Nos. 19-15566, 19-15662

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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

Plaintiffs-Appellees-Cross-Appellants,

v.

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

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court for the Northern District of California, No. 4:14-md-2541 (Wilken, J.)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BACKGROUND 2

ARGUMENT 3

THE ACT DOES NOT AFFECT THIS LITIGATION 3

A. The Act Will Not Become Operative For Several Years, If Ever, And Its Enactment Has No Effect On Any Issue In This Case 3

B. The NCAA Working Group Mentioned In The Act Does Not Affect This Case 5

CONCLUSION 9

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984)....................8

NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993)....................4

O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)....................5, 8

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)....................4

STATUTES

California's Fair Pay to Play Act, Cal. Educ. Code §67456....................1, 2, 3

Cal. S.B. 206, §1(a) (Sept. 30, 2019)....................3, 4, 5

OTHER AUTHORITIES

Hosick, Michelle Brutlag, *NCAA Working Group to Examine Name, Image and Likeness* (May 14, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness....................5

Report of the NCAA Board of Governor (Oct. 29, 2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf....................6, 7, 8

Statement of Mark Emmert, *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation*, Hearing Before the Senate Science, Commerce & Transportation Committee's Subcommittee on Manufacturing, Trade, & Consumer Protection (Feb. 11, 2020), https://www.commerce.senate.gov/services/files/A3E515B6-A2A3-4453-BB32-DE37F4D72FB5....................7, 8

This Court has requested supplemental briefing "on the impact, if any, of California's Fair Pay to Play Act, California Education Code §67456, on this case." Order 3 (Dkt. 99). That law (hereafter "Act") requires colleges and universities in California to permit student-athletes to be paid for use of their names, images, and likenesses (NILs), and it bars the NCAA and its member institutions from preventing a student-athlete from receiving such compensation.

Defendants submit that the Act, which was enacted well after the trial record here closed, has no effect on this case, including these appeals. The Act's substantive provisions will not become operative until 2023, and the Act expressly contemplates that it may be revised before then, in ways that are obviously not known now. Moreover, even if the Act (which defendants believe is unconstitutional) took effect as currently written, that would not resolve any issue raised in this appeal, as the Act does not render any of the NCAA rules plaintiffs challenged below valid or invalid under federal antitrust law. Nor could any steps defendants might take to try to comply with the Act bear on these appeals, because the Act governs conduct in only one state and affects only one type of payment (for NILs), whereas this litigation concerns the validity of nationwide rules governing any and all compensation to student-athletes.

Likewise irrelevant to these appeals is the NCAA working group mentioned in the Act, which is exploring rule modifications to allow student-athletes to

benefit from the use of their NILs. *See* Resp.-and-Reply Br. 6 n.1. That process is still in its exploratory stages, and the contours of any rule changes—which are not expected to be voted on until 2021—are uncertain. What is certain, however, is that, as the NCAA has said clearly, defendants remain both committed to their longstanding principle of amateurism and opposed to permitting student-athletes to receive NIL payments that could serve as pay-for-play.

In short, this Court should resolve the appeals based on the trial record, the briefs that have been filed, and the oral arguments that will be presented on March 9.

BACKGROUND

On September 30, 2019, after defendants filed their opening brief in this Court, California enacted the Fair Pay to Play Act. The Act amends the California Education Code to provide that colleges, athletic conferences, and athletic associations (including the NCAA) must allow students who participate in intercollegiate athletics to earn compensation for the use of their NILs (except that schools may prohibit students from receiving such payments when "engaged in official team activities"). Cal. Educ. Code §67456(a)(1), (2), (d)-(f). The Act also declares that earning such compensation "shall not affect the student's scholarship eligibility." *Id.* §67456(a)(1). And it further provides that athletic conferences and associations shall not exclude any college from participating in intercollegiate athletics because a student-athlete has received compensation for the use of his or

her NIL, *id*. §67456(a)(3), and that colleges, athletic conferences, and athletic associations must permit "a California student participating in intercollegiate athletics" to "obtain[] professional representation in relation to contracts or legal matters," *id*. §67456(c)(1). Finally, the Act prohibits colleges, athletic conferences, and athletic associations from compensating "prospective" student-athletes "in relation to" their NILs. *Id*. §67456(b).

The Act specifies that the foregoing provisions will become "operative" on January 1, 2023. Cal. Educ. Code §67456(h). However, its preamble explicitly notes that "[i]t is the intent of the Legislature to monitor the National Collegiate Athletic Association (NCAA) working group created in May 2019 to examine issues relating to the use of a student's name, image, and likeness and revisit this issue to implement significant findings and recommendations of the NCAA working group in furtherance of the statutory changes proposed by this act." Cal. S.B. 206, §1(a) (Sept. 30, 2019).

ARGUMENT

THE ACT DOES NOT AFFECT THIS LITIGATION

A. The Act Will Not Become Operative For Several Years, If Ever, And Its Enactment Has No Effect On Any Issue In This Case

For several reasons, California's Fair Pay to Play Act has no impact on these appeals (or the case more generally). To begin with, the Act expressly provides

that it will not become operative until January 2023, which is almost certain to be well after these appeals conclude.

But the Act may never become operative in its current form, or at all. It expressly contemplates that its provisions could materially change between now and any operative date; as noted, the Act declares the legislature's "intent … to monitor" the NCAA working group that is addressing the NIL issue and to "revisit this issue to implement significant findings and recommendations." Cal. S.B. 206, §1(a). Further, if California does not substantially modify the law, it is likely to be invalidated on constitutional grounds, given this Court's recognition "that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals," *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993); *see also id.* at 638-640 (holding that a Nevada law requiring the NCAA to provide in-state schools and their student-athletes certain procedures in enforcement actions was "a per se violation of the Commerce Clause"); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-2091 (2018).

Even if the Act were to become operative in its current form, that would not affect the disposition of any material issue in this case. Plaintiffs allege that the NCAA's current rules, which prohibit student-athletes from being paid to play their sports, violate federal antitrust law. The validity of that federal claim has nothing to do with what one particular state's law mandates several years in the

future, or with the manner in which the NCAA and its members might eventually respond to that mandate. The Act applies only to schools in California, whereas the NCAA compensation rules at issue apply uniformly throughout the Ninth Circuit, and indeed nationwide. The Act, moreover, would nullify NCAA rules only insofar as they apply to NIL payments, whereas the rules at issue govern all types of compensation irrespective of whether the funds are derived from NILs.[1]

B. The NCAA Working Group Mentioned In The Act Does Not Affect This Case

As noted, California's Fair Pay to Play Act expressly refers to "the National Collegiate Athletic Association (NCAA) working group created in May 2019 to examine issues relating to the use of a student's name, image, and likeness." Cal. S.B. 206, §1(a); *see also, e.g.*, Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA.org (May 14, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness. The working group's efforts, like the Act itself, do not affect the disposition of this case.

As an initial matter, the outcome of the working group's efforts remains uncertain. The group has not suggested any specific changes to NCAA rules, nor

[1] Plaintiffs assert that this case is not about NILs at all. *See, e.g.*, Principal-and-Resp. Br. 31. But as defendants have explained, that is wrong; plaintiffs attack the same set of compensation rules that was at issue in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). *See* Resp.-and-Reply Br. 19-20.

are any rule changes expected before next year. The group has simply proposed a high-level "regulatory framework" to guide "discussions," Federal and State Legislative Working Group Report to the NCAA Board of Governors 4 (Oct. 23, 2019) ("Working Group Report"), *attached to* Report of the NCAA Board of Governors (Oct. 29, 2019) ("Board Report"), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf. And the NCAA Board of Governors has accepted that proposal, directing the working group and the three NCAA divisions to investigate the issue further and develop specific legislative proposals that are not expected to be voted on until January 2021. Board Report 3-4. What those proposals will be, and what will ultimately be adopted, is thus speculative.

That is especially true given that the NCAA has repeatedly made clear that any rule changes must maintain the traditional differentiation between college and professional sports, and in particular must not enable NIL-related benefits to be used as pay-for-play. For example, in accepting the working group's report, the Board of Governors stated—as "the policy of the Association"—"that NCAA member schools may permit students participating in athletics the opportunity to benefit from the use of their [NILs] in a manner consistent with the values and beliefs of intercollegiate athletics." Board Report 3. The Board also emphasized that any NIL-related rule changes must be "in harmony with" eight fundamental

"principles and guidelines," including that they "[m]ake clear" both "the distinction between collegiate and professional opportunities," and "that compensation for athletics performance or participation is impermissible." *Id.* at 3-4. Accordingly, the Board adopted the working group's recommendation to "[r]eject any approach that would make student-athletes employees or use likeness as a substitute for compensation related to athletic participation and performance." Working Group Report 2. Hence, any such rule changes will not allow the kind of NIL payments that the district court ordered but this Court rightly set aside in *O'Bannon*.[2]

The foregoing views were reiterated by NCAA President Mark Emmert in testimony to a congressional committee last week. He testified that "as part of this modernization effort, we will not consider any concepts that could be construed as payment for athletic play." Statement of Mark Emmert 6, *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation*, Hearing Before the Senate Science, Commerce & Transportation Committee's Subcommittee on

[2] Plaintiffs mischaracterize the Board's measured directive in asserting that the NCAA unqualifiedly "instructed each Division to promulgate rules permitting athletes to receive compensation for the right to use their names, images, and likenesses." Reply 8. As noted, the Board directed the divisions to "begin considering modification and modernization of relevant NCAA bylaws" consistent with the aforementioned principles, and "work to create new NCAA bylaws reflecting divisional priorities." Board Report 3-4.

Manufacturing, Trade, & Consumer Protection (Feb. 11, 2020), https://www.commerce.senate.gov/services/files/A3E515B6-A2A3-4453-BB32-DE37F4D72FB5. He further testified that "the NCAA has no intention of taking any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with respect to the types of NIL payments that were at issue in the *O'Bannon* case." *Id.*

If the rulemaking process has any relevance to this case, it is only to underscore the enormous complexity of the task defendants face in seeking to ensure both that NCAA rules account for recent technological and other developments and that college sports retains its amateur character. *See* Working Group Report 1-7. That complexity confirms that the NCAA and its members, not federal courts, are the proper entities to evaluate and decide on any possible revisions to the NCAA's rules. *See NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 96 (1984); *O'Bannon*, 802 F.3d at 1074.

CONCLUSION

California's Fair Pay for Play Act has no impact on this appeal. The Court should proceed in the normal course to resolve the issues in these appeals based on the trial record, the briefs that have been filed, and the upcoming oral arguments.

February 19, 2020

Respectfully submitted,

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On this 19th day of February 2020, I electronically filed the foregoing with the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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