Nos. 19-15566, 19-15662

In the United States Court of Appeals for the Ninth Circuit

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

SHAWN ALSTON, ET AL.,
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

On Appeal from the United States District Court
for the Northern District of California, No. 14-md-02541,
the Honorable Claudia Wilken, presiding

PLAINTIFFS' CORRECTED SUPPLEMENTAL BRIEF ON IMPACT OF CALIFORNIA FAIR PAY TO PLAY ACT

STEVE W. BERMAN
CRAIG R. SPIEGEL
EMILEE N. SISCO
Hagens Berman Sobol Shapiro LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700
jkessler@winston.com

Additional counsel on next page

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
Pearson, Simon & Warshaw, LLP
350 Sansome Street, Suite 680
San Francisco, CA 94104
(415) 433-9000
bsimon@pswlaw.com

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
Pritzker Levine LLP
180 Grand Avenue, Suite 1390
Oakland, CA 94612
(415)-692-0772

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

JEANIFER E. PARSIGIAN
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
(415) 591-1000
jparsigian@winston.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

As the NCAA has explained, the "State of California last year adopted legislation that would allow college athletes in California to be compensated for their name, image and likeness beginning in 2023. In the meantime, lawmakers in more than 30 other states have introduced similar bills or intend to do so."[1] The California Fair Pay to Play Act[2]—along with Defendants' response to it—reinforces every position Plaintiffs have taken in this litigation.

First, the Act underscores—and is a direct response to—the inequities that the challenged restraints impose on college athletes. Athletes are expected to work like professionals despite having their compensation limited by the disingenuous claim that they must be treated as "amateurs," while everyone else working in college athletics—from conference commissioners to college athletic directors to team trainers—is compensated lavishly from the billions in revenue

---

[1] http://www.ncaa.org/about/resources/media-center/news/emmert-sets-stage-transformative-year-college-sports. *See, e.g.*, Arizona House Bill ("HB") 2143; Florida Senate Bill ("SB") 582, SB 646, HB 251, and HB 287; Georgia HB 743; Illinois HB 3904; Michigan SB 0660 and HB 5217; Missouri HB 1564, HB 1792, and HB 1748; New Jersey Assembly Bill 5863; New York SB 6722; Oklahoma HB 3347; South Carolina SB 935 and HB 4973; Tennessee SB 1636/HB 1694, SB 1767, and HB 1710; Virginia HB 300; Washington HB 1084.

[2] Dkt. 99 (Jan. 6, 2020), *citing* Cal. Educ. Code § 67456.

that the athletes are responsible for generating. None of this unfairness is lost on consumers, who—as Plaintiffs demonstrated at trial through survey evidence—would not watch or attend fewer games if additional benefits were made available to college athletes. Indeed, many consumers indicated that they might even watch or attend *more* games if the athletes were treated more fairly. ER847–48; ER42–44. The legislation adopted by California and proposed in other states is a consequence of this consumer consensus. And now the NCAA itself recognizes this shift in consumer demand, because in response to the Act, its "top governing board voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model."[3]

[3] *Board of Governors starts process to enhance name, image and likeness opportunities*, NCAA.ORG (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities. This Court may take judicial notice of the NCAA's statements on its own website. *See* Fed. R. Evid. 201(b)(2); *United States ex rel. Hong v. Newport Sensors, Inc.*, 728 F. App'x 660, 661 (9th Cir. 2018). Moreover, this Court may exercise its inherent authority to supplement the record, particularly when the evidence is relevant to this Court's order. *Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) ("We may … take judicial notice ... and exercise inherent authority to supplement the record in extraordinary cases….").

Second, Defendants' newfound support for name, image, and likeness ("NIL") compensation is a complete about-face from the NCAA's position in *O'Bannon*, where it insisted that NIL payments—no matter how small—would be "anathema to amateurism," would constitute "pay-for-play," and would "blur the clear line between amateur college sports and their professional counterparts." *See infra* at 8, 15. It is no surprise that Defendants have abandoned their prior positions. As the district court found, since *O'Bannon*, Defendants have provided all kinds of non-education-related benefits substantially above athletes' cost-of-attendance ("COA"). *E.g.*, ER27–33. Defendants' embrace of yet more non-education-related payments shows how dramatically the economic facts have changed since the *O'Bannon* record closed in 2014, and why *O'Bannon* cannot possibly bar Plaintiffs' claims in this litigation.

Third, Defendants' new support for NIL payments reinforces the merit of Plaintiffs' cross-appeal, which seeks a more traditional, complete injunction against *all* of the anticompetitive effects of the restraints that the district court held to be unlawful. The NIL payments that Defendants now support *are completely consistent with*

the type of non-education-related-benefits, on top of COA, that would be permitted if Plaintiffs' cross-appeal is granted.

II. ARGUMENT

A. The California Act—coupled with Defendants' decision to permit NIL payments in response to the Act—affirms the district court's finding that Defendants' compensation restraints are broader than necessary to protect consumer demand.

The California Act reflects an emerging consensus that the NCAA's compensation restraints are anticompetitive and unjustifiable.[4] The billions of dollars in revenue in the FBS football and D-I basketball ecosystems are freely paid to administrators and coaches, but not to athletes, despite the onerous demands placed upon them—demands resembling those placed on professional athletes, not on students participating in a mere avocation. ER109. As the author of the California Act explained, "80% of full-scholarship athletes live at or below the federal poverty level. Meanwhile, the NCAA and universities

[4] *See* Assembly Committee on Arts, Entertainment, Sports, Tourism and Internet Media analysis (June 25, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB206 (compensating athletes for NIL "is only fair because it is the athletes who are the draw in these hugely profitable activities").

use these athletes to generate billions in profits, through commercial sponsorships, TV deals and ticket sales."[5]

States across the country (*see* n.2, *supra*), as well as Congress, are considering similar legislation for the same reasons. A bill entitled the "Student-Athlete Equity Act" (H.R.1804), which is pending in the U.S. House of Representatives, would modify the definition of a tax-exempt amateur sports organization to exclude organizations that substantially restrict a student-athlete's ability to use, or to be reasonably compensated for third-party use of, his or her own NIL.[6] These legislative efforts reflect the prevailing consumer sentiment that restricting college athletes from receiving payments for their NIL rights is fundamentally unfair, anticompetitive, and without procompetitive justification.[7]

---

[5] *See* "09/04/19 - Assembly Floor Analysis," https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB206. *See id*. ("The NCAA president Mark Emmert made over 3 million dollars in salary just last year, while any athletes who put their bodies on the line struggle to make ends meet.").

[6] https://www.congress.gov/bill/116th-congress/house-bill/1804.

[7] While the NCAA has also taken the public position that the California Act may violate the Commerce Clause (*see SNYDER: California moves to give college athletes piece of pie*, THE WASHINGTON TIMES (Sept. 11, 2019), https://www.washingtontimes.com/news/2019/sep/11/california-moves-cut-college-athletes-action/ ("[w]e believe [the California Act] would inappropriately affect interstate commerce"); *see also NCAA responds to*

The NCAA's Board of Governors itself shares this view. In response to the California Act, the Board "voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model." *Board, supra* n.3. This unanimous vote was, in turn, "based on comprehensive recommendations from the NCAA Board of Governors Federal and State Legislation Working Group, which includes presidents, commissioners, athletics directors, administrators and student-athletes." *Id*. The Board's Chair (the President of The Ohio State University) said "[w]e must embrace change to provide the best possible experience for college athletes .... Additional flexibility in this area can and must continue to support college sports as a part of higher education." *Id*.

California Senate Bill 206 (Sept. 11, 2019), https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 ("[w]e urge the state of California to reconsider this harmful and, we believe, unconstitutional bill")), it must recognize that this assertion would not prevail because the NCAA already permits different conferences and schools to be governed by very different compensation rules, as found below (ER22–23, 33, 36–37, 67) so that it could not credibly be argued that there is a compelling Commerce Clause need for uniform nationwide compensation restrictions.

The Act and the NCAA's decision to allow NIL payments in response to the Act are on all fours with the consumer survey evidence that Plaintiffs presented at trial, establishing that consumer demand for D-I basketball and FBS football would not suffer if additional benefits became available to the athletes. ER44; ER847–850.[8] On the contrary, consumers would tend to watch or attend *more* college sports if athletes were treated more fairly. ER847–48; *see also* ER42–44. The Act, similar proposed legislation in other states, and the NCAA's response all put an exclamation point on this evidence.[9]

[8] *See also* Senate Floor Analyses (Sept. 9, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB206 (identifying myriad potential costs resulting from the California Act with *no mention* of potential lost revenues due to an adverse impact on consumer demand).

[9] Defendants may argue that the fact that legislative bodies are considering these issues cuts against judicial action. But this Court has already held in *O'Bannon* that the strictures of Section 1 of the Sherman Act apply to NCAA rules, and it is the responsibility of the courts to enforce this existing law. *O'Bannon v. NCAA*, 802 F.3d 1049, 1061–64 (9th Cir. 2015). Further, the California Act is directed solely at eliminating Defendants' restrictions on NIL payments—which are not at issue in this litigation. The Act does not address the restrictions on compensating athletes for working for their teams and generating enormous revenues for their schools.

B. Defendants' decision to permit NIL payments, in response to the California Act, cements the conclusion that *O'Bannon* does not bar Plaintiffs' claims.

The unanimous decision by the NCAA's Board of Governors to allow NIL payments also demonstrates that *O'Bannon* does not bar this case. The NCAA's decision to allow NIL payments "in a manner consistent with the collegiate model" means the NCAA will eventually permit small, medium, or large NIL payments, which is yet another dramatic factual change since the record closed in *O'Bannon*. There, the NCAA argued to this Court that permitting *any* NIL payments would destroy amateurism and be ruinous to consumer demand because such payments are not related to educational expenses:

> Contrary to the [district] court's view, *amateurism is not simply a matter of the amount of any payment*. Allowing student-athletes to receive compensation for specific commercial revenue generated via use of their NILs is no less anathema to amateurism than paying football players $100 per sack.

O'Bannon v. NCAA, Nos. 14-16601 & 14-17068 (9th Cir.), Brief for NCAA (Dkt. 13-1) at 57 (Nov. 14, 2014) ("NCAA *O'Bannon* Br.") (emphasis added).

Indeed, the factual premise of *O'Bannon* was that consumers would perceive even "*small sums*" of NIL payments as transforming

student-athletes into professionals—albeit "poorly-paid professional collegiate athletes"—and thereby "vitiate their amateur status." *O'Bannon*, 802 F.3d at 1076–79 (emphasis added). Now, however, the NCAA's Board has unanimously decided to permit the very type of NIL payments that six years ago they derided as the death knell of consumer demand. This is yet another profound change in the facts since the *O'Bannon* trial record closed in 2014 that makes it implausible for Defendants to continue to argue that *O'Bannon* somehow precludes the claims that Plaintiffs are pursuing on a completely different evidentiary record. *See* Pls.' Response Brief and Opening Brief on Cross-Appeal, Dkt. No. 59 ("Pls.' Br.") at 39–51; Pls.' Reply Brief on Cross-Appeal, Dkt. No. 113 ("Pls.' Reply") at 14–16.

To be sure, the fact that this case concerns compensation for athletes' services—rather than their NILs—makes Plaintiffs' *claims* different. But the import of the NCAA's response to the California Act is the same for this litigation as it would be if *O'Bannon* were still open. In *O'Bannon*, the NCAA's opposition to NIL payments rested on its argument that such payments would amount to "pay-for-play":

> [R]ecognizing that an undisguised claim of pure pay-for-play was unpalatable, plaintiffs brought

> claims that student-athletes should receive payments for the dissemination of their 'name, image, and likeness' (NIL) in sports broadcasts and certain other media. That is a distinction without a difference; pay for use of a player's 'image' *is* pay-for-play.

NCAA *O'Bannon* Br. 3 (emphasis in original); *see also id.* at 29 ("Once student-athletes are paid, their sports are no longer amateur .... The district court was not free to simply redefine amateurism to include a league in which athletes are paid for their NILs."). Yet the NCAA now endorses the very NIL-related "pay for play" payments that it previously claimed would destroy consumer demand.

This has a direct impact on this case, where Defendants have recycled their failed "pay for play" argument to defend a different set of restrictions on a different type of athlete compensation. They characterize the district court's injunction here—which remediated restraints only on education-related benefits—as "requir[ing] the NCAA to allow student-athletes to be paid for participating in intercollegiate athletics." Defs.' Jt. Opening Br., Dkt. No. 39 ("Defs.' Op. Br.") at 3. But their response to the Act underscores the district court's unassailable finding that Defendants "do not follow any coherent definition of amateurism, including [their] proffered definition of no 'pay

for play.'" ER33. Indeed, the continuing and profound economic changes in the relevant markets have even caused one of the NCAA's 30(b)(6) witnesses to declare publicly that he no longer supports the NCAA's compensation restrictions.[10]

In summary, the response of the NCAA to the California Act represents a final nail in the coffin of Defendants' argument that *O'Bannon* bars Plaintiffs' claims here. As the district court found below, Plaintiffs have brought "new antitrust challenges to conduct affecting a different class, in a different time period, relating to forms of compensation that are not the same as those challenged in *O'Bannon*." ER78. The decision by the NCAA to permit NIL payments in response to the California Act—on top of Plaintiffs' showing that, since *O'Bannon*, conferences and colleges have provided substantial new non-education-related compensation to student-athletes, well above COA—further reinforces the district court's finding that "material factual differences … defeat Defendants' preclusion arguments." The factual

[10] Press Release, *NCPA White Paper Lays Out the "Players' Plan" for College Athlete Name, Image, and Likeness Compensation*, Nat'l College Players Ass'n (Jan. 15, 2020), https://www.ncpanow.org/news/releases-advisories/ncpa-white-paper-lays-out-the-players-plan-for-college-athlete-name-image-and-likeness-compensation.

landscape of *O'Bannon* simply no longer exists, and that decision does not in any way preclude the relief that Plaintiffs seek here.

C. The NCAA Board's decision to permit NIL payments reinforces the merit of Plaintiffs' cross-appeal.

Plaintiffs' cross-appeal seeks to expand the district court's injunction insofar as it fails to remedy the anticompetitive impact that Defendants' unlawful restraints impose on non-education-related benefits. *See* Pls.' Br. at 80–92; Pls.' Reply. Defendants' rejoinder has been heavily based on the *O'Bannon* majority's statement that the "difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses" is a "quantum leap," and "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point." Defs.' Op. Br. at 14 (quoting *O'Bannon*, 802 F.3d at 1078). Defendants further claim that "restrictions on payments unrelated to education could not be eliminated without erasing the distinction between college and professional sports." Defs.' Jt. Response-and-Reply Br. at 4, Dkt. No. 87.

Even before the California Act, Defendants' attempt to invoke the language of *O'Bannon* against the cross-appeal was baseless because

Defendants have *already* taken the "quantum leap." Now, these arguments completely collapse under the weight of the NCAA Board's endorsement of NIL payments in response to the California Act.

In *O'Bannon*, the NCAA told this Court that permitting even small NIL payments "would blur the clear line between amateur college sports and their professional counterparts." NCAA *O'Bannon* Br. at 57–58 (internal quotation marks and citations omitted). Yet, *these are the same NIL benefits that Defendants will now permit individual conferences and schools to provide*. Permitting NIL compensation thus destroys Defendants' argument that the NCAA must be permitted to bar all non-education-related-benefits in order to preserve consumer demand.

In short, there is no colorable basis for Defendants to continue to argue that granting the broader injunctive relief sought on the cross-appeal—striking down the NCAA's unlawful restrictions on non-education-related compensation—will destroy the distinction in consumers' minds between college and professional sports. The district court should have entered a more traditional, complete injunction against all of the anticompetitive effects of Defendants' illegal

restraints, thus effectively permitting competition among conferences and schools to determine what, if any, limits to impose on non-educational benefits.

III. CONCLUSION

In *NCAA v. Board of Regents*,[11] the NCAA decried schools freely competing to sell their broadcast rights, claiming that it was an existential threat to amateurism and consumer demand; today, D-I basketball and FBS football engage in such competition and, as a result, enjoy billions in broadcast revenue, and consumer demand still flourishes. In *Law v. NCAA*,[12] the NCAA opposed allowing schools to freely compete to compensate assistant basketball coaches as contrary to the collegiate model; today, such competition is unrestrained, assistant coaches often earn *millions*,[13] and consumer demand still flourishes. In *White v. NCAA*, the NCAA argued against allowing schools to freely compete by offering COA scholarships, calling such scholarships "pay for play"; today, such competition is permitted and

[11] 468 U.S. 85, 119 (1984) (rejecting NCAA argument that restricting sale of broadcast rights was necessary "to preserve amateurism").

[12] 134 F.3d 1010, 1021 (10th Cir. 1998) (rejecting NCAA's proposed procompetitive justifications for restricting assistant coach salaries).

[13] For example, between 2009 and 2015, assistant men's basketball coaches' salaries increased by nearly 40%. ER701.

both full COA scholarships and compensation *above* COA are ubiquitous, and consumer demand still flourishes.[14] And, in *O'Bannon*, the NCAA insisted any amount of NIL compensation was "anathema to amateurism" and would render D-I basketball and FBS football indistinguishable from the NBA and NFL; today, in response to the Act, the NCAA's governing body has indicated unanimous support for NIL payments—and consumer demand still flourishes.[15]

In each of the preceding antitrust cases that reached a verdict, the NCAA was found liable. And in each case, its prognostication that market competition would doom college sports and consumer demand has been proven wrong. Plaintiffs have presented an evidentiary record that is on all fours with this litigation history. It amply supports both the liability verdict of the trial court below and the more complete relief Plaintiffs seek on their cross-appeal. The California Act—coupled with the unanimous actions of the NCAA Board in response—powerfully reinforces this conclusion.

---

[14] *Cf.* NCAA Mem. P. & A. in Supp. Summ. J. 28, *White v. NCAA*, No. 06-cv-999 ECF 220 (C.D. Cal Oct. 22, 2007) *with* ER86–87.

[15] *Cf.* NCAA *O'Bannon* Br. 57, *with* Report of the NCAA Board of Governors, n.3 *supra.*

Dated: February 19, 2020

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By *s/ Steve W. Berman*
Steve W. Berman
Craig R. Spiegel
Emilee N. Sisco
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
steve@hbsslaw.com
craigs@hbsslaw.com
emilees@hbsslaw.com

PEARSON, SIMON & WARSHAW, LLP

By *s/ Bruce L. Simon*
Bruce L. Simon
Benjamin E. Shiftan
350 Sansome Street, Suite 680
San Francisco, CA 94104
Telephone: (415) 433-9000
bsimon@pswlaw.com
bshiftan@pswlaw.com

Class Counsel for the Consolidated Action Plaintiffs

WINSTON & STRAWN LLP

By *s/ Jeffrey L. Kessler*
Jeffrey L. Kessler
David G. Feher
David L. Greenspan
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com

Linda T. Coberly
35 W. Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5600
lcoberly@winston.com

Jeanifer E. Parsigian
101 California Street
San Francisco, CA 94111
Telephone: (415) 591-1000
jparsigian@winston.com

Class Counsel for the Consolidated Action Plaintiffs

PRITZKER LEVINE LLP

By *s/ Elizabeth C. Pritzker*
Elizabeth C. Pritzker
Jonathan K. Levine
Bethany L. Caracuzzo
180 Grand Avenue, Suite 1390
Oakland, CA 94612
Telephone: (415) 692-0772

Additional Class Counsel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-15566, 19-15662

I am the attorney or self-represented party.

This brief contains 3,013 **words,** excluding the items exempted by Fed. R. App. P. 32(f).

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[x] complies with the length limit designated by court order dated January 6, 2020.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *s/ Steve W. Berman* **Date** February 19, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: February 19, 2020

HAGENS BERMAN SOBOL SHAPIRO LLP

s/ Steve W. Berman
Steve W. Berman

Counsel for the Consolidated Action Plaintiffs