

No. 15-1388

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.

EDWARD C. O'BANNON, JR., ET AL., ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL D. HAUSFELD
HILARY K. SCHERRER
SATHYA S. GOSSELIN
SWATHI BOJEDLA
HAUSFELD LLP
1700 K St. N.W., Ste. 650
Washington, D.C. 20006
Tel: (202) 540-7200
mhausfeld@hausfeld.com

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL, LLP
1325 G St., N.W., Ste. 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com

MICHAEL P. LEHMANN
BONNY E. SWEENEY
BRUCE WECKER
HAUSFELD LLP
600 Montgomery St.,
Ste. 3200
San Francisco, CA 94111
Tel: (415) 633-1908

SETH A. ROSENTHAL
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
Tel: (202) 344-4741
sarosenthal@venable.com

Dated: July 1, 2016

QUESTIONS PRESENTED

After a lengthy trial with extensive evidence of anticompetitive harm, the District Court entered judgment holding that rules of the National Collegiate Athletic Association (“NCAA”) prohibiting member schools from competing on price in compensating college athletes for the commercial use of their names, images, and likenesses (“NILs”) were an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act. The Ninth Circuit affirmed the NCAA’s liability and affirmed in part and reversed in part the permanent injunctive relief. The questions presented by the Ninth Circuit’s judgment are:

1. Whether the Ninth Circuit properly interpreted *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), in refusing to confer categorical antitrust immunity on the NCAA for what in any other industry would be an unreasonable restraint of trade.

2. Whether this Court should decide an abstract First Amendment question that is only tangentially related to Plaintiffs’ standing, when (i) the question is not directly presented in this case, and if the First Amendment question ever has concrete implications for speakers and videogame makers, this Court will have ample opportunity to review it, (ii) the Court of Appeals and the District Court found standing on the basis of factual findings that do not depend on the First Amendment issue, (iii) the NCAA has

failed to show that the outcome of this case would turn on the First Amendment question (even assuming that Plaintiffs' standing depended on the question), and (iv) the First Amendment question is not independently certworthy because there is no square circuit conflict or conflict with decisions of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
BRIEF IN OPPOSITION	1
STATEMENT	1
ARGUMENT	16
I. This Court Should Grant The NCAA’s First Question.	16
A. <i>Board of Regents</i> Supports The O’Bannon Plaintiffs, Not The NCAA.	17
1. The NCAA Ignores The <i>Holding</i> Of <i>Board of Regents</i> : That An NCAA Restraint Of Trade Violated The Rule of Reason.....	17
2. The NCAA Misunderstands The Relevance Of The Court’s “Twinkling Of An Eye” Approach.....	19

3.	The NCAA’s Plea For A Procompetitive “Presumption” Ignores The Fact That A Trial Has Already Occurred In This Case.	20
4.	The NCAA Misapprehends Snippets Of Dicta From <i>Board of Regents</i>	21
5.	The Scholarly Consensus Rejects The NCAA’s Interpretation Of <i>Board of Regents</i>	22
B.	The <i>Board of Regents</i> Dicta On Which The NCAA Relies Is Outdated.	23
C.	The Ninth Circuit Applied An Improper “Less Restrictive Alternative” Test, Although Not For The Reasons Cited By The NCAA.....	25

D.	Decisions In Other Circuits Do Not Support The NCAA.	27
II.	This Court Should Deny The NCAA’s Second Question.	27
A.	The First Amendment Question Is Not Directly Presented In This Case.....	29
B.	Plaintiffs’ Standing Does Not Depend On The First Amendment Question The NCAA Seeks To Present.	31
C.	The District Court’s Factual Findings Of Television And Other Licensing Markets Further Counsel Against Review.	34
D.	Review Should Be Denied Because The Decision Below Does Not Rest On Any Particular First Amendment Test.....	35
E.	The <i>Keller</i> Decision Does Not Warrant This Court’s Review.	38
	CONCLUSION.....	41

TABLE OF AUTHORITIES

CASES:

<i>Agnew v. NCAA</i> , 683 F.3d 328 (7th Cir. 2012)	27
<i>American Needle, Inc. v. Nat'l Football League</i> , 560 U.S. 183 (2010)	19, 20
<i>Cal. Dental Ass'n v. FTC</i> , 526 U.S. 756 (1999)	19
<i>Hart v. Electronic Arts, Inc.</i> , 717 F.3d 141 (3d Cir. 2013).....	39
<i>In re NCAA Student-Athlete Name & Likeness Licensing Litigation</i> , 724 F.3d 1268 (9th Cir. 2013)(<i>Keller</i>)	<i>passim</i>
<i>McCormack v. NCAA</i> , 845 F.2d 1338 (5th Cir. 1988)	27
<i>National Cable & Telecommunications Ass'n v. Brand X Internet Services</i> , 545 U.S. 967 (2005)	23
<i>NCAA v. Board of Regents of the University of Oklahoma</i> , 468 U.S. 85 (1984)	<i>passim</i>

<i>Rogers v. Grimaldi</i> , 875 F.2d 994 (2d Cir. 1989).....	38, 40
<i>Smith v. NCAA</i> , 139 F.3d 180 (3d Cir. 1998), <i>vacated on other grounds</i> , 525 U.S. 459 (1999)	27
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	30
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977)	36, 37, 38, 39

CONSTITUTIONAL PROVISIONS:

First Amendment.....	<i>passim</i>
----------------------	---------------

OTHER AUTHORITIES:

Walter Byers, UNSPORTSMANLIKE CONDUCT (1995)	8
Marc Edelman, “A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act,” 64 CASE W. RESERVE L. REV. 61 (2013).....	22

Gabe Feldman, “A Modest Proposal for
Taming the Antitrust Beast,”
41 PEPPERDINE L. REV. 249 (2014)..... 22-23

Daniel E. Lazaroff, “The NCAA in Its Second
Century: Defender of Amateurism or
Antitrust Recidivist?” 86 OR. L. REV.
329 (2007)23

Joe Nocera & Ben Strauss, INDENTURED: THE
INSIDE STORY OF THE REBELLION
AGAINST THE NCAA (2016).....4

Restatement (Third) Of Unfair Competition37, 38

BRIEF IN OPPOSITION

Respondents Edward C. O'Bannon, Jr., et al. ("O'Bannon Plaintiffs"), have filed their own Petition in No. 15-1167 raising questions that are related to the NCAA's first Question Presented.

The O'Bannon Plaintiffs urge the Court to grant the two Questions Presented in No. 15-1167 and to grant the first Question Presented by the NCAA's Petition in No. 15-1388. The NCAA's answer to its first Question Presented is incorrect, but the question is worthy of this Court's review.

Indeed, the NCAA's first Question demonstrates the need to grant the O'Bannon Petition in No. 15-1167. The first O'Bannon Question addresses the NCAA's purported interest in "amateurism" and operates as a precondition to the NCAA's first question. The second O'Bannon Question (like the NCAA's Petition) concerns the Ninth Circuit's "less restrictive alternative" test. The NCAA and the O'Bannon Plaintiffs agree that the Ninth Circuit applied the wrong legal standards (though for different reasons), and both urge this Court's review.

The NCAA's second Question Presented does not merit certiorari.

STATEMENT

This case presents fundamental questions of federal antitrust law in an important context: the multi-billion-dollar business of college athletics. The NCAA's untenable position is that it may prohibit its members from competing on price for the talents and

services of the young athletes who make this billion-dollar enterprise possible – while, at the same time, the NCAA and its members compete on price for the services of everyone else connected with the fruits of the athletes’ labor, including coaches, administrators, videogame makers, sponsors, and broadcasters.

In this case, the Ninth Circuit unanimously affirmed the judgment of the District Court that the NCAA no-compensation rule (in the competitive athletic recruitment process) was an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act. The Ninth Circuit properly rejected the NCAA’s claim to blanket antitrust immunity under *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). However, the Ninth Circuit improperly eliminated part of the District Court’s remedy, which is the subject of the O’Bannon Petition in No. 15-1167.

1. Background. This case was the subject of a 15-day bench trial in the District Court, which encompassed the testimony of 23 witnesses and 287 exhibits and produced a transcript of 3,395 pages and a written decision of 99 pages. Thus, this case comes to this Court with an extensive factual record and presents an excellent vehicle to review the NCAA’s claim that it is entitled to categorical antitrust immunity under *Board of Regents*, which lacked any relevant factual record on “amateurism.” The record demonstrates several key points:

(a) *The NCAA Is A Classic Cartel.* As the District Court found, the members of NCAA Division I are “buyers of labor” who “are competing for the labor of the sellers” (“prospective student-athletes”) in “a market for athletic services.” Pet. App. 129a (internal quotation marks and citation omitted).

The NCAA creates what Plaintiffs’ expert Dr. Roger Noll identified (in uncontradicted testimony) as a “binding restraint,” preventing schools from competing on price to recruit and retain athletes. SER132-33. The District Court found that, “[i]n the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits’ athletic services and licensing rights — that is, they would engage in price competition.” *Id.* at 130a.

The combination of a no-compensation (price-fixing) rule and a “binding restraint” produces a textbook antitrust violation. In fact, the NCAA’s own expert witness, Dr. Daniel Rubinfeld, has authored a microeconomics textbook that has maintained, over numerous editions, that the NCAA is a “cartel,” SER116-29, 375-76, and the athletes its victims.

The NCAA exhibits classic cartel behavior, with members often complaining that their individual economic choices are throttled. For example, in 2014, the five largest Division I conferences sought to provide their full-scholarship college athletes with \$5,000 stipends in addition to their grants-in-aid, SER142-43 — relief similar to that ordered by the

District Court but rejected by the Ninth Circuit as supposedly inconsistent with “amateurism.” In a letter to the NCAA, these five conferences criticized “[t]he mechanism we use to enforce the rules of engagement among our membership” and added that the conferences “do not have the ability within the current NCAA structure, to control our own destiny, to adopt reforms that respond to . . . concerns [about exploitation of college athletes].” SER543; *see also* SER539 (decrying NCAA’s use of a “one size fits all” approach).

(b) *College Sports Are Big Business.* Today’s college sports industry would have been unfathomable when *Board of Regents* was decided. “[C]ollege sports in its totality generates some \$13 billion, which, incredibly, is more than the most lucrative professional sports league in America, the National Football League.”¹

The five largest conferences receive aggregate annual television revenue of \$750 million. SER243-44.² Some conferences, like the Big 12, include in their agreements with ESPN licenses for the rights to telecast football and men’s basketball games on regional ESPN networks. Other conferences, like the Big Ten, the Pac-12, and the Southeastern Conference (“SEC”), also have established their own

¹ Joe Nocera & Ben Strauss, *INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA* 3 (2016).

² The Supplemental Excerpts of Record in the Ninth Circuit are styled “SER”; the Excerpts of Record are styled “ER.”

networks to broadcast some regular season football and men's basketball games, sometimes in conjunction with external partners, such as Fox Broadcasting, which owns part of the Big Ten Network. Some conferences, like the SEC, also have agreements with digital media companies (like XOS) for the rebroadcast of football and men's basketball games and video clips. SER360-63, 596.

Additionally, the NCAA has agreements with Turner Broadcasting and CBS to broadcast the men's basketball championships, known as "March Madness." In recent years, CBS and Turner Broadcasting paid the NCAA \$700-\$750 million annually for broadcast rights, and under an escalation clause that amount will increase over time. SER245.

As the District Court found, an "arms race" among the NCAA's members is already occurring. Pet. App. 152a. Schools spend their substantial athletic revenue on eye-popping coaching salaries and lavish facilities. From 2005-2011, basketball coaching pay in NCAA Division I schools increased by 11.4% (as opposed to 1.6% for the NBA). SER213-14. The comparable figure for NCAA Division I football coaches was 9.7% (as opposed to 4.5% for NFL coaches). SER714. Between 1985-86 and 2009-10, salaries for full professors and presidents at 44 universities increased only modestly, while coaching salaries increased by 650%. SER247-49.

(c) "Amateurism" cannot justify the NCAA's anticompetitive rules. The NCAA trumpets its

supposed history of “amateurism.” NCAA Pet. 4-5. But the evidence from the three-week trial – evidence the NCAA wishes away in its quest for immunity – conclusively demonstrated that the NCAA has never consistently adhered to any meaningful conception of “amateurism.”

At trial, NCAA President Mark Emmert testified that NCAA bylaws and rules do not contain a definition of “amateurism.” SER323-24. Emmert acknowledged in a 2013 speech: “we have problems and challenges around things like the definition of amateurism and how we establish it and how we don’t. *It is not at all like it was not long ago.*” SER752 (emphasis added). David Berst, Vice President for the NCAA’s Division I, conducted a study of amateurism and in January 2008 concluded that it was “a definition that was *not* steeped in any sacred absolute principle that had to be preserved . . . and *can be modified as views change.*” SER508 (emphasis added).

Notwithstanding the rhetoric in the NCAA’s Petition, big-time college football and basketball are not merely avocations. They entail a 40-hours-per-week (or more) per week time commitment that dictates academic major selection and course scheduling, entails missing class, requires substantial time away from campus for games (usually to accommodate profit-driven television scheduling), and often results in lower graduation rates. Rather than protecting athletes from commercial exploitation, the NCAA and its members

themselves take advantage of football and basketball players to support a professionalized, multi-billion dollar business enterprise. The NCAA's own documents show, for example, that each school on average uses athletes' NILs in 20 promotions annually, with many schools reporting 100 or more. SER513-14.

In an email to then-incoming NCAA President Mark Emmert in November 2010, long-time NCAA senior official Wallace Renfro acknowledged that “[t]here is a general sense that intercollegiate athletics is as thoroughly commercialized as professional sports” and that “the notion that athletes are students is the great hypocrisy of intercollegiate athletics.” SER413-14. Renfro added that “the development of increased dollars acquired through corporate relationships does not square with the principle of amateurism, especially when images of student-athletes — even through the use of game video — are used in proximity to commercial products.” SER535. Former NCAA President Myles Brand similarly conceded in his 2006 NCAA State of the Association speech that amateurism has been inaccurately romanticized as a “halcyon ideal that college sports can operate without commercial support and indifferent to the realities of a modern business model.” SER438.

Tellingly, at trial and on appeal, the NCAA attempted to revise its conception of “amateurism” and instead advance a non-“halcyon” definition: simply that athletes must not be paid. This

definition is equally incoherent. At its core, as the O'Bannon Petition shows, this new definition reduces the NCAA's justification for its agreement in restraint of trade to a meaningless tautology: according to the NCAA, the rule prohibiting athlete compensation (the restraint) is necessary to preserve the prohibition on athlete compensation ("amateurism"). Walter Byers, NCAA Executive Director from 1951 to 1987, explained that amateurism thus becomes "a transparent excuse for monopoly operations that benefit others" — "an economic camouflage for monopoly practice."³

Further, the NCAA's conception of "amateurism" is pliable and has morphed repeatedly. As the District Court found, "[t]he historical evidence presented at trial . . . demonstrates that the association's amateurism rules have not been nearly as consistent as [the NCAA] represents. In fact, these rules have changed numerous times since the NCAA" was formed. Pet. App. 92a. In the past, NCAA member schools have made numerous kinds of payments to athletes, such as "player subsidies" and other forms of compensation. *Id.* at 5a-6a, 93a-95a.

Indeed, the NCAA's conception of amateurism continues to change. In August 2014 — the same month in which the District Court issued its Findings of Fact and Conclusions of Law and caused by mounting pressure created by the trial two

³ Walter Byers, UNSPORTSMANLIKE CONDUCT 388, 376 (1995).

months earlier – the NCAA announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance. Pet. App. 7a. Five months later, the 80 member schools of the five largest athletic conferences voted to take that step, and the scholarship cap at those schools is now at the full cost of attendance. *Id.* In practical terms, this result now allows athletes to receive “a few thousand dollars” in payments each year to cover supplies, transportation, and other expenses related to school attendance that exceed a student’s grant-in-aid. *Id.* at 6a n.3. This is precisely one of the forms of relief proposed by Plaintiffs at trial and ultimately ordered by the District Court in this case, which the NCAA paradoxically contends would hamper “amateurism.” Yet NCAA President Emmert acknowledged at trial that the NCAA’s conception of amateurism *would permit* these payments. SER321-23.

2. Procedural history. In 2009, Petitioner O’Bannon sued the NCAA, Collegiate Licensing Company (“CLC”), and (later) Electronic Arts, Inc. (“EA”) after seeing an unauthorized depiction of himself — a playable “avatar” with matching physical characteristics and his jersey number — in an NCAA college basketball videogame. Pet. App. 7a-8a. Five years of pre-trial proceedings yielded extensive discovery, a \$40 million settlement releasing EA and CLC, the District Court’s certification of an injunctive class of current and former Football Bowl Subdivision (“FBS”) football

players and Division I men's basketball players, and a partial victory for Plaintiffs at summary judgment.

3. *The District Court's decision.* In June 2014, the District Court held a three-week bench trial that featured 23 witnesses, most of whom were sponsored by the NCAA. Over three weeks, the District Court had ample opportunity to assess the witnesses' credibility and frequently posed questions to witnesses. Following extensive post-trial briefing, the District Court issued 99 pages of detailed findings of fact and conclusions of law, entered judgment for Plaintiffs, and issued a permanent injunction. Pet. App. 69a-166a.

The District Court concluded that the NCAA's no-compensation rule was anticompetitive and found insufficient evidence to support the NCAA's proffered justifications of competitive balance, the integration of academics and athletics, and increasing output: the evidence does "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.* at 149a. At various junctures, the District Court found the NCAA's evidence "unpersuasive," "not sufficient," "flaw[ed]," and "not credible." *Id.* at 147a, 152a, 98a, 109a. In particular, the court found:

- "[T]he NCAA has not presented sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on

competitive balance, let alone produce an optimal level of competitive balance.” *Id.* at 150a.

- “[T]he NCAA has not shown that the specific restraints challenged in this case are necessary to achieve these benefits” of integrating academics and athletics. *Id.* at 153a.

- “[T]he NCAA’s argument that the current rules enable some schools to participate in Division I that otherwise could not afford to do so is unsupported by the record.” *Id.* at 155a.

With respect to amateurism, the District Court found that the evidence “does not justify the NCAA’s sweeping prohibition on FBS football and Division I basketball players receiving any compensation for the use of their names, images, and likenesses.” *Id.* at 145a. The District Court noted that “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways” and that “[r]ather than evincing the association’s adherence to a set of core principles, this history documents how malleable the NCAA’s definition of amateurism has been since its founding.” *Id.* at 147a. “[E]ven today, the NCAA does not consistently adhere to a single definition of amateurism.” *Id.* The District Court noted that the NCAA’s definition of “amateurism” varies from sport to sport. *Id.* (noting that tennis players can preserve their amateur status even if they accept \$10,000 in prize money the year before enrolling in college).

In addition, the District Court concluded that the NCAA's no-compensation rule was not necessary to sustain consumer demand for college sports. The court found 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.* at 162a (emphasis added).

In fact, various witnesses – including experts presented by the NCAA – testified that providing student-athletes with small amounts of compensation above their cost of attendance would not likely have a significant impact on "amateurism" or consumer demand. For example, the NCAA's own expert witness, Neal Pilson, testified that "a million dollars would trouble me and \$5000 wouldn't, but that's a pretty good range." SER180. Bernard Muir of Stanford testified that while payments of six or seven figures per athlete would be too high, some lesser sum would not undermine "amateurism." SER365. Another expert, Dr. Daniel Rascher, testified 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" and that "consumer demand in sports such as tennis and rugby increased after the sports' governing boards

permitted athletes to receive payment.” Pet. App. 62a.⁴

Moreover, the District Court found that, even if the challenged restraint could be justified by its effect on consumer demand, two readily identifiable less restrictive alternatives existed – awarding “stipends to student-athletes up to the full cost of attendance” and permitting “schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.” *Id.* at 114a. “Neither of these practices would undermine consumer demand for the NCAA’s products nor hinder its member schools’ efforts to educate student-athletes.” *Id.* at 162a. The District Court noted that the alternatives were “obvious” options that had been widely discussed in the literature, *id.* at 159a & n.16, disclosed to the NCAA eight months prior to trial, *id.* at 159a, and addressed at trial by the NCAA’s witnesses. *Id.* at 160a-161a.

After entering judgment for Plaintiffs, the District Court permanently enjoined the NCAA from prohibiting its member schools from awarding scholarships up to the full cost of attendance or from providing up to \$5,000 per year in deferred payments to athletes. *Id.* at 167a-169a.

⁴ The District Court noted that, although the NCAA’s defenses “*might* justify a restriction on *large* payments to student-athletes *while in school*, they do not justify the rigid prohibition on student-athletes” adopted by the NCAA and challenged by Plaintiffs. Pet. App. 149a (emphasis added).

4. *The Decision Below.* The Ninth Circuit (per Bybee, J., and Quist, J. (sitting by designation), with Thomas, C.J., concurring in part and dissenting in part) affirmed in part and reversed in part.

First, the Ninth Circuit unanimously affirmed the NCAA's antitrust liability for fixing the price that college athletes pay to attend college and properly rejected the NCAA's claim to immunity under *Board of Regents*. Pet. App. 21a-29a. The Court of Appeals opined that "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." *Id.* at 58a-59a.

The Ninth Circuit explained that "[b]y and large, the NCAA does not challenge the district court's findings." *Id.* at 40a. The Ninth Circuit recognized that the NCAA's no-compensation rule imposed a "significant anticompetitive effect on the college education market." *Id.* at 43a. The Court found that the NCAA had engaged in a "price fixing agreement" governing "one component of an overall price" (*id.* at 41a) and that the harm suffered by college athletes "satisfied the plaintiffs' initial burden under the Rule of Reason." *Id.* at 41a.

The Ninth Circuit next explained that the NCAA's procompetitive justification focused solely on the supposed benefits of "the promotion of amateurism." *Id.* at 44a. The Court of Appeals rejected the claim that amateurism "increased choice available to student-athletes." *Id.* It deemed "irrelevant" the NCAA's "historical commitment to

amateurism,” however wavering. *Id.* at 46a. And it upheld the District Court’s finding that allowing NCAA member schools to award grants-in-aid up to the full cost of attendance “would be a substantially less restrictive alternative to the current compensation rules.” The Court of Appeals explained:

All of the evidence 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. 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. at 49a-50a.

Accordingly, the Ninth Circuit correctly affirmed the District Court’s injunction allowing NCAA schools to award grants-in-aid that cover the full cost

of attending college, rather than simply tuition, room, board and books. *Id.* at 49a-51a.

However, the Ninth Circuit improperly rejected the second part of the relief ordered by the District Court: the portion of the injunction allowing NCAA schools to pay college athletes up to \$5,000 in deferred compensation. *Id.* at 51a-58a.

Chief Judge Thomas concurred in part and dissented in part. He agreed with the majority's decision to affirm the District Court's finding of an antitrust violation under the Rule of Reason. But he disagreed with the majority's decision to truncate the District Court's remedy. Chief Judge Thomas explained that "[t]he 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" to craft its remedies. Pet. App. 62a-63a.

On rehearing, Chief Judge Thomas voted to grant plaintiffs' petition for hearing en banc. Pet. App. 171a.

ARGUMENT

I. This Court Should Grant The NCAA's First Question.

The NCAA seeks a categorical declaration that its challenged no-compensation rule is procompetitive as a matter of law on the basis of dicta in *Board of Regents*. The NCAA misreads that decision, but the O'Bannon Petitioners urge this

Court to grant review to make clear that the NCAA lacks the sweeping immunity it seeks.

A. *Board of Regents* Supports The O'Bannon Plaintiffs, Not The NCAA.

1. The NCAA Ignores The *Holding Of Board of Regents*: That An NCAA Restraint Of Trade Violated The Rule of Reason.

In *Board of Regents*, this Court held that the NCAA's plan for televising college football games was a horizontal agreement in restraint of trade and invalid under the Sherman Act. The Court declined to apply a per se rule of invalidity to the agreement and instead opined that a Rule of Reason approach was required because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. at 101. The Court made clear that amateurism was not the justification for its decision to reject a per se analysis and instead apply the Rule of Reason. *See id.* at 100-01 (decision "not based . . . on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics"). Indeed, the Court cited a long line of venerable antitrust precedents condemning private self-regulation schemes under the Sherman Act, even when they purported to achieve a positive social outcome. *Id.* at 101 n.23.

This Court expressed "no doubt that the challenged practices of the NCAA constitute[d] a 'restraint of trade'" that "limit[ed] members' freedom

to negotiate and enter into their own television contracts.” *Id.* at 98. (In the same way, the no-compensation rule at issue here limits members’ freedom to negotiate and enter into their own scholarship contracts for athletes’ services.) In words that foreshadowed the anticompetitive nature of the non-compensation rule, this Court found it “undeniable that these practices share[d] characteristics of restraints . . . previously held unreasonable” — including prohibitions on member institutions “competing against each other on the basis of price” or engaging in “any price negotiation [with] broadcasters.” *Id.* at 99. As the Court explained, the rule “restrain[ed] price and output” — “paradigmatic examples” of what “the Sherman Act was intended to prohibit” — and imposed “anticompetitive consequences.” *Id.* at 104, 106, 107-08.

Remarkably, the NCAA says *Board of Regents* — which rejected its antitrust defenses and repudiated its plea for immunity from antitrust scrutiny — should be viewed as a victory providing that restraints on player compensation, no matter how anticompetitive, are shielded from antitrust review.

In this case, the lower courts properly followed *Board of Regents*’ instruction to apply a “Rule of Reason” analysis, which is exactly what the District Court did in this case. The District Court compiled an exhaustive factual record demonstrating in detail that the no-compensation rule is anticompetitive, not procompetitive. The Ninth Circuit affirmed the

liability finding. *Board of Regents* provides no authority for disturbing that determination.

2. The NCAA Misunderstands The Relevance Of The Court’s “Twinkling Of An Eye” Approach.

The “twinkling of an eye” language cited by the NCAA was used in *Board of Regents* in the context of *condemning* a restraint of trade, not *upholding* one. In fact, this Court has explained that the “quick look” doctrine may be used where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an *anticompetitive* effect on customers and markets.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (emphasis added). In other words, a “quick look” may be used to *invalidate* a restraint — not (as the NCAA seeks) to uphold one as a matter of law, without proper factual analysis — and against lengthy trial testimony and a rich discovery record that yielded hundreds of trial exhibits. The NCAA cannot cite a single case where this Court — or any other court, for that matter — applied a “quick look” to uphold a horizontal restraint similar to the NCAA’s no-compensation rule.

The NCAA’s argument would turn this Court’s precedent on its head. Both *Board of Regents* and *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010), embraced the Rule of Reason. Neither decision found any restraints “procompetitive as a matter of law.” *Board of Regents* unequivocally affirmed an antitrust

violation; it stated that “the NCAA’s historic role in . . . amateur athletics” did not water down the applicable antitrust standard. 468 U.S. at 101. *American Needle* reversed the grant of summary judgment for a professional sports league and remanded the restraints to the lower court for a Rule of Reason analysis. The only type of restraints that *American Needle* suggested might be justified by the “special characteristics” of the sports industry had to do with such matters as cooperation in the production and scheduling of games (560 U.S. at 203), not the fixing of player wages — where competition was subject to full antitrust review. *Id.* at 196-97 (finding that teams could not claim independent action, or exemption from antitrust scrutiny, where they competed for playing personnel). Moreover, the Court there stressed that the “necessity of cooperation” did not “transform[] concerted action into independent action” — the fact that sports entities “operate jointly in some sense does not mean that they are immune.” *Id.* at 199.

3. The NCAA’s Plea For A Procompetitive “Presumption” Ignores The Fact That A Trial Has Already Occurred In This Case.

The NCAA’s request that its restraint of trade be deemed presumptively procompetitive is particularly inappropriate because this case is no longer at the pretrial stage. Here, the District Court made detailed factual findings — based on years of discovery, exhaustive briefing, and a three-week

bench trial — documenting that the NCAA’s restraint of trade was anticompetitive under the Rule of Reason. The court afforded the NCAA a full opportunity to be heard on the factual support for any procompetitive justifications. The NCAA’s speculation about what might have appeared to be true “in the twinkling of an eye” *years ago* is now moot. We now *know*, based on a full trial, that the NCAA’s challenged rules are anticompetitive. The NCAA’s argument is an improper attempt to displace the lower courts’ findings without actually engaging them under the clear-error standard.

4. The NCAA Misapprehends Snippets Of Dicta From *Board of Regents*.

The NCAA seizes on another snippet from *Board of Regents*: that “[i]n order to preserve the character and quality of the ‘product,’ athletes must not be paid.” But the NCAA ignores the rest of the sentence, which adds “must be required to attend class, and the like.” 468 U.S. at 102 (emphasis added). This passage was part of this Court’s explanation for applying Rule of Reason and not in support of some lesser degree of scrutiny. This case does not involve safeguards to ensure that student-athletes attend class and the like, which was the focus of the brief passage on which the NCAA relies.

Furthermore, *Board of Regents* was careful to convey that efforts to ensure the nonprofessional character of college sports “*can* be viewed as procompetitive” (468 U.S. at 102) (emphasis added), not that they *must* be so viewed in every instance or

that they will *automatically* qualify as procompetitive as a matter of law. In fact, the NCAA’s own counsel in *Board of Regents* told this Court that the NCAA was not relying on amateurism as a procompetitive justification and “might be able to get more viewers and so on [*i.e.*, increase output] if it had semi-professional clubs rather than amateur clubs.” Pet. App. 146a.

The existence of a procompetitive justification merely advances the analysis under the Rule of Reason to weighing alleged procompetitive justifications and considering less restrictive alternatives; it creates no incontestable immunity.⁵

5. The Scholarly Consensus Rejects The NCAA’s Interpretation Of *Board of Regents*.

The scholarly literature rejects the NCAA’s overreading of *Board of Regents*.⁶ Thirty-two (32)

⁵ The NCAA’s *amicus* states that a procompetitive presumption is applicable only where “the restraint is reasonably necessary to create a new product.” BADC Br. 2. 18. The findings in this case demonstrate that the restraint here was *not* reasonably necessary to create the product at issue. The restraint was not even in existence when the product was created. *See* Pet. App. 5a-6a, 93a-95a, 147a.

⁶ Marc Edelman, “A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act,” 64 CASE W. RESERVE L. REV. 61, 76-78 (2013) (NCAA’s no-compensation rule constitutes illegal wage-fixing under settled law); Gabe Feldman, “A Modest Proposal for Taming the Antitrust Beast,” 41 PEPPERDINE L. REV. 249, 258 (2014) (decisions rejecting NCAA liability are “incoherent”);

sports economists filed a brief below supporting Plaintiffs, CA9 Dkt. Entry 51, as did 26 professors of antitrust and sports law. CA9 Dkt. Entry 66. The NCAA’s Ninth Circuit antitrust scholar *amici* did not even argue that the challenged restraint was per se lawful. See CA9 Br. for Antitrust Scholars 5 n.2 (*amici* “do not opine” on the NCAA’s contention that its rules are “procompetitive as a matter of law.”).

B. The *Board of Regents* Dicta On Which The NCAA Relies Is Outdated.

Nothing in *Board of Regents* remotely suggests that a Rule of Reason analysis should be frozen as of 1984.⁷ In fact, *Board of Regents* carefully limited its analysis to the “evidence” of “today’s market” (468 U.S. at 116) — *i.e.*, the market for college football in 1984, which looks decidedly different from the market today. As the NCAA’s *amicus* observes, the Rule of Reason turns on a “flexible factual inquiry.” BADC Br. 3. Because the Rule of Reason analysis applied in *Board of Regents* was necessarily based on the specific facts before the Court, any dicta in that decision cannot govern the validity of restraints on

Daniel E. Lazaroff, “The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?” 86 OR. L. REV. 329, 353 (2007) (NCAA’s position “has been criticized frequently and consistently by commentators with good reason”).

⁷ See *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 1001 (2005) (noting that “changed market conditions” may “warrant different treatment” under the law).

compensation more than 30 years later, in an altogether new era.

The NCAA's attempt to stretch *Board of Regents* beyond the breaking point blinks the economic realities of today's collegiate sports industry (*see pp. 3-5, supra*) and relies on conceptions of "amateurism" from which the NCAA itself has largely departed in the years since *Board of Regents* was decided. (*See pp. 5-9, supra.*) As the District Court found, with the benefit of a full trial record in this case:

The record in this case shows that revenues from FBS football and Division I basketball have grown exponentially since *Board of Regents* was decided and that, as a result of this growth, many schools have invested more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes. This trend, which several witnesses referred to as an "arms race," has likely negated whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had on competitive balance.

Pet. App. 152a. "The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed." *Id.* at 147a (internal quotation marks and citation omitted).

Today's record is replete with evidence of the NCAA's inconsistent applications of "amateurism," its internal recognition that the commercialism of men's basketball and football has eroded and undermined the relationship between athletics and academics, and its concessions that modest NIL payments would be consistent with even the NCAA's interpretation of "amateurism." None of this evidence was before this Court in *Board of Regents*.

C. The Ninth Circuit Applied An Improper "Less Restrictive Alternative" Test, Although Not For The Reasons Cited By The NCAA.

The NCAA also argues that the Ninth Circuit misconstrued the "less restrictive alternative" test. Pet. 18-26. The NCAA is correct, but not for the reasons it states.

The NCAA asserts that the Ninth Circuit applied a "*least* restrictive alternative" test rather than a "*less* restrictive alternative" test. Pet. 23. The Ninth Circuit did no such thing. In fact, the Court of Appeals opined that "defendants are '*not* required to adopt the *least* restrictive' alternative." Pet. App. 50a (citation omitted and emphasis added).

But the NCAA is correct that the Ninth Circuit applied the wrong legal standard. In fact, the Court of Appeals committed a *double* legal error, as explained in the O'Bannon Petition (No. 15-1167, pp. 21-33). *First*, the Ninth Circuit engrafted onto the determination of proper antitrust *remedies* a "less restrictive alternative" test that is applicable

only to determinations of *liability* under the Rule of Reason. *Next*, the Ninth Circuit applied a version of the less restrictive alternative test that was too pro-defendant and put too many burdens on Plaintiffs. The Court of Appeals opined that a plaintiff must make a “strong evidentiary showing” that an alternative is “viable” and “virtually as effective” in serving the alleged purposes of the restraint, “without significantly increased cost.” Pet. App. 48a. The Ninth Circuit further held that a plaintiff must show that a “restraint is *patently and inexplicably* stricter than necessary.” *Id.* at 51a (emphasis in original). Finally, the Ninth Circuit ignored the last prong of the Rule of Reason: balancing anticompetitive harms against procompetitive effects, which is required even if a plaintiff cannot identify a less restrictive alternative. *See* BADC Br. 4 n.10. Both this Court’s precedent and sound antitrust principles counsel against biasing the “less-restrictive-alternative” test against plaintiffs as the Ninth Circuit did (and as the NCAA requests in its own Petition). The Ninth Circuit’s version of the test would dramatically weaken the Sherman Act and warrants this Court’s review.

The NCAA complains of judicial “micromanagement.” Pet. 3. But the real issue here is *appellate* micromanagement of trial court remedial discretion, as explained in the O’Bannon Petition (No. 15-1167, pp. 21-33).

D. Decisions In Other Circuits Do Not Support The NCAA.

The NCAA cites decisions from lower courts, but no court has ever applied the *Board of Regents* dicta to a full trial record to give the NCAA blanket immunity for its no-compensation rule.

The NCAA cites *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012) (cited Pet. 17), but that case was decided at the dismissal stage and turned essentially on a pleading error by the plaintiffs. The Seventh Circuit made clear that the NCAA could face antitrust liability in a different case. *See Agnew*, 683 F.3d at 346 (“[t]he proper identification of a labor market for student-athletes, on the other hand, would meet plaintiffs’ burden of describing a cognizable market under the Sherman Act”). The Seventh Circuit stressed that the NCAA is not exempt from antitrust liability. *Id.* at 338.

The NCAA also cites *Smith v. NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459, 464 n.2 (1999), and *McCormack v. NCAA*, 845 F.2d 1338, 1343-1345 (5th Cir. 1988), but those cases applied the Rule of Reason, rather than deeming the restraints procompetitive as a matter of law.

II. This Court Should Deny The NCAA’s Second Question.

In its second Question, the NCAA incorrectly contends that the Ninth Circuit’s decision in this case is premised exclusively on the prior ruling in *In*

re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013) (*Keller*), which held that the First Amendment did not prevent a right-of-publicity claim arising from the use of college-football players' NILs in videogames. The NCAA maintains that *Keller* — a case that it ultimately settled instead of appealing to this Court — was wrongly decided.

This question does not merit this Court's review at this time. The two Questions presented by the O'Bannon Petitioners in No. 15-1167 and the first Question presented by the NCAA in the instant Petition provide ample substance for this Court's review. They should be briefed and argued by themselves. The second Question presented by the NCAA, which mistakenly proposes that the O'Bannon Petitioners lack standing because the First Amendment trumps any NIL rights with respect to videogames, injects a host of unrelated issues and would unduly complicate this Court's review.

This Court denied review in *Electronic Arts, Inc. v. Davis*, No. 15-424 (*cert. denied* Mar. 21, 2016), which involved the same substantive question as the NCAA seeks to present, but which — like this case — contained ancillary issues complicating review (such as whether state anti-SLAPP statutes are applicable in federal court). *See* ConLaw/IP Professors Br. 5. Denial of certiorari is similarly appropriate here, as this case is even more distant from the question proposed.

Tellingly, the NCAA did not seek *certiorari* in *Keller*. Instead, it settled the separate claims of the *Keller* Plaintiffs. Other defendants settled while petitions for certiorari were pending. See ConLaw/IP Professors Br. 6. The NCAA now seeks to use this case to review the question it declined to present in *Keller*. If this Court wishes to review the NCAA's second Question, it should find a more appropriate vehicle that presents the Question directly.

A. The First Amendment Question Is Not Directly Presented In This Case.

The First Amendment connection to this case is highly attenuated. This case involves neither an effort to assert Plaintiffs' rights of publicity nor a constitutional challenge to such an assertion by videogame manufacturers (or, for that matter, broadcasters of sporting events). The First Amendment comes into the case only tangentially, as part of the NCAA's failed argument that the O'Bannon Plaintiffs lack standing because, under the First Amendment, they supposedly do not have an enforceable right of publicity in their NILs as used in videogames sufficient to establish antitrust injury to their businesses or property. That argument misapprehends Plaintiffs' standing arguments – and is infirm in its own right in any event.⁸

⁸ Because this is an *antitrust* case, in which the First Amendment issue is necessarily attenuated, it assuredly is *not* “the rare *right of publicity case* that comes all the way up to this Court,” as the NCAA's *amicus* asserts. ConLaw/IP

This case is a singularly inappropriate vehicle for exploring potential First Amendment issues. To begin, the NCAA itself lacks standing to assert First Amendment rights of videogame creators because it does not produce video games. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975) (noting the prudential standing rule that “the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”). There is no legal or practical impediment to videogame makers (or others) asserting their First Amendment rights when and if athletes ever seek to enforce publicity rights against them.

Even if videogame makers were parties here, their First Amendment rights would not be ripe for adjudication. This is an antitrust case. It involves no effort to enforce athletes’ NIL rights against a videogame maker or other holder of relevant First Amendment rights. The NCAA effectively seeks a determination of those third parties’ First Amendment rights long before those rights are implicated by any actual effort to enforce athletes’ NIL rights.

Professors Br. 6 (emphasis added). Indeed, the *amicus* ultimately states – in a tellingly conditional sentence – that “[i]f this Court agrees with” the NCAA’s attempt to frame the standing issue, “then a decision about the First Amendment defense to the right of publicity *could* dispose of this case.” *Id.* at 5 (emphases added).

**B. Plaintiffs' Standing Does Not Depend On
The First Amendment Question The
NCAA Seeks To Present.**

The NCAA insists that the Ninth Circuit's resolution of the standing issue rests on *Keller*, which the NCAA claims was wrongly decided. That misreads the Ninth Circuit's decision.

The Ninth Circuit made only a passing reference in a footnote to *Keller*. Pet. App. 36a n.13. Instead, the Court of Appeals based its standing analysis on the District Court's factual finding of a vibrant licensing market for athlete NILs in college sports videogames – a factual assessment of market realities that is not dependent on *Keller's* resolution of the First Amendment question. For example, EA's Executive Vice President for Business and Legal Affairs, Joel Linzner, confirmed at trial that EA was and is “very interested in acquiring those rights [to use the NILs of college athletes],” as it does for its games corresponding to professional leagues — and regardless of the precise legal import of those authorizations. Trial Tr. 1671.

The Ninth Circuit concluded that “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.” Pet. App. 38a. The Court of Appeals explained that “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.” *Id.* at 33a-34a. “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.* at 34a. “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.’” *Id.*

Thus, Plaintiffs *proved* their standing as a factual matter at trial, based on evidence of how the market for NILs operates and how they are actually sold for commercial purposes. The NCAA now seeks to unwind that *factual* determination by insisting that the First Amendment might shield videogame makers from right-of-publicity lawsuits arising from the commercial use of athletes’ NILs in videogames. But even if the NCAA were correct — and it is not — video game makers *in the real world* have paid, are paying, and will continue to pay to use athlete NILs. As the Court of Appeals explained, the NCAA’s argument that there were legal impediments to a video-game licensing market was ultimately not dispositive as to standing:

[According to the NCAA] *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. 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.

Pet. App. 37a.⁹ The Ninth Circuit added that “[o]ur conclusion is unaffected by the NCAA’s claim that other rules and practices, not directly at issue here, would forbid video game makers from using student-athlete NILs in their games.” *Id.* at 35a.

The District Court similarly recognized that the NCAA’s First Amendment argument was not dispositive as to standing, in finding that Plaintiffs suffered injury from the denial of compensation for use of their NILs in live broadcasts: “even if some television networks believed that student-athletes lacked publicity rights in the use of their names, images, and likenesses, they may have still sought to acquire these rights as a precautionary measure. Businesses often negotiate licenses to acquire uncertain rights.” Pet. App. 135a.

The NCAA’s First Amendment question therefore has no bearing on whether Plaintiffs suffered injury-

⁹ The Ninth Circuit made this remark in its analysis of the NCAA’s argument that the Copyright Act eliminated athletes’ right of publicity, but it is equally applicable to the NCAA’s First Amendment argument.

in-fact. This Court should deny review of the First Amendment question the NCAA seeks to present.

C. The District Court's Factual Findings Of Television And Other Licensing Markets Further Counsel Against Review.

Another factor militating against review is the point that Plaintiffs' standing is also grounded *as a factual matter* in the market for NIL rights in live game telecasts, rebroadcasts, advertisements, and archival footage – again, entirely apart from the First Amendment question tied to videogames the NCAA seeks to present. The District Court made extensive factual findings that a market for these rights *actually* exists, notwithstanding the NCAA's *theoretical* First Amendment argument. Pet. App. 81a-84a, 86a-87a. Indeed, the NCAA's current contracts with television and cable networks (under which it reaps hundreds of millions of dollars in revenue annually) contain express provisions assigning Plaintiffs' purportedly non-existent NIL rights. *Id.* at 82a. The NCAA's position appears to be that the First Amendment limits the Plaintiffs but not the NCAA.

The market for NIL rights in live game telecasts and related broadcast markets (separate and apart from videogames) provides an independent basis for Plaintiffs' standing. The Court of Appeals did not need to reach these issues in order to find Plaintiffs' standing (*id.* at 33a), but they still provide an alternative basis for affirming Plaintiffs' standing (in addition to the District Court's findings regarding

the videogame licensing market), without the need to address the NCAA's First Amendment question.

D. Review Should Be Denied Because The Decision Below Does Not Rest On Any Particular First Amendment Test.

Even under the NCAA's view that market realities are irrelevant and that Plaintiffs' standing rests on the First Amendment issue decided in *Keller*, this case is a poor vehicle to examine that question because a finding that Plaintiffs have standing does not require any conclusion as to the precise scope or value of their NIL rights; rather, it requires only a conclusion that *some* such value exists. Plaintiffs are injured by the NCAA's rules with respect to that value.

The NCAA would need to show that Plaintiffs' deprivation could not be actionable against anyone (even if they lacked a cause of action against videogame makers and broadcasters). For instance, even if the First Amendment prevented athletes from asserting any rights of publicity against videogame makers and broadcasters, they could conceivably institute an action against their university for unjust enrichment or restitution, seeking a share of the university's broadcast revenues.

In short, even if the First Amendment dictated whether Plaintiffs had standing, the standing requirement would be satisfied so long as Plaintiffs' NILs possessed any economic value at all. The NCAA must show that the First Amendment

categorically precludes recognizing any such value. The NCAA falls far short of that showing.

This Court's holding in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) – which, remarkably, the NCAA's Petition does not cite, even though it is the only Supreme Court case ever to address the right of publicity – squarely rules out the categorical prohibition sought by the NCAA. Beyond that, this Court need not go. The precise balance between Plaintiffs' NIL rights and the First Amendment rights of others can and should be examined when and if litigation to enforce those rights arises.

Zacchini rejected the claim that the First Amendment privileged the television broadcast of the act of Hugo Zacchini, a “human cannonball,” at the Geauga County Fair:

The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright holder.

Id. at 574-75.

The NCAA's *amici* seek to distinguish *Zacchini* because it involved the telecast of a performance rather than “general” use of NILs, “such as advertising.” ConLaw/IP Professors Br. 7. But videogames are not “advertising.” Rather,

videogame makers use NILs in order to give games the look and feel of a telecast – to make them a life-like, realistic depiction of actual players and games. Pet. App. 7a-8a, 12a. As the Court of Appeals noted, videogame “companies want to make games that are as realistic as possible.” *Id.* at 34a. *Zacchini* cannot be brushed aside as inapposite.¹⁰

Rather, the principles articulated by this Court in *Zacchini* are fully applicable to this case. This Court stressed the legitimacy and importance of rights of publicity, noting that “Ohio has recognized what may be the strongest case for a ‘right of publicity’ involving . . . the appropriation of the very activity by which the entertainer acquired his reputation in the first place.” 433 U.S. at 576. This Court noted the rights of “a person with a *name having commercial value*.” *Id.* at 572 (emphasis added). That is exactly what videogame makers seek to appropriate from Plaintiffs.

The Restatement (Third) of Unfair Competition reflects *Zacchini’s* conclusion that the First Amendment does not eliminate the right of publicity. For example, § 46 of the Restatement imposes liability on one “who appropriates the commercial value of a person’s identity” without consent “for purposes of trade,” but § 47 exempts from that

¹⁰ *Amici’s* acknowledgment that *Zacchini* recognizes NIL rights in live telecasts eliminates any argument that the First Amendment would deprive Plaintiffs of standing to challenge the denial of compensation for use of their NILs in live telecasts. As explained in Part II-D, *supra*, this deprivation independently establishes Plaintiffs’ standing.

category “the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” Restatement (Third) of Unfair Competition §§ 46, 47. As the commentary to § 47 makes clear, these exceptions are designed in part to accommodate First Amendment interests. *See id.* at § 47 cmt. d. But the exceptions do not confer a blanket privilege for “entertainment”; rather, the Restatement acknowledges an enforceable right of publicity in cases like *Zacchini*. *See id.* at Illustration 7. And “purposes of trade” do include appropriation of publicity rights by retailers of merchandise, for example. *See id.* at cmt. e.

Zacchini makes clear that, whatever test is used and wherever the balance is struck, the First Amendment would not extinguish all of Plaintiffs’ rights of publicity.

E. The *Keller* Decision Does Not Warrant This Court’s Review.

The NCAA urges this Court to review *Keller*, to reject the “transformative use” test of California law applied in *Keller*, and to adopt the federal Lanham Act standard of *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Tellingly, the NCAA makes no attempt to argue that Plaintiffs’ antitrust standing (or the outcome in this case) would be any different under *Rogers*. In any event, *Keller* does not merit this Court’s review.

Keller applied the “transformative use” test simply because the defendant in that case asked it

to, perhaps on the view that the dispute was governed by California law. *See* 724 F.3d at 1273. *Keller* “reserve[d] the question of whether the First Amendment furnishes a defense other than those the parties raise.” *Id.* at 1273 n.5.

Keller is entirely consistent with this Court’s precedent. *Keller* applied *Zacchini* to require a nuanced balancing of rights of publicity against First Amendment values. *Keller* recognized that First Amendment “rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.” *Id.* at 1271 (citing *Zacchini*, 433 U.S. at 574-75). Pursuant to *Zacchini*, *Keller* “balance[d] 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.” *Id.*

Nor does the NCAA show a circuit split on the issue of athlete NILs in videogames. *Keller* is entirely consistent with *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 165 (3d Cir. 2013), where the Third Circuit also applied the “transformative use” test to athlete NILs and videogames. Thus, there is no conflict on the specific issue the NCAA seeks to present.

The NCAA’s *amici* present a catalog of decisions involving everything from films to comic books, greeting cards, and T-shirts. *See* ConLaw/IP Professors Br. 2-3. But all these cases involve vastly different circumstances. *Keller* itself noted that it was “leav[ing] room for distinguishing between this

case—where we have emphasized [Electronic Arts’] primary emphasis on reproducing reality—and cases involving other kinds of expressive works.” 724 F.3d at 1279 n.10. This case does not present an appropriate vehicle for the all-encompassing, encyclopedic resolution that *amici* propose.

The NCAA claims that four circuits and two states use the *Rogers* test (Pet. 34), but it fails to show that they involved athlete NILs, much less the use of athlete NILs in videogames. The *Rogers* test pertains to the Lanham Act context, which involves issues of misbranding and consumer confusion, rather than the property rights of NILs. *Keller* noted that the supposed “division” among courts regarding the “transformative use” and *Rogers* tests is exaggerated and that courts (such as the Sixth Circuit) have been “inconsistent[.]” 724 F.3d at 1281-82.

Accordingly, further percolation on the issue is warranted. This Court’s review should await another case on another day.

CONCLUSION

For the foregoing reasons, the Court should grant the two Questions Presented in No. 15-1167 and the first Question Presented by the NCAA's Petition in No. 15-1388.

Respectfully submitted,

MICHAEL D. HAUSFELD	JONATHAN S. MASSEY
HILARY K. SCHERRER	<i>Counsel of Record</i>
SATHYA S. GOSSELIN	MASSEY & GAIL, LLP
SWATHI BOJEDLA	1325 G St., NW, Ste 500
HAUSFELD LLP	Washington, D.C. 20005
1700 K St. NW, Ste. 650	Tel: (202) 652-4511
Washington, D.C. 20006	jmassey@masseygail.com
Tel: (202) 540-7200	
mhausfeld@hausfeld.com	

MICHAEL P. LEHMANN	SETH A. ROSENTHAL
BONNY E. SWEENEY	VENABLE LLP
BRUCE WECKER	575 7th Street, N.W.
HAUSFELD LLP	Washington, D.C. 20004
600 Montgomery St.,	Tel: (202) 344-4741
Ste. 3200	sarosenthal@venable.com
San Francisco, CA 94111	
Tel: (415) 633-1908	

Dated: July 1, 2016