal of a complaint for failure to state a claim, this Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in plaintiff's favor. *See* *Adelson v. Harris*, 774 F.3d 803, 807 (2d Cir. 2014).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Since 1922, however, the Supreme Court has recognized a judicially created exemption from antitrust regulation for the business of baseball. *See* *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09, 42 S.Ct. 465, 66 L.Ed. 898 (1922). Despite heavy criticism, the Supreme Court has repeatedly affirmed baseball's antitrust exemption. *See* *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357, 74 S.Ct. 78, 98 L.Ed. 64 (1953) (per curiam) ("[T]he business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws.");

Flood v. Kuhn, 407 U.S. 258, 282, 284, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972) (recognizing that baseball's antitrust exemption was an established "aberration" and "adher[ing] once again to *Federal Baseball* and *Toolson* and to their application to professional baseball"). Our Court has applied this precedent ***29** to exempt from antitrust regulation certain claims brought by professional baseball umpires against the American League. *See* *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, *J.*) ("[P]rofessional baseball is not subject to the antitrust laws.").

In 1998, Congress passed the Curt Flood Act, which created an exception to baseball's antitrust exemption for major league baseball players. *See* 15 U.S.C. § 26b. The Act clearly stated that this exception applied only to major league baseball players and not to others "employed in the business of organized professional baseball." *Id.* § 26b(b)(5).

In light of the binding precedent from the Supreme Court and from this Circuit, and the limited exception created by Congress in the Curt Flood Act, we refuse Plaintiffs' invitation to adopt a narrower reading of baseball's antitrust exemption here. Because we are bound by that precedent, we hold that Defendants' conduct in this case is insulated from antitrust scrutiny.

Plaintiffs' own allegations foreclose their argument that they are not involved in the business of baseball. The complaint states that professional baseball scouts "assess baseball players and project the players' abilities to perform at the major league level, and they present that information to the Franchises." App'x at 41 ¶ 93. Plaintiffs acknowledge that this information is "important and valuable to the Franchises," because it "guide[s] the Franchises' decisions on how to rank players to be acquired" through free agency, the amateur draft, and other player acquisition means. App'x at 41 ¶¶ 95-96. Plaintiffs further acknowledge that because the Franchises "place importance on the acquisition and development of baseball players, ... a scout who is good at evaluating baseball players has great value." App'x at 48 ¶ 127. Based on Plaintiffs' allegations, the district court properly concluded that professional baseball scouts are involved in the business of baseball and, therefore, that the complained-of conduct fails to state a claim for which relief can be granted under existing precedent.

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

All Citations

705 Fed.Appx. 26, 168 Lab.Cas. P 11,046, 2017-2 Trade Cases P 80,117

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705 Fed.Appx. 654 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Gail PAYNE and Stephanie Smith, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,
v.
OFFICE OF THE COMMISSIONER OF BASEBALL, DBA Major League Baseball; et al., Defendants-Appellees.

No. 16-17131
|
Submitted December 6, 2017 [*] San Francisco, California
|
Filed December 08, 2017

[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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Appeal from the United States District Court for the Northern District of California, Yvonne Gonzalez Rogers, District Judge, Presiding, D.C. No. 4:15-cv-03229-YGR

Before: M. SMITH and IKUTA, Circuit Judges, and MCAULIFFE, [**] District Judge.

[**] The Honorable Steven J. McAuliffe, United States District Judge for the District of New Hampshire, sitting by designation.

***655** MEMORANDUM [***]

[***] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Gail Payne and Stephanie Smith appeal the district court's order dismissing Payne and Smith's class action complaint for lack of standing. We have jurisdiction under 28 U.S.C. § 1291.

The district court did not err in concluding that Smith and Payne failed to demonstrate the injury-in-fact element of Article III standing. Smith cannot demonstrate a "certainly impending" or "substantial risk" of future injury from a foul ball, *Susan B. Anthony List v. Driehaus*, ––– U.S. ––––, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014) (citation omitted), because she does not plan to attend any future ball game unless she is sitting in a location that is screened by a net, *see* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563–64, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Although Payne plans to attend future games, her chance of being hit by a foul ball in her chosen sections is roughly 0.0027% per game. Payne has not offered evidence or statistical analysis indicating she faces a significantly greater likelihood of injury than 0.0027%, let alone that she faces a "certainly impending" injury. *Susan B. Anthony List*, 134 S.Ct. at 2341. We also reject Payne and Smith's argument that their general anxiety about being injured by foul balls constitutes an injury-in-fact, because it is based on "fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *see also* *Munns v. Kerry*, 782 F.3d 402, 411 (9th Cir. 2015).

Finally, we reject Smith and Payne's argument that inadequate safety precautions at baseball games interfere with their recreational use of their baseball tickets, and such interference constitutes an injury-in-fact. A person does not suffer "an invasion of a legally protected interest" solely because the owner of a facility open to the public has failed to implement a particular safety measure. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Cases concerning individuals' use of public natural resources that are threatened by business operations, *see* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182–83, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), are inapposite and therefore insufficient to meet the plaintiffs' burden to show they have standing, *see* *Spokeo, Inc. v. Robins*, ––– U.S. ––––, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

AFFIRMED.

All Citations

705 Fed.Appx. 654 (Mem)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Senne v. Kansas City Royals Baseball Corp., N.D.Cal., March 15, 2022

860 F.3d 1237
United States Court of Appeals, Ninth Circuit.

Sergio MIRANDA; Jeffrey Dominguez; Jorge Padilla; and Cirilo Cruz, Individually and on Behalf of All Those Similarly Situated, Plaintiffs–Appellants
v.
Allan Huber SELIG, Bud; Kansas City Royals Baseball Corp.; Miami Marlins, L.P.; San Francisco Baseball Associates, LLC; Boston Red Sox Baseball Club L.P.; Angels Baseball L.P.; Chicago White Sox Ltd.; St. Louis Cardinals, LLC; Colorado Rockies Baseball Club, Ltd.; Baseball Club of Seattle, LLP; Cincinnati Reds, LLC; Houston Baseball Partners, LLC; Athletics Investment Group, LLC; Rogers Blue Jays Baseball Partnership; Cleveland Indians Baseball Co., L.P.; Cleveland Indians Baseball Co., Inc.; Padres L.P.; San Diego Padres Baseball Club, L.P.; Minnesota Twins, LLC; Washington Nationals Baseball Club, LLC; Detroit Tigers, Inc.; Los Angeles Dodgers Holding Co.; Sterling Mets L.P.; Atlanta National League Baseball Club, Inc.; AZPB L.P.; Baltimore Orioles, Inc.; Baltimore Orioles, L.P.; Phillies L.P.; Pittsburgh Baseball, Inc.; Pittsburgh Baseball P'ship; New York Yankees P'ship; Tampa Bay Rays Baseball Ltd.; Rangers Baseball Express, LLC; Rangers Baseball, LLC; Chicago Baseball Holdings, LLC; Milwaukee Brewers Baseball Club, Inc.; Milwaukee Brewers Baseball Club, L.P.; Office of Commissioner of Baseball, DBA Major League Baseball; Los Angeles Dodgers, LLC, Defendants–Appellees.

No. 15-16938
|
Argued and Submitted April 18, 2017, San Francisco, California
|
Filed June 26, 2017

Synopsis
Background: Minor league baseball players brought putative class action against Office of the Commissioner of Baseball, former Commissioner of Baseball, and Major League Baseball's (MLB) 30 franchises, seeking declaratory and injunctive relief as well as damages for violation of federal antitrust law by restraining horizontal competition between and among MLB franchises. The United States District Court for the Northern District of California, Haywood S. Gilliam, Jr., J., 2015 WL 5357854, dismissed action. Players appealed.

[Holding:] The Court of Appeals, Sidney R. Thomas, Chief Judge, held that business-of-baseball exemption to federal antitrust law precluded minor league players' action.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (6)

[1] **Federal Courts** Pleading

The Court of Appeals reviews the district court's order dismissing an action for failure to state a claim de novo. Fed. R. Civ. P. 12(b)(6).

1 Case that cites this headnote

[2] **Federal Civil Procedure** Insufficiency in general

Federal Civil Procedure Matters deemed admitted; acceptance as true of allegations in complaint

To survive a motion to dismiss for failure to state a claim, a plaintiff must raise sufficient factual allegations, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

1 Case that cites this headnote

[3] **Antitrust and Trade Regulation** Sports

Employment contracts of minor league baseball players related to the business of providing public baseball games for profit between clubs of professional baseball players, and thus business-of-baseball exemption to federal antitrust law and Curt Flood Act, which withdrew such exemption except as it applied to minor league baseball, precluded minor league players' putative class action against Major League Baseball (MLB) and former Commissioner of Baseball alleging MLB restrained horizontal competition between MLB franchises and artificially depressed minor league salaries in violation of federal antitrust laws; although prior cases defining the business-of-baseball exemption applied to major league baseball, minor league players were employed and paid by MLB and MLB employed minor league players with hope that they would develop into major league players. Clayton Act § 27, 15 U.S.C.A. § 26b(b).

3 Cases that cite this headnote

[4] **Courts** Supreme Court decisions

Courts of Appeals must adhere to the controlling decisions of the Supreme Court.

[5] **Courts** Number of judges concurring in opinion, and opinion by divided court

Under the law-of-the-circuit rule, the Court of Appeals is bound by decisions of prior panels, unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions.

8 Cases that cite this headnote

[6] **Statutes** Exceptions, limitations, and conditions

When Congress specifically legislates in a field and explicitly exempts an issue from that legislation, the courts' ability to infer congressional intent to leave that issue undisturbed is at its apex.

Attorneys and Law Firms

***1238** Samuel Kornhauser (argued) and David Truong, Law Offices of Samuel Kornhauser, San Francisco, California; Brian David, Law Offices of Brian David, Chicago, Illinois; for Plaintiffs–Appellants.

John W. Keker (argued), David J. Rosen, Thomas E. Gorman, and R. Adam Lauridsen, Keker & Van Nest LLP, San Francisco, California, for Defendants–Appellees.

Appeal from the United States District Court for the Northern District of California, Haywood S. Gilliam, Jr., District Judge, Presiding, D.C. No. 3:14–cv–05349–HSG

Before: Sidney R. Thomas, Chief Judge, and Ferdinand F. Fernandez and Mary H. Murguia, Circuit Judges.

OPINION

THOMAS, Chief Judge:

In this case we consider whether professional minor league baseball is exempt from federal antitrust law. Applying controlling precedent, we hold that it is, and we affirm the judgment of the district court.

I

Major League Baseball ("MLB") is an unincorporated association consisting of thirty MLB franchises, also known as clubs or teams. Each franchise employs approximately forty baseball players on its "40–man roster," with up to twenty-five players on its "active roster," who play at the major league level. As part of MLB's "farm system," each franchise also employs 150 to 250 players who compete at the minor league level. MLB franchises employ a high number of minor league players hoping that a handful will develop into major league players. Therefore, though minor league players train and play for minor league clubs, they are nonetheless employed by an MLB club.

***1239** MLB requires all franchises to use its Uniform Player Contract ("the Contract") when hiring minor league players. Any change to the Contract terms requires permission from the MLB Commissioner. Once completed, all Contracts are filed with the MLB Commissioner for approval. Under the Contract's so-called "reserve clause," MLB franchises receive exclusive rights to their minor league players for seven championship seasons, approximately seven years. This provision precludes players from playing for any other baseball team during the contract period, whether or not the team is an MLB franchise. However, MLB franchises have the power to transfer amongst themselves their exclusive rights to a player at the end of each contract season.

The Contract sets forth minor league players' first-season monthly salary rate. For each subsequent season, players and clubs are supposed to negotiate a monthly salary. If a player and club are unable to reach an agreement, the monthly salary rate is determined in the same manner as the first-season salary. Unlike major league baseball players, minor league players do not belong to a labor union and therefore must engage in negotiations independently.

Although MLB's salary guidelines are not publicly available, the plaintiffs, a class of minor league baseball players ("the Players") allege MLB requires that all first-year minor league players earn $1,100 per month, Class–A minor league players earn $1,250 per month, Class–AA minor league players earn $1,500 per month, and Class–AAA minor league players earn $2,150 per month. The Players allege that most minor league players earn less than $7,500 per year, with some earning as little as $3,000. Minor league players receive no salary for spring training, during which they work fifty to sixty hours per week.

II

On February 5, 2015, the Players filed a complaint against the Office of the Commissioner of Baseball, former Commissioner Allan Huber "Bud" Selig, and MLB's thirty franchises (collectively, "the Owners"). Each class representative played minor league baseball at some point between 2010 and 2012. While employed as minor league players, the class representatives worked an average of fifty to sixty hours per week and earned less than $10,000 per year. Seeking declaratory and injunctive relief as well as damages, the Players allege that MLB's hiring and employment policies have violated federal antitrust laws by "restrain[ing] horizontal competition between and among" the MLB franchises and "artificially and illegally depressing" minor league salaries.

The Owners filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the business of baseball has long been exempt from federal antitrust laws, and Congress specifically declined to take minor league baseball out of the scope of the exemption. The district court granted the Owners' motion to dismiss and the Players timely appealed.

III

[1] **[2]** We have jurisdiction under 28 U.S.C. § 1291, and we review the district court's order de novo. *See, e.g.*, *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1029, 1031 (9th Cir. 2016). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must raise sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Because we are bound by Supreme Court and Ninth Circuit precedent upholding the business of baseball's exemption ***1240** from federal antitrust laws, and because Congress explicitly exempted minor league baseball in the Curt Flood Act of 1998, the Players have not "state[d] a claim to relief that is plausible on its face." *Id.* We affirm.

A

The business-of-baseball exemption is best understood within its historical context. In 1890, Congress passed the Sherman Act "to protect trade and commerce against unlawful restraints and monopolies." Sherman Act, ch. 647, 26 Stat. 209 (1890). Under the Sherman Act, "[e]very contract ... in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. It is also a felony under the Sherman Act to "monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. In 1914, Congress passed the Clayton Act to supplement existing federal antitrust law. Clayton Act, ch. 323, 38 Stat. 731 (1914). Section 4 of the Clayton Act establishes that those injured "by reason of anything forbidden in the antitrust laws may sue" in federal district court. 15 U.S.C. § 15(a).

The Supreme Court first exempted the business of baseball from these federal antitrust laws almost a century ago in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922). In *Federal Baseball*, the Supreme

Court held that the business of baseball does not constitute "trade or commerce among the several States," 15 U.S.C. § 1, and therefore is not bound by antitrust laws, because the "business is giving exhibitions of base ball, which are purely state affairs." *Federal Baseball*, 259 U.S. at 208, 42 S.Ct. 465. Comparing the baseball league to a law firm sending a lawyer to another state to argue a case, the Court reasoned that the need for baseball teams to cross state lines to attend competitions was "mere[ly] incident[al]" to the business itself. *Id.* at 209, 42 S.Ct. 465.

The Court revisited the baseball exemption thirty years later in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) (per curiam). In a one-paragraph per curiam opinion, and over Justice Burton's dissent, the Court declined to overrule *Federal Baseball*, reasoning that the business of baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." *Toolson*, 346 U.S. at 357, 74 S.Ct. 78. Therefore, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

In the years after deciding *Toolson*, the Supreme Court considered antitrust claims brought against defendants engaged in the business of traveling theater companies, *United States v. Shubert*, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955), professional boxing, *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955), professional football, *Radovich v. Nat'l Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), and professional basketball, *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971). In each case, the Supreme Court held that the exemption articulated in *Federal Baseball* did not extend to sports or entertainment beyond baseball. *See Shubert*, 348 U.S. at 228, 75 S.Ct. 277; *Boxing Club*, 348 U.S. at 243, 75 S.Ct. 259; *Radovich*, 352 U.S. at 452, 77 S.Ct. 390; *Haywood*, 401 U.S. at 1205, 91 S.Ct. 672. Adopting the reasoning from *Toolson*, the Court also stated in *Shubert*, *Boxing Club*, and *Radovich* that it was the role of Congress—not the courts—to create additional exceptions to federal antitrust laws. *See Shubert*, 348 U.S. at 230, 75 S.Ct. 277 ("If the *Toolson* holding is to be expanded—or contracted—the ***1241** appropriate remedy lies with Congress."); *Boxing Club*, 348 U.S. at 243, 75 S.Ct. 259 ("The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court."); *Radovich*, 352 U.S. at 451, 77 S.Ct. 390 ("As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in [*Federal Baseball* and *Toolson*]."). [1]

1 These holdings were not without controversy. Justice Frankfurter dissented in *Boxing Club* and *Radovich*, arguing that the doctrine of stare decisis required the Court to exempt boxing and football from antitrust laws as well. *Boxing Club*, 348 U.S. at 248–51, 75 S.Ct. 259 ("It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions ... and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.' ") (Frankfurter, J., dissenting); *Radovich*, 352 U.S. at 455–56, 77 S.Ct. 390. Justice Harlan, joined by Justice Brennan, dissented in *Radovich* for similar reasons. *Radovich*, 352 U.S. at 456, 77 S.Ct. 390 ("Since I am unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson*, and can find no basis for attributing to Congress a purpose to put baseball in a class by itself, I would adhere to the rule of stare decisis and affirm the judgment below.") (Harlan, J., dissenting). Justice Minton dissented in *Boxing Club* based on his belief that boxing is neither trade nor commerce. *Boxing Club*, 348 U.S. at 251–53, 75 S.Ct. 259 ("What this Court held in the *Federal Baseball* case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up.") (Minton, J., dissenting).

The Supreme Court once again upheld the baseball exemption in *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d

728 (1972), and, unlike in *Toolson*, it provided a lengthy explanation for its holding. The Court discussed in detail the cases described above. *Flood*, 407 U.S. at 274–80, 92 S.Ct. 2099. It also noted that numerous bills had been introduced in Congress regarding the applicability or nonapplicability of antitrust laws to baseball, yet none passed both houses of Congress. *See id.* at 281, 92 S.Ct. 2099. Furthermore, it noted that bills that passed one house of Congress expanded rather than restricted the exemption. *Id.* at 281–82, 92 S.Ct. 2099. In light of the case law and legislative history, the Court acknowledged that (1) "[p]rofessional baseball is ... engaged in interstate commerce"; (2) "baseball is ... an exception and an anomaly" with regard to its exemption from federal antitrust laws; (3) though it may be considered "unrealistic, inconsistent, or illogical," this exemption is well-established and does not extend to boxing, football, basketball, and, presumably, other sports; (4) the Supreme Court has previously emphasized that Congress allowed professional baseball to develop and expand unhindered by federal antitrust laws, even in the advent of radio and television; and (5) the Court has also "expressed concern about the confusion and retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*" and its progeny, and, therefore, any change should be made by Congress and not the courts. *Flood*, 407 U.S. at 282–83, 92 S.Ct. 2099. Thus, the *Flood* Court declined to overrule *Federal Baseball* and *Toolson*, holding, once again, that professional baseball is exempt from federal antitrust laws. *Id.* at 284–85, 92 S.Ct. 2099.

B

In 1998, Congress passed the Curt Flood Act, taking long-awaited action on the business-of-baseball exemption. Curt Flood Act of 1998, Pub. L. No. 105–297, 112 Stat. 2824 (codified at ***1242** 15 U.S.C. § 266). The Curt Flood Act established that "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players ... are subject to the antitrust laws." 15 U.S.C. § 26b(a). However, it explicitly maintained the baseball exemption for anything related to the employment of minor league baseball players—including the use of reserve clauses—and the relationship between organized professional major and minor league baseball. 15 U.S.C. § 26b(b)(1)–(2).

C

In *City of San Jose v. Office of the Commissioner of Baseball*, 776 F.3d 686 (9th Cir. 2015), *cert. denied*, ––– U.S. ––––, 136 S.Ct. 36, 36, 193 L.Ed.2d 25 (2015), we held that restrictions on franchise relocation fall squarely within the "business of baseball" and are therefore exempt from federal antitrust laws under *Flood*. We reasoned that this was particularly evident because the Curt Flood Act "withdrew baseball's antitrust exemption with respect to the reserve clause and other labor issues [for major league players], but explicitly maintained it for franchise relocation." *Id.* at 690.

[3] Considering the case law and the Curt Flood Act, it is undeniably true that minor league baseball—particularly the employment of minor league baseball players and the requirement that they sign a uniform contract containing a reserve clause—falls squarely within baseball's exemption from federal antitrust laws. Even more than the franchise relocation rules at issue in *San Jose*, the employment contracts of minor league players "relate to the 'business of providing public baseball games for profit between clubs of professional baseball players.' " *San Jose*, 776 F.3d at 690 (quoting *Toolson*, 346 U.S. at 357, 74 S.Ct. 78). Indeed, MLB's reserve clause, albeit as applied to major league players, is precisely what was challenged in *Flood*, where the Supreme Court determined, once again, to uphold the baseball exemption. *Flood*, 407 U.S. at 259, 284, 92 S.Ct. 2099.

The Players argue that the baseball exemption does not apply to minor league baseball because *Federal Baseball*, *Toolson*, and *Flood* did not decide the issue of "whether major league baseball and its constituent clubs could conspire to fix the salaries paid to *minor league* players." However, MLB's farming structure belies the claim that major and minor league baseball are separate and distinct in a meaningful way for the purposes of the Sherman Act. Minor league baseball players are employed and paid by

MLB, and MLB employs minor league players with the hope that some of them will develop into major league players. Therefore, the employment of minor league players is precisely the type of activity that falls within the antitrust exemption for the business of baseball.

Citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), the Players insist that we can "refuse[ ] to apply *stare decisis*" and decline to follow *Federal Baseball*, *Toolson*, and *Flood*. Specifically, the Players argue that we, like the Supreme Court in *Leegin*, should not "blindly apply[ ] outmoded, erroneous reasoning to an antitrust case," especially in light of economic changes that have occurred since *Federal Baseball*.

[4] The Players misapprehend the doctrine of *stare decisis*, particularly as it applies to intermediate federal appellate courts. Courts of Appeal must adhere to the controlling decisions of the Supreme Court. *See* *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) ***1243** ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); *Nunez–Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) (" 'we are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court.' ") (quoting *United States v. Weiland*, 420 F.3d 1062, 1079 n. 16 (9th Cir. 2005)).

[5] Further, under the law-of-the-circuit rule, "[w]e are bound by decisions of prior panels' [sic] unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993) (internal quotation marks and citation omitted). [2]

2 The exceptions to the rule, as noted in *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003), are not applicable here.

The Supreme Court may, of course, overrule its own prior precedent. *See* *Payne v. Tennessee*, 501 U.S. 808, 827–28, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("Nevertheless, when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' ") (quoting *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 88 L.Ed. 987 (1944)). Nonetheless, even at the Supreme Court, "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827, 111 S.Ct. 2597.

Both the Supreme Court and our Court have repeatedly upheld the business-of-baseball exemption, and as recently as 2015. *See* *Flood*, 407 U.S. at 284, 92 S.Ct. 2099; *Toolson*, 346 U.S. at 357, 74 S.Ct. 78; *Shubert*, 348 U.S. at 228, 75 S.Ct. 277; *Boxing Club*, 348 U.S. at 243, 75 S.Ct. 259; *Radovich*, 352 U.S. at 452, 77 S.Ct. 390; *Haywood*, 401 U.S. at 1205, 91 S.Ct. 672; *San Jose*, 776 F.3d at 692. We are bound by these decisions. Indeed, even if the Supreme Court had not spoken on this issue, the Players are unable to point to any of the narrow circumstances that would justify departure from our own circuit precedent.

[6] Moreover, Congress has made clear its intent to maintain the baseball exemption for anything related to the employment of minor league players, the reserve clause as applied to minor league players, and the relationship between major and minor league baseball. 15 U.S.C. § 26b(b). As we recently stated in *San Jose*, "when Congress specifically legislates in a field and explicitly exempts an issue from that legislation, our ability to infer congressional intent to leave that issue undisturbed is at its apex." *San Jose*, 776 F.3d at 691 (citing *Kimbrough v. United States*, 552 U.S. 85, 106, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007)). "The exclusion of [organized professional minor league baseball] from the Curt Flood Act demonstrates that Congress (1) was aware of the possibility that the baseball exemption could apply to [minor league baseball]; (2) declined to alter the status quo with respect to [minor league baseball]; and (3) had sufficient will to overturn the exemption in other areas." *Id.*

IV

In light of Supreme Court precedent, the decisions of our Court, and the Curt Flood Act, minor league baseball falls squarely within the nearly century-old ***1244** business-of-baseball exemption from federal antitrust laws.

AFFIRMED.

All Citations

860 F.3d 1237, 167 Lab.Cas. P 36,544, 2017-1 Trade Cases P 80,036, 17 Cal. Daily Op. Serv. 6135, 2017 Daily Journal D.A.R. 6191

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Maloney v. T3Media, Inc., 9th Cir.(Cal.), April 5, 2017

724 F.3d 1268
United States Court of Appeals,
Ninth Circuit.

In re NCAA STUDENT–ATHLETE NAME & LIKENESS LICENSING LITIGATION,
Samuel Michael Keller; Edward C. O'bannon, Jr.; Byron Bishop; Michael Anderson; Danny Wimprine; Ishmael Thrower; Craig Newsome; Damien Rhodes; Samuel Jacobson, Plaintiffs–Appellees,
v.
Electronic Arts Inc., Defendant–Appellant,
and
National Collegiate Athletic Association; Collegiate Licensing Company, Defendants.

No. 10–15387.
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Argued and Submitted Feb. 15, 2011.
|
Submission Vacated Feb. 18, 2011.
|
Argued and Resubmitted July 13, 2012.
|
Filed July 31, 2013.

Synopsis
Background: Former college football player filed putative class-action against developer of video games, which allowed users to control avatars representing college football and basketball players as those avatars participated in simulated games, alleging violations of class members' rights of publicity. Developer moved to strike the complaint as a strategic lawsuit against public participation (SLAPP) under California's anti-SLAPP statute. The United States District Court for the Northern District of California, Claudia A. Wilken, J., 2010 WL 530108, denied the motion, and developer appealed.

[Holding:] The Court of Appeals, Bybee, Circuit Judge, held that video game developer's use of the likenesses of college athletes in its video games was not protected by the First Amendment, and therefore former college football player's right-of-publicity claims against developer were not barred by California's anti-SLAPP statute.

Affirmed.

Thomas, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal.

West Headnotes (6)

[1] **Pleading** Frivolous pleading

California's anti-SLAPP (strategic lawsuit against public participation) statute is designed to discourage suits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. West's Ann.Cal.C.C.P. § 425.16(b)(1).

15 Cases that cite this headnote

[2] **Pleading** Frivolous pleading
Pleading Application and proceedings thereon

In evaluating an anti-SLAPP (strategic lawsuit against public participation) motion under California law, court requires that defendant make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution, and then determine whether the plaintiff has established a reasonable probability that the plaintiff will prevail on his or her claim. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 425.16(b)(1).

29 Cases that cite this headnote

[3] **Torts** Elements of the tort in general

Elements of a right-of-publicity claim under California common law are: (1) the defendant's use of the plaintiff's identity, (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise, (3) lack of consent, and (4) resulting injury; same claim under California Civil Code requires a plaintiff to prove all the elements of the common law cause of action plus a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose. West's Ann.Cal.Civ.Code § 3344.

17 Cases that cite this headnote

[4] **Constitutional Law** Video and Computer Games

Pleading Frivolous pleading

Torts Defenses in general

Under California's transformative use defense, video game developer's use of the likenesses of college athletes in its video games was not protected by the First Amendment, and therefore former college football player's right-of-publicity claims against developer were not barred by California's anti-SLAPP (strategic lawsuit against public participation) statute; video game realistically portrayed college football players in the context of college football games, and thus developer's use of player's likeness did not add significant creative elements so as to be transformed into something entitled to First Amendment protection. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 425.16(b)(1); West's Ann.Cal.Civ.Code § 3344.

19 Cases that cite this headnote

[5] **Federal Courts** Inferior courts

Federal Courts Anticipating or predicting state decision

Federal Courts Sources of authority; assumptions permissible

Where there is no binding precedent from the state's highest court, federal court must predict how the highest state court would decide issue of state law using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.

7 Cases that cite this headnote

[6] **Torts** Nature and extent of right

Under California law, right of publicity protects the celebrity, not the consumer. West's Ann.Cal.Civ.Code § 3344.

12 Cases that cite this headnote

Attorneys and Law Firms

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Thomas R. Carpenter and Purvi Patel, American Federation of Television & Radio Artists, AFL–CIO, New York, NY; Duncan Crabtree–Ireland and Danielle S. Van Lier, Screen Actors Guild, Inc., Los Angeles, CA, for Amici Curiae Screen Actors Guild, Inc., American Federation of Television & Radio Artists, AFL–CIO, Writers Guild of America, West, Inc., Creative Property Rights Alliance, Fifty Six Hope Road Music Ltd., Luminary Group LLC, Thomas Steinbeck, and Gail Knight Steinbeck.

Nathan Siegel and Lee Levine, Levine Sullivan Koch & Schulz, L.L.P., Washington, District of Columbia, for Amici

Curiae Advance Publications, A & E Television Networks, Allied Daily Newspapers of Washington, Association of American Publishers, Activision, California Newspaper Publishers Association, Capcom USA, Comic Book Legal Defense Fund, E! Entertainment Television, ESPN, First Amendment Coalition, First Amendment Project, Freedom Communications, The Gannett Company, Gawker Media, Hybrid Films, ITV Studios, Konami Digital Entertainment, The Los Angeles Times, The McClatchy Company, Namco Bandai Games America, Original Productions, The Press–Enterprise Company, Radio Television Digital News Association, Sirens Media, Take Two Interactive Software, Thq, Viacom, The Washington Newspaper Publishers Association, and Wenner Media.

Gregory L. Cutner and Robert J. Wierenga, Schiff Harden, LLP, Ann Arbor, MI; Rocky N. Unruh, Schiff Hardin, LLP, San Francisco, CA, for Amicus Curiae National Collegiate Athletic Association.[*]

[*] The NCAA's motion to file its amicus brief is GRANTED.

Appeal from the United States District Court for the Northern District of California, Claudia A. Wilken, District Judge, Presiding. D.C. No. 4:09–cv–01967–CW.

Before: SIDNEY R. THOMAS and JAY S. BYBEE, Circuit Judges, and GORDON J. QUIST, Senior District Judge.[**]

[**] The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

OPINION

BYBEE, Circuit Judge:

Video games are entitled to the full protections of the First Amendment, because ***1271** "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." *Brown v. Entm't Merchs. Ass'n,* ––– U.S. ––––, 131 S.Ct. 2729, 2733, 180 L.Ed.2d 708 (2011).[1] Such rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment. *Zacchini v. Scripps–Howard Broad. Co.,* 433 U.S. 562, 574–75, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). In this case, we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.

1 In *Brown v. Electronic Arts, Inc.,* No. 09–56675, 724 F.3d 1235, 1241–42, 2013 WL 3927736, at *3 (9th Cir. July 31, 2013), we noted that "there may be some work referred to as a 'video game' (or referred to as a 'book,' 'play,' or 'movie' for that matter) that does not contain enough of the elements contemplated by the Supreme Court [in *Brown v. Entertainment Merchants Association*] to warrant First Amendment protection as an expressive work," but asserted that "[e]ven if there is a line to be drawn between expressive video games and non-expressive video games, and even if courts should at some point be drawing that line, we have no need to draw that line here." The same holds true in this case.

The district court concluded that the game developer, Electronic Arts ("EA"), had no First Amendment defense against the right-of-publicity claims of the football player, Samuel Keller. We affirm. Under the "transformative use" test developed by the California Supreme Court, EA's use does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat Keller's claims either.

I

Samuel Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. EA is the producer of the *NCAA Football* series of video games, which allow users to control avatars representing college football players as those avatars participate in simulated games. In *NCAA Football,* EA seeks to replicate each school's entire team as accurately as possible. Every real football player on each team included in the game has a corresponding avatar in the game with the player's actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state. EA attempts to match any unique, highly identifiable playing behaviors by sending detailed questionnaires to team equipment managers. Additionally, EA creates realistic virtual versions of actual stadiums; populates them with the virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA's graphic artists; and incorporates realistic sounds such as the crunch of the players' pads and the roar of the crowd.

EA's game differs from reality in that EA omits the players' names on their jerseys and assigns each player a home town that is different from the actual player's home town. However, users of the video game may upload rosters of names obtained from third parties so that the names do appear on the jerseys. In such cases, EA allows images from the game containing athletes' real names to be posted on its website by users. Users can further alter ***1272** reality by entering "Dynasty" mode, where the user assumes a head coach's responsibilities for a college program for up to thirty seasons, including recruiting players from a randomly generated pool of high school athletes, or "Campus Legend" mode, where the user controls a virtual player from high school through college, making choices relating to practices, academics, and social life.

In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller. In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not match, presumably because Keller changed his number right before the season started.

Objecting to this use of his likeness, Keller filed a putative class-action complaint in the Northern District of California asserting, as relevant on appeal, that EA violated his right of publicity under California Civil Code § 3344 and California common law.[2] EA moved to strike the complaint as a strategic lawsuit against public participation ("SLAPP") under California's anti-SLAPP statute, Cal.Civ.Proc.Code § 425.16, and the district court denied the motion. We have jurisdiction over EA's appeal pursuant to 28 U.S.C. § 1291. *See* *Batzel v. Smith,* 333 F.3d 1018, 1024–26 (9th Cir.2003).[3]

2 There are actually nine named plaintiffs, all former National Collegiate Athletic Association ("NCAA") football or basketball players: Keller, Edward O'Bannon, Jr. (UCLA), Byron Bishop (University of North Carolina), Michael Anderson (University of Memphis), Danny Wimprine (University of Memphis), Ishmael Thrower (Arizona State University), Craig Newsome (Arizona State University), Damien Rhodes (Syracuse University), and Samuel Jacobson (University of Minnesota). EA's NCAA basketball games are also implicated in this appeal. Because the issues are the same for each plaintiff, all of the claims are addressed through our discussion of Keller and *NCAA Football.*

3 We review *de novo* the district court's denial of a motion to strike under California's anti-SLAPP statute. *Mindys Cosmetics, Inc. v. Dakar,* 611 F.3d 590, 595 (9th Cir.2010).

II

[1] California's anti-SLAPP statute is designed to discourage suits that "masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Batzel,* 333 F.3d at 1024 (internal quotation marks omitted). The statute provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal.Civ.Proc.Code § 425.16(b)(1). We have determined that the anti-SLAPP statute is available in federal court. *Thomas v. Fry's Elecs., Inc.,* 400 F.3d 1206 (9th Cir.2005) (per curiam).

[2] We evaluate an anti-SLAPP motion in two steps. First, the defendant must "make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public ***1273** issue in furtherance of the defendant's right to free speech under the United States or California Constitution." *Batzel,* 333 F.3d at 1024. Keller does not contest that EA has made this threshold showing. Indeed, there is no question that "video games qualify for First Amendment protection," *Entm't Merchs. Ass'n,* 131 S.Ct. at 2733, or that Keller's suit arises from EA's production and distribution of *NCAA Football* in furtherance of EA's protected right to express itself through video games.

[3] Second, we must evaluate whether the plaintiff has "establish[ed] a reasonable probability that the plaintiff will prevail on his or her ... claim." *Batzel,* 333 F.3d at 1024. "The plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited." *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d 832, 840 (9th Cir.2001) (internal quotation marks omitted). The statute "subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim." *Navellier v. Sletten,* 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 711 (2002) (internal quotation marks omitted). EA did not contest before the district court and does not contest here that Keller has stated a right-of-publicity claim under California common and statutory law. [4] Instead, EA raises four affirmative defenses derived from the First Amendment: the "transformative use" test, the *Rogers* test, the "public interest" test, and the "public affairs" exemption. EA argues that, in light of these defenses, it is not reasonably probable that Keller will prevail on his right-of-publicity claim. This appeal therefore centers on the applicability of these defenses. We take each one in turn. [5]

4 The elements of a right-of-publicity claim under California common law are: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Stewart v. Rolling Stone LLC,* 181 Cal.App.4th 664, 105 Cal.Rptr.3d 98, 111 (internal quotation marks omitted). The same claim under California Civil Code § 3344 requires a plaintiff to prove "all the elements of the common law cause of action" plus "a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." *Id.*

5 Just as we did in *Hilton v. Hallmark Cards,* we reserve the question of whether the First Amendment furnishes a defense other than those the parties raise. 599 F.3d 894, 909 n. 11 (9th Cir.2010).

A

The California Supreme Court formulated the transformative use defense in *Comedy III Productions, Inc. v. Gary Saderup, Inc.,* 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001). The defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 799. The California Supreme Court explained that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity." *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 808. The court rejected the wholesale importation of the copyright "fair use" defense into right-of-publicity claims, but recognized that some aspects of ***1274** that defense are "particularly pertinent." *Id.; see* 17 U.S.C. § 107; *see also* *SOFA Entm't, Inc. v. Dodger Prods., Inc.,* 709 F.3d 1273, 1277–78 (9th Cir.2013) (discussing the "fair use" defense codified in 17 U.S.C. § 107).

Comedy III gives us at least five factors to consider in determining whether a work is sufficiently transformative to obtain First Amendment protection. *See* J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8:72 (2d ed.2012).

First, if "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized," it is more likely to be transformative than if "the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 809. Second, the work is protected if it is "primarily the defendant's own expression"—as long as that expression is "something other than the likeness of the celebrity." *Id.* This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. McCarthy, *supra,* § 8:72. Third, to avoid making judgments concerning "the quality of the artistic contribution," a court should conduct an inquiry "more quantitative than qualitative" and ask "whether the literal and imitative or the creative elements predominate in the work." *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 809. Fourth, the California Supreme Court indicated that "a subsidiary inquiry" would be useful in close cases: whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted." *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 810. Lastly, the court indicated that "when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame," the work is not transformative. *Id.*

We have explained that "[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike," because the California Supreme Court "envisioned the application of the defense as a question of fact." *Hilton,* 599 F.3d at 910. As a result, EA "is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative." *Id.*

California courts have applied the transformative use test in relevant situations in four cases. First, in *Comedy III* itself, the California Supreme Court applied the test to T-shirts and lithographs bearing a likeness of The Three Stooges and concluded that it could "discern no significant transformative or creative contribution." *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 811. The court reasoned that the artist's "undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." *Id.* "[W]ere we to decide that [the artist's] depictions were protected by the First Amendment," the court continued, "we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements." *Id.*

Second, in *Winter v. DC Comics,* the California Supreme Court applied the test to comic books containing characters Johnny and Edgar Autumn, "depicted as villainous half-worm, half-human offspring" but evoking two famous brothers, rockers Johnny and Edgar Winter. 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (2003). The court held that "the comic ***1275** books are transformative and entitled to First Amendment protection." *Id.* 134 Cal.Rptr.2d 634, 69 P.3d at 480. It reasoned that the comic books "are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses." *Id.* 134 Cal.Rptr.2d 634, 69 P.3d at 479. "To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature." *Id.* Importantly, the court relied on the fact that the brothers "are but cartoon characters ... in a larger story, which is itself quite expressive." *Id.*

Third, in *Kirby v. Sega of America, Inc.,* the California Court of Appeal applied the transformative use test to a video game in which the user controls the dancing of "Ulala," a reporter from outer space allegedly based on singer Kierin Kirby, whose " 'signature' lyrical expression ... is 'ooh la la.' " 144 Cal.App.4th 47, 50 Cal.Rptr.3d 607, 609–10 (2006). The court held that "Ulala is more than a mere likeness or literal depiction of Kirby," pointing to Ulala's "extremely tall, slender computer-generated physique," her "hairstyle and primary costume," her dance moves, and her role as "a space-age reporter in the 25th century," all of which were "unlike any public depiction of Kirby." *Id.* at 616. "As in *Winter,* Ulala is a 'fanciful, creative character' who exists in the context of a unique and expressive video game." *Id.* at 618.

Finally, in *No Doubt v. Activision Publishing, Inc.,* the California Court of Appeal addressed Activision's *Band Hero* video game. 192 Cal.App.4th 1018, 122 Cal.Rptr.3d 397, 400 (2011), *petition for review denied,* 2011 Cal. LEXIS 6100 (Cal. June 8, 2011) (No. B223996). In *Band Hero,* users simulate performing in a rock band in time with popular songs. *Id.* at 401. Users choose from a number of avatars, some of which represent actual rock stars, including the members of the rock band No Doubt. *Id.* at 401. Activision licensed No Doubt's likeness, but allegedly exceeded the scope of the license by permitting users to manipulate the No Doubt avatars to play any song in the game, solo or with members of other bands, and even to alter the avatars' voices. *Id.* at 402. The court held that No Doubt's right of publicity prevailed despite Activision's First Amendment defense because the game was not "transformative" under the *Comedy III* test. It reasoned that the video game characters were "literal recreations of the band members," doing "the same activity by which the band achieved and maintains its fame." *Id.* at 411. According to the court, the fact "that the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." *Id.* The court concluded that "the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of No Doubt so as to commercially exploit its fame." *Id.* (internal quotation marks omitted).

We have also had occasion to apply the transformative use test. In *Hilton v. Hallmark Cards,* we applied the test to a birthday card depicting Paris Hilton in a manner reminiscent of an episode of Hilton's reality show *The Simple Life.* 599 F.3d at 899. We observed some differences between the episode and the card, but noted that "the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress." *Id.* at 911. We reasoned that "[w]hen we compare ***1276** Hallmark's card to the video game in *Kirby,* which transported a 1990s singer (catchphrases and all) into the 25th century and transmogrified her into a space-age reporter, ... the card falls far short of the level of new expression added in the video game." *Id.* As a result, we concluded that "there is enough doubt as to whether Hallmark's card is transformative under our case law that we cannot say Hallmark is entitled to the defense as a matter of law." *Id.* [6]

6 We also briefly addressed the transformative use test in a footnote in *Hoffman v. Capital Cities/ABC, Inc.,* 255 F.3d 1180 (9th Cir.2001). We indicated that if we had considered the test, we would have concluded that an image of Dustin Hoffman from "Tootsie" that had been altered to make it appear like he was wearing fashions from a decade later "contained 'significant transformative elements.' " *Id.* at 1184 n. 2; 1182–83. "Hoffman's body was eliminated and a new, differently clothed body was substituted in its place. In fact, the entire theory of Hoffman's case rests on his allegation that the photograph is not a 'true' or 'literal' depiction of him, but a false portrayal." *Id.* at 1184 n. 2.

[4] With these cases in mind as guidance, we conclude that EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law. The facts of *No Doubt* are very similar to those here. EA is alleged to have replicated Keller's physical characteristics in *NCAA Football,* just as the members of No Doubt are realistically portrayed in *Band Hero.* Here, as in *Band Hero,* users manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case, and performing in a rock band in *Band Hero.* The context in which the activity occurs is also similarly realistic—real venues in *Band Hero* and realistic depictions of actual football stadiums in *NCAA Football.* As the district court found, Keller is represented as "what he was: the starting quarterback for Arizona State" and Nebraska, and "the game's setting is identical to where the public found [Keller] during his collegiate career: on the football field." *Keller v. Elec. Arts, Inc.,* No. C 09–1967 CW, 2010 WL 530108, at *5 (N.D.Cal. Feb. 8, 2010).

EA argues that the district court erred in focusing primarily on Keller's likeness and ignoring the transformative elements of the game as a whole. Judge Thomas, our dissenting colleague, suggests the same. *See* Dissent at 1285. We are unable to say that there was any error, particularly in light of *No Doubt*, which reasoned much the same as the district court in this case: "that the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." *No Doubt,* 122 Cal.Rptr.3d at 411. [7] ***1277** EA suggests that the fact that *NCAA Football* users can alter the characteristics of the avatars in the game is significant. Again, our dissenting colleague agrees. *See* Dissent at 1286–87. In *No Doubt,* the California Court of Appeal noted that *Band Hero* "d[id] not permit players to alter the No Doubt avatars in any respect." *Id.* at 410. The court went on to say that the No Doubt avatars "remain at all times immutable images of the real celebrity musicians, in stark contrast to the 'fanciful, creative characters' in *Winter* and *Kirby.*" *Id.* The court explained further:

7 Judge Thomas argues that the "sheer number of virtual actors," the absence of "any evidence as to the personal marketing power of Sam Keller," and the relative anonymity of each individual player in *NCAA Football* as compared to the public figures in other California right-of-publicity cases all mitigate in favor of finding that the EA's First Amendment rights outweigh Keller's right of publicity. *See* Dissent at 1286–88. These facts are not irrelevant to the analysis—they all can be considered in the framework of the five considerations from *Comedy III* laid out above—but the fact is that EA elected to use avatars that mimic real college football players for a reason. If EA did not think there was value in having an avatar designed to mimic each individual player, it would not go to the lengths it does to achieve realism in this regard. Having chosen to use the players' likenesses, EA cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player.

> [I]t is the differences between *Kirby* and the instant case ... which are determinative. In *Kirby,* the pop singer was portrayed as an entirely new character—the space-age news reporter Ulala. In *Band Hero,* by contrast, no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.

Id. at 410–11. Judge Thomas says that "[t]he Court of Appeal cited character immutability as a chief factor distinguishing [*No Doubt*] from *Winter* and *Kirby.*" Dissent at 1287. Though No Doubt certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal's decision as turning on the inability of users to alter the avatars. The key contrast with *Winter* and *Kirby* was that in those games the public figures were transformed into "fanciful, creative characters" or "portrayed as ... entirely new character[s]." *No Doubt,* 122 Cal.Rptr.3d at 410. On this front, our case is clearly aligned with *No Doubt,* not with *Winter* and *Kirby.* We believe No Doubt offers a persuasive precedent that cannot be materially distinguished from Keller's case.[8], [9]

8 EA further argues that *No Doubt* is distinguishable because the video game company in that case entered into a license agreement which it allegedly breached. However, the California Court of Appeal did not rely on breach of contract in its analysis of whether the game was transformative. 122 Cal.Rptr.3d at 412 n. 7. Keller asserts here that EA contracted away its First Amendment rights in a licensing agreement with the NCAA that purportedly prohibited the use of athlete likenesses. However, in light of our conclusion that EA is not entitled to a First Amendment defense as a matter of law, we need not reach this issue and leave it for the district court to address in the first instance on remand should the finder of fact determine in post-SLAPP proceedings that EA's use is transformative.

9 In dissent, Judge Thomas suggests that this case is distinguishable from other right-to-publicity cases because "an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent" because "NCAA rules prohibit athletes from benefitting economically from any success on the field." Dissent at 1289. Judge Thomas commendably addresses the fairness of this structure, *see* Dissent at 1289 n. 5, but setting fairness aside, the fact is that college athletes are not indefinitely bound by NCAA rules. Once an athlete graduates from college, for instance, the athlete can capitalize on his success on the field during college in any number of ways. EA's use of a college athlete's likeness interferes with the athlete's right to capitalize on his athletic success once he is beyond the dominion of NCAA rule.

***1278** The Third Circuit came to the same conclusion in *Hart v. Electronic Arts, Inc.,* 717 F.3d 141 (3d Cir.2013). In *Hart,* EA faced a materially identical challenge under

New Jersey right-of-publicity law, brought by former Rutgers quarterback Ryan Hart. *See* *id.* at 163 n. 28 ("*Keller* is simply [*Hart*] incarnated in California."). Though the Third Circuit was tasked with interpreting New Jersey law, the court looked to the transformative use test developed in California. *See* *id.* at 158 n. 23 (noting that the right-of-publicity laws are "strikingly similar ... and protect similar interests" in New Jersey and California, and that "consequently [there is] no issue in applying balancing tests developed in California to New Jersey"); *see also* *id.* at 165 (holding that "the Transformative Use Test is the proper analytical framework to apply to cases such as the one at bar"). Applying the test, the court held that "the *NCAA Football* ... games at issue ... do not sufficiently transform [Hart]'s identity to escape the right of publicity claim," reversing the district court's grant of summary judgment to EA. *Id.* at 170.

As we have, the Third Circuit considered the potentially transformative nature of the game as a whole, *id.* at 166, 169, and the user's ability to alter avatar characteristics, *id.* at 166–68. Asserting that "the lack of transformative context is even more pronounced here than in *No Doubt,*" *id.* at 166, and that "the ability to modify the avatar counts for little where the appeal of the game lies in users' ability to play as, or alongside [,] their preferred players or team," *id.* at 168 (internal quotation marks omitted), the Third Circuit agreed with us that these changes do not render the *NCAA Football* games sufficiently transformative to defeat a right-of-publicity claim.

[5] Judge Ambro dissented in *Hart,* concluding that "the creative components of *NCAA Football* contain sufficient expressive transformation to merit First Amendment protection." *Id.* at 175 (Ambro, J., dissenting). But in critiquing the majority opinion, Judge Ambro disregarded *No Doubt* and *Kirby* because "they were not decided by the architect of the Transformative Use Test, the Supreme Court of California." *Id.* at 172 n. 4. He thus "d [id] not attempt to explain or distinguish the[se cases'] holdings except to note that [he] believe[s] *No Doubt,* which focused on individual depictions rather than the work in its entirety, was wrongly decided in light of the prior precedent in *Comedy III* and *Winter.*" *Id.* We recognize that we are bound only by the decisions of a state's highest court and not by decisions of the state's intermediate appellate court when considering statelaw issues sitting in diversity jurisdiction. *See* *In re Kirkland,* 915 F.2d 1236, 1238–39 (9th Cir.1990). Nonetheless, where there is no binding precedent from the state's highest court, we "must predict how the highest state court would decide the issue using *intermediate appellate court decisions,* decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* at 1239 (emphasis added). As stated above, we believe *No Doubt* in particular provides persuasive guidance. We do not believe *No Doubt* to be inconsistent with the California Supreme Court's relevant decisions, and we will not disregard a well-reasoned decision from a state's intermediate appellate court in this context. Like the majority in *Hart,* we rely substantially ***1279** on *No Doubt,* and believe we are correct to do so.

Given that *NCAA Football* realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense at the anti-SLAPP stage. *Cf.* *Hilton,* 599 F.3d at 910–11. [10]

10 Judge Thomas asserts that "[t]he logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context," "jeopardiz[ing] the creative use of historic figures in motion pictures, books, and sound recordings." Dissent at 1290. We reject the notion that our holding has such broad consequences. As discussed above, one of the factors identified in *Comedy III* "requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist." McCarthy, *supra,* § 8:72; *see* *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 809. Certainly this leaves room for distinguishing between this case—where we have emphasized EA's primary emphasis on reproducing reality—and cases involving other kinds of expressive works.

B

EA urges us to adopt for right-of-publicity claims the broader First Amendment defense that we have previously adopted in the context of false endorsement claims under the Lanham

Act: the *Rogers* test. [11] *See* *Brown v. Elec. Arts,* 724 F.3d at 1239–41, 2013 WL 3927736, at *1–2 (applying the *Rogers* test to a Lanham Act claim brought by former NFL player Jim Brown relating to the use of his likeness in EA's *Madden NFL* video games).

11 Keller argues that EA never asked the district court to apply *Rogers* and has therefore waived the issue on appeal. Although it could have been more explicit, EA's anti-SLAPP motion did cite *Rogers* and argue that Keller had not alleged that his likeness was "wholly unrelated" to the content of the video game or a "disguised commercial advertisement," the two prongs of the *Rogers* test.

Rogers v. Grimaldi is a landmark Second Circuit case balancing First Amendment rights against claims under the Lanham Act. 875 F.2d 994 (2d Cir.1989). The case involved a suit brought by the famous performer Ginger Rogers against the producers and distributors of *Ginger and Fred,* a movie about two fictional Italian cabaret performers who imitated Rogers and her frequent performing partner Fred Astaire. *Id.* at 996–97. Rogers alleged both a violation of the Lanham Act for creating the false impression that she endorsed the film and infringement of her common law right of publicity. *Id.* at 997.

The *Rogers* court recognized that "[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection," but that "[t]he purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product." *Id.* "Consumers of artistic works thus have a dual interest: They have an interest in not being misled and they also have an interest in enjoying the results of the author's freedom of expression." *Id.* at 998. The *Rogers* court determined that titles of artistic or literary works were less likely to be misleading than "the names of ordinary commercial products," and thus that Lanham Act protections applied with less rigor when considering titles of artistic or literary works than when considering ordinary products. *Id.* at 999–1000. The court concluded that "in general the Act should be construed to apply to artistic works only ***1280** where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 999. The court therefore held:

> In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.

Id.

We first endorsed the *Rogers* test for Lanham Act claims involving artistic or expressive works in *Mattel, Inc. v. MCA Records, Inc.,* 296 F.3d 894, 902 (9th Cir.2002). We agreed that, in the context of artistic and literary titles, "[c]onsumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer," and "adopt[ed] the *Rogers* standard as our own." *Id.* Then, in *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.,* we considered a claim by a strip club owner that video game maker Rock Star incorporated its club logo into the game's virtual depiction of East Los Angeles, violating the club's trademark right to that logo. 547 F.3d 1095, 1096–98 (9th Cir.2008). We held that Rock Star's use of the logo and trade dress was protected by the First Amendment and that it therefore could not be held liable under the Lanham Act. *Id.* at 1099–1101. In so doing, we extended the Rogers test slightly, noting that "[a]lthough this test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work." *Id.* at 1099.

In this case, EA argues that we should extend this test, created to evaluate Lanham Act claims, to apply to right-of-publicity claims because it is "less prone to misinterpretation" and "more protective of free expression" than the transformative use defense. Although we acknowledge that there is some overlap between the transformative use test formulated by the California Supreme Court and the *Rogers* test, we disagree that the *Rogers* test should be imported wholesale for right-of-publicity claims. Our conclusion on this point is consistent with the Third Circuit's rejection of EA's identical argument in *Hart.* *See* *Hart,* 717 F.3d at 154–58. As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim. *See* *Cairns v. Franklin Mint Co.,* 292 F.3d 1139, 1149 (9th Cir.2002). The right of publicity, on the other hand, does not primarily seek to prevent consumer confusion. *See* *Hart,* 717 F.3d at 158 ("[T]he right of publicity does not implicate the potential for consumer confusion...."). Rather, it primarily "protects a form of intellectual property [in one's person] that society deems to have some social utility." *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 804. As the California Supreme Court has explained:

> Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.

Id. 106 Cal.Rptr.2d 126, 21 P.3d at 804–05 (internal quotation marks and citations omitted).

***1281 [6]** The right of publicity protects the *celebrity,* not the *consumer.* Keller's publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products. Indeed, he would be hard-pressed to support such an allegation absent evidence that EA explicitly misled consumers into holding such a belief. *See* *Brown v. Elec. Arts,* 724 F.3d at 1242–43, 2013 WL 3927736, at *4 (holding under the *Rogers* test that, since "Brown's likeness is artistically relevant to the [*Madden NFL*] games and there are no alleged facts to support the claim that EA explicitly misled consumers as to Brown's involvement with the games," "the public interest in free expression outweighs the public interest in avoiding consumer confusion"). Instead, Keller's claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field. The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly mislead consumers—is simply not responsive to Keller's asserted interests here. *Cf.* *Hart,* 717 F.3d at 157 ("Effectively, [EA] argues that [Hart] should be unable to assert a claim for appropriating his likeness as a football player precisely because his likeness was used for a game about football. Adopting this line of reasoning threatens to turn the right of publicity on its head.").

We recognize that *Rogers* also dealt with a right-of-publicity claim-one under Oregon law—and applied a modified version of its Lanham Act test in order to adapt to that particular context:

> In light of the Oregon Court's concern for the protection of free expression, ... the right of publicity [would not] bar the use of a celebrity's name in a movie title unless the title was "wholly unrelated" to the movie or was "simply a disguised commercial advertisement for the sale of goods or services."

875 F.2d at 1004. However, the *Rogers* court was faced with a situation in which the "Oregon Courts ... [had] not determined the scope of the common law right of publicity in that state." *Id.* at 1002. In the absence of clear state-law precedent, the *Rogers* court was "obliged to engage in the uncertain task of predicting what the New York courts would predict the Oregon courts would rule as to the contours of a right of publicity under Oregon law." *Id.* In light of *Comedy III* and its progeny, we are faced with no such uncertain task.

Lastly, we note that the only circuit court to import the *Rogers* test into the publicity arena, the Sixth Circuit, has done so inconsistently. In *Parks v. LaFace Records,* the Sixth Circuit indicated that the *Rogers* test was appropriate for right-of-publicity claims, noting that the Restatement (Third) of Unfair Competition had endorsed use of the test in that context. 329 F.3d 437, 461 (6th Cir.2003) (citing *Restatement (Third) of Unfair Competition* § 47 cmt. c). Subsequently, in *ETW Corp. v. Jireh Publishing, Inc.,* the court acknowledged the *Parks* decision but did not apply the *Rogers* test to the Ohio right-of-publicity claim in question. 332 F.3d at 915, 936 & n. 17 (6th Cir.2003). Instead, the court applied a balancing test from comment d in the *Restatement* (analyzing "the substantiality and market effect of the use of the celebrity's image ... in light of the informational and creative content"), as well as the transformative use test from *Comedy III. Id.* at 937–38; *see* *Hart,* 717 F.3d at 157 ("We find *Parks* to be less than persuasive [as to the applicability of the *Rogers* test to right-of-publicity ***1282** cases] given that just over a month later another panel of the Sixth Circuit decided [*ETW*], a right of publicity case where the Circuit applied the Transformative Use Test."). Similarly, the Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Ass'n,* 95 F.3d 959 (10th Cir.1996), and the Eighth Circuit in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.,* 505 F.3d 818 (8th Cir.2007), rejected the *Rogers* test in favor of a flexible case-by-case approach that takes into account the celebrity's interest in retaining his or her publicity and the public's interest in free expression. Therefore, we decline EA's invitation to extend the *Rogers* test to right-of-publicity claims.

C

California has developed two additional defenses aimed at protecting the reporting of factual information under state law. One of these defenses only applies to common law right-of-publicity claims while the other only applies to statutory right-of-publicity claims. *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639, 640 (1995). Liability will not lie for common law right-of-publicity claims for the "publication of matters in the public interest." *Id.* at 640–41. Similarly, liability will not lie for statutory right-of-publicity claims for the "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." Cal. Civ.Code § 3344(d). Although these defenses are based on First Amendment concerns, *Gill v. Hearst Publ'g Co.,* 40 Cal.2d 224, 253 P.2d 441, 443–44 (1953), they are not coextensive with the Federal Constitution, *New Kids on the Block v. News Am. Publ'g, Inc.,* 971 F.2d 302, 310 n. 10 (9th Cir.1992), and their application is thus a matter of state law.

EA argues that these defenses give it the right to "incorporate athletes' names, statistics, and other biographical information" into its expressive works, as the defenses were "designed to create 'extra breathing space' for the use of a person's name in connection with matters of public interest." Keller responds that the right of publicity yields to free use of a public figure's likeness only to the extent reasonably required to report information to the public or publish factual data, and that the defenses apply only to broadcasts or accounts of public affairs, not to EA's *NCAA Football* games, which do not contain or constitute such reporting about Keller.

California courts have generally analyzed the common law defense and the statutory defense separately, but it is clear that both defenses protect only the act of publishing or reporting. By its terms, § 3344(d) is limited to a "broadcast or account," and we have confirmed that the common law defense is about a publication or reporting of newsworthy items. *Hilton,* 599 F.3d at 912. However, most of the discussion by California courts pertains to whether the subject matter of the communication is of "public interest" or related to "news" or "public affairs," leaving little guidance as to when the communication constitutes a publication or reporting.

For instance, in *Dora v. Frontline Video, Inc.,* a wellknown surfer sued the producer of a documentary on surfing entitled "The Legends of Malibu," claiming misappropriation of his name and likeness. 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790, 791 (1993). The court held that the documentary was protected because it was "a fair comment on real life events which have ***1283** caught the popular imagination." *Id.* at 792 (internal quotation marks omitted). The court explained that surfing "has created a lifestyle that influences speech, behavior, dress, and entertainment," has had "an economic impact," and "has also had a significant influence on the popular culture," such that "[i]t would be difficult to conclude that a surfing documentary does not fall within the category of public affairs." *Id.* at 794–95. Similarly, in *Gionfriddo v. Major League Baseball,* retired professional baseball players alleged that Major League Baseball violated their right of publicity by displaying "factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play" in game programs and on its website. 94 Cal.App.4th 400, 114 Cal.Rptr.2d 307, 314 (2001). The court reasoned that "[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."

Id. at 315. And in *Montana v. San Jose Mercury News, Inc.,* former NFL quarterback Joe Montana brought a right-of-publicity action against a newspaper for selling posters containing previously published pages from the newspaper depicting the many Super Bowl victories by Montana and the San Francisco 49ers. *Montana,* 40 Cal.Rptr.2d at 639–40. The court found that "[p]osters portraying the 49'ers' [sic] victories are ... a form of public interest presentation to which protection must be extended." *Id.* at 641 (internal quotation marks omitted).

We think that, unlike in *Gionfriddo, Montana*, and *Dora,* EA is not publishing or reporting factual data. EA's video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. Although EA has incorporated certain actual player information into the game (height, weight, etc.), its case is considerably weakened by its decision not to include the athletes' names along with their likenesses and statistical data. EA can hardly be considered to be "reporting" on Keller's career at Arizona State and Nebraska when it is not even using Keller's name in connection with his avatar in the game. Put simply, EA's interactive game is not a publication of facts about college football; it is a game, not a reference source. These state law defenses, therefore, do not apply. [12]

12 We similarly reject Judge Thomas's argument that Keller's right-of-publicity claim should give way to the First Amendment in light of the fact that "the essence of *NCAA Football* is founded on publicly available data." Dissent at 1288. Judge Thomas compares *NCAA Football* to the fantasy baseball products that the Eighth Circuit deemed protected by the First Amendment in the face of a right-of-publicity claim in *C.B.C. Distribution and Marketing,* 505 F.3d at 823–24. Dissent at 1288. But there is a big difference between a video game like *NCAA Football* and fantasy baseball products like those at issue in *C.B.C.* Those products merely "incorporate[d] the names along with performance and biographical data of actual major league baseball players." *Id.* at 820. *NCAA Football,* on the other hand, uses virtual likenesses of actual college football players. It is seemingly true that each likeness is generated largely from publicly available data—though, as Judge Thomas acknowledges, EA solicits certain information directly from schools—but finding this fact dispositive would neuter the right of publicity in our digital world. Computer programmers with the appropriate expertise can create a realistic likeness of any celebrity using only publicly available data. If EA creates a virtual likeness of Tom Brady using only publicly available data—public images and videos of Brady—does EA have free reign to use that likeness in commercials without violating Brady's right of publicity? We think not, and thus must reject Judge Thomas's point about the public availability of much of the data used given that EA produced and used actual likenesses of the athletes involved.

*1284 III

Under California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. We reject EA's suggestion to import the *Rogers* test into the right-of-publicity arena, and conclude that statelaw defenses for the reporting of information do not protect EA's use.

AFFIRMED.

THOMAS, Circuit Judge, dissenting:

Because the creative and transformative elements of Electronic Arts' *NCAA Football* video game series predominate over the commercial use of the athletes' likenesses, the First Amendment protects EA from liability. Therefore, I respectfully dissent.

I

As expressive works, video games are entitled to First Amendment protection. *Brown v. Entm't Merchs. Ass'n,* ––– U.S. ––––, 131 S.Ct. 2729, 2733, 180 L.Ed.2d 708 (2011). The First Amendment affords additional protection to *NCAA Football* because it involves a subject of substantial public interest: collegiate football. *Moore v. Univ. of Notre Dame,* 968 F.Supp. 1330, 1337 (N.D.Ind.1997). Because football is a matter of public interest, the use of the images of athletes is entitled to constitutional protection, even if profits are involved. *Montana v. San Jose Mercury News, Inc.,* 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639, 643 n. 2 (1995); *see also* Cal. Civ.Code § 3344(d) (exempting from liability the "use of a name ... or likeness in connection with any ... public affairs, or sports broadcast or account").

Where it is recognized, the tort of appropriation is a creature of common law or statute, depending on the jurisdiction. However, the right to compensation for the misappropriation for commercial use of one's image or celebrity is far from absolute. In every jurisdiction, any right of publicity must be balanced against the constitutional protection afforded by the First Amendment. Courts have employed a variety of methods in balancing the rights. *See, e.g., Doe v. TCI Cablevision,* 110 S.W.3d 363, 374 (Mo.2003) (en banc). The California Supreme Court applies a "transformative use" test it formulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.,* 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001).[1]

1 I agree with the majority that the test articulated in *Rogers v. Grimaldi,* 875 F.2d 994 (2d Cir.1989), should not be employed in this context. The *Rogers* test is appropriately applied in Lanham Act cases, where the primary concern is with the danger of consumer confusion when a work is depicted as something it is not. 15 U.S.C. § 1125(a)(1). However, the right of publicity is an economic right to use the value of one own's celebrity. *Zacchini v. Scripps–Howard Broad. Co.,* 433 U.S. 562, 576–77, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Therefore, a more nuanced balancing is required. In our context, I believe the transformative use test —if correctly applied to the work as a whole— provides the proper analytical framework.

As the majority properly notes, the transformative use defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness ***1285** or imitation." *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 799. The rationale for the test, as the majority notes, is that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity." *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 808.

The five considerations articulated in *Comedy III,* and cited by the majority, are whether: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant's own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist's skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame. *Id.* 106 Cal.Rptr.2d 126, 21 P.3d at 809–10.

Although these considerations are often distilled as analytical factors, Justice Mosk was careful in *Comedy III* not to label them as such. Indeed, the focus of *Comedy III* is a more holistic examination of whether the transformative and creative elements of a particular work predominate over commercially based literal or imitative depictions. The distinction is critical, because excessive deconstruction of *Comedy III* can lead to misapplication of the test. And it is at this juncture that I must respectfully part ways with my colleagues in the majority.

The majority confines its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole. In my view, this approach contradicts the holistic analysis required by the transformative use test. *See Hart v. Elec. Arts, Inc.,* 717 F.3d 141, 170–76 (3d Cir.2013) (Ambro, J., dissenting).[2] The salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.

2 I agree fully with Judge Ambro's excellent dissent in *Hart,* which describes the analytic flaws of applying a transformative use test outside the context of the work as a whole.

When EA's *NCAA Football* video game series is examined carefully, and put in proper context, I conclude that the creative and transformative elements of the games predominate over the commercial use of the likenesses of the athletes within the games.

A

The first step in conducting a balancing is to examine the creative work at issue. At its essence, EA's *NCAA Football* is a work of interactive historical fiction. Although the game changes from year to year, its most popular features predominately involve role-playing by the gamer. For example, a player can create a virtual image of himself as a potential college football player. The virtual player decides which position he would like to play, then participates in a series of "tryouts" or competes in an entire high school season to gauge his skill. Based on his performance, the virtual player is ranked and available to play at select colleges. The player chooses among the colleges, then assumes the role of a college football player. He ***1286** also selects a major, the amount of time he wishes to spend on social activities, and practice—all of which may affect the virtual player's performance. He then plays his position on the college team. In some versions of the game, in another mode, the virtual player can engage in a competition for the Heisman Trophy. In another popular mode, the gamer becomes a virtual coach. The coach scouts, recruits, and develops entirely fictional players for his team. The coach can then promote the team's evolution over decades of seasons.

The college teams that are supplied in the game do replicate the actual college teams for that season, including virtual athletes who bear the statistical and physical dimensions of the actual college athletes. But, unlike their professional football counterparts in the *Madden NFL* series, the NCAA football players in these games are not identified.

The gamers can also change their abilities, appearances, and physical characteristics at will. Keller's impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team. Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Applying the *Comedy III* considerations to *NCAA Football* in proper holistic context, the considerations favor First Amendment protection. The athletic likenesses are but one of the raw materials from which the broader game is constructed. The work, considered as a whole, is primarily one of EA's own expression. The creative and transformative elements predominate over the commercial use of likenesses. The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements.

The video game at issue is much akin to the creations the California Supreme Court found protected in *Winter v. DC Comics,* 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (2003), where the two fabled guitarists Johnny and Edgar Winter were easily identifiable, but depicted as chimeras. It is also consistent with the California Court of Appeal's decision in *Kirby v. Sega of America, Inc.,* 144 Cal.App.4th 47, 50 Cal.Rptr.3d 607, 609–10 (2006), where a character easily identified as singer Kierin Kirby, more popularly known as Lady Miss Kier, was transformed into a " 'fanciful, creative character' who exists in the context of a unique and expressive video game." *Id.* at 618. So, too, are the virtual players who populate the world of the *NCAA Football* series.

No Doubt v. Activision Publishing, Inc., 192 Cal.App.4th 1018, 122 Cal.Rptr.3d 397 (2011), is not to the contrary. The literal representations in *No Doubt* were not, and could not be, transformed in any way. Indeed, in *No Doubt,* the bandmembers ***1287** posed for motion-capture photography to allow reproduction of their likenesses, *id.* at 402, and the Court of Appeal underscored the fact that the video game did not "permit players to alter the No Doubt avatars in any respect" and the avatars remained "at all times immutable images of the real celebrity musicians," *id.* at 410. The Court of Appeal cited character immutability as a chief factor distinguishing that case from *Winter* and *Kirby. Id.* Unlike the avatars in *No Doubt,* the virtual players in NCAA Football are completely mutable and changeable at the whim of the gamer. The majority places great reliance on *No Doubt* as support for its proposition that the initial placement of realistic avatars in the game overcomes the First Amendment's protection, but the Court of Appeal in *No Doubt* rejected such a cramped construction, noting that "even literal reproductions of celebrities may be 'transformed' into expressive works based on the context into which the celebrity image is placed." *Id.* at 410 (citing *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 797). [3]

3 Of course, to the extent that the Court of Appeal's opinion in *No Doubt* may be read to be in tension with the transformative use test as articulated by the California Supreme Court in *Comedy III* and *Winter,* it must yield.

Unlike the majority, I would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games. Majority op. at 1279 n. 10. That the lifelike roar of the crowd and the crunch of pads contribute to the gamer's experience demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs, rather than by the game's artistic elements.

In short, considering the creative elements alone in this case satisfies the transformative use test in favor of First Amendment protection.

B

Although one could leave the analysis with an examination of the transformative and creative aspects of the game, a true balancing requires an inquiry as to the other side of the scales: the publicity right at stake. Here, as well, the *NCAA Football* video game series can be distinguished from the traditional right of publicity cases, both from a quantitative and a qualitative perspective.

As a quantitative matter, *NCAA Football* is different from other right of publicity cases in the sheer number of virtual actors involved. Most right of publicity cases involve either one celebrity, or a finite and defined group of celebrities. *Comedy III* involved literal likenesses of the Three Stooges. *Hilton v. Hallmark Cards,* 599 F.3d 894, 909–12 (9th Cir.2009), involved the literal likeness of Paris Hilton. *Winter* involved the images of the rock star brother duo. *Kirby* involved the likeness of one singer. *No Doubt* focused on the likenesses of the members of a specific legendary band.

In contrast, *NCAA Football* includes not just Sam Keller, but thousands of virtual actors. This consideration is of particular significance when we examine, as instructed by *Comedy III,* whether the source of the product marketability comes from creative elements or from pure exploitation of a celebrity image. 106 Cal.Rptr.2d 126, 21 P.3d at 810. There is not, at this stage of the litigation, any evidence as to the personal marketing power of Sam Keller, as distinguished from the appeal of the creative aspects of the product. Regardless, the sheer number of athletes involved ***1288** inevitably diminish the significance of the publicity right at issue. *Comedy III* involved literal depictions of the Three Stooges on lithographs and T-shirts. *Winter* involved characters depicted in a comic strip. *Kirby* and *No Doubt* involved pivotal characters in a video game. The commercial image of the celebrities in each case was central to the production, and its contact with the consumer was immediate and unavoidable. In contrast, one could play *NCAA Football* thousands of times without ever encountering a particular avatar. In context of the collective, an individual's publicity right is relatively insignificant. Put another way, if an anonymous virtual player is tackled in an imaginary video game and no one notices, is there any right of publicity infringed at all?

The sheer quantity of the virtual players in the game underscores the inappropriateness of analyzing the right of publicity through the lens of one likeness only. Only when the creative work is considered in complete context can a proper analysis be conducted.

As a qualitative matter, the essence of *NCAA Football* is founded on publicly available data, which is not protected by any individual publicity rights. It is true that EA solicits and receives information directly from colleges and universities. But the information is hardly proprietary. Personal vital statistics for players are found in college programs and media guides. Likewise, playing statistics are easily available. In this respect, the information used by EA is indistinguishable from the information used in fantasy athletic leagues, for which the First Amendment provides protection, *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.,* 505 F.3d 818, 823–24 (8th Cir.2007), or much beloved statistical board games, such as Strat–O–Matic. An athlete's right of publicity simply does not encompass publicly available statistical data. *See, e.g., IMS Health Inc. v. Sorrell,* 630 F.3d 263, 271–72 (2d Cir.2010) ("The First Amendment protects '[e]ven dry information, devoid of advocacy, political relevance, or artistic expression.' " (quoting *Universal*

City Studios, Inc. v. Corley, 273 F.3d 429, 446 (2d Cir.2001)) (alteration in original)). [4]

4 Contrary to the majority's suggestion, I do not claim that any use of a likeness founded on publicly available information is transformative. Majority op. 1283–84 n. 12. The majority's analogy to a commercial featuring Tom Brady is inapposite for at least two reasons: (1) a commercial is not interactive in the same way that *NCAA Football* is, and (2) Brady's marketing power is well established, while that of the plaintiffs is not.

Further, the structure of the game is not founded on exploitation of an individual's publicity rights. The players are unidentified and anonymous. It is true that third-party software is available to quickly identify the players, but that is not part of the EA package. And the fact that the players can be identified by the knowledgeable user by their position, team, and statistics is somewhat beside the point. The issue is whether the marketability of the product is driven by an individual celebrity, or by the game itself. *Comedy III,* 106 Cal.Rptr.2d 126, 21 P.3d at 810. Player anonymity, while certainly not a complete defense, bears on the question of how we balance the right of publicity against the First Amendment. This feature of the game places it in stark contrast with *No Doubt,* where the whole point of the enterprise was the successful commercial exploitation of the specifically identified, world-famous musicians.

***1289** Finally, as a qualitative matter, the publicity rights of college athletes are remarkably restricted. This consideration is critical because the "right to exploit commercially one's celebrity is primarily an economic right." *Gionfriddo v. Major League Baseball,* 94 Cal.App.4th 400, 114 Cal.Rptr.2d 307, 318 (2001). NCAA rules prohibit athletes from benefitting economically from any success on the field. NCAA Bylaw 12.5 specifically prohibits commercial licensing of an NCAA athlete's name or picture. NCAA, *2012–13 NCAA Division I Manual* § 12.5.2.1 (2012). Before being allowed to compete each year, all Division I NCAA athletes must sign a contract stating that they understand the prohibition on licensing and affirming that they have not violated any amateurism rules. In short, even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent. [5]

5 The issue of whether this structure is fair to the student athlete is beyond the scope of this appeal, but forms a significant backdrop to the discussion. The NCAA received revenues of $871.6 million in fiscal year 2011–12, with 81% of the money coming from television and marketing fees. However, few college athletes will ever receive any professional compensation. The NCAA reports that in 2011, there were 67,887 college football players. Of those, 15,086 were senior players, and only 255 athletes were drafted for a professional team. Thus, only 1.7% of seniors received any subsequent professional economic compensation for their athletic endeavors. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level* (2011), *available at* http://www.ncaa. org/wps/wcm/connect/public/ncaa/pdfs/2011/2011+probability+of+going+pro.
And participation in college football can come at a terrible cost. The NCAA reports that, during a recent five-year period, college football players suffered 41,000 injuries, including 23 non-fatal catastrophic injuries and 11 fatalities from indirect catastrophic injuries. NCAA, *Football Injuries: Data From the 2004/05 to 2008/09 Seasons, available at* http:// www.ncaa. org/wps/wcm/connect/public/ncaa/health+and+safety/sports+injuries/resources/football+ injuries.

In sum, even apart from consideration of transformative elements, examination of the right of publicity in question also resolves the balance in favor of the First Amendment. The quantity of players involved dilutes the commercial impact of any particular player and the scope of the publicity right is significantly reduced by the fact that: (1) a player cannot own the individual, publicly available statistics on which the game is based; (2) the players are not identified in the game; and (3) NCAA college athletes do not have the right to license their names and likenesses, even if they chose to do so. [6]

6 While acknowledging that these considerations are relevant to the *Comedy III* analysis, the majority says EA's use of realistic likenesses demonstrates that it sees "value in having an avatar designed to mimic each individual player." Majority op. at 1276 n. 7. But the same is true of any right of

> publicity case. The defendants in *Winter* saw value in using comic book characters that resembled the Winter brothers. Andy Warhol—whose portraits were discussed in *Comedy III*—saw value in using images of celebrities such as Marilyn Monroe. In those cases, the products' marketability derives primarily from the creative elements, not from a pure commercial exploitation of a celebrity image. The same is true of *NCAA Football.*

II

Given the proper application of the transformative use test, Keller is unlikely to prevail. The balance of interests falls squarely on the side of the First Amendment. ***1290** The stakes are not small. The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble. The majority's holding that creative use of realistic images and personas does not satisfy the transformative use test cannot be reconciled with the many cases affording such works First Amendment protection.[7] I respectfully disagree with this potentially dangerous and out-of-context interpretation of the transformative use test.

7

See, e.g., ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir.2003) (affording First Amendment protection to an artist's use of photographs of Tiger Woods); J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8.65 (2013 ed.) (collecting cases); *Hart,* 717 F.3d at 173 (Ambro, J., dissenting) (describing cases).

For these reasons, I respectfully dissent.

All Citations

724 F.3d 1268, 107 U.S.P.Q.2d 1629, 13 Cal. Daily Op. Serv. 8156, 2013 Daily Journal D.A.R. 10,071

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Concepcion v. Office of Commissioner of Baseball, D.Puerto Rico, May 31, 2023

141 S.Ct. 2141
Supreme Court of the United States.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner
v.
Shawne ALSTON, et al.;
American Athletic Conference, et al., Petitioners
v.
Shawne Alston, et al.

Nos. 20–512 and 20–520
|
Argued March 31, 2021
|
Decided June 21, 2021 [1]

[1] Together with No. 20–520, *American Athletic Conference et al.* v. *Alston et al.,* also on certiorari to the same court.

Synopsis

Background: Current and former collegiate student-athletes who played football and basketball brought putative class action alleging that National Collegiate Athletic Association (NCAA) violated federal antitrust law by limiting compensation they could receive in exchange for their athletic services. Following bench trial, the United States District Court for the Northern District of California, Claudia Wilken, Senior District Judge, 375 F.Supp.3d 1058, entered judgment in plaintiffs' favor with respect to NCAA rules limiting education-related benefits, and, 2019 WL 1593939, ordered permanent injunction enjoining NCAA from limiting education-related benefits that member conferences or schools could provide. Student-athletes and NCAA appealed. The United States Court of Appeals for the Ninth Circuit, Thomas, Chief Judge, 958 F.3d 1239, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] rules limiting education-related benefits were subject to rule of reason analysis;

[2] District Court did not require NCAA, contrary to rule of reason analysis, to show that its rules constituted least restrictive means of preserving consumer demand;

[3] District Court did not engage in impermissible product redesign when analyzing rules under rule of reason; and

[4] scope of permanent injunction was appropriate.

Affirmed.

Justice Kavanaugh filed concurring opinion.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Permanent Injunction.

West Headnotes (25)

[1] **Antitrust and Trade Regulation** Sports

National Collegiate Athletic Association (NCAA) rules limiting education-related benefits for student-athletes who played football and basketball were subject to rule of reason analysis, rather than a quick look, under Sherman Act section prohibiting undue restraints of trade, even if NCAA was joint venture with its member conferences and schools and some degree of coordination between competitors within sports leagues could be procompetitive, since dispute was over whether and to what extent NCAA's restrictions on education-related compensation or benefits in its labor market yielded benefits to its consumer market that could be attained using substantially less restrictive means, and such dispute presented complex questions requiring more than a blink to answer. Sherman Act § 1, 15 U.S.C.A. § 1.

5 Cases that cite this headnote

[2] **Antitrust and Trade Regulation** Rule of reason

Antitrust and Trade Regulation Antitrust Law and Joint Ventures

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which is a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition, especially its capacity to reduce output and increase price. Sherman Act § 1, 15 U.S.C.A. § 1.

16 Cases that cite this headnote

[3] **Antitrust and Trade Regulation** "Quick look" and other tests

For those restraints of trade at opposite ends of the competitive spectrum—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

9 Cases that cite this headnote

[4] **Antitrust and Trade Regulation** Illegal Restraints or Other Misconduct

Some restraints of trade may be so obviously incapable of harming competition that they require little scrutiny under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

5 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Per se

Antitrust and Trade Regulation "Quick look" and other tests

Some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look under the Sherman Act section prohibiting undue restraints of trade. Sherman Act § 1, 15 U.S.C.A. § 1.

16 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Sports

While a quick look will often be enough to approve the restraints necessary to produce a game within a sports league under the Sherman Act, a fuller review may be appropriate for other restraints. Sherman Act § 1, 15 U.S.C.A. § 1.

2 Cases that cite this headnote

[7] **Antitrust and Trade Regulation** Relevant Market

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities.

3 Cases that cite this headnote

[8] **Antitrust and Trade Regulation** Purpose of Antitrust Regulation

The policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Purpose of Antitrust Regulation

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[10] **Antitrust and Trade Regulation** Antitrust Exemptions and Defenses

An argument that a particular industry should be exempt from the usual operation of the antitrust laws because of the special characteristics of the industry is properly addressed to Congress.

1 Case that cites this headnote

[11] **Antitrust and Trade Regulation** Purpose of Antitrust Regulation

The Sherman Act is predicated on one assumption alone—that competition is the best method of allocating resources in the national economy. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[12] **Antitrust and Trade Regulation** Presumptions and burden of proof

An antitrust plaintiff has the initial burden under a rule of reason analysis to prove that the challenged restraint has a substantial anticompetitive effect, and should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint, and if the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

17 Cases that cite this headnote

[13] **Antitrust and Trade Regulation** Rule of reason

What is required under a rule of reason analysis to assess whether a challenged restraint harms competition can vary depending on the circumstances; the whole point of the rule of reason is to furnish an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful.

14 Cases that cite this headnote

[14] **Antitrust and Trade Regulation** Sports

District Court did not require National Collegiate Athletic Association (NCAA), contrary to rule of reason analysis under Sherman Act, to show that its rules limiting education-related benefits for student-athletes who played football and basketball constituted least restrictive means of preserving consumer demand for amateur athletics; District Court found rules in violation of Sherman Act only after requiring student-athletes to show that there were substantially less restrictive alternative rules that would achieve procompetitive benefits that NCAA had demonstrated. Sherman Act § 1, 15 U.S.C.A. § 1.

9 Cases that cite this headnote

[15] **Antitrust and Trade Regulation** Rule of reason

Courts performing a rule of reason analysis of a challenged restraint under the Sherman Act should not second-guess degrees of reasonable necessity so that the lawfulness of the conduct turns upon judgments of degrees of efficiency. Sherman Act § 1, 15 U.S.C.A. § 1.

5 Cases that cite this headnote

[16] **Antitrust and Trade Regulation** Protection of competition rather than competitors

Even under the best of circumstances, applying the antitrust laws can be difficult, and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect.

2 Cases that cite this headnote

[17] **Antitrust and Trade Regulation** Sports

District Court did not engage in impermissible product redesign when analyzing whether National Collegiate Athletic Association (NCAA) rules limiting education-related benefits for student-athletes who played football and basketball violated Sherman Act section prohibiting restraints of trade under rule of reason; while NCAA had substantial latitude to fashion rules that served legitimate business interests, District Court was not required to defer to NCAA's conception of amateurism, and District Court's findings that NCAA had not adopted any consistent definition of amateurism, that it adopted rules without any reference to considerations of consumer demand, and that rules were not necessary to preserve consumer demand were straightforward application of rule of reason. Sherman Act § 1, 15 U.S.C.A. § 1.

6 Cases that cite this headnote

[18] **Antitrust and Trade Regulation** Illegal Restraints or Other Misconduct

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests, including agreements that may include efforts aimed at introducing a new product into the marketplace; but none of that means a party can relabel a restraint as a product feature and declare it immune from scrutiny under the Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

1 Case that cites this headnote

[19] **Antitrust and Trade Regulation** Injunction

Scope of permanent injunction prohibiting National Collegiate Athletic Association (NCAA) from enforcing rules that limited education-related compensation or benefits that member conferences or schools could provide to student-athletes who played football and basketball was appropriate, as remedy for Sherman Act violation; District Court only enjoined restraints on education-related benefits after finding that relaxing such restrictions would not blur distinction between college and professional sports, injunction did not stop NCAA from continuing to prohibit compensation from any entity other than member conferences or schools, and injunction allowed NCAA to define which benefits did and did not relate to education. Sherman Act § 1, 15 U.S.C.A. § 1.

6 Cases that cite this headnote

[20] **Antitrust and Trade Regulation** Damages and Other Relief

In crafting antitrust remedies, judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition.

1 Case that cites this headnote

[21] **Antitrust and Trade Regulation** Damages and Other Relief

Judges must be wary when crafting antitrust remedies of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts.

[22] **Antitrust and Trade Regulation** Damages and Other Relief

Judges must be open to reconsideration and modification of antitrust remedies in light of changing market realities.

1 Case that cites this headnote

[23] **Antitrust and Trade Regulation** Damages and Other Relief

No court should impose a duty when crafting an antitrust remedy that it cannot explain or adequately and reasonably supervise.

1 Case that cites this headnote

[24] **Antitrust and Trade Regulation** Damages and Other Relief

Judges crafting antitrust remedies must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives.

1 Case that cites this headnote

[25] **Antitrust and Trade Regulation** Damages and Other Relief

Judges crafting antitrust remedies must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare.

****2144** *Syllabus* [*]

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***69** Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on "amateur" student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U.S.C. § 1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court "struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." 958 F.3d 1239, 1263. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the rules that remain in place. The Court considers only the subset of NCAA rules restricting ***70** education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. —— – ——.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of* Okla., 468 U.S. 85, 104, n. 27, 104 S.Ct. 2948, 82 L.Ed.2d 70. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are "undue." *Ohio* v. *American Express Co.*, 585 U. S. ——, ——, 138 S.Ct. 2274, 2283, 201 L.Ed.2d 678. Whether a particular restraint is undue "presumptively" turns on an application of a "rule of reason analysis." *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ——, 138 S.Ct., at 2284. Pp. —— – —— .

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express*, 585 U. S., at ——, 138

S.Ct., at 2284. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or "quick look." See *Dagher*, 547 U.S. at 7, n. 3, 126 S.Ct. 1276; *Board of Regents*, 468 U.S. at 109, n. 39, 104 S.Ct. 2948. But not here. Pp. —— – —— .

(2) The NCAA next contends that the Court's decision in *Board of Regents* expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely consistent with the goals of the Sherman ***71** Act." *Id.*, at 120, 104 S.Ct. 2948. But that sort of passing comment on an issue not presented is not binding, nor is it dispositive here. Pp. —— – —— .

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not "commercial enterprises" but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 424, 110 S.Ct. 768, 107 L.Ed.2d 851. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that "the special characteristics of [the NCAA's] particular industry" should exempt it from the usual operation of the antitrust laws is "properly addressed to Congress." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 689, 98 S.Ct. 1355, 55 L.Ed.2d 637. Pp. —— – —— .

(b) The NCAA's remaining attacks on the district court's decision lack merit. Pp. —— – —— .

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. Rather, only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" did the district court find the restraints unlawful. Pp. —— – —— .

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." But a party cannot declare a restraint "immune from § 1 scrutiny" by relabeling it a product feature. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 199, n. 7, 130 S.Ct. 2201, 176 L.Ed.2d 947. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. Pp. —— – —— .

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will "micromanage" its business. Judges must indeed be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415, 124 S.Ct. 872, 157 L.Ed.2d 823. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this course ***72** represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. Pp. —— – —— .

958 F.3d 1239, affirmed.

GORSUCH, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

***73** ****2147** In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of* Okla., 468 U.S. 85, 104, n. 27, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). The plaintiffs before ***74** us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

****2148** I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852–1924, pp. 15–16 (1993). He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, Unpaid Professionals 6–7 (1999) (Zimbalist); Rushin, Inside the Moat, Sports Illustrated, Mar. 3, 1997. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, ***75** col. 2, and one student-athlete described the " 'junket' " as an experience " 'as unique and irreproducible as the Rhodian colossus,' " Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree of Doctor of Laws, Yale University Commencement, June 30, 1886, in Speeches by Oliver Wendell Holmes, p. 27 (1918), but it was football that really caused college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 ... in gate revenues." Zimbalist 7. Schools regularly had "graduate students and paid ringers" on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, The College Athlete, McClure's Magazine, June 1905, p. 124. The absence of academic residency requirements gave rise to " 'tramp athletes' " who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." *Ibid.* The next week, he "was back at West Virginia's law school." *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that " 'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.' " Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in ***76** 1905. *Id.*, at 8. President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes —admonishing that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, § 3 (1906); see also Proceedings of the Eleventh Annual Convention of the National ****2149** Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. *Id.*, at 87. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." *Id.*, at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." *Id.*, at xiv–xv. One coach estimated that a rival team "spent over $200,000 a year on players." Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because ***77** upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, 28 Stan. L. & Pol'y Rev. 181, 190 (2017). In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.' " Zimbalist 22–23. He reportedly said: " '[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.' " *Id.,* at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. *Ibid*. And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." ***78** *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 1063 (ND Cal. 2019) (hereinafter D. Ct. Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Curiae* 10. In ****2150** 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon* v. *National Collegiate Athletic Assn.*, 802 F.3d 1049, 1054–1055 (CA9 2015). The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits. D. Ct. Op., at 1064.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id.*, at 1072. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id.*, at 1072, n. 15. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id.*, at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id.*, at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments " 'incidental to athletics participation,' " including awards for "participation or ***79** achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id.,* at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. *Id.*, at 1074. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id.*, at 1069.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id.*, at 1063. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id.,* at 1090.

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id.,* at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id.,* at 1063; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference ***80** revenues exceeding $650 million that ****2151** year." D. Ct. Op., at 1063. All these amounts have "increased consistently over the years." *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between $2 to $5 million. *Ibid.* College athletic directors average more than $1 million annually. *Ibid.* And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million. *Id*., at 17–18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." D. Ct. Op., at 1062, 1065, n. 5. Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U.S.C. § 1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce ***81** these limits by punishing violations; and these limits "affect interstate commerce." D. Ct. Op., at 1066.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. This Court has "long recognized that in view of the common law and the law in this country when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.' " *Ohio* v. *American Express Co.*, 585 U. S. ––––, ––––, 138 S.Ct. 2274, 2283, 201 L.Ed.2d 678 (2018) (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006); *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 60–62, 31 S.Ct. 502, 55 L.Ed. 619 (1911). That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at –––– – ––––, 138 S.Ct., at 2284 (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.* (brackets and internal quotation marks omitted).

In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and ****2152** FBS football, wherein each class member participates in his or her sport-specific market." D. Ct. Op., at 1097. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id.*, at 1067. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id.*, at 1067, 1070. In short, the NCAA and its ***82** member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id.*, at 1070.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." *Id.*, at 1067. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." *Id.*, at 1097. In a market without the challenged restraints, the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." *Id.*, at 1068. "Student-athletes would receive offers that would more closely match the value of their athletic services." *Ibid.* And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. *Id.*, at 1067; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, D. Ct. Op., at 1070, n. 12, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive ***83** benefits in the consumer market —and the district court agreed to do so. *Id.*, at 1098.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id.*, at 1063–1064, 1072–1073; see also *supra,* at –––– – ––––. The court noted that the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon." D. Ct. Op., at 1070. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, *id.*, at 1074, noting the testimony of a former SEC commissioner that he's " 'never been clear on ... what is really meant by amateurism.' " *Id.*, at 1070–1071.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." *Id.*, at 1070. The court observed, for example, that the NCAA's "only economics expert on the issue of consumer demand" did not "study any standard measures of consumer demand" but instead simply "interviewed people connected with the NCAA and its schools, who were chosen for him by defense ****2153** counsel." *Id.*, at 1075. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id.*, at 1074, 1076. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would "not negatively affect consumer demand." *Id.*, at 1076. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." *Id.*, at 1082. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some ***84** role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id.*, at 1083.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the challenged set of rules." *Id.*, at 1104. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments ... could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id.*, at 1088. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." *Id.*, at 1083. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id.*, at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated ***85** to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet. for Cert. in No. 20–512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). *Id.,* at 168a–169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14–md–02541, ECF Doc. 1329, pp. 5–6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits " 'related to education.' " App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. And the court ****2154** explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id.*, at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both ***86** prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, Antitrust Law ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA ***87** suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, *e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321, 127 S.Ct. 1069, 166 L.Ed.2d 911 (2007); 2A Areeda & Hovenkamp ¶352c, pp. 288–289 (2014); 12 *id.*, ¶2011a, at 132–134.

****2155** Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off " sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12. But the parties before us do not pursue this line.

II

A

[1] With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20–512, p. 14, or a " 'quick look,' " Brief for Petitioners in No. 20–520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer ***88** consumers the benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See *Dagher*, 547 U.S. at 7, 126 S.Ct. 1276; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22–23, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

[2] But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express*, 585 U. S., at –––– – ––––, 138 S.Ct., at 2284 (internal quotation marks omitted).

[3] Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling of an eye.' " *Board of Regents*, 468 U.S. at 110, n. 39, 104 S.Ct. 2948 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); *American Needle, Inc. v. National Football League*, 560 U.S. 183, 203, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

[4] At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In ***89** ****2156** *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (CADC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market." *Id.*, at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 191 (CA7 1985) ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

[5] At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher*, 547 U.S. at 7, n. 3, 126 S.Ct. 1276; *California Dental Assn. v. FTC*, 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). Recognizing the inherent limits on a court's ability to master an entire industry —and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–887, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 975 (1986) (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra*, at –––– – –––– (further reasons for caution).

***90** None of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. See D. Ct. Op., at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U.S. at 101, 104 S.Ct. 2948 (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the " 'twinkling of an eye.' " *American Needle*, 560 U.S. at 203, 130 S.Ct. 2201.

[6] But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are." ****2157** *Id.*, at 199 n. 7, 130 S.Ct. 2201. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. See, *e.g.*, *Chicago Professional Sports Ltd. Partnership v. National Basketball Assn.*, 95 F.3d 593, 600 (CA7 1996) ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of ***91** sports teams to agree on a TV contract need not imply an ability to set wages for players").

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U.S. at 94, 104 S.Ct. 2948. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as " 'illegal *per se*.' " *Id.*, at 100, 104 S.Ct. 2948. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." *Id.*, at 101–102, 104 S.Ct. 2948. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust ***92** review as a path to condemnation, not salvation. *Id.*, at 109 n. 39, 104 S.Ct. 2948. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.*, at 120, 104 S.Ct. 2948.

See also *id.*, at 101, 102, 104 S.Ct. 2948 (the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the like"). On the NCAA's telling, ****2158** these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only assuming the reasonableness of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore ***93** procompetitive ...." *Id.*, at 117, 104 S.Ct. 2948 (emphasis added). Accordingly, the Court simply did not have occasion to declare—

nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

[7] Our confidence on this score is fortified by still another factor. Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g.,* *American Express Co.*, 585 U. S., at ––––, ––––, 138 S.Ct., at 2285; 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. D. Ct. Op., at 1064. It has increased the size of permissible benefits "incidental to athletics participation." *Id.*, at 1066. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id.*, at 1072. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than $13.5 billion. *Ibid.* From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to $1.1 billion. D. Ct. Op., at 1077, n. 20.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because we are final," *Brown* v. *Allen*, 344 U. S. 443, 540, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J., concurring in result), but those sorts of stray comments are neither.

***94** C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." Brief for Petitioner in No. 20–512, at 31. The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." *Id.*, at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See ****2159** D. Ct. Op., at 1066. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to maximize revenues." 468 U.S. at 100–101, n. 22, 104 S.Ct. 2948. Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade ***95** serve uniquely important social objectives beyond enhancing competition.

[8] Take two examples. In *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id.*, at 679–680, 98 S.Ct. 1355. This Court rejected that appeal as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.*, at 695, 98 S.Ct. 1355. The "statutory policy" of the Act is one of competition and it "precludes inquiry into the question whether competition is good or bad." *Ibid.* In *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. *Id.*, at 414, 110 S.Ct. 768. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: "The social justifications proffered for respondents' restraint of trade ... do not make it any less unlawful." *Id.*, at 424, 110 S.Ct. 768.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce —even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. *Id.*, at 208–209, 42 S.Ct. 465. But this Court has refused to extend *Federal Baseball*'s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as " 'unrealistic' " and " 'inconsistent' " and "aberration[al]." *Flood v. Kuhn*, 407 U.S. 258, 282, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972) (quoting *Radovich v. National Football League*, 352 U.S. 445, 452, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957)); see also Brief for Advocates for Minor Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). ***96** Indeed, as we have seen, this Court has already recognized that the NCAA itself *is* subject to the Sherman Act.

****2160 [9] [10] [11]** The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." *Flood*, 407 U.S. at 279, 92 S.Ct. 2099. The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." *National Soc. of Professional Engineers*, 435 U.S. at 689, 98 S.Ct. 1355. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, *e.g.*, 7 U.S.C. §§ 291–292 (agricultural cooperatives); 15 U.S.C. §§ 1011–1013 (insurance); 15 U.S.C. §§ 1801–1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy. *National Soc. of Professional Engineers*, 435 U.S. at 695, 98 S.Ct. 1355.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

[12] When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for " 'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " *American Express Co.*, 585 U. S., at ––––, 138 S.Ct., at 2284. As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Ibid.* If the ***97** defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*, at –––– – ––––, 138 S.Ct., at 2284

[13] These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at –––– – –––– . The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U.S. at 781, 119 S.Ct. 1604; see also, *e.g.*, *Leegin Creative*, 551 U.S. at 885, 127 S.Ct. 2705 (" '[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition' "); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104

S.Ct. 2731, 81 L.Ed.2d 628 (1984); 7 Areeda & Hovenkamp ¶1507a, at 442–444 (slightly different "decisional model" using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." D. Ct. Op., at 1067. This was no slight burden. According to ****2161** one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power ***98** to set wages in the market for student-athletes' labor —and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See D. Ct. Op., at 1067. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

[14] Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id.*, at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

[15] We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F.2d at 227; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, n. 29, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶1505b, at 435–436.

***99** **[16]** Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws " 'can be difficult' "—and mistaken condemnations of legitimate business arrangements " 'are especially costly, because they chill the very' " procompetitive conduct " 'the antitrust laws are designed to protect.' " *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to " '[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).

****2162** While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See D. Ct. Op., at 1070–1076, 1080–1083. Recall that the court found the NCAA failed "to establish that the challenged compensation rules ... have any direct connection to consumer demand." *Id.*, at 1070.

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" ***100** they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id.,* at 1082–1083. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." D. Ct. Op., at 1104. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, *e.g.,* 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints ***101** " 'patently and inexplicably stricter than is necessary' " to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. D. Ct. Op., at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

[17] In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. ****2163** Brief for Petitioner in No. 20–512, at 35–36.

[18] This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra*, at ––––, ––––. But none of that means a party can relabel a restraint as a product feature and declare it "immune from § 1 scrutiny." *American Needle*, 560 U.S. at 199, n. 7, 130 S.Ct. 2201. In this suit, as in any, the district court had to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by "substantially less restrictive alternative" means. D. Ct. Op., at 1104.

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. *Id.,* at 1070. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id.,* at 1071–1074. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations ***102** of consumer demand," *id.,* at 1100, and that some were "not necessary to preserve consumer demand," *id.,* at 1075, 1080, 1104. None of this is product redesign; it is a straightforward application of the rule of reason.

C

[19] Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20–512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id.*, at 50.

[20] **[21]** **[22]** **[23]** Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. See *supra*, at ––––, ––––. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko*, 540 U.S. at 415, 124 S.Ct. 872. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra*, at –––– – ––––. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U.S. at 408, 124 S.Ct. 872. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." *California Dental*, 526 U.S. at 781, 119 S.Ct. 1604. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U.S. at 415, 124 S.Ct. 872. Nor should any court " 'impose a ***103** duty ... that it cannot explain or adequately and reasonably supervise.' " *Ibid.* In short, judges make for poor "central planners" and ****2164** should never aspire to the role. *Id.*, at 408, 124 S.Ct. 872.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. D. Ct. Op., at 1104–1105.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. D. Ct. Op., at 1104; App. to Pet. for Cert. in No. 20–512, at 168a–169a, ¶5. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id.,* at 169a–170a, ¶¶6–7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related ***104** benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships "at a sneaker company or auto dealership" with extravagant salaries as a "thinly disguised vehicle" for paying professional-level salaries. Brief for Petitioner in No. 20–512, at 37–38.

This argument rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits "that may be made available *from conferences or schools*." App. to Pet. for Cert. in No. 20–512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction "does not stop the NCAA from continuing to prohibit compensation from" sneaker companies, auto dealerships, boosters, "or anyone else." Brief for Respondents 47–48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only "a conference or institution" may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14–md–02541, ECF Doc. 1302–2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league room to police phony internships. As we've observed, the ****2165** district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships ***105** however they wish. *Id.,* at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *Id.,* at 168a–169a, ¶5; D. Ct. Op., at 1104. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20–512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team *achievement*" and that "[m]ost ... are received by only a few student-athletes each year." *Ibid.* Meanwhile, the NCAA says, the district court's decree would allow a school to pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." D. Ct. Op., at 1088. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules —and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses on allowing schools to offer scholarships for ***106** "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20–512, at 167a–168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes " 'luxury cars' " "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20–512, at 48–49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns ****2166** in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

[24] **[25]** When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations —as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering ***107** their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: " 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.' " 958 F.3d at 1265. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

Justice KAVANAUGH, concurring.
The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the ***108** Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions ****2167** under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined." *Ante,* at ——.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. The Court makes clear that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of* Okla., 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. ***109** *Ante,* at ——. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante,* at —— – —— ; see also *Radovich v. National Football League*, 352 U.S. 445, 449–452, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957). As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny. See *ante,* at —— – —— .

Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality:

The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in ***110** order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook ****2168** antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, *e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006). Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay ***111** student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–237, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996); *Wood v. National Basketball Assn.*, 809 F.2d 954, 958–963 (CA2 1987) (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series ****2169** in Oklahoma City and Omaha; the list goes on. But ***112** those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

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San Jose Division.

Phil MICKELSON, et al., Plaintiffs,
v.
PGA TOUR, INC., Defendant.

Case No. 22-cv-04486-BLF
|
Signed August 10, 2022

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ORDER DENYING PLAINTIFFS TALOR GOOCH, HUDSON SWAFFORD, AND MATT JONES'S MOTION FOR TEMPORARY RESTRAINING ORDER

[Re: ECF No. 2]

BETH LABSON FREEMAN, United States District Judge

***1** Three elite golfers who joined LIV Golf, accepting lucrative signing deals, now seek this Court's protection from tournament suspensions imposed by PGA TOUR under the terms of the TOUR regulations the golfers previously agreed to. That emergency request is DENIED.

Before the Court is Plaintiffs Talor Gooch, Hudson Swafford, and Matt Jones's (collectively, "TRO Plaintiffs") motion for temporary restraining order in this antitrust and breach of contract case against Defendant PGA Tour, Inc. ("PGA TOUR"). TRO Plaintiffs are three of the eleven Plaintiffs, who are all professional golfers and PGA TOUR members. Plaintiffs are suing PGA TOUR for its conduct related to Plaintiffs' involvement with LIV Golf, a recently established competing golf league financed by Saudi Arabia's sovereign wealth fund that has held events in and outside of the United States. PGA TOUR allegedly used its regulations to exclude LIV Golf from the elite professional golf market and keep players from contracting with LIV Golf, including via 2-year suspensions from PGA TOUR events and threats of lifetime bans from the PGA TOUR. Plaintiffs assert claims under (1) Section 1 of the Sherman Act, 15 U.S.C. § 1, based on PGA TOUR's alleged group boycott alongside the DP Tour (the "European Tour") of LIV Golf and its players; (2) Section 2 of the Sherman Act, 15 U.S.C. § 2, based on PGA TOUR's unlawful maintenance of a monopsony over elite professional golf; and (3) California's Cartwright Act, Cal. Bus. & Profs. C. §§ 16720(a), 16726. Plaintiffs further assert a breach of contract claim, arguing that PGA TOUR violated its own regulations by suspending Plaintiffs and declining to stay their suspensions pending their appeal through PGA TOUR's internal disciplinary process. TRO Plaintiffs seek an order enjoining PGA TOUR from continuing to suspend TRO Plaintiffs pending the appeal of their suspensions so that TRO Plaintiffs can play in the PGA TOUR's FedExCup Playoffs, which begin on August 11, 2022. *See* Motion, ECF No. 2. PGA TOUR opposes TRO Plaintiffs' motion. *See* Opposition, ECF No. 50. The Court held a hearing on TRO Plaintiffs' motion on August 9, 2022.

Based on the below reasoning, the Court hereby DENIES TRO Plaintiffs' motion WITHOUT PREJUDICE to filing a motion for preliminary injunction.

I. BACKGROUND

A. PGA TOUR, Plaintiffs, and LIV Golf

PGA TOUR is a Maryland 501(c)(6) non-profit corporation that sponsors an annual series of golf tournaments primarily in the United States from September to September each year called the PGA Tour. The PGA Tour is the largest professional golf tour in the world, and prior to LIV Golf's entry, it was the only tour for elite golfers in the United States. *See* Leitzinger Decl., ECF No. 2-13 ¶ 18. PGA TOUR golfers are independent contractors who pay their own expenses and are compensated through prize money. *See, e.g.*, Gooch Decl., ECF No. 2-11 ¶ 40. Plaintiffs are some of the world's top-ranked golfers and members of PGA TOUR. Mr. Gooch is currently ranked 20th in the 2022 FedExCup season standings; Mr. Jones is ranked 62nd; and Mr. Swafford is ranked 63rd. *See* Brass Decl., ECF No. 2-2, Ex. 40.

***2** The PGA TOUR regular season culminates in the FedExCup Playoffs in August, for which the top 125 players qualify to compete. *See* Brass Decl., ECF No. 2-2, Ex. 39. The top 30 players in the FedExCup Playoffs qualify to play in the Majors—a series of four prestigious championship events (Masters, PGA Championship, U.S. Open, and The Open)—the following year. *See id.* The top 75 players in the FedExCup Playoffs qualify for the following years' PGA Tour Invitationals. *See id.* This year's FedExCup Playoffs begin on August 11, 2022. TRO Plaintiffs—along with four other Plaintiffs who do not seek a temporary restraining order (Jason Kokrak, Abraham Ancer, Carlos Ortiz, and Pat Perez) —qualified for this year's FedExCup Playoffs. *See* Levinson Decl., ECF No. 50-4 ¶ 97.

LIV Golf was established with plans to set up a rival golf league to the PGA TOUR with 48 of the world's top golfers. *See* Khosla Decl., ECF No. 2-12 ¶ 8. LIV Golf touts that its events offer an "extremely fan-friendly" change from the established PGA TOUR model, including larger rewards or "purses;" a team-based tournament format; and no "cut," such that all golfers receive a monetary reward for participating in events. *See id.* ¶¶ 8, 11–17; Brass Decl., ECF No. 2-2, Exs. 41–42. In 2022, LIV Golf scheduled its first series of events—the LIV Golf Invitational Series, a series of eight events starting in June 2022. *See* Khosla Decl., ECF No. 2-12 ¶ 16. The first event was held in London from June 9–11, 2022; the second was held in Portland, Oregon from June 30 to July 2, 2022; and the third was held in Bedminster, New Jersey from July 29–31, 2022. *See id.* At present, golfers do not earn Official World Golf Ranking ("OWGR") points—which are used to qualify in a variety of elite golf events—by participating in LIV Golf events, although this may change in the future. *See, e.g.*, Leitzinger Decl., ECF No. 2-13 ¶ 69.

B. PGA TOUR Regulations

PGA TOUR golfers are required to comply with the TOUR's regulations (the "PGA TOUR Regulations"). *See* PGA TOUR Regulations, ECF No. 1-1. The "Media Rights Regulation"—Section V.B.1.b—prohibits participating in any live or recorded golf program not sponsored by PGA TOUR without the prior written approval of the Commissioner. *See id.* § V.B.1.b. The "Conflicting Events Regulation"—Section V.A.2–3—prohibits PGA TOUR members from (1) playing in any other golf tournament in North America during any week when PGA TOUR sponsors or co-sponsors an event and (2) playing in any events *outside of* North America during any week when PGA TOUR sponsors or co-sponsors an event unless the PGA TOUR Commissioner grants a release—three of which a player can request per year. *See id.* §§ V.A.2–3. Further, the PGA TOUR Regulations prohibit "conduct unbecoming a professional golfer." *See id.* § VII.C.

For PGA TOUR members who violate the Regulations, the Regulations outline a disciplinary process. *See id.* § VII. The Regulations define three classes of penalties—minor, intermediate, and major—and indicate that any member subject to intermediate or major penalties shall first be notified in writing. *See id.* § VII.A. Members are required to submit to the Commissioner facts or evidence of mitigating circumstances within 14 days of the notification, and the Commissioner will notify the member of the imposition of any penalty within an additional 14 days. *See id.* Upon imposition of any penalty, a member can appeal to the Commissioner within 14 days, and the Commissioner may transfer the appeal to the Appeals Committee if he "deems it in the best interest of PGA TOUR." *See id.* § VII.E. The Regulations provide that "[a]n appeal shall operate to stay the effective date of any penalty, except suspension from a tournament then in progress or scheduled for the calendar week in which the alleged violation occurred, until after the final decision on the appeal." *See id.* § VII.E.2. The Regulations further provide that a member can be placed on probation for an infraction, such that if the member violates any rule during the probation period, "irrespective of whether that violation carries with it a penalty designated minor, intermediate or major ... the Commissioner may immediately suspend the member's playing privileges." *See id.* § VII.C.

C. TRO Plaintiffs' Alleged Infractions and Disciplinary Process

***3** While remaining PGA TOUR members, TRO Plaintiffs signed contracts to join LIV Golf's newly established league in 2022. *See* Peters Decl., ECF No. 50-1, Exs. 2–4. Before participating in the first LIV Golf Invitational Series in London, TRO Plaintiffs Gooch and Jones requested a release under the Conflicting Events Regulation, but the requests were denied on May 10, 2022. *See* Gooch Decl., ECF No. 2-11 ¶ 19; Jones Decl., ECF No. 2-10 ¶ 19. TRO Plaintiffs nonetheless participated in the first three events of the LIV Golf Invitational Series. *See* Peters Decl., ECF No. 50-1, Exs. 2–4; Gooch Decl., ECF No. 2-11 ¶¶ 29–30; Jones Decl., ECF No. 2-10 ¶¶ 28, 31; Swafford Decl., ECF No. 2–9 ¶¶ 28, 31.

On June 1, 2022, PGA TOUR sent TRO Plaintiffs a letter indicating that it considered them in violation of the Conflicting Events Regulation based on their upcoming participation in the first LIV Golf Invitational Series event. *See, e.g.*, Jones Decl., ECF No. 2-10, Ex. B. On June 1 and 2, 2022, Mr. Gooch communicated with a Tour representative who told him that if a player chooses to play in LIV Golf events, "he should not expect to be welcomed back." *See* Gooch Decl., ECF No. 2-11, Ex. C. On June 3, 2022, PGA TOUR sent TRO Plaintiffs a letter indicating that they were "being placed on probation until further notice" under Article VII, Section C of the PGA TOUR Regulations based on TRO Plaintiffs' violation of the Conflicting Events Regulation. *See, e.g.*, Swafford Decl., ECF No. 2-9, Ex. A. On June 9, 2022, shortly after TRO Plaintiffs teed off in the first LIV Golf Invitational Series event in London, PGA TOUR notified TRO Plaintiffs that they had violated the Media Rights Regulation while on probation and were suspended immediately from playing in PGA TOUR events "until further notice" under Article VII, Section C of the PGA TOUR Regulations. *See, e.g.*, Gooch Decl., ECF No. 2-11 ¶ 29. At the start of the second LIV Golf Invitational Series event in Portland, Oregon, PGA TOUR sent TRO Plaintiffs another disciplinary notice regarding their participation in the Portland event. *See, e.g.*, Gooch Decl., ECF No. 2-11, Ex. I.

On June 30, 2022, PGA TOUR notified TRO Plaintiffs that based on their participation in the first LIV Golf Invitational Series event, the PGA TOUR would suspend TRO Plaintiffs from playing in PGA TOUR events through March 31, 2023. *See, e.g.*, Gooch Decl., ECF No. 2-11, Ex. G. On July 13, 2022, TRO Plaintiffs appealed the June 30, 2022 disciplinary action, indicating that their suspensions should be stayed pending appeal under Section VII.E.2 of the PGA TOUR Regulations. *See, e.g.*, Gooch Decl., ECF No. 2-11, Ex. J. On July 23, 2022, PGA TOUR notified TRO Plaintiffs that they were suspended through March 31, 2024 based on their participation in the second LIV Golf Invitational Series event. *See, e.g.*, Gooch Decl., ECF No. 2-11, Ex. B. On July 27, 2022, PGA TOUR Commissioner Jay Monahan notified TRO Plaintiffs that he was referring TRO Plaintiffs' appeals to the Appeals Committee. *See* Gooch Decl., ECF No. 2-11 ¶ 35. On August 1, 2022, Mr. Gooch asked a PGA TOUR representative if his suspension would be stayed pending his appeal. *See* Gooch Decl., ECF No. 2-11, Ex. L. On August 2, 2022, PGA TOUR and its counsel notified Mr. Gooch that his July 13, 2022 appeal does not effectuate a stay of his suspension under Article VII, Section C of the PGA TOUR Regulations, because any "interim suspension under Section C is separate and distinct from any 'penalty' that may be imposed by the Commissioner," and only such penalties are stayed pending appeal. *See* Gooch Decl., ECF No. 2-11, Exs. M–N.

D. Filing of Action and Motion for Temporary Restraining Order

***4** The above-captioned action and TRO Plaintiffs' motion was filed on August 3, 2022. *See* ECF Nos. 1–2. TRO Plaintiffs seek an order enjoining PGA TOUR from prohibiting them from playing in the FedExCup Playoffs starting August 11, 2022. *See* Proposed Order, ECF No. 56 ¶ 2.

First, TRO Plaintiffs argue that the Court should grant the TRO based on their breach of contract claim. TRO Plaintiffs allege that PGA TOUR is in breach of Article VII, Section E of the PGA TOUR Regulations by failing to stay their suspensions pending appeal. *See* Motion, ECF No. 2 at 11–12.

Second, TRO Plaintiffs argue that the Court should grant the TRO based on their antitrust claims. Plaintiffs' Sherman Act § 2 claim for unlawful maintenance of monopoly is based on PGA TOUR's alleged efforts to maintain its position as a monopsonist—a buy-side monopolist—for the services of professional golfers for elite golf events. Relying on a declaration from their expert Jeffrey Leitzinger, PhD, *see* ECF No. 2-13, TRO Plaintiffs argue that PGA TOUR's monopsony power is supported by evidence that PGA TOUR has increased player pay in response to LIV Golf's entry, indicating that it has been paying PGA TOUR members sub-competitively. *See* Motion, ECF No. 2 at 12–14 (citing Leitzinger Decl., ECF No. 2-13 ¶¶ 54–61). TRO Plaintiffs further argue that PGA TOUR has unlawfully maintained its monopsony through its Media Rights and Conflicting Events Regulations, which limit golfer output and threaten the viability of competitors like LIV Golf by restricting the availability of elite golfer talent. *See id.* at 14–17. Additionally, TRO Plaintiffs argue that the unlawfulness of these provisions is evidenced by how PGA TOUR has arbitrarily denied releases for Tour members to play in LIV Golf events and has otherwise used penalties and threats of penalties based on these provisions as a cudgel to dissuade PGA TOUR member attrition to LIV Golf. *See id.* at 15–16. TRO Plaintiffs argue that there is no procompetitive justification for PGA TOUR's conduct, including because such conduct degrades PGA TOUR's product by forcing golfers to sit on the sidelines. *See id.* at 17–19.

Plaintiffs' Sherman Act § 1 claim alleges that PGA TOUR has entered a "strategic alliance" with the European Tour to refuse to deal with LIV Golf and its players. *See* Motion, ECF No. 2 at 19–20 (citing Brass Decl., ECF No. 2-2, Ex. 22). TRO Plaintiffs assert that such conduct is a *per se* violation of the Sherman Act. *See id.* At the hearing on August 9, 2022, TRO Plaintiffs also argued that PGA TOUR's group boycott conduct constituted a rule of reason violation, as briefed in a footnote in TRO Plaintiffs' motion. *See* Motion, ECF No. 2 at 19 n.7.

PGA TOUR opposes TRO Plaintiffs' motion, arguing that TRO Plaintiffs have not established any of the elements necessary to meet the standard for a temporary restraining order. *See* Opposition, ECF No. 50.

II. LEGAL STANDARD

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001); *Lockheed Missile & Space Co. v. Hughes Aircraft*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking emergency injunctive relief must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "[I]f a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks and citations omitted).

III. DISCUSSION

A. Irreparable Harm

***5** The Court first considers whether TRO Plaintiffs have adequately shown irreparable harm. *Winter*, 555 U.S. at 20. TRO Plaintiffs argue that they will suffer irreparable harm based on their suspension from participating in the FedExCup Playoffs, because the Playoffs are professional golf's "Super Bowl." If TRO Plaintiffs are not allowed to participate in the FedExCup Playoffs, then they will lose the opportunity to qualify for the 2023 Majors and other premier tournaments; lose opportunities to accumulate OWGR points; lose income earning opportunities; and suffer losses to goodwill, reputation, and brand. *See* Gooch Decl., ECF No. 2-11 ¶¶ 42–46; Swafford Decl., ECF No. 2-9 ¶¶ 41–46; Jones Decl., ECF No. 2-10 ¶¶ 41–46. At the August 9, 2022 hearing, TRO Plaintiffs further emphasized that the FedExCup Playoffs come with particularly significant income opportunities, including up to around $20 million in individual earnings. TRO Plaintiffs cite to cases in which courts have found irreparable harm where a sports player was prevented from playing professionally or playing as he or she saw fit. *See* *Jackson v. NFL*, 802 F.Supp. 226, 231–35 (D. Minn. 1992); *O.M. by & through Moultrie v. Nat'l Women's Soccer League, LLC*, 544 F.Supp.3d 1063, 1077 (D. Or. 2021); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F.Supp. 1049, 1057 (C.D. Cal. 1971); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1319–20 (D. Conn. 1977). Additionally, at the August 9, 2022 hearing, TRO Plaintiffs argued that they did not delay seeking relief, because August 2, 2022—the day before TRO Plaintiffs filed their motion—was the first time PGA TOUR asserted that it was not staying TRO Plaintiffs' suspensions pending appeal.

In response, PGA TOUR argues that TRO Plaintiffs' delay in seeking relief undermines their claim of irreparable harm.

See Opposition, ECF No. 50 at 12. PGA TOUR argues that TRO Plaintiffs failed to seek a TRO until two months after they were notified of their suspensions. *See id.* Further, PGA TOUR argues that TRO Plaintiffs' asserted irreparable harm boils down to either easily calculable monetary injury or speculative reputational harm—neither of which is sufficient to show irreparable harm. *See* *id.* at 12–14. PGA TOUR argues that tournaments and points are "merely means to earn financial and reputational rewards." *See* *id.* at 12. PGA TOUR asserts that courts regularly award compensation for lost income, including projected future income. *See* *id.* at 14. As evidence that the cost of TRO Plaintiffs' lost opportunities are calculable, PGA TOUR points out that TRO Plaintiffs' expert opines that golfers have calculated those costs in determining the size of upfront payments necessary to woo them to LIV Golf. *See* Leitzinger Decl., ECF No. 2-13 ¶ 9. As to reputational harm, PGA TOUR argues that TRO Plaintiffs have provided only boilerplate claims of harm, which is insufficient. *See* Opposition, ECF No. 50 at 15. Additionally, PGA TOUR argues that the fact that only three of seven Plaintiffs that qualify for the FedExCup Playoffs are moving for a temporary restraining order suggests that any injury to TRO Plaintiffs is not irreparable. *See* *id.* at 15–16. PGA TOUR supports its contention that TRO Plaintiffs have failed to show irreparable harm with cases in which courts have found a lack of irreparable harm where a professional sports player is barred from playing in one professional sports league but is free to play professionally in a separate league. *See* *Heldman v. United States Lawn Tennis Ass'n*, 354 F.Supp. 1241, 1251 (S.D.N.Y. 1973); *Elite Rodeo Ass'n v. Prof. Rodeo Cowboys Ass'n, Inc.*, 159 F.Supp.3d 738, 745 (N.D. Tex. 2016).

As to the timeliness of TRO Plaintiffs' motion, the Court agrees with TRO Plaintiffs. Although the claim would have been ripe upon receipt of the initial suspension on June 9, 2022, TRO Plaintiffs have demonstrated the reasonableness of their decision to withhold filing this motion until PGA TOUR confirmed that it would not grant a stay of the suspensions on August 2, 2022. Since TRO Plaintiffs filed their motion on August 3, 2022—the day after the relevant date—the Court finds that TRO Plaintiffs timely sought relief.

As to whether TRO Plaintiffs have adequately shown irreparable harm, the Court agrees with PGA TOUR. TRO Plaintiffs are not barred from playing professional golf against the world's top players, [1] from earning lucrative prizes in some of golf's highest-profile events, from earning sponsorships, or from building a reputation, brand, and fan following in elite golf. *See, e.g.*, Khosla Decl., ECF No. 2-12 ¶¶ 11–13. The only thing TRO Plaintiffs are barred from is pursuing these goals *at PGA TOUR events.* Considering the major playing and earning opportunities still open to TRO Plaintiffs as LIV Golf players, the Court finds that the suspension from PGA TOUR events is not enough to show irreparable harm. *See, e.g., Heldman*, 354 F.Supp. at 1251 (no irreparable harm to tennis player given that "other tournament opportunities may be lost to her" where she "saw a valuable opportunity in [competitor] plaintiff's contract and opted for it; she has available to her the chance to win large sums of prize money and with that the subsequent opportunities of endorsements that accrue to athletic stars"); *Elite Rodeo*, 159 F.Supp.3d at 746 (no irreparable harm where plaintiffs "are unable to compete in the PRCA because they own and are competing professionally in the competing ERA, arguably at a higher level of competition, and which they claim will lead to increased exposure to fans, improved ability to attract sponsors, better health, and longer careers").

1 PGA presented evidence at the August 9, 2022 hearing that of the top ten PGA TOUR players in 2021, half of them are now LIV Golf players.

***6** The Court recognizes that if TRO Plaintiffs are not allowed to play in the 2022 FedExCup Playoffs, TRO Plaintiffs will lose the opportunity to qualify for next year's Majors and several other high-profile tournaments. The Court accepts that the FedExCup Playoffs are a major tournament of the year, and that they serve as a gateway to the Majors, future sponsorships, and career status. Further, the Court acknowledges that TRO Plaintiffs each had a reasonable opportunity to make it into the top 30 or top 75 golfers in the 2022 FedExCup Playoffs. Nonetheless, the Court finds that these facts are not sufficient to show irreparable harm. TRO Plaintiffs each knew, going into negotiations with LIV Golf, that they were virtually certain to be cut off from TOUR play. TRO Plaintiffs' own expert indicated that PGA TOUR members that have "already elected to participate in LIV Golf events" required "large upfront payments" at least in part because their calculus included the "loss of opportunities to earn ranking points [and] to earn entry into the Majors." *See* Leitzinger Decl., ECF No. 2-13 ¶ 9. Based on this evidence, TRO Plaintiffs have not even shown that they have been harmed—let alone irreparably. It is clear that the LIV Golf contracts negotiated by the TRO Plaintiffs and consummated between the parties were based on the players' calculation of what they would be leaving behind and the amount of money they would need to compensate for those losses. TRO Plaintiffs have signed contracts that richly reward them for their talent and compensate for lost opportunity through TOUR play. In fact, the evidence shows almost without a doubt that they will be earning significantly more money with LIV Golf than they could reasonably have expected to make through TOUR play over the same time period.

Further, TRO Plaintiffs' contention that they will irreparably lose future sponsorship opportunities and career status is undermined by TRO Plaintiffs' evidence that LIV Golf offers a refreshing new "extremely fan-friendly" business model that will lead to "an improved broadcast output and entertainment experience" compared to the staid old golf world built by PGA TOUR. *See* Khosla Decl., ECF No. 2-12 ¶¶ 11–13; *see also* Complaint, ECF No. 1 ¶¶ 49–57 ("Elite Professional Golf Has Stagnated Under the PGA Tour's Monopoly"). If LIV Golf is elite golf's future, what do TRO Plaintiffs care about the dust-collecting trophies of a bygone era?

The Court further appreciates the ample case law TRO Plaintiffs have presented where courts have found irreparable harm based on professional sports players being barred from play. However, the Court finds persuasive Judge Lynn's reasoning in the *Elite Rodeo* case that "[i]n cases recognizing lost playing time alone as constituting irreparable harm, athletes were entirely locked out of their sports"—a fate that has not befallen TRO Plaintiffs given their continued involvement with LIV Golf. *See* 159 F.Supp.3d at 745; *O.M., by and through Moultrie v. Nat'l Women's Soccer League, LLC*, 541 F.Supp.3d 1171, 1184 (D. Or. 2021) ("[T]here are no substitutes to actual professional competition to help [plaintiff] realize her full potential."); *Linseman*, 439 F.Supp. at 1319 ("The nature of [hockey player's] occupation is it requires constant practice against the very best competition possible in order to finely hone his hockey skills."); *Denver Rockets*, 325 F.Supp. at 1057 ("If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of highlevel [sic] competition[.]"). TRO Plaintiffs' other cases involve harms and issues not present in the above-captioned case. *See* *Gilder*, 936 F.2d at 423 (irreparable harm where a PGA TOUR ban on clubs will have an "unquantifiable adverse impact on [golfers'] earnings, their ability to maintain their eligibility for the tour, and for endorsement contracts"); *Jackson*, 802 F.Supp. at 231 (irreparable harm given players' "inability to play for teams that may better utilize their skills, and thus maximize their value, [and] their inability to switch to teams that would allow them to start or [ ] to play on natural grass (which may prolong a player's career), may be impossible to quantify in monetary terms"); *see also* *Elite Rodeo*, 159 F.Supp.3d at 746 n.36 ("Such demonstrated harms [as were at issue in *Jackson*] were not proven here."). And to the extent that the case law supports irreparable harm based on a professional sports player's lost opportunity to become a "superstar," the Court finds that there is evidence to suggest that superstar status is still available—potentially even *more* available—to TRO Plaintiffs in LIV Golf's "extremely fan-friendly" league. *See* Khosla Decl., ECF No. 2-12 ¶¶ 11–13.

***7** Based on the above reasoning, the Court finds that TRO Plaintiffs have failed to meet their burden of showing irreparable harm.

B. Likelihood of Success on the Merits

Since the Court finds that TRO Plaintiffs have failed to show irreparable harm, the Court does not need to reach the issue of whether TRO Plaintiffs have shown a likelihood of success on the merits. Nonetheless, as it did at the August 9, 2022 hearing, the Court will provide a brief summary of its impressions of the merits of TRO Plaintiffs' claims at this stage.

As a threshold matter, the Court determines whether TRO Plaintiffs are seeking a mandatory or a prohibitory injunction, since this impacts the applicable standard for satisfying the likelihood of success on the merits requirement. *See, e.g.,* *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) ("Because [plaintiff] seeks a mandatory injunction, she must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed.") (emphasis in original). A mandatory injunction goes beyond simply maintaining the status quo, *i.e.* "the state of affairs 'at the time the complaint was filed.' " *Animal Legal Def. Fund v. U.S.D.A.*, No. 17–cv–00949–WHO, 2017 WL 2352009, at *3 (N.D. Cal. May 31, 2017); *see also* *N.D. ex rel. Parents v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1112 n. 6 (9th Cir. 2010) ("The status quo means the last, uncontested status which preceded the pending controversy."). Here, TRO Plaintiffs seek to "enjoin[ ] [PGA TOUR] from prohibiting [TRO Plaintiffs] from playing in the FedExCup Playoffs." *See* Proposed Order, ECF No. 56 ¶ 2. At the time TRO Plaintiffs filed their Complaint, they had been suspended for over one month from playing in PGA TOUR events and their disciplinary action was pending appeal. Whether they would be granted a stay was unclear. Accordingly, the relief TRO Plaintiffs are seeking is a mandatory—not a prohibitory—injunction. Therefore, TRO Plaintiffs would be required to show that the law and facts "clearly favor" their success on the merits—not simply that they are likely to succeed. *See* *Garcia*, 786 F.3d at 740.

1. Breach of Contract

Regarding their breach of contract claim, TRO Plaintiffs argue that the PGA TOUR Regulations unambiguously provide that "any penalty" is stayed pending appeal. *See* PGA TOUR Regulations, ECF No. 1-1 § VII.E.2. Since PGA TOUR has not stayed TRO Plaintiffs' suspension pending their appeals, TRO Plaintiffs argue that PGA TOUR has breached its regulations. In response, PGA TOUR argues that the language of Article VII, Section C of the PGA TOUR Regulations, which allows the Commissioner to "immediately suspend" a member's playing privileges upon a probation violation, clearly indicates that such a suspension is "irrespective of whether that violation carries with it a penalty designated minor, intermediate or major." *See id.* § VII.C. Since the Regulations provide appeals only for minor, intermediate, and major penalties, PGA TOUR argues that the stay-of-appeal right does not pertain to an immediate suspension based on a probation violation. Further, PGA TOUR argues that courts must defer to the judgment of private organizations on how their regulations and disciplinary procedures for their members should operate. *See* Opposition, ECF No. 50 at 23 (citing *Scheire v. Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465 (9th Cir. 1983)).

***8** The Court agrees with PGA TOUR as to TRO Plaintiffs' breach of contract claim. Giving proper deference to the PGA TOUR's interpretation and application of its disciplinary rules, the Court finds that PGA TOUR's interpretation of the Commissioner's authority under Article VII, Section C of the PGA TOUR Regulations is not unreasonable. Accordingly, the Court finds that at this early stage of the case TRO Plaintiffs have failed to make the necessary showing that the facts clearly favor their success on the merits of their breach of contract claim.

2. Antitrust Claims

TRO Plaintiffs argue that the merits of their two federal antitrust claims—under Sections 1 and 2 of the Sherman Act—are sufficient to warrant a temporary restraining order. *See* Motion, ECF No. 2 at 11–22. TRO Plaintiffs claim that the disciplinary actions and the PGA TOUR Regulations they are based on violate the Sherman Act. PGA TOUR raises significant deficiencies as to each claim at this stage. *See* Opposition, ECF No. 50 at 17–25.

Regarding the Section 1 claim that PGA TOUR and the European Tour engaged in a group boycott, TRO Plaintiffs argue that such a group boycott is a *per se* violation of the Sherman Act. But PGA TOUR accurately points out that group boycotts are only considered to be a *per se* violation when they involve horizontal competitors—which TRO Plaintiffs' own expert opines PGA TOUR and the European Tour are not. *See* *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); Leitzinger Decl., ECF No. 2-13 ¶¶ 42–46. While a group boycott may still be considered a violation of the Sherman Act under the rule of reason, TRO Plaintiffs' rule of reason analysis is limited to a single footnote and not alleged in the Complaint. *See* Motion, ECF No. 2 at 19 n.7. Accordingly, the Court finds TRO Plaintiffs' showing as to the Sherman Act Section 1 claim to be insufficient to meet their burden of showing that the facts clearly favor their success on the merits at this stage.

Regarding the Section 2 claim that PGA TOUR engaged in unlawful maintenance of a monopoly, PGA TOUR argues that TRO Plaintiffs' evidence of LIV Golf's early success in entering the elite professional golf market undermines TRO Plaintiffs' contention that PGA TOUR has the power to exclude competitors from the market. *See* Opposition, ECF No. 50 at 18–19. On this claim, as well as the Section 1 claim, the Court acknowledges that TRO Plaintiffs raise significant antitrust issues that are facially appealing. But PGA TOUR has responded with preliminary evidence and argument potentially exposing fundamental flaws in Plaintiffs' claims. These complex issues are best resolved on a more developed record.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that TRO Plaintiffs' motion is DENIED WITHOUT PREJUDICE to filing a motion for preliminary injunction.

All Citations

Not Reported in Fed. Supp., 2022 WL 3229341

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Declined to Extend by In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation, N.D.Cal., August 5, 2016

802 F.3d 1049
United States Court of Appeals, Ninth Circuit.

Edward C. O'BANNON, Jr., On Behalf of Himself and All Others Similarly Situated, Plaintiff–Appellee,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, aka The NCAA, Defendant–Appellant.

Nos. 14–16601, 14–17068
|
Argued and Submitted March 17, 2015.
|
Filed Sept. 30, 2015.

Synopsis
Background: Group of current and former college football and men's basketball players brought antitrust class action against National Collegiate Athletic Association (NCAA), alleging Sherman Act violations for restraining trade in relation to players' names, images, and likenesses (NIL). After bench trial, the United States District Court for the Northern District of California, Claudia Wilken, Senior Judge, 7 F.Supp.3d 955, entered judgment in plaintiffs' favor, and NCAA appealed.

Holdings: The Court of Appeals, Bybee, Circuit Judge, held that:

[1] NCAA's compensation rules were subject to antitrust scrutiny;

[2] plaintiffs suffered antitrust injury as result of compensation rules;

[3] compensation rules were subject to analysis pursuant to rule of reason;

[4] district court did not clearly err in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be substantially less restrictive alternative to current compensation rules; but

[5] district court clearly erred in finding it viable alternative to allow students to receive NIL cash payments untethered to their education expenses.

Affirmed in part and vacated in part.

Thomas, Chief Judge, concurred in part, dissented in part, and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Federal Courts** Questions of Law in General
Federal Courts "Clearly erroneous" standard of review in general
Court of Appeals reviews district court's findings of fact after bench trial for clear error and review its conclusions of law de novo.

2 Cases that cite this headnote

[2] **Federal Courts** Definite and firm conviction of mistake
Court of Appeals' clear-error review of district court's findings of fact is deferential; it will accept district court's findings of fact unless it is left with definite and firm conviction that mistake has been committed.

2 Cases that cite this headnote

[3] **Antitrust and Trade Regulation** Presumptions and burden of proof
National Collegiate Athletic Association's (NCAA) amateurism rules were not presumptively valid under Sherman Act, but rather were subject to rule of reason analysis. Sherman Act, § 1, 15 U.S.C.A. § 1.

4 Cases that cite this headnote

[4] **Antitrust and Trade Regulation** Sports

National Collegiate Athletic Association's (NCAA) rules prohibiting payment of compensation to student-athletes beyond grants-in-aid constituted "restraints of trade or commerce" subject to antitrust scrutiny, despite NCAA's contention that its compensation rules are mere eligibility rules that did not regulate any commercial activity; labor of student-athletes was integral and essential component of NCAA's product, and rules went to heart of NCAA's business. Sherman Act, § 1, 15 U.S.C.A. § 1.

16 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Injury to Business or Property

Antitrust and Trade Regulation Causation

To satisfy antitrust-injury requirement, plaintiff must show injury of type that antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Sherman Act, § 1, 15 U.S.C.A. § 1.

3 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Particular cases

Current and former college football and men's basketball players suffered antitrust injury as result of National Collegiate Athletic Association (NCAA) compensation rules having foreclosed market for their names, images, and likenesses (NIL) in video games, and thus had standing to bring action alleging that rules violated Sherman Act, where, absent NCAA's compensation rules, video game makers would have negotiated with student-athletes for right to use their NILs. Sherman Act, § 1, 15 U.S.C.A. § 1.

6 Cases that cite this headnote

[7] **Federal Courts** Briefs

Statements in appellate briefs are not evidence.

3 Cases that cite this headnote

[8] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Federal Courts Voluntary cessation of challenged conduct

When defendant has voluntarily ceased allegedly improper behavior in response to suit, but is free to return to it at any time, challenge to defendant's behavior is generally not considered moot unless there is no reasonable expectation that illegal action will recur.

[9] **Antitrust and Trade Regulation** Presumptions and burden of proof

To establish violation of § 1 of Sherman Act pursuant to rule of reason: (1) plaintiff bears initial burden of showing that restraint produces significant anticompetitive effects within relevant market; (2) if plaintiff meets this burden, defendant must come forward with evidence of restraint's procompetitive effects; and (3) plaintiff must then show that any legitimate objectives can be achieved in substantially less restrictive manner. Sherman Act, § 1, 15 U.S.C.A. § 1.

11 Cases that cite this headnote

[10] **Antitrust and Trade Regulation** Sports

National Collegiate Athletic Association (NCAA) rules prohibiting payment of compensation to student-athletes beyond grants-in-aid had sufficiently significant anticompetitive effect on college education market to support student-athletes' claim that application of rules to prohibit payments for use of their names, images, and likenesses (NIL) violated Sherman Act pursuant to rule of reason, even if consumers of NCAA football and basketball were not harmed directly by price-fixing, and any NIL compensation that student-athletes might receive in absence of compensation rules would be de minimis; rules fixed price of one component of exchange between school and recruit, thereby precluding competition among schools with respect to that component. Sherman Act, § 1, 15 U.S.C.A. § 1.

11 Cases that cite this headnote

[11] **Antitrust and Trade Regulation** Price Fixing in General

Combinations condemned by Sherman Act include price-fixing by purchasers, even though persons specially injured are sellers, not customers or consumers. Sherman Act, § 1, 15 U.S.C.A. § 1.

[12] **Antitrust and Trade Regulation** Sports

District court did not clearly err, in student-athletes' action alleging that National Collegiate Athletic Association's (NCAA) use of its compensation rules to prohibit payments for use of their names, images, and likenesses (NIL) in video games violated Sherman Act, in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be substantially less restrictive alternative to current compensation rules, in light of testimony that raising grant-in-aid cap to cost of attendance would have virtually no impact on amateurism or on consumers' interest in NCAA sports, and absence of evidence that raising cap would significantly increase costs. Sherman Act, § 1, 15 U.S.C.A. § 1.

7 Cases that cite this headnote

[13] **Antitrust and Trade Regulation** Sports

District court clearly erred, in student-athletes' action alleging that National Collegiate Athletic Association's (NCAA) use of its compensation rules to prohibit payments for use of their names, images, and likenesses (NIL) in video games violated Sherman Act, in finding it viable alternative to allow students to receive NIL cash payments untethered to their education expenses, despite evidence that small payments to players would impact consumer demand less than larger payments, where court found that amateurism was integral to NCAA's market and that rules served to preserve popularity of NCAA's product by promoting its current understanding of amateurism, and paying student-athletes for their NIL rights would vitiate their amateur status as collegiate athletes. Sherman Act, § 1, 15 U.S.C.A. § 1.

5 Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of California, Claudia Wilken, Senior District Judge, Presiding. D.C. No. 4:09–cv–03329–CW.

Before: SIDNEY R. THOMAS, Chief Judge, JAY S. BYBEE, Circuit Judge and GORDON J. QUIST, * Senior District Judge.

* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

Partial Concurrence and Partial Dissent by Chief Judge THOMAS.

OPINION

BYBEE, Circuit Judge:

Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, prohibits "[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce." For more than a century, the National Collegiate Athletic Association (NCAA) has prescribed rules governing the eligibility of athletes at its more than 1,000 member colleges and universities. Those rules prohibit student-athletes from being paid for the use of their names, images, and likenesses (NILs). The question presented in this momentous case is whether the NCAA's rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade.

After a bench trial and in a thorough opinion, the district court concluded that ***1053** the NCAA's compensation rules were an unlawful restraint of trade. It then enjoined the NCAA from prohibiting its member schools from giving student-athletes scholarships up to the full cost of attendance at their respective schools and up to $5,000 per year in deferred compensation, to be held in trust for student-athletes until after they leave college. As far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.

We conclude that the district court's decision was largely correct. Although we agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive, we hold that those rules are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason. Applying the Rule of Reason, we conclude that the district court correctly identified one proper alternative to the current NCAA compensation rules —*i.e.,* allowing NCAA members to give scholarships up to the full cost of attendance—but that the district court's other remedy, allowing students to be paid cash compensation of up to $5,000 per year, was erroneous. We therefore affirm in part and reverse in part.

I

A. *The NCAA*

American colleges and universities have been competing in sports for nearly 150 years: the era of intercollegiate athletics began, by most accounts, on November 6, 1869, when Rutgers and Princeton met in the first college football game in American history—a game more akin to soccer than to modern American football, played with "25 men to a side." Joseph N. Crowley, In the Arena: The NCAA's First Century 2 (2006), *available at* https://www.ncaapublications.com/p-4039-in-the-arena-the-ncaas-first-century.aspx. College football quickly grew in popularity over the next few decades.

Fin de siècle college football was a rough game. Serious injuries were common, and it was not unheard of for players to be killed during games. Schools were also free to hire nonstudent ringers to compete on their teams or to purchase players away from other schools. By 1905, these and other problems had brought college football to a moment of crisis, and President Theodore Roosevelt convened a conference at the White House to address the issue of injuries in college football. Later that year, the presidents of 62 colleges and universities founded the Intercollegiate Athletic Association to create uniform rules for college football. In 1910, the IAA changed its name to the National Collegiate Athletic Association (NCAA), and it has kept that name to this day.

The NCAA has grown to include some 1,100 member schools, organized into three divisions: Division I, Division II, and Division III. Division I schools are those with the largest athletic programs—schools must sponsor at least fourteen varsity sports teams to qualify for Division I—and they provide the most financial aid to student-athletes. Division I has about 350 members.

For football competition only, Division I's membership is divided into two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). FBS schools are permitted to offer more full scholarships to their football players and, as a result, the level of competition is generally higher in FBS than in FCS. FBS consists of about 120 of the nation's premier college football schools.

***1054** B. *The Amateurism Rules*

One of the NCAA's earliest reforms of intercollegiate sports was a requirement that the participants be amateurs. President C.A. Richmond of Union College commented in 1921 that the competition among colleges to acquire the best players had come to resemble "the contest in dreadnoughts" that had led to World War I, [1] and the NCAA sought to curb this problem by restricting eligibility for college sports to athletes who received no compensation whatsoever. [2] But the NCAA, still a voluntary organization, lacked the ability to enforce this requirement effectively, and schools continued to pay their athletes under the table in a variety of creative ways; a 1929 study found that 81 out of 112 schools surveyed provided some sort of improper inducement to their athletes.

1 The *Dreadnought* was a British battleship that featured large, long-range guns. The term came to refer to a class of super battleship. In drawing this comparison, Mr. Richmond showed himself to be a historian ahead of his time. *See generally* Robert K. Massie, Dreadnought: Britain, Germany, and the Coming of the Great War (1991) (explaining how the naval arms race between Britain and Germany contributed to the outbreak of World War I).

2 The rise of the NCAA roughly paralleled that of the International Olympic Committee (IOC) and the Amateur Athletic Union (AAU), both in time and in philosophy. Like the NCAA, both organizations have had to adapt to increasing professionalization and commercialization in sports. In the late twentieth century, the IOC abandoned its amateurism experiment. The AAU, meanwhile, continues to operate as a sponsor of amateur sports programs and tournaments; it is currently best known for its many boys' basketball teams, which have struggled to deal with the influence of professional agents and outside money. *See, e.g.,* Jason Zengerle, *Breaks of the Game,* N.Y. Times, Dec. 26, 2010, at BR8 (calling it "a commonplace for sportswriters to describe A.A.U. basketball as a cesspool of corruption").

The NCAA began to strengthen its enforcement capabilities in 1948, when it adopted what became known as the "Sanity Code"—a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students. *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism* *or Antitrust Recidivist?,* 86 Or. L.Rev. 329, 333 (2007). The Sanity Code also created a new "compliance mechanism" to enforce the NCAA's rules—"a Compliance Committee that could terminate an institution's NCAA membership." *Id.*

In 1956, the NCAA departed from the Sanity Code's approach to financial aid by changing its rules to permit its members, for the first time, to give student-athletes scholarships based on athletic ability. These scholarships were capped at the amount of a full "grant in aid," defined as the total cost of "tuition and fees, room and board, and required course-related books." Student-athletes were prohibited from receiving any "financial aid based on athletics ability" in excess of the value of a grant-in-aid, on pain of losing their eligibility for collegiate athletics. Student-athletes could seek additional financial aid not related to their athletic skills; if they chose to do this, the total amount of athletic and nonathletic financial aid they received could not exceed the "cost of attendance" at their respective schools. [3]

3 The "cost of attendance" at a particular school includes the items that make up a grant in aid plus "[nonrequired] books and supplies, transportation, and other expenses related to attendance at the institution." The difference between a grant in aid and the cost of attendance is a few thousand dollars at most schools.

In August 2014, the NCAA announced it would allow athletic conferences to authorize ***1055** their member schools to increase scholarships up to the full cost of attendance. The 80 member schools of the five largest athletic conferences in the country voted in January 2015 to take that step, and the scholarship cap at those schools is now at the full cost of attendance. Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills,* N.Y. Times, Jan. 18, 2015, at SP8.

In addition to its financial aid rules, the NCAA has adopted numerous other amateurism rules that limit student-athletes' compensation and their interactions with professional sports leagues. An athlete can lose his amateur status, for example, if he signs a contract with a professional team, enters a professional league's player draft, or hires an agent. And, most importantly, an athlete is prohibited—with few exceptions—from receiving *any* "pay" based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness (NIL).

C. *The* O'Bannon *and* Keller *Litigation*

In 2008, Ed O'Bannon, a former All–American basketball player at UCLA, visited a friend's house, where his friend's son told O'Bannon that he was depicted in a college basketball video game produced by Electronic Arts (EA), a software company that produced video games based on college football and men's basketball from the late 1990s until around 2013. The friend's son turned on the video game, and O'Bannon saw an avatar of himself—a virtual player who visually resembled O'Bannon, played for UCLA, and wore O'Bannon's jersey number, 31. O'Bannon had never consented to the use of his likeness in the video game, and he had not been compensated for it.

In 2009, O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC), the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use, in federal court. The gravamen of O'Bannon's complaint was that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

Around the same time, Sam Keller, the former starting quarterback for the Arizona State University and University of Nebraska football teams, separately brought suit against the NCAA, CLC, and EA. Keller alleged that EA had impermissibly used student-athletes' NILs in its video games and that the NCAA and CLC had wrongfully turned a blind eye to EA's misappropriation of these NILs. The complaint stated a claim under Indiana's and California's right of publicity statutes, as well as a number of common-law claims.

The two cases were consolidated during pretrial proceedings. The defendants moved to dismiss Keller's right-of-publicity claims on First Amendment grounds. The district court denied the motion to dismiss, and we affirmed that decision, holding that "[u]nder California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment." *In re NCAA Student–Athlete Name & Likeness Licensing Litig. ("Keller"),* 724 F.3d 1268, 1284 (9th Cir.2013).

In November 2013, the district court granted the plaintiffs' motion for class certification. The court held that certification of a damages class under Rule 23(b)(3) was inappropriate, but it certified the following class under Rule 23(b)(2) for injunctive and declaratory relief:

> All current and former student-athletes residing in the United States who compete ***1056** on, or competed on, an NCAA Division I (formerly known as "University Division" before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.[4]

4 As this class definition indicates, O'Bannon and Keller limited their suits only to high-level (Division I/FBS) college football and men's basketball players. They likely did so in part because almost all of EA's college sports video games have been football and men's basketball games, and in part because those two sports generate far more revenue than any other college sports. *See, e.g.,* Richard Sandomir & Pete Thamel, *Tournament Stays at CBS, Adding Cable and 3 Teams,* N.Y. Times, Apr. 23, 2010, at B9 (describing CBS's agreement to pay $10.8 billion for the TV rights to the NCAA Division I men's basketball tournament for a period of 13 years); Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? $7.3 Billion, for a Start,* N.Y. Times, Dec. 31, 2014, at A1 (describing ESPN's agreement to pay "$7.3 billion over 12 years to telecast seven [college football] games a year"); Nat'l Collegiate Ath. Ass'n, 2004–2013 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report, at 37 (2014), *available at* https://www.ncaapublications.com/p-4344-division-i-revenues-and-expenses-2004-2013.aspx. Thus, although NCAA member schools sponsor teams in a variety of other sports, both the district court's analysis and our own focus on football and men's basketball.

After class certification was granted, the plaintiffs voluntarily dismissed their damages claims with prejudice. The plaintiffs also settled their claims against EA and CLC, and the district court preliminarily approved the settlement. *O'Bannon* and *Keller* were deconsolidated, and in June 2014, the antitrust claims against the NCAA at issue in *O'Bannon* went to a bench trial before the district court.

D. *The District Court's Decision*

After a fourteen-day bench trial, the district court entered judgment for the plaintiffs, concluding that the NCAA's rules prohibiting student-athletes from receiving compensation for their NILs violate Section 1 of the Sherman Act. *O'Bannon v. NCAA,* 7 F.Supp.3d 955 (N.D.Cal.2014).

1. The Markets

The court began by identifying the markets in which the NCAA allegedly restrained trade. It identified two markets that were potentially affected by the challenged NCAA rules.

a. The college education market

First, the court found that there is a "college education market" in which FBS football and Division I basketball schools compete to recruit the best high school players by offering them "unique bundles of goods and services" that include not only scholarships but also coaching, athletic facilities, and the opportunity to face high-quality athletic competition. *Id.* at 965–66. The court found that very few athletes talented enough to play FBS football or Division I basketball opt not to attend an FBS/Division I school; hardly any choose to attend an FCS, Division II, or Division III school or to compete in minor or foreign professional sports leagues, and athletes are not allowed to join either the NFL or the NBA directly from high school.[5] *Id.* at 966. Thus, the ***1057** court concluded, the market specifically for FBS football and Division I basketball scholarships is cognizable under the antitrust laws because "there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide." *Id.* at 968.

5 The NFL has never allowed high school players to enter its draft. The NBA did at one time, and a number of NBA stars (including LeBron James and Kobe Bryant) came to the league directly from high school, but in 2005, the NBA adopted a rule requiring draftees to be at least nineteen years old and one year out of high school, a rule it has retained to the present day. *See* Howard Beck, *N.B.A. Draft Will Close Book on High School Stars,* N.Y. Times, June 28, 2005, at D1.

b. The group licensing market

The second market identified by the district court was a "group licensing market" in which, but for the NCAA's compensation rules, college football and basketball athletes would be able to sell group licenses for the use of their NILs. *Id.* The court broke this "group licensing market" down into three submarkets in which players' NILs could be profitably licensed: (1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage.[6] *Id.* With respect to live game telecasts, the court noted that the TV networks that broadcast live college football and basketball games "often seek to acquire the rights to use" the players' NILs, which the court concluded "demonstrate[s] that there is a demand for these rights" on the networks' part. *Id.* at 968–69. With respect to video games, the court found that the use of NILs increased the attractiveness of college sports video games to consumers, creating a demand for players' NILs.[7] *Id.* at 970. And with respect to archival footage, the court noted that the NCAA had licensed footage of student-athletes—including current athletes—to a third-party licensing company, T3Media, proving that there is demand for such footage. *Id.* at 970–71.

6 Although the plaintiffs presented some evidence of other licensing opportunities for merchandise such as jerseys and bobbleheads, they abandoned these claims and the district court did not consider such markets further. *O'Bannon,* 7 F.Supp.3d at 968 n. 4.

7 The court acknowledged that the NCAA had recently terminated its relationship with EA by declining to renew its license for such video games, but the court found that there was no evidence that the NCAA would not renew the relationship in the future. *O'Bannon,* 7 F.Supp.3d at 970.

2. The Rule of Reason

Having concluded that the NCAA's compensation rules potentially restrained competition in these two markets, the court proceeded to analyze the legality of the challenged NCAA rules with respect to those markets, applying the Rule of Reason. *Id.* at 984–1009. The district court found that the NCAA's rules have an anticompetitive effect in the college education market but not in the group licensing market. It then concluded that the rules serve procompetitive purposes. Finally, it determined that the procompetitive purposes of the rules could be achieved by less restrictive alternative restraints and that the current rules were therefore unlawful.

a. Anticompetitive effects

At the first step of the Rule of Reason, the court found that the NCAA's rules have an anticompetitive effect on the college education market. Were it not for those rules, the court explained, schools would compete with each other by offering recruits compensation exceeding the cost of attendance, which would "effectively lower the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide." *Id.* at 972. The rules prohibiting compensation for the use of student-athletes' NILs are thus a price-fixing agreement: ***1058** recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the "sellers" of these bundles—the colleges—collectively "agree to value [NILs] at zero." *Id.* at 973. Under this theory, colleges and universities behave as a cartel—a group of sellers who have colluded to fix the price of their product.

The court found in the alternative that the college education market can be thought of as a market in which student-athletes are sellers rather than buyers and the schools are purchasers of athletic services. In the court's alternative view, the college education market is a monopsony—a market in which there is only one buyer (the NCAA schools, acting collectively) for a particular good or service (the labor and NIL rights of student-athletes), and the colleges' agreement not to pay anything to purchase recruits' NILs causes harm to competition. *Id.* at 973, 991.

By contrast, the court found that the NCAA's rules do not have an anticompetitive effect on any of the submarkets of the group licensing market. The court explained that although these submarkets exist, there would be no *competition* in any of them if the challenged NCAA rules were abolished. The court reasoned that the value of an NIL license to a live game broadcaster or a video game company would depend on the licensee's acquiring every other NIL license that was available. A live game broadcaster, for example, would need to acquire a license from every team or player whose games it might telecast. Similarly, a video game producer would want to acquire NIL rights for all of the teams it needed to include in the game. Given these requirements, the court deemed it highly unlikely that groups of student-athletes would compete with each other to sell their NIL rights; on the contrary, they would have an incentive to cooperate to make sure that the package of NIL rights sold to buyers was as complete as possible. *Id.* at 993–98. With respect to archival footage, meanwhile, the court found that the NCAA's licensing arrangement with T3Media did not deprive student-athletes of any compensation they might otherwise receive because T3Media is prohibited from licensing footage of current athletes and must obtain the consent of any former athlete whose NIL appears in its footage. *Id.* at 998–99.

b. Procompetitive purposes

At the second step of the Rule of Reason, the NCAA proffered four procompetitive purposes for its rules prohibiting student-athletes from receiving compensation for the use of their NILs: (1) preserving "amateurism" in college sports; (2) promoting competitive balance in FBS football and Division I basketball; (3) integrating academics and athletics; and (4) increasing output in the college education market. *Id.* at 999. The court accepted the first and third justifications in part while rejecting the others.

(1) *Amateurism.* The NCAA argued to the district court that restrictions on student-athlete compensation are "necessary to preserve the amateur tradition and identity of college sports." *Id.* It contended that amateurism had been one of the NCAA's core principles since its founding and that amateurism is a key driver of college sports' popularity with consumers and fans. *Id.* at 999–1000.

The district court rejected the NCAA's contention that it had a "longstanding commitment to amateurism," concluding instead that the NCAA's definition of amateurism was "malleable," changing frequently over time in "significant and contradictory ways." *Id.* at 1000. The court suggested that, even today, the NCAA's definition of amateurism is inconsistent: although players generally cannot receive ***1059** compensation other than scholarships, tennis players are permitted to accept up to $10,000 in prize money before enrolling in college, and student-athletes are permitted to accept Pell grants even when those grants raise their total financial aid package above their cost of attendance. *Id.* It thus concluded that amateurism was not, in fact, a "core principle[ ]" of the NCAA. *Id.*

The district court was not persuaded that amateurism is the *primary* driver of consumer demand for college sports—but it did find that amateurism serves some procompetitive purposes. The court first concluded that consumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country. *Id.* at 977–78. It also found much of the NCAA's evidence about amateurism unreliable. For example, the NCAA provided a survey conducted by Dr. J. Michael Dennis, a "survey research expert," which purported to show that Americans "generally oppose[ ] the idea of paying college football and basketball players." *Id.* at 975. The court deemed the Dennis survey "unpersuasive" for a couple reasons, one of which was that it believed the survey's initial question skewed the results by priming respondents to think about *illicit* payments to student-athletes rather than the possibility of allowing athletes to be paid. *Id.*

But the district court ultimately found that the NCAA's "current understanding of amateurism" plays some role in preserving "the popularity of the NCAA's product." *Id.* at 1005. It found that the NCAA's current rules serve a procompetitive benefit by promoting this understanding of amateurism, which in turn helps preserve consumer demand for college sports.

(2) *Competitive Balance.* The NCAA argued before the district court that restricting compensation to student-athletes helps level the playing field between FBS and Division I schools in recruiting, thereby maintaining competitive balance among those schools' football and basketball teams. *Id.* at 1001–02.

The district court acknowledged that promoting competitive balance could be a valid procompetitive purpose under the antitrust laws, but it concluded that the challenged NCAA rules do not promote competitive balance. The court noted that numerous economists have studied the NCAA over the years and that "nearly all" of them have concluded that the NCAA's compensation rules do not promote competitive balance. *Id.* at 978. The court also explained that although the NCAA forbids its member schools to pay student-athletes anything beyond a fixed scholarship, it allows schools to spend as much as they like on other aspects of their athletic programs, such as coaching, facilities, and the like, which "negate[s] whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had." *Id.* at 1002. The court concluded that competitive balance was thus not a viable justification for restricting student-athlete compensation.

(3) *Integrating Academics and Athletics.* The NCAA's third procompetitive justification for its restraints on student-athlete compensation was that these restraints integrate academics and athletics and thereby "improve the quality of educational services provided to student-athletes." *Id.* According to the NCAA, student-athletes derive long-term benefits from participating fully in academic life at their schools, which the compensation rules encourage them to do. *Id.* at 979–80.

The district court allowed that this was a viable procompetitive justification for the ***1060** NCAA's regulating the college education market, but it concluded that most of the benefits of academic and athletic "integration" are not the result of the NCAA's rules restricting compensation. Rather, these benefits are achieved by other NCAA rules —such as those requiring student-athletes to attend class, prohibiting athletes-only dorms, and forbidding student-athletes to practice more than a certain number of hours per week. *Id.* at 980. The court explained that the only way in which the compensation rules might facilitate the integration of athletics and academics is that, by prohibiting student-athletes from being paid large sums of money not available to ordinary students, the rules prevent the creation of a social "wedge" between student-athletes and the rest of the student body. *Id.* at 980, 1003. It held, however, that even though the avoidance of such a "wedge" is a legitimate procompetitive goal, it does not justify a total, "sweeping prohibition" on paying student-athletes for the use of their NILs. *Id.* at 1003.

(4) *Increasing Output.* The fourth and final procompetitive justification alleged by the NCAA was that the restraints on student-athlete compensation "increase output" in the college education market by increasing the available opportunities for students to play FBS football or Division I basketball. *Id.* at 1003–04. The NCAA contended that its rules accomplish this goal by attracting schools with a philosophical commitment to amateurism to compete in Division I and by enabling schools to compete in Division I that otherwise could not afford to do so. *Id.* at 1004.

The district court rejected this justification. The court found the idea that schools join Division I because of a philosophical commitment to amateurism "implausible," noting that some major-conference schools had lobbied to change the NCAA's scholarship rules to raise compensation limits. *Id.* at 981. The court also explained that schools in FCS, Division II, and Division III are subject to the same amateurism rules as Division I schools, making it unlikely that schools choose to join Division I because of the amateurism rules. *Id.*

The court likewise found no support in the record for the notion that the NCAA's compensation rules enable more schools to compete in Division I. The court found that, because Division I schools do not share revenue, there is no reason to believe that the cost savings from not paying student-athletes are being used to fund additional scholarships at low-revenue schools or to enable those schools to join Division I. *Id.* at 1004. The court also noted that the plaintiffs were not seeking to *require* that all schools pay their student-athletes; rather, they sought an injunction *permitting* schools to do so. Schools that could not afford to pay their student-athletes would not need to do so if the plaintiffs prevailed and would therefore not be driven out of Division I by a ruling in the plaintiffs' favor. *Id.*

c. Less restrictive alternatives

Having found that the NCAA had presented two procompetitive justifications for "circumscribed" limits on student-athlete compensation—*i.e.,* increasing consumer demand for college sports and preventing the formation of a "wedge" between student-athletes and other students —the court proceeded to the third and final step of the Rule of Reason, where it considered whether there were means of achieving the NCAA's procompetitive purposes that were "substantially less restrictive" than a total ban on compensating student-athletes for use of their NILs. *Id.* at 1004–05.

The court held that the plaintiffs had identified two legitimate, less restrictive alternatives to the current NCAA rules:

***1061** (1) allowing schools to award stipends to student-athletes up to the full cost of attendance, thereby making up for any "shortfall" in their grants-in-aid, and (2) permitting schools to hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college.[8] *Id.* at 1005–06. The court determined that neither of these alternatives to the total ban on NIL compensation would undermine the NCAA's procompetitive purposes. The court also held that it would be permissible for the NCAA to prohibit schools from funding these stipends or trusts with anything other than revenue derived from the use of players' NILs. *Id.* at 1005.

8 The district court rejected a third proposal: permitting student-athletes to receive compensation from school-approved endorsements. *O'Bannon,* 7 F.Supp.3d at 984. The court found that this proposal would undermine the NCAA's efforts to protect its student-athletes from commercial exploitation. *Id.*

After entering judgment for the plaintiffs on their antitrust claims, the district court permanently enjoined the NCAA from prohibiting its member schools from (1) compensating FBS football and Division I men's basketball players for the use of their NILs by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to $5,000 per year in deferred compensation to FBS football and Division I men's basketball players for the use of their NILs, through trust funds distributable after they leave school. The NCAA timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II

[1] **[2]** We review the district court's findings of fact after the bench trial for clear error and review the district court's conclusions of law de novo. *FTC v. BurnLounge, Inc.,* 753 F.3d 878, 883 (9th Cir.2014). Our clear-error review of the district court's findings of fact is "deferential"; "we will accept the district court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed." *Id.* (alteration and internal quotation marks omitted).

III

On appeal, the NCAA contends that the plaintiffs' Sherman Act claim fails on the merits, but it also argues that we are precluded altogether from reaching the merits, for three independent reasons: (1) The Supreme Court held in *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), that the NCAA's amateurism rules are "valid as a matter of law"; (2) the compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity; and (3) the plaintiffs have no standing to sue under the Sherman Act because they have not suffered "antitrust injury." We find none of these three arguments persuasive.

A. Board of Regents *Did Not Declare the NCAA's Amateurism Rules "Valid as a Matter of Law"*

We consider, first, the NCAA's claim that, under *Board of Regents,* all NCAA amateurism rules are "valid as a matter of law."

Board of Regents concerned the NCAA's then-prevailing rules for televising college football games. The rules allowed television networks to negotiate directly with schools and conferences for the right to televise games, but they imposed caps on the total number of games that could be broadcast on television each year and the number of games that any particular school could televise. ***1062** *Id.* at 91–94, 104 S.Ct. 2948. The University of Oklahoma and the University of Georgia challenged this regime as an illegal restraint of trade under Section 1.

The Court observed that the television rules resembled two kinds of agreements that are ordinarily considered per se unlawful when made among horizontal competitors in the same market: a price-fixing agreement (in that the rules set a minimum aggregate price that the television networks were required to pay the NCAA's members) and an output-restriction agreement (in that the rules artificially capped the number of televised game licenses for sale). *Id.* at 99–100, 104 S.Ct. 2948. But it concluded that applying a per se rule of invalidity to the NCAA's television rules would be "inappropriate" because college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 100–01, 104 S.Ct. 2948. The Court elaborated:

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football.... *In order to preserve the character and quality of th[is] "product," athletes must not be paid, must be required to attend class, and the like.* And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice —not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Id. at 101–02, 104 S.Ct. 2948 (emphasis added). The Court held that the NCAA's rules should therefore be analyzed under the Rule of Reason.

Applying the Rule of Reason, the Court struck down the television rules on the ground that they did not serve any legitimate procompetitive purpose. *Id.* at 113–20, 104 S.Ct. 2948. It then concluded its opinion by stating:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, *or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.* But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.

Id. at 120, 104 S.Ct. 2948 (emphasis added).

***1063** **[3]** Quoting heavily from the language in *Board of Regents* that we have emphasized, the NCAA contends that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid. We disagree.

The *Board of Regents* Court certainly discussed the NCAA's amateurism rules at great length, but it did not do so in order to pass upon the rules' merits, given that they were not before the Court. Rather, the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se. The point was a significant one. Naked horizontal agreements among competitors to fix the price of a good or service, or to restrict their output, are usually condemned as per se unlawful. *See, e.g., United States v. Trenton Potteries Co.,* 273 U.S. 392, 398, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *see also, e.g., Broad. Music, Inc. v. CBS, Inc.,* 441 U.S. 1, 19–20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (arrangements that "almost always tend to restrict competition and decrease output" are usually per se illegal). The *Board of Regents* Court decided, however, that because college sports could not exist without certain horizontal agreements, NCAA rules should not be held per se unlawful even when—like the television rules in *Board of Regents*—they appear to be pure "restraints on the ability of member institutions to compete in terms of price and output." *Bd. of Regents,* 468 U.S. at 103, 104 S.Ct. 2948.

Board of Regents, in other words, did not approve the NCAA's amateurism rules as categorically consistent with the Sherman Act. Rather, it held that, because many NCAA rules (among them, the amateurism rules) [9] are part of the "character and quality of the [NCAA's] 'product,' " *id.* at 102, 104 S.Ct. 2948, no NCAA rule should be invalidated without a Rule of Reason analysis. The Court's long encomium to amateurism, though impressive-sounding, was therefore dicta. To be sure, "[w]e do not treat considered dicta from the Supreme Court lightly"; such dicta should be accorded "appropriate deference." *United States v. Augustine,* 712 F.3d 1290, 1295 (9th Cir.2013). Where applicable, we will give the quoted passages from *Board of Regents* that deference. But we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid.

9 Importantly, the Court was quite clear that the preservation of amateurism, standing alone, was *not* the justification for its decision to reject a per se analysis. *Bd. of Regents,* 468 U.S. at 100–01, 104 S.Ct. 2948 ("This decision [not to apply a per se rule] is not based on ... our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.").

What is more, even if the language in *Board of Regents* addressing amateurism were *not* dicta, it would not support the tremendous weight that the NCAA seeks to place upon it. The Court's opinion supports the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue, but the NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny. [10] Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, ***1064** as *Board of Regents* did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well. *See Bd. of Regents,* 468 U.S. at 101 n. 23, 104 S.Ct. 2948 ("While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.").

10 The NCAA appears at some places in its briefs to concede that the amateurism rules are subject to Rule of Reason analysis and merely to argue that *Board of Regents* "dictates the *outcome* " of that analysis. But we see no distinction between that position and an argument for blanket antitrust immunity.

The NCAA cites decisions of three of our sister circuits, claiming that each adopted its view of *Board of Regents*. Two of these three cases, however, ultimately subjected the NCAA's rules to Rule of Reason scrutiny—the very approach we adopt today. *See Smith v. NCAA,* 139 F.3d 180, 186 (3d Cir.1998), *vacated on other grounds by NCAA v. Smith,* 525 U.S. 459, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999); *McCormack v. NCAA,* 845 F.2d 1338, 1344–45 (5th Cir.1988). Only one—the Seventh Circuit's decision in *Agnew v. NCAA,* 683 F.3d 328 (7th Cir.2012)—comes close to agreeing with the NCAA's interpretation of *Board of Regents*, and we find it unpersuasive.

In *Agnew,* two former college football players who lost their scholarships challenged certain NCAA rules that prohibited schools from offering multi-year scholarships and capped the number of football scholarships each school could offer. *Id.* at 332–33. The *Agnew* court read *Board of Regents* broadly and concluded that, "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw [should] be presumed procompetitive." *Id.* at 342–43 (quoting *Bd. of Regents,* 468 U.S. at 120, 104 S.Ct. 2948). The court concluded, however, that the scholarship limitations that were before it did not "implicate the preservation of amateurism," since awarding more or longer scholarships to college athletes would not change their status as amateurs. *Id.* at 344. Thus, no "procompetitive presumption" applied to the scholarship rules. *Id.* at 345. Instead of dismissing the plaintiffs' antitrust claims on the merits, the court dismissed them on the unrelated ground that the plaintiffs had failed to plead the existence of a cognizable market. *Id.*

Like the amateurism language in *Board of Regents, Agnew's* "procompetitive presumption" was dicta that was ultimately unnecessary to the court's resolution of that case. But we would not adopt the *Agnew* presumption even if it were not dicta. *Agnew's* analysis rested on the dubious proposition that in *Board of Regents*, the Supreme Court "blessed" NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny. *Id.* at 341. We doubt that was the Court's intent, and we will not give such an aggressive construction to its words.

In sum, we accept *Board of Regents* ' guidance as informative with respect to the procompetitive purposes served by the NCAA's amateurism rules, but we will go no further than that. The amateurism rules' validity must be proved, not presumed.

B. *The Compensation Rules Regulate "Commercial Activity "*

The NCAA next argues that we cannot reach the merits of the plaintiffs' Sherman Act claim because the compensation rules are not subject to the Sherman Act at all. The NCAA points out that Section 1 of the Sherman Act applies only to "restraint[s] of trade or commerce," 15 U.S.C. § 1, and claims that its compensation rules are ***1065** mere "eligibility rules" that do not regulate any "commercial activity."

[4] This argument is not credible. Although restraints that have no effect on commerce are indeed exempt from Section 1, the modern legal understanding of "commerce" is broad, "including almost every activity from which the actor anticipates economic gain." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* ¶ 260b (4th ed.2013). That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it. *See, e.g., Agnew,* 683 F.3d at 340 ("No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."). Moreover, *Board of Regents* ' discussion of the procompetitive justifications for NCAA amateurism rules shows that the Court "presume[d] the applicability of the Sherman Act to NCAA bylaws, since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply." *Id.* at 339.

It is no answer to these observations to say, as the NCAA does in its briefs, that the compensation rules are "eligibility rules" rather than direct restraints on the terms of agreements between schools and recruits. True enough, the compensation rules are written in the form of eligibility rules; they provide that an athlete who receives compensation other than the scholarships specifically permitted by the NCAA loses his eligibility for collegiate sports. The mere fact that a rule can be characterized as an "eligibility rule," however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an "eligibility rule." The antitrust laws are not to be avoided by such "clever manipulation of words." *Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 21–22, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964).

In other words, the substance of the compensation rules matters far more than how they are styled. And in substance, the rules clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools: a school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated. The NCAA's argument that its compensation rules are "eligibility" restrictions, rather than substantive restrictions on the price terms of recruiting agreements, is but a sleight of hand. There is real money at issue here.

As the NCAA points out, two circuits have held that certain NCAA rules are noncommercial in nature. In *Smith v. NCAA,* the Third Circuit dismissed a student-athlete's challenge to the NCAA's “Postbaccalaureate Bylaw,” which prohibited athletes from participating in athletics at postgraduate schools other than their undergraduate schools, on the grounds that the Sherman Act did not apply to that Bylaw. The *Smith* court held that eligibility rules such as the Postbaccalaureate Bylaw “are not related to the NCAA's commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.” *Smith,* 139 F.3d at 185.

The Sixth Circuit, meanwhile, held in ***1066** *Bassett v. NCAA,* 528 F.3d 426, 430, 433 (6th Cir.2008), that the NCAA's rules against giving recruits “improper inducements” were “explicitly noncommercial.” The court explained:

> In fact, th[e]se rules are *anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools. Violation of the applicable NCAA rules gives the violator a decided competitive advantage in recruiting and retaining highly prized student athletes. It also violates the spirit of amateur athletics by providing remuneration to athletes in exchange for their commitments to play for the violator's football program. Finally, violators of these rules harm the student-athlete academically when coaches and assistants complete coursework on behalf of the student-athlete.

Id. at 433.

Neither *Smith* nor *Bassett* convinces us that the NCAA's compensation rules are noncommercial. The Postbaccalaureate Bylaw challenged in *Smith* was a true “eligibility” rule, akin to the rules limiting the number of years that student-athletes may play collegiate sports or requiring student-athletes to complete a certain number of credit hours each semester. As the *Smith* court expressly noted, the Postbaccalaureate Bylaw was “not related to the NCAA's commercial or business activities.” *Smith,* 139 F.3d at 185. By contrast, the rules here—which regulate what compensation NCAA schools may give student-athletes, and how much—*do* relate to the NCAA's business activities: the labor of student-athletes is an integral and essential component of the NCAA's “product,” and a rule setting the price of that labor goes to the heart of the NCAA's business. Thus, the rules at issue here are more like rules affecting the NCAA's dealings with its coaches or with corporate business partners—which courts have held to be commercial—than they are like the Bylaw challenged in *Smith. See* *Bd. of Regents,* 468 U.S. at 104–13, 104 S.Ct. 2948 (applying Sherman Act to rules governing NCAA members' contracts with television networks); *Law v. NCAA,* 134 F.3d 1010, 1024 (10th Cir.1998) (applying Sherman Act to NCAA rules limiting compensation of basketball coaches).

Bassett cannot be distinguished here in the way that *Smith* can since it involved an NCAA rule relating to payments to athletic recruits, but we believe *Bassett* was simply wrong on this point. Bassett's reasoning, in fine, is that rules that seek to combat *commercialism* in college sports by preventing schools from competing to pay student-athletes cannot be considered restraints on “commerce.” We simply cannot understand this logic. Rules that are “*anti-commercial* and designed to promote and ensure competitiveness,” *Bassett,* 528 F.3d at 433, surely *affect* commerce just as much as rules promoting commercialism. The intent behind the NCAA's compensation rules does not change the fact that the exchange they regulate—labor for in-kind compensation—is a quintessentially commercial transaction.

We therefore conclude that the NCAA's compensation rules are within the ambit of the Sherman Act.

C. *The Plaintiffs Demonstrated that the Compensation Rules Cause Them Injury in Fact*

[5] The NCAA's last argument antecedent to the merits is that the plaintiffs' Section 1 claim fails at the threshold because the plaintiffs have failed to show that they have suffered “antitrust injury.” Antitrust injury is a heightened standing requirement that applies to private parties suing to enforce the antitrust laws. To satisfy the antitrust-injury requirement, a plaintiff must show “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.” ***1067**

Glen Holly Entm't, Inc. v. Tektronix Inc., 343 F.3d 1000, 1007–08 (9th Cir.2003) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)) (internal quotation marks omitted).

Although the NCAA purports to be making an antitrust-injury argument, it is mistaken. The NCAA has not contended that the plaintiffs' injuries are not "of the type the antitrust laws were intended to prevent." Rather, the NCAA has made a garden-variety standing argument: it alleges that the plaintiffs have not been *injured in fact* by the compensation rules because those rules do not deprive them of any NIL compensation they would otherwise receive. Addressing each of the potential markets for NIL rights that the district court identified, the NCAA argues that (1) there are no legally-recognized NIL rights for participants in live game broadcasts; (2) the NCAA's compensation rules do not deprive the plaintiffs of compensation for use of their NILs in video games because the NCAA no longer permits college sports video games to be made and has a separate policy forbidding the use of student-athletes' NILs in video games; and (3) the NCAA's licensing agreement for archival footage with T3Media does not deprive athletes of NIL compensation for archival footage because it prevents T3Media from licensing student-athletes' NILs while they are in school and requires the company to obtain consent once student-athletes have left school.

[6] We conclude that the plaintiffs have shown that they are injured in fact as a result of the NCAA's rules having foreclosed the market for their NILs in video games. We therefore do not reach the thornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage.

1. Absent the NCAA's compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs

As we have explained, the district court found that, if permitted to do so, video game makers such as EA would negotiate with college athletes for the right to use their NILs in video games because these companies want to make games that are as realistic as possible. *O'Bannon,* 7 F.Supp.3d at 970. The district court noted that EA currently negotiates with the NFL and NBA players' unions for the right to use their members' NILs in pro sports video games. *Id.* The plaintiffs also put into evidence a copy of a 2005 presentation by EA representatives to the NCAA, which stated that EA's inability to use college athletes' NILs was the "number one factor holding back NCAA video game growth."

[7] **[8]** The NCAA argues, however, that we cannot find that the plaintiffs have suffered an injury in fact based on lost compensation from video game companies because the NCAA has terminated its relationship with EA and is not currently working with any other video game maker.[11] We disagree. The district court found that it is entirely possible that the NCAA will resume its support for college sports video games at some point in the future, given that the NCAA found such games to be profitable in the past, *id.,* and that finding of fact was not clearly erroneous. Given the NCAA's previous, lengthy ***1068** relationship with EA and the other evidence presented, it was reasonable for the district court to conclude that the NCAA may well begin working with EA or another video game company in the future.[12]

11 The NCAA also asserts before us that it has no intent to license its intellectual property for use in video games in the future, but we place no weight on that assertion. Statements in appellate briefs are not evidence. *See, e.g., Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.,* 341 F.3d 987, 1002 (9th Cir.2003).

12 Even if the district court had not made this factual finding, we would be reluctant to conclude that the NCAA's current moratorium on college sports video games precludes the plaintiffs' suit. When a defendant has voluntarily ceased "allegedly improper behavior in response to a suit, but is free to return to it at any time," a challenge to the defendant's behavior is generally not considered moot unless "there is no reasonable expectation that the illegal action will recur." *Native Vill. of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir.1994). Under this logic, the NCAA's decision to terminate its relationship with video game companies should not moot the plaintiffs' video game-related claims or show that the NCAA's conduct does not injure the plaintiffs.

Our conclusion is unaffected by the NCAA's claim that other rules and policies, not directly at issue here, would forbid video game makers from using student-athletes' NILs in their games if such games were to be made again. The NCAA did, after all, permit EA to continue making NCAA video games for some time after EA began incorporating recognizable player avatars into the games. Moreover, Joel Linzner, a EA executive, testified at trial that EA "made a long-sustained effort to work with the NCAA" to change the policy against using student-athletes' NILs, and that NCAA executives were "supportive" of the idea. It was not clearly erroneous for the district court to conclude on the basis of this evidence that the NCAA might well either change its policy barring the use of athletes' NILs in video games or decline to enforce it.

2. Whether the Copyright Act preempts right-of-publicity claims based on sports video games is tangential to this case and irrelevant to the plaintiffs' standing

In addition to arguing that its current policies against college sports video games defeat the plaintiffs' claims to standing, the NCAA also contends that there are legal barriers that would prevent the plaintiffs from being compensated by a video game maker. Specifically, the NCAA argues that the Copyright Act would preempt any right-of-publicity claim arising out of the use of those NILs in sports video games. [13] Thus, the NCAA maintains, if it were to resume its support for college sports video games and permit video game companies to use student-athletes' NILs, the video game makers would not *pay* student-athletes for their NILs; rather, they could use the NILs for free.

13 The NCAA also argues that the First Amendment would preclude any right-of-publicity claim arising out of a sports video game. We rejected that argument in *Keller,* 724 F.3d at 1284, and we will not consider it further in this appeal. *Accord* *Hart v. Electronic Arts, Inc.,* 717 F.3d 141, 170 (3d Cir.2013) (holding that "the *NCAA Football* ... games at issue in this case do not sufficiently transform [student-athletes'] identit[ies] to escape [a] right of publicity claim").

We decline to consider this argument, for two reasons. First, it is convoluted and far afield from the main issues in this case. The NCAA asks us to decide whether, assuming that EA or some other video game company were to make a college sports video game that incorporated student-athletes' NILs and then refuse to pay student-athletes for those NILs, the game maker would have a viable Copyright Act defense to a right-of-publicity lawsuit brought by the athletes. That question is a complex one, implicating both Section 301 of the Copyright Act, 17 U.S.C. § 301, which expressly preempts certain common-law claims, and a murky body of case law holding that, in some circumstances, the Act impliedly preempts claims that fall ***1069** outside of Section 301's scope. *See, e.g.,* *Facenda v. NFL Films, Inc.,* 542 F.3d 1007, 1028–32 (3d Cir.2008) (suggesting, on the basis of a conflict preemption analysis, that federal copyright law can "impliedly preempt[ ]" right-of-publicity claims). It is scarcely fit for resolution within the confines of a standing inquiry in an antitrust suit between the NCAA and its student-athletes that involves neither EA nor any other video game company as a party. Should a college sports video game be made in the future and the right-of-publicity suit envisioned by the NCAA come to pass, the court hearing that suit will be in a far better position to resolve the question of Copyright Act preemption than we are.

Second and more importantly, the NCAA's argument about the Copyright Act, even if correct, is irrelevant to whether the plaintiffs lack standing. On the NCAA's interpretation of the Copyright Act, *professional* football and basketball players have no enforceable right-of-publicity claims against video game makers either—yet EA currently pays NFL and NBA players for the right to use their NILs in its video games. *O'Bannon,* 7 F.Supp.3d at 970. Thus, there is every reason to believe that, if permitted to do so, EA or another video game company would pay NCAA athletes for their NIL rights rather than test the enforceability of those rights in court. That the NCAA's rules deny the plaintiffs all opportunity to receive this compensation is sufficient to endow them with standing to bring this lawsuit. *See* 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.4 (3d ed. 1998) ("[L]oss of an opportunity may constitute injury, even though it is not certain that any benefit would have been realized if the opportunity had been accorded." (collecting cases)); *cf., e.g.,* *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (rejecting the government's argument that standing should be limited "to those who have been 'significantly' affected by agency action"); *Preminger v. Peake,* 552 F.3d 757, 763 (9th Cir.2008) ("The injury may be minimal.").

* * *

Because the plaintiffs have shown that, absent the NCAA's compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.

IV

Having rejected all of the NCAA's preliminary legal arguments, we proceed to review the plaintiffs' Section 1 claim on the merits. Although in another context the NCAA's decision to value student-athletes' NIL at zero might be per se illegal price fixing, we are persuaded—as was the Supreme Court in *Board of Regents* and the district court here—that the appropriate rule is the Rule of Reason. As the Supreme Court observed, the NCAA "market[s] a particular brand ... [that] makes it more popular than professional sports to which it might otherwise be comparable." *Board of Regents,* 468 U.S. at 101–02, 104 S.Ct. 2948. Because the "integrity of the 'product' cannot be preserved except by mutual agreement," "restraints on competition are essential if the product is to be available at all." *Id.* at 101, 102, 104 S.Ct. 2948; *see also id.* at 117, 104 S.Ct. 2948 ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved." (footnote omitted)).

***1070** **[9]** Like the district court, we follow the three-step framework of the Rule of Reason: "[1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Tanaka v. Univ. of S. Cal.,* 252 F.3d 1059, 1063 (9th Cir.2001) (citations and internal quotation marks omitted).

A. *Significant Anticompetitive Effects Within a Relevant Market*

[10] As we have recounted, the district court made the following factual findings: (1) that a cognizable "college education market" exists, wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities; (2) that if the NCAA's compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs; and (3) that the compensation rules therefore have a significant anticompetitive effect on the college education market, in that they fix an aspect of the "price" that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services). These findings have substantial support in the record.

By and large, the NCAA does not challenge the district court's findings. It does not take issue with the way that the district court defined the college education market. Nor does it appear to dispute the district court's conclusion that the compensation rules restrain the NCAA's member schools from competing with each other within that market, at least to a certain degree. Instead, the NCAA makes three modest arguments about why the compensation rules do not have a significant anticompetitive effect. First, it argues that because the plaintiffs never showed that the rules reduce output in the college education market, the plaintiffs did not meet their burden of showing a significant anticompetitive effect. Second, it argues that the rules have no anticompetitive effect because schools would not pay student-athletes anything for their NIL rights in any event, given that those rights are worth nothing. And finally, the NCAA argues that even if the district court was right that schools would pay student-athletes for their NIL rights, any such payments would be small, which means that the compensation rules' anticompetitive effects cannot be considered significant.

We can dispose of the first two arguments quickly. First, the NCAA's contention that the plaintiffs' claim fails because they did not show a decrease in output in the college education market is simply incorrect. Here, the NCAA argues that output in the college education market "consists of opportunities for student-athletes to participate in FBS football or Division I men's basketball," and it quotes the district court's finding that these opportunities have "increased steadily over time." *See O'Bannon,* 7 F.Supp.3d at 981. But this argument misses the mark. Although output reductions are one common kind of anticompetitive effect in antitrust cases, a "reduction in output is not the *only* measure of anticompetitive effect." Areeda & Hovenkamp ¶ 1503b(1) (emphasis added).

[11] The "combination[s] condemned by the [Sherman] Act" also include "price-fixing ... by purchasers" even though "the persons specially injured ... are sellers, not customers or consumers." *Mandeville Island Farms, Inc. v. Am.*

Crystal Sugar Co., 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). At trial, the plaintiffs demonstrated that the ***1071** NCAA's compensation rules have just this kind of anticompetitive effect: they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component. The district court found that although consumers of NCAA football and basketball may not be harmed directly by this price-fixing, the "student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools." *O'Bannon,* 7 F.Supp.3d at 972–73. The athletes accept grants-in-aid, and no more, in exchange for their athletic performance, because the NCAA schools have agreed to value the athletes' NILs at zero, "an anticompetitive effect." [14] *Id.* at 973. This anticompetitive effect satisfied the plaintiffs' initial burden under the Rule of Reason. *Cf.* *Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) ("[R]aising price, reducing output, and dividing markets have the same anticompetitive effects." (quoting *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n,* 744 F.2d 588, 594–95 (7th Cir.1984))).

14 As we have explained, the district court alternatively characterized student-athletes as buyers of educational services from a cartel rather than sellers of labor to a monopsony. This different way of describing the college education market did not alter either the district court's analysis of how the market functioned or its assessment that student-athletes are harmed by the NCAA's compensation rules. *O'Bannon,* 7 F.Supp.3d at 973, 991–93.

Second, the NCAA's argument that student-athletes' NILs are, in fact, worth nothing is simply a repackaged version of its arguments about injury in fact, which we have rejected.

Finally, we reject the NCAA's contention that any NIL compensation that student-athletes might receive in the absence of its compensation rules would be de minimis and that the rules therefore do not significantly affect competition in the college education market. This "too small to matter" argument is incompatible with the Supreme Court's holding in *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (per curiam). In *Catalano,* a group of beer retailers sued a group of beer wholesalers, alleging that the wholesalers had secretly agreed to end their customary practice of extending the retailers interest-free credit for roughly a month after the delivery of beer. *Id.* at 644, 100 S.Ct. 1925. The Court unanimously held that this agreement was unlawful per se. It reasoned that the agreement was clearly a means of "extinguishing one form of [price] competition among the sellers," given that credit terms were part of the price of the beer, and that the agreement was therefore tantamount to price-fixing. *Id.* at 649, 100 S.Ct. 1925. The Court was not concerned with whether the agreement affected the market adversely: "It is no excuse that the prices fixed are themselves reasonable." *Id.* at 647, 100 S.Ct. 1925.

The NCAA's compensation rules function in much the same way as the agreement at issue in *Catalano:* they "extinguish[ ] one form of competition" among schools seeking to land recruits. We acknowledge that *Catalano* was a per se case in which the Court did not analyze the anticompetitive effect of the wholesalers' agreement in detail, [15] but the decision nonetheless indicates that an antitrust court should not dismiss an anticompetitive price-fixing agreement as benign simply because the agreement relates only to one component of an overall price. That proposition ***1072** finds further support in *Board of Regents*: in *Board of Regents*, a Rule of Reason case, the Court held that the NCAA's television plan had "a significant potential for anticompetitive effects" without delving into the details of exactly how much the plan restricted output of televised games or how much it fixed the price of TV contracts. 468 U.S. at 104–05, 104 S.Ct. 2948. While the precise value of NIL compensation is uncertain, at this point in the analysis and in light of *Catalano* and *Board of Regents*, we conclude that the plaintiffs have met their burden at the first step of the Rule of Reason by showing that the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits.

15 Indeed, the *Catalano* defendants declined to "suggest a procompetitive justification for [their] horizontal agreement to fix credit." *Catalano,* 446 U.S. at 646 n. 8, 100 S.Ct. 1925.

Because we agree with the district court that the compensation rules have a significant anticompetitive effect on the college education market, we proceed to consider the procompetitive justifications the NCAA proffers for those rules.

B. *Procompetitive Effects*

As discussed above, the NCAA offered the district court four procompetitive justifications for the compensation rules: (1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education market. The district court accepted the first and third and rejected the other two.

Although the NCAA's briefs state in passing that the district court erred in failing to "credit all four justifications fully," the NCAA focuses its arguments to this court entirely on the first proffered justification—the promotion of amateurism. We therefore accept the district court's factual findings that the compensation rules do not promote competitive balance, that they do not increase output in the college education market, and that they play a limited role in integrating student-athletes with their schools' academic communities, since we have been offered no meaningful argument that those findings were clearly erroneous. *See, e.g., Md. Cas. Co. v. Knight,* 96 F.3d 1284, 1291 (9th Cir.1996).

The district court acknowledged that the NCAA's current rules promote amateurism, which in turn plays a role in increasing consumer demand for college sports. *O'Bannon,* 7 F.Supp.3d at 978. The NCAA does not challenge that specific determination, but it argues to us that the district court gave the amateurism justification short shrift, in two respects. First, it claims that the district court erred by focusing solely on the question of whether amateurism increases consumers' (*i.e.,* fans') demand for college sports and ignoring the fact that amateurism also increases choice for student-athletes by giving them "the only opportunity [they will] have to obtain a college education while playing competitive sports *as students.*" Second, it faults the district court for being inappropriately skeptical of the NCAA's historical commitment to amateurism. Although we might have credited the depth of the NCAA's devotion to amateurism differently, these arguments do not persuade us that the district court clearly erred.

The NCAA is correct that a restraint that broadens choices can be procompetitive. The Court in *Board of Regents* observed that the difference between college and professional sports "widen[s]" the choices "available to athletes." *Bd. of Regents,* 468 U.S. at 102, 104 S.Ct. 2948. But we fail to see how the restraint at issue in this particular case—*i.e.,* the NCAA's limits on student-athlete compensation—makes college sports more attractive to recruits, or widens recruits' spectrum of choices in the sense that *Board of Regents* ***1073** suggested. As the district court found, it is primarily "the opportunity to earn a higher education" that attracts athletes to college sports rather than professional sports, *O'Bannon,* 7 F.Supp.3d at 986, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships. Nothing in the plaintiffs' prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes.

Indeed, if anything, loosening or abandoning the compensation rules might be the best way to "widen" recruits' range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school. *See* Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights,* 54 Antitrust Bull. 923, 948 (2009). We therefore reject the NCAA's claim that, by denying student-athletes compensation apart from scholarships, the NCAA increases the "choices" available to them. [16]

16 It may be that what the NCAA means by this argument is that its compensation rules make it possible for schools to fund more scholarships than they otherwise could and thereby increase the number of opportunities that recruits have to play college sports. To the extent the NCAA is making that argument, it is the functional equivalent of the NCAA's argument that the rules increase output in the college education market. The district court found that argument unproved, and we have affirmed that finding.

The NCAA's second point has more force—the district court probably underestimated the NCAA's commitment to amateurism. *See Bd. of Regents,* 468 U.S. at 120, 104 S.Ct. 2948 (referring to the NCAA's "revered tradition of amateurism in college sports"). But the point is ultimately irrelevant. Even if the NCAA's concept of amateurism had been perfectly coherent and consistent, the NCAA would still need to show that amateurism brings about some procompetitive *effect* in order to justify it under the antitrust laws. *See id.* at 101–02 & n. 23, 104 S.Ct. 2948. The NCAA cannot fully answer the district court's finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time. Nevertheless, the district court found, and the record supports that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers. We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism." *O'Bannon,* 7 F.Supp.3d at 1005.[17]

17 The dissent suggests that during the second step the district court defined the procompetitive benefits as "limits on large amounts of student-athlete compensation preserve the popularity of the NCAA's product." Dissent at 1081, 1082. But this cannot be right. During the second step, the district court could only consider the benefits of the NCAA's existing rule prohibiting NIL payments—it could not consider the potential benefits of an alternative rule (such as capping large payments). The correct inquiry under the Rule of Reason is: What procompetitive benefits are served by the NCAA's existing rule banning NIL payments? The district court found that the NCAA's existing ban provides the procompetitive benefit of preserving amateurism, and thus consumer demand. It is only in the third step, where the burden is on the plaintiffs, when the court could consider whether alternative rules provide a procompetitive benefit. And even then, the courts' analysis is cabined to considering whether the alternative serves the same procompetitive interests identified in second step.

***1074** We note that the district court's findings are largely consistent with the Supreme Court's own description of the college football market as "a particular brand of football" that draws from "an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball." *Bd. of Regents,* 468 U.S. at 101–02, 104 S.Ct. 2948. "Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." *Id.* at 102, 104 S.Ct. 2948. But, as *Board of Regents* demonstrates, not every rule adopted by the NCAA that restricts the market is necessary to preserving the "character" of college sports. We thus turn to the final inquiry—whether there are reasonable alternatives to the NCAA's current compensation restrictions.

C. *Substantially Less Restrictive Alternatives*

The third step in the Rule of Reason analysis is whether there are substantially less restrictive alternatives to the NCAA's current rules. We bear in mind that—to be viable under the Rule of Reason—an alternative must be "virtually as effective" in serving the procompetitive purposes of the NCAA's current rules, and "without significantly increased cost." *Cnty. of Tuolumne v. Sonora Cmty. Hosp.,* 236 F.3d 1148, 1159 (9th Cir.2001) (internal quotation marks omitted). We think that plaintiffs must make a strong evidentiary showing that its alternatives are viable here. Not only do plaintiffs bear the burden at this step, but the Supreme Court has admonished that we must generally afford the NCAA "ample latitude" to superintend college athletics. *Bd. of Regents,* 468 U.S. at 120, 104 S.Ct. 2948; *see also* *Law v. Nat'l Collegiate Athletic Ass'n,* 134 F.3d 1010, 1022 (10th Cir.1998) ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.,* 614 F.3d 57, 83 (3d Cir.2010) (noting that, generally, "sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport").

The district court identified two substantially less restrictive alternatives: (1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.[18] *O'Bannon,* 7 F.Supp.3d at 1005–07. We hold that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA's current amateur-status rule.

18 Although the NCAA now permits schools and conferences to elect to raise their scholarship caps to the full cost of attendance, it could reverse its

position on that issue at any time. The district court's injunction prohibiting the NCAA from setting a cap any lower than the cost of attendance thus remains in effect, which means that the NCAA's challenge to that portion of the injunction is not moot.

1. Capping the permissible amount of scholarships at the cost of attendance

[12] The district court did not clearly err in finding that allowing NCAA member schools to award grants-in-aid up to their full cost of attendance would be a substantially less restrictive alternative to the current compensation rules. All of the evidence ***1075** before the district court indicated that raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism: Dr. Mark Emmert, the president of the NCAA, testified at trial that giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their "legitimate costs" to attend school. Other NCAA witnesses agreed with that assessment. *Id.* at 983. Nothing in the record, moreover, suggested that consumers of college sports would become less interested in those sports if athletes' scholarships covered their full cost of attendance, or that an increase in the grant-in-aid cap would impede the integration of student-athletes into their academic communities. *Id.*

The NCAA, along with fifteen scholars of antitrust law appearing as *amici curiae,* warns us that if we affirm even this more modest of the two less restrictive alternative restraints identified by the district court, we will open the floodgates to new lawsuits demanding all manner of incremental changes in the NCAA's and other organizations' rules. The NCAA and these *amici* admonish us that as long as a restraint (such as a price cap) is "reasonably necessary to a valid business purpose," it should be upheld; it is not an antitrust court's function to tweak every market restraint that the court believes could be improved.

We agree with the NCAA and the *amici* that, as a general matter, courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints. *See, e.g., Bruce Drug, Inc. v. Hollister, Inc.,* 688 F.2d 853, 860 (1st Cir.1982) (noting that defendants are "not required to adopt the least restrictive" alternative); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230, 1249 (3d Cir.1975) (denying that "the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree"). The particular restraint at issue here, however —the grant-in-aid cap that the NCAA set below the cost of attendance—is not such a restraint. To the contrary, the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.

Thus, in holding that setting the grant-in-aid cap at student-athletes' full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmance of this aspect of the district court's decision should be taken to establish only that where, as here, a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.

A compensation cap set at student-athletes' full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA's legitimate procompetitive purposes. And there is no evidence that this cap will significantly increase costs; indeed, the NCAA already permits schools to fund student-athletes' full cost of attendance. The district court's determination that the existing compensation rules violate Section 1 of the Sherman Act was correct and its injunction requiring the NCAA to permit schools ***1076** to provide compensation up to the full cost of attendance was proper.

2. Allowing students to receive cash compensation for their NILs

[13] In our judgment, however, the district court clearly erred in finding it a viable alterative to allow students to receive NIL cash payments untethered to their education expenses. Again, the district court identified two procompetitive purposes served by the NCAA's current rules: "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism" and "integrating academics and athletics." *O'Bannon,* 7 F.Supp.3d at 1005; *see also* *Board of Regents,* 468 U.S.

at 117, 104 S.Ct. 2948 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."). The question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is "virtually as effective" in preserving amateurism as *not* allowing compensation. *Cnty. of Tuolumne,* 236 F.3d at 1159 (internal quotation marks omitted).

We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand. [19] Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs.* [20]

19 Although our analysis focuses on whether the alternative serves procompetitive purposes, our prior cases make clear that plaintiffs must prove that any alternative will not significantly increase costs to implement. *Cnty. of Tuolumne,* 236 F.3d at 1159. And the district court here failed to make any findings about whether allowing schools to pay students NIL cash compensation will significantly increase costs to the NCAA and its member schools.

20 The dissent suggests that the district court found amateurism itself has no procompetitive value, and that "[a]mateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism." Dissent at 1082. But this ignores that the district court found that the NCAA's "current understanding of amateurism" helps "preserv[e] the popularity of the NCAA's product." Amateurism is not divorced from the procompetitive benefit identified by the court; it is its core element.

Elsewhere the dissent argues that "we are not tasked with deciding what makes an amateur an amateur," Dissent at 1083 n. 5, and that "the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw," *id.* at 1082 n. 4. However, if we do not have some shared conception of what makes an amateur an amateur—or, more precisely, the difference between amateurs and professionals —then the district court's findings on the role of amateurism in college sports make no sense. We may not agree on all the particulars, but the basic difference was spelled out by Neal Pilson, a witness the district court relied on when determining that small cash payments to students was a viable alternative: "if you're paid for performance, you're not an amateur."

Having found that amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is "virtually as effective" for that market as being as amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be "differentiate[d]" from professional sports lest it become ***1077** "minor league [football]." *Bd. of Regents,* 468 U.S. at 102, 104 S.Ct. 2948.

Aside from the self-evident fact that paying students for their NIL rights will vitiate their amateur status as collegiate athletes, the court relied on threadbare evidence in finding that small payments of cash compensation will preserve amateurism as well the NCAA's rule forbidding such payments. Most of the evidence elicited merely indicates that paying students large compensation payments would harm consumer demand more than smaller payments would —not that small cash payments will preserve amateurism. Thus, the evidence was addressed to the wrong question. Instead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments, the evidence before the district court went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments? For example, the district court noted that a witness called by the NCAA, Bernard Muir, the athletic director at Stanford University, testified that paying student-athletes modest sums raises less concern than paying them large sums. The district court also relied on Dr. Dennis's opinion survey, which the court read to indicate that in the absence of the NCAA's compensation rules, "the popularity of college sports would likely depend on the size of payments awarded to student-athletes." *O'Bannon,* 7 F.Supp.3d at 983. Dr. Dennis had found that payments of $200,000 per year to each athlete would alienate the public more than would payments of $20,000 per year. *Id.* at 975–76, 983. At best, these pieces of evidence indicate that small payments to players will impact consumer demand less than larger payments. But there is a stark difference between finding that small payments are less harmful to the market than large payments—and finding that paying students small sums is virtually as effective in promoting amateurism as not paying them.

The other evidence cited by the district court is even less probative of whether paying these student-athletes will preserve amateurism and consumer demand. The district court adverted to testimony from a sports management expert, Daniel Rascher, who explained that although opinion surveys had shown the public was opposed to rising baseball salaries during the 1970s, and to the decision of the International Olympic Committee to allow professional athletes to compete in the Olympics, the public had continued to watch baseball and the Olympics at the same rate after those changes. *Id.* at 976–77. But professional baseball and the Olympics are not fit analogues to college sports.[21] The Olympics have not been nearly as transformed by the introduction of professionalism as college sports would be.

21 The district court also considered evidence that Division I tennis recruits are permitted to earn up to ten thousand dollars per year in prize money from athletic events before they enroll in college. *O'Bannon,* 7 F.Supp.3d at 974, 1000. Allowing college-bound tennis players to accept award money from outside athletic events implicates amateurism differently than allowing schools to pay student-tennis players directly.

Finally, the district court, and the dissent, place particular weight on a brief interchange during plaintiffs' cross-examination of one of the NCAA's witnesses, Neal Pilson, a television sports consultant formerly employed at CBS. Pilson testified that "if you're paid for your performance, you're not an amateur," and explained at length why paying students would harm the student-athlete market. Plaintiffs then asked Pilson whether his opinions about amateurism "depend on the level of the money" paid to players, and he acknowledged ***1078** that his opinion was "impacted by the level." When asked whether there was a line that "should not be crossed" in paying players, Pilson responded "that's a difficult question. I haven't thought about the line. And I haven't been asked to render an opinion on that." When pressed to come up with a figure, Pilson repeated that he was "not sure." He eventually commented that "I tell you that a million dollars would trouble me and $5,000 wouldn't, but that's a pretty good range." When asked whether deferred compensation to students would concern him, Pilson said that while he would not be as concerned by deferred payments, he would still be "troubled by it."[22]

22 Later in his cross-examination, Pilson was asked if "the public watches college sports because they perceive student athletes as playing for the love of the game and for the value and opportunities available to them from a college education?" Pilson responded that that was "one of the reasons that ... would be jeopardized." He then commented that "the public has ... a sense of college sports that is different from professional [sports] and it's at the bedrock of the popularity of college sports."

So far as we can determine, Pilson's offhand comment under cross-examination is the sole support for the district court's $5,000 figure. But even taking Pilson's comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them. Pilson made clear that he was not prepared to opine on whether pure cash compensation, of any amount, would affect amateurism. Indeed, he was never asked about the impact of giving student-athletes small cash payments; instead, like other witnesses, he was asked only whether big payments would be worse than small payments. Pilson's casual comment—"[I] haven't been asked to render an opinion on that. It's not in my report"—that he would not be troubled by $5,000 payments is simply not enough to support the district court's far-reaching conclusion that paying students $5,000 per year will be as effective in preserving amateurism as the NCAA's current policy.[23]

23 The dissent contends that the record supports the finding that $5,000 payments to student-athletes will have little to no effect on consumer demand for college football. Dissent at 1081 n. 3, 1083 (suggesting the district court found "the distinction between offering student-athletes no compensation and offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way"). But there is little evidence in the record about the

impact of these $5,000 NIL payments. There is evidence only that small payments will be *less harmful* than larger payments, and that a single witness would not be as troubled by $5,000 payments. This is not enough for plaintiffs to meet their burden to show that payments to student-athletes will be as effective in preserving consumer demand as the NCAA's current amateurism policy.

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. [24] Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; ***1079** we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status. *Bd. of Regents,* 468 U.S. at 101–02, 104 S.Ct. 2948. In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA "ample latitude" to superintend college athletics, *Bd. of Regents,* 468 U.S. at 120, 104 S.Ct. 2948, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint. [25] We thus vacate that portion of the district court's decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation.

24 The district court suggested that compensating athletes beyond the full cost of attendance would not be problematic because student-athletes are already permitted to accept Pell grants that raise their total aid package above the cost of attendance. *O'Bannon,* 7 F.Supp.3d at 1000; Dissent at 1080. This reasoning was faulty because it improperly equates compensation intended for education-related expenses (*i.e.,* Pell grants) with pure cash compensation. The fact that Pell grants (which are available to athletes and nonathletes alike) have not eroded the NCAA's culture of amateurism says little about whether cash payments into trust funds to compensate student-athletes for their prowess on the gridiron or the court would do so.

25 The dissent criticizes us for citing "no record evidence to support [our] conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand." Dissent at 1081 n. 3. But we do not decide, and the NCAA need not prove, whether paying student athletes $5,000 payments will necessarily *reduce* consumer demand. The proper inquiry in the Rule of Reason's third step is whether the plaintiffs have shown these payments will *not reduce* consumer demand (relative to the existing rules). And we conclude they have not.

V

By way of summation, we wish to emphasize the limited scope of the decision we have reached and the remedy we have approved. Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.

We vacate the district court's judgment and permanent injunction insofar as they require the NCAA to allow its member schools to pay student-athletes up to $5,000 per year in deferred compensation. We otherwise affirm. The parties shall bear their own costs on appeal.

AFFIRMED IN PART and **VACATED IN PART.**

THOMAS, Chief Judge, concurring in part and dissenting in part:

I largely agree with all but one of the majority's conclusions. [1] I respectfully disagree with the majority's conclusion that the district court clearly erred in ordering the NCAA to permit up to $5,000 in deferred compensation above student-athletes' full cost of attendance.

1 The majority concludes that the plaintiffs established antitrust injury in fact because the NCAA has foreclosed them from the market for the athletes' names, images, and likenesses ("NILs") in video games. Because we are bound by *In re NCAA Student–Athlete Name & Likeness Licensing Litig. ("Keller"),* 724 F.3d 1268 (9th Cir.2013), a case in which I dissented, I agree that the plaintiffs have sufficiently established antitrust injury. However, absent *Keller,* there is a serious question as to whether the plaintiffs have established the requisite antitrust injury in fact.

I

We review the district court's determinations of fact for clear error. We are not permitted to "review the evidence de novo ***1080** and freely substitute our judgment for that of the trial judge." *United States v. Ironworkers Local 86,* 443 F.2d 544, 549 (9th Cir.1971). Rather, the clear error standard "is significantly deferential, and we will accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed." *Lentini v. Cal. Ctr. for the Arts, Escondido,* 370 F.3d 837, 848–49 (9th Cir.2004).

There was sufficient evidence in the record to support the award. The district court's conclusion that the proposed alternative restraint satisfied the Rule of Reason was based on testimony from at least four experts-including three experts presented by the NCAA-that providing student-athletes with small amounts of compensation above their cost of attendance most likely would not have a significant impact on consumer interest in college sports. *O'Bannon,* 7 F.Supp.3d at 976–77, 983–84, 1000–01. It was also based on the fact that FBS football players are currently permitted to accept Pell grants in excess of their cost of attendance, and the fact that Division I tennis recruits are permitted to earn up to $10,000 per year in prize money from athletic events before they enroll in college. *Id.* at 974, 1000. The majority characterizes the weight of this evidence as "threadbare." Op. at 1077. I respectfully disagree.

The NCAA's own expert witness, Neal Pilson, testified that the level of deferred compensation would have an effect on consumer demand for college athletics, but that paying student-athletes $5,000 per year in trust most likely would not have a significant impact on such demand. He also testified that any negative impact that paying student-athletes might have on consumer demand could be partially mitigated by placing the compensation in a trust fund to be paid out after graduation.

The majority dismisses this testimony because it was made in a very "offhand" manner, and because Pilson proffered the $5,000 amount on cross-examination "[w]hen pressed." Op. at 1078. However, the NCAA presented this witness as an expert on the issue of whether paying college athletes will negatively impact consumer demand for college sports. [2] Pilson testified at length on the topic, and his qualifications were not challenged. It is not appropriate for us on appeal to assess demeanor we did not see. As a result, I would take the testimony at face value, and the district court did not clearly err in crediting it.

2 Pilson's testimony included the following exchanges:

> Q: Okay. And let me just turn finally to your last opinion just briefly, Mr. Pilson, regarding whether paying basketball and football players in college threatens the popularity of college sports with the television audience. Just briefly sir, over the course of your career in the sports broadcast industry, have you come to have opinions about why viewers are interested in college sports on television?
> A: Yes, I have.
> Q: And how did you come to have those opinions?
> A: I [sic] been in the industry for 40 years. I've acquired and telecast thousands of hours of college sports. I watch college sports and evaluate them, so I have a pretty good handle on the industry. Of course, I have personal opinions as well, but I certainly—I've worked in the industry a long time.

* * *

> Q: Okay. Now, your opinions about why this would be damaging to the sport are based on your—what you think viewers appreciate, what the public perceives. I have that correct?
> A: Yes. And I would suggest I've been in that business measuring viewers—my whole job at CBS over 20 years was to try to figure out what

> the viewers wanted to watch and give it to them, so I'm not a layman on that subject.

***1081** The majority also dismisses the testimony given by expert witness Dr. Daniel Rascher demonstrating that consumer interest in major league baseball and the Olympics increased after baseball players' salaries rose and professional athletes were allowed to compete in the Olympics. The majority reasons that major league baseball and the Olympics are "not fit analogues to college sports," speculating that college sports would be more significantly transformed by professionalism than have the Olympics. Op. at 1077. However, the majority does not offer any evidentiary support for the distinction, nor explain how or why the district court clearly erred in crediting this testimony.

Moreover, Rascher also testified that consumer demand in sports such as tennis and rugby increased after the sports' governing boards permitted athletes to receive payment. *O'Bannon,* 7 F.Supp.3d at 977. In my view, the majority errs in dismissing this testimony. The import of Rascher's testimony was that consumer demand typically does not decrease when athletes are permitted to receive payment, and that this general principle holds true across a wide variety of sports and competitive formats. The district court did not clearly err in crediting it.

The district court accepted the testimony of multiple experts that small amounts of compensation would not affect consumer demand, and then used the lowest amount suggested by one of the NCAA's experts. The district court was within its right to do so. [3]

3 The majority states that it "cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand." Op. at 1076. And yet the majority cites no record evidence to support its conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand. Rather, the majority declares that it is a "self-evident fact" that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." Op. at 1077, 1078. To the contrary, the district court concluded after a full bench trial that the distinction between offering student-athletes no compensation and offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way. *See* *O'Bannon,* 7 F.Supp.3d at 976–77, 983–84, 1000–01.

II

The disagreement between my view and the majority view largely boils down to a difference in opinion as to the procompetitive interests at stake. The majority characterizes our task at step three of the Rule of Reason as determining "whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses is 'virtually as effective' in preserving *amateurism* as not allowing compensation." Op. at 1076 (emphasis added). This conclusion misstates our inquiry. Rather, we must determine whether allowing student-athletes to be compensated for their NILs is 'virtually as effective' in preserving *popular demand for college sports* as not allowing compensation. In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.

The district court found that there are two, limited procompetitive benefits to the current rule. It found that limits on large amounts of student-athlete compensation preserve the popularity of the NCAA's product, and that limits on large amounts of student-athlete compensation promote the integration of academics and athletics. *O'Bannon,* 7 F.Supp.3d at 1004–05. In reaching these conclusions, the district court explained:

> ***1082** [S]ome restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA's product—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise—then the restrictions

> would be procompetitive. *Id.* at 1000 (emphasis added).

The district court recounted the testimony of NCAA expert witness Dr. J. Michael Dennis, who conducted a survey of consumer attitudes concerning college sports in 2013. The court found that "[w]hat Dr. Dennis's survey does suggest is that the public's attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive." *Id.* at 1000–01. It noted that this conclusion "is consistent with the testimony of the NCAA's own witnesses, including [Stanford athletic director Bernard] Muir and Mr. Pilson, who both indicated that smaller payments to student-athletes would bother them less than larger payments." *Id.* at 1001.

The district court determined that "the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography." *Id.* The court therefore concluded that:

> the NCAA's restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

Id.

The district court's findings of fact provide that one procompetitive benefit of the current rule is that restricting large payments to student-athletes plays a limited role in preserving the popularity of the NCAA's products. In the context of this antitrust suit, the concept of "amateurism" is useful only to the extent that it furthers this goal. In terms of antitrust analysis, amateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism. Viewed through the antitrust lens, it is consumer desire that we must credit; not the NCAA's preferred articulation of the term. [4]

4 The majority argues that "[h]aving found amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional athlete is 'virtually as effective' for that market as being an amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports lest it become 'minor league [football].' " Op. at 1076–77. The district court found that amateurism played a limited role in preserving the popularity of college sports, and that other factors, such as school loyalty, served as the primary force driving interest in college athletics. *O'Bannon,* 7 F.Supp.3d at 1000. But I agree that an antitrust court should not eliminate the distinction between professional and college sports; to do so would undermine competition. However, in terms of antitrust analysis, the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw. If consumers believe that paying college football players $5,000 to be held in trust for use of their NILs will convert college football into professional football, and as a consequence they stop watching college football, then the proposed alternative will not be virtually as effective as the current rule. But, taken to its literal extreme to prohibit even small, deferred payments, the idea that "if you're paid for performance, you're not an amateur," Op. at 1076 n. 20, does not reflect consumer behavior. The district court made factual findings that modest payments, including those held in trust, would not significantly affect consumer demand. *See* *O'Bannon,* 7 F.Supp.3d at 976–77, 983–84, 1000–01. Therefore, I cannot conclude that the district court clearly erred.

***1083** Plaintiffs are not required, as the majority suggests, to show that the proposed alternatives are "virtually as effective" at preserving the concept of amateurism as the NCAA chooses to define it. Indeed, this would be a difficult task, given that "amateurism" has proven a nebulous concept prone to ever-changing definition. *See* *O'Bannon,* 7 F.Supp.3d at 973–75 (describing the ways that the NCAA's definition of amateurism has changed over time). Even today, the NCAA's conception of amateurism does not fall easily into a bright line rule between paying student-athletes and not paying them. Tennis players are permitted to receive payment of up to $10,000 per year for playing their sport. A tennis player who begins competing at a young age could presumably earn upwards of $50,000 for playing his sport and still be considered an amateur athlete by the NCAA. [5]

5 The majority states that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs.*" Op. at 1076. This is not true even under the NCAA's current definition of the term. But more importantly, we are not tasked with deciding what makes an amateur an amateur. We are tasked with determining whether a proposed less-restrictive alternative restraint will affect consumer demand.

The NCAA insists that consumers will flee if student-athletes are paid even a small sum of money for colleges' use of their NILs. This assertion is contradicted by the district court record and by the NCAA's own rules regarding amateurism. The district court was well within its right to reject it. Division I schools have spent $5 billion on athletic facilities over the past 15 years. The NCAA sold the television rights to broadcast the NCAA men's basketball championship tournament for 12 years to CBS for $10.8 billion dollars. The NCAA insists that this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance. That is a difficult argument to swallow. Given the trial evidence, the district court was well within its rights to reject it.

III

The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law and under the appropriate standard of review. In the end, my disagreement with the majority is founded on the appropriate standard of review. After an extensive bench trial, the district court made a factual finding that payment of $5,000 in deferred compensation would not significantly reduce consumer demand for college sports. This finding was supported by extensive testimony from at least four expert witnesses. There was no evidence to the contrary. Therefore, on this record, I cannot agree with the majority that the district court clearly erred when it determined that paying student-athletes up to $5,000 per year would be "virtually as effective" at preserving the pro-competitive benefits of the current rule. Therefore, I would affirm the district court in all respects.

***1084** For these reasons, I concur in part and dissent in part.

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Distinguished by Epic Games, Inc. v. Apple, Inc., 9th Cir.(Cal.), April 24, 2023

776 F.3d 686
United States Court of Appeals, Ninth Circuit.

CITY OF SAN JOSE; City of San Jose as Successor Agency to the Redevelopment Agency of the City of San Jose; The San Jose Diridon Development Authority, Plaintiffs–Appellants,
v.
OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association, DBA Major League Baseball; Allan Huber Selig, "Bud," Defendants–Appellees.

No. 14–15139
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Argued and Submitted Aug. 12, 2014.
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Synopsis
Background: City brought action alleging that Major League Baseball's (MLB) attempts to prevent relocation of club violated state and federal antitrust laws, state consumer protection statute, and state tort law. The United States District Court for the Northern District of California, Ronald M. Whyte, Senior Judge, 2013 WL 5609346, dismissed federal claims, and city appealed.

[Holding:] The Court of Appeals, Kozinski, Circuit Judge, held that action fell within scope of baseball exemption to antitrust laws.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (6)

[1] **Antitrust and Trade Regulation** Sports

Baseball exemption from federal antitrust laws extends to entire business of providing public baseball games for profit between clubs of professional baseball players.

9 Cases that cite this headnote

[2] **Antitrust and Trade Regulation** Sports

Major League Baseball's (MLB) restrictions on franchise relocation related to business of providing public baseball games for profit between clubs of professional baseball players, and thus city's action alleging that MLB's attempts to prevent relocation of club violated state and federal antitrust laws fell within scope of baseball exemption; limitations on franchise relocation were designed to ensure access to baseball games for broad range of markets and to safeguard profitability, and thus viability, of each ball club.

9 Cases that cite this headnote

[3] **Statutes** Exceptions, limitations, and conditions

When Congress specifically legislates in field and explicitly exempts issue from that legislation, court's ability to infer congressional intent to leave that issue undisturbed is at its apex.

2 Cases that cite this headnote

[4] **Antitrust and Trade Regulation** Sports

Baseball is exception to normal rule that federal antitrust laws supplement, not displace, state antitrust remedies.

5 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Source of prohibition or obligation; lawfulness

Under California law, if same conduct is alleged to be both antitrust violation and unfair business act or practice for same reason, because it unreasonably restrains competition and harms consumers, determination that conduct is not unreasonable restraint of trade necessarily implies that conduct is not unfair toward consumers.

9 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Right of Action; Persons Entitled to Sue; Standing; Parties

Antitrust and Trade Regulation Jurisdiction and Venue

Unlike Article III standing, question of standing to sue under antitrust laws does not go to subject matter jurisdiction, and thus need not be considered before addressing merits.

2 Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of California, Ronald M. Whyte, Senior District Judge, Presiding. D.C. No. 5:13–cv–02787–RMW.

Before: ALEX KOZINSKI, BARRY G. SILVERMAN and RICHARD R. CLIFTON, Circuit Judges.

OPINION

KOZINSKI, Circuit Judge:

The City of San Jose steps up to the plate to challenge the baseball industry's 92–year old exemption from the antitrust laws. It joins the long line of litigants that have sought to overturn one of federal law's most enduring anomalies.

I. Background

Major League Baseball's (MLB) [1] constitution requires that each of the league's 30 ***688** member clubs play their home games within a designated operating territory. For the Oakland Athletics, that territory is comprised of two California counties: Alameda and Contra Costa. Faced with dwindling attendance and revenue, the Athletics want to move to San Jose, which they consider a more profitable venue. But there's a snag: San Jose falls within the exclusive operating territory of the San Francisco Giants, and relocation to another franchise's territory is prohibited unless approved by at least three-quarters of MLB's clubs.

1 The defendants in this case are the "Office of the Commissioner of Baseball," which is an unincorporated association of all 30 MLB clubs, and Allan "Bud" Selig, whose individual job title is Commissioner of MLB. For convenience, we refer to the defendants as "MLB." The plaintiffs in this case are the City of San Jose and the San Jose Diridon Development Authority, which we refer to collectively as "San Jose."

MLB has not rushed to grant this approval. In 2009, MLB established a "special Relocation Committee" to investigate the implications of the move for the league, but four years later the committee was "still at work," with no resolution in sight. In the meantime, the Athletics moved forward with their plan to build a stadium in San Jose by entering into an option agreement with the city that gave them the right to purchase six parcels of land the city had set aside. But, because MLB hadn't yet approved the move, the Athletics were unable to perform on the agreement, and the land sat idle.

Believing that the delay was MLB's attempt to stymie the relocation and preserve the Giants' local monopoly, San Jose filed suit. It alleged violations of state and federal antitrust laws, of California's consumer protection statute and of California tort law. Relying on the baseball industry's historic exemption from the antitrust laws, the district court granted MLB's motion to dismiss on all but the tort claims. [2] San Jose appeals, arguing that the baseball exemption does not apply to antitrust claims relating to franchise relocation. We review de novo. *See* *Colony Cove Props., LLC v. City of Carson,* 640 F.3d 948, 955 (9th Cir.2011).

2 The district court subsequently declined to retain supplemental jurisdiction over those state law tort claims and dismissed them without prejudice.

II. Discussion

Our analysis is governed by three Supreme Court cases decided over the course of half a century; taken together, they set the scope of baseball's exemption from the antitrust laws. *See generally* Stuart Banner, *The Baseball Trust: A History of Baseball's Antitrust Exemption* (2013). First, in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs,* 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), the Court, reflecting the era's soon-to-be-outmoded interpretation of the Commerce Clause, held that the Sherman Act had no application to the "business [of] giving exhibitions of base ball" because such "exhibitions" are a "purely state affair[ ]." *Id.* at 208, 42 S.Ct. 465.

Next up, in *Toolson v. New York Yankees, Inc.,* 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953), the Court, in a short per curiam, affirmed *Federal Baseball,* albeit on a different ground. *Federal Baseball's* Commerce Clause underpinning was no longer good law, but the Court recognized that "Congress [ ] had the [*Federal Baseball*] ruling under consideration [and had] not seen fit to bring [baseball] under the [antitrust] laws by legislation." *Id.* at 357, 74 S.Ct. 78. As such, "[t]he business [was] left for thirty years to develop, on the understanding that it was not subject to ***689** existing antitrust legislation," and the Court determined that even if there were circumstances that "warrant[ed] application [ ] of the antitrust laws[, such laws] should be [applied] by legislation." *Id.* "Without re-examination of the underlying issues," the Court reaffirmed *Federal Baseball's* central holding that "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws." *Id.*

Finally in *Flood v. Kuhn,* 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), the Court once again upheld the baseball exemption, this time in a lengthy, reasoned opinion. [3] The Court noted "the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball* " and again stated its "preference that if any change is to be made, it come by legislative action." *Id.* at 283, 92 S.Ct. 2099. In particular, the Court stressed that Congress had acquiesced in the baseball exemption and thus "by its positive inaction ... clearly evinced a desire not to disapprove [it] legislatively." *Id.* at 283–84, 92 S.Ct. 2099. *Flood* and its progenitors, therefore, upheld the baseball exemption for two fundamental reasons: (1) fidelity to the principle of stare decisis and the concomitant aversion to disturbing reliance interests created by the exemption; and (2) Congress's apparent acquiescence in the holdings of *Federal Baseball* and *Toolson.*

3 Some thought, too lengthy. *See* 407 U.S. at 285, 92 S.Ct. 2099.

San Jose first argues that *Flood* applies only to baseball's "reserve clause" [4] —the particular provision at issue in that case—and not to other facets of the baseball industry, like franchise relocation. In other words, San Jose urges that we limit *Flood* to its facts. Such a drastic limitation on *Flood's* scope is foreclosed by our precedent. Under the baseball exemption, we have rejected an antitrust claim that was wholly unrelated to the reserve clause. *See* *Portland Baseball Club, Inc. v. Kuhn,* 491 F.2d 1101, 1103 (9th Cir.1974). In Portland Baseball, a former minor league franchise owner brought suit against MLB. The owner argued that MLB failed to comply with the terms of an agreement it struck with minor league teams to provide compensation in the event a major league franchise moved into a minor league franchise's territory. *Id.* at 1102. One of the plaintiff's claims was that MLB's monopolization of the baseball industry rendered minor league teams unable to negotiate on fair terms. *Portland Baseball Club, Inc. v. Kuhn,* 368 F.Supp. 1004, 1009 (D.Or.1971). Even though the antitrust claim in *Portland Baseball* had nothing to do with the reserve clause, we cited *Flood* in upholding the claim's dismissal. *Portland Baseball,* 491 F.2d at 1103. *Portland Baseball* may not define precisely the boundaries of the baseball exemption, but it fatally undercuts San Jose's attempt to restrict *Flood* to the reserve clause.

4 The "reserve clause" was a provision in baseball contracts that prevented players from signing with other clubs, even after their contracts had expired, without the express consent of the club they played for.

San Jose next contends that if we are to hold that the baseball exemption extends beyond the reserve clause, we must remand to the district court to determine whether franchise relocation is sufficiently related to "baseball's unique characteristics and needs" to warrant exemption. This argument appears to be derived from a single sentence in *Flood,* which states that the baseball exemption "rests on a recognition and an acceptance of baseball's ***690** unique characteristics and needs." *Flood,* 407 U.S. at 282, 92 S.Ct. 2099. From this line alone, San Jose argues that the *Flood* Court intended a fact-sensitive inquiry whenever the antitrust exemption is challenged. But, aside from the isolated language San Jose quotes, nothing in *Flood* suggests that the reserve clause was exempted based on some fact-sensitive analysis of the role the clause played within the baseball industry.

[1] Rather, *Flood's* stare decisis and congressional acquiescence rationales suggest the Court intended the exemption to have the same scope as the exemption established in *Federal Baseball* and *Toolson.* After all, it would make little sense for *Flood* to have contracted (or expanded) the exemption from the one established in the cases in which Congress acquiesced and which generated reliance interests. And *Federal Baseball* and *Toolson* clearly extend the baseball exemption to the entire "business of providing public baseball games for profit between clubs of professional baseball players." *Toolson,* 346 U.S. at 357, 74 S.Ct. 78; *see also* *Radovich v. Nat'l Football League,* 352 U.S. 445, 451, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957) (noting that the antitrust exemption articulated in *Federal Baseball* and *Toolson* applies to "the business of organized professional baseball."); *Charles O. Finley & Co., Inc. v. Kuhn,* 569 F.2d 527, 541 (7th Cir.1978) ("Despite the two references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the three baseball cases, as well as from *Radovich,* that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.") (footnote omitted).

[2] It is undisputed that restrictions on franchise relocation relate to the "business of providing public baseball games for profit between clubs of professional baseball players." *Toolson,* 346 U.S. at 357, 74 S.Ct. 78. The designation of franchises to particular geographic territories is the league's basic organizing principle. Limitations on franchise relocation are designed to ensure access to baseball games for a broad range of markets and to safeguard the profitability —and thus viability—of each ball club. Interfering with franchise relocation rules therefore indisputably interferes with the public exhibition of professional baseball. *See* *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn,* 693 F.2d 1085, 1086 (11th Cir.1982) (rejecting an antitrust challenge to baseball franchise relocation because it is "an integral part of the business of baseball").

That doesn't necessarily mean all antitrust suits that touch on the baseball industry are barred. In *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.,* 512 F.2d 1264 (9th Cir.1975), for example, we assessed an antitrust claim by a baseball franchise against stadium concessionaires without any reference to the baseball exemption. Nor does it mean that MLB or its franchises are immune from antitrust suit. There might be activities that MLB and its franchises engage in that are wholly collateral to the public display of baseball games, and for which antitrust liability may therefore attach. But San Jose does not—and cannot—allege that franchise relocation is such an activity. To the contrary, few, if any, issues are as central to a sports league's proper functioning as its rules regarding the geographic designation of franchises.

Flood's congressional acquiescence rationale applies with special force to franchise relocation. In 1998, Congress passed the Curt Flood Act, which withdrew baseball's antitrust exemption with respect to the reserve clause and other labor issues, but explicitly maintained it for franchise relocation. See ***691** Pub.L. No. 105–297, § 3(b)(3), 112 Stat. 2824 (1998) (codified at 15 U.S.C. § 26b(b)(3)) ("This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to ... franchise [ ] location or relocation").

[3] In an ordinary case, congressional inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal quotation marks omitted). But when Congress specifically legislates in a field and explicitly exempts an issue from that legislation, our ability to infer congressional intent to leave that issue undisturbed is at its apex. *See, e.g.,* *Kimbrough v. United States,* 552 U.S. 85, 106, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (congressional inaction is probative when Congress "fail[s] to act on a proposed amendment ... in a high-profile area in which it had previously exercised its [ ] authority"). The exclusion of franchise relocation from the

Curt Flood Act demonstrates that Congress (1) was aware of the possibility that the baseball exemption could apply to franchise relocation; (2) declined to alter the status quo with respect to relocation; and (3) had sufficient will to overturn the exemption in other areas. *Flood's* clear implication is that the scope of the baseball exemption is coextensive with the degree of congressional acquiescence, and the case for congressional acquiescence with respect to franchise relocation is in fact far stronger than it was for the reserve clause at issue in *Flood* itself.

In short, antitrust claims against MLB's franchise relocation policies are in the heartland of those precluded by *Flood's* rationale. San Jose's claims under the Sherman and Clayton Acts must accordingly be dismissed.

[4] And San Jose's state antitrust claims necessarily fall with its federal claims. Baseball is an exception to the normal rule that "federal antitrust laws [ ] supplement, not displace, state antitrust remedies." *California v. ARC Am. Corp.,* 490 U.S. 93, 102, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). In *Flood,* the Court affirmed the dismissal of the plaintiff's state law claims because "state antitrust regulation would conflict with federal policy and because national uniformity is required in any regulation of baseball." *Flood,* 407 U.S. at 284, 92 S.Ct. 2099 (internal quotation marks omitted). In other words, the Court in *Flood* determined that state antitrust claims constitute an impermissible end run around the baseball exemption. San Jose can point to no case that has ever held that state antitrust claims continue to be viable after federal antitrust claims have been dismissed under the baseball exemption. *See, e.g., Major League Baseball v. Crist,* 331 F.3d 1177, 1179 (11th Cir.2003) (holding that state antitrust claims are preempted if they mirror federal claims that fall within the baseball exemption). That suffices to reject San Jose's state antitrust claims, which entirely duplicate its claims under the federal antitrust laws.

[5] **[6]** San Jose also alleges a violation of California's unfair competition law (UCL). However, under California law, "[i]f the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." ***692** *Chavez v. Whirlpool Corp.,* 93 Cal.App.4th 363, 113 Cal.Rptr.2d 175, 184 (2001). An independent claim under California's UCL is therefore barred so long as MLB's activities are lawful under the antitrust laws. [5]

5 MLB also argues that San Jose lacks antitrust standing to bring this challenge. However, "[u]nlike Article III standing, the question of standing to sue under the antitrust laws does not go to subject matter jurisdiction, and thus need not be considered" before addressing the merits. *Datagate, Inc. v. Hewlett–Packard Co.,* 60 F.3d 1421, 1425 n. 1 (9th Cir.1995). Because we affirm on the basis of the baseball exemption, we need not reach the question of San Jose's standing.

* * *

Like Casey, San Jose has struck out here. The scope of the Supreme Court's holding in *Flood* plainly extends to questions of franchise relocation. San Jose is, at bottom, asking us to deem *Flood* wrongly decided, and that we cannot do. Only Congress and the Supreme Court are empowered to question *Flood's* continued vitality, and with it, the fate of baseball's singular and historic exemption from the antitrust laws. [6]

6 In light of our disposition, all pending motions are denied as moot.

AFFIRMED.

All Citations

776 F.3d 686, 2015-1 Trade Cases P 79,024, 15 Cal. Daily Op. Serv. 417, 2015 Daily Journal D.A.R. 601