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June 4, 2020

The Honorable Nancy Pelosi
The Honorable Mitch McConnell
The Honorable Kevin McCarthy
The Honorable Charles Schumer
United States Capitol
First Street, S.E.
Washington, D.C. 20004

Dear Speaker Pelosi, Leader McConnell, Leader McCarthy and Leader Schumer,

We are writing as class counsel who represent the many thousands of college athletes around the country who participate in FBS football or men's or women's Division-I college basketball, in an antitrust action pending in federal court, known as the *In re NCAA Grant-in-Aid Cap Antitrust Litigation*. Specifically, on behalf of the thousands of college athletes who make up these classes, we write in response to the letter recently sent to you by the "Power 5" athletic conferences requesting federal legislation that would, among other things, grant them statutory immunity from certain antitrust scrutiny.

The student-athletes we represent—along with all other college athletes—would suffer if such an antitrust exemption were enacted. Indeed, history demonstrates that antitrust litigation has been the most effective tool in compelling the NCAA and its members to begin to take overdue steps to enhance student-athlete welfare. And each time the NCAA and its conferences have lost an antitrust action, their cries about ruinous competition have proved empty. Instead, the antitrust courts' easing of the NCAA's and conferences' restraints of trade have uniformly benefitted conferences, schools, students, and fans.

The *NCAA Grant-in-Aid Cap* litigation is the latest in this line of antitrust cases. It resulted in a U.S. District Court and a (unanimous) U.S. Court of Appeals striking down the NCAA's and Power 5 conferences' artificial and unlawful caps on the education-related benefits available to the college athletes we represent. Both federal courts also reaffirmed that the NCAA and the conferences remain subject to future antitrust scrutiny for anticompetitive behavior. Although, in the wake of this latest antitrust defeat, the NCAA's President now purports to embrace the injunction that frees schools to provide substantially enhanced education-related benefits,[1] it was

[1] NCAA President Mark Emmert has said that the injunction is "not in any way fundamentally inconsistent with what we've been doing for about a decade now" and that "compet[ition] over who can provide the best educational experience is an inherently good thing, not a bad thing from my point of view." Associated Press, *Emmert: Ruling Reinforced Fundamentals of NCAA*, ESPN.COM, Apr. 4, 2019, https://www.espn.com/college-sports/story/_/id/26436658/ruling-reinforced-fundamentals-ncaa.

only after years of hard-fought antitrust litigation that our class members were able to obtain such relief.

The Power 5 conferences' requests for legislation that would afford them "protection from potential liability under antitrust and other laws related to the implementation of" federally mandated standards for compensating college athletes for their names, images and likenesses would undermine the operation of our nation's antitrust laws, which fosters economic competition for the benefit of all. The antitrust history in collegiate athletics is instructive. In the 1980s, the U.S. Supreme Court struck down NCAA restrictions on college football telecasts. *See NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). At the time, the NCAA vehemently opposed such market competition for the broadcast of college football, but in hindsight, the conferences' and schools' freedom to compete has been uniformly recognized as positively transformative to the welfare of college sports. Undeterred by this antitrust condemnation, the NCAA and its conferences persisted in flouting the antitrust laws through rules to suppress the compensation and benefits available to those with the least leverage—such as assistant college basketball coaches. *See Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (striking down as illegal $16,000 annual cap on assistant coaches' salaries). Even as to the name, image, and likeness compensation that the Power 5 now claim to support, just several years ago, they opposed such funds, describing it as "no less anathema to amateurism than paying football players $100 per sack." Br. for NCAA at 57, *O'Bannon v. NCAA*, Nos. 14-16601 & 14-17068 (9th Cir. Nov. 14, 2014) (Dkt. No. 13-1). The NCAA was held to have violated antitrust law in this case, too. *See O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

This pattern repeated itself in the *NCAA Grant-in-Aid Cap* litigation. There, the classes of college athletes that we represent sued the NCAA and the Power 5 conferences (among others) to eliminate the restrictions on compensation and benefits that could be provided for their athletic services. In response, the NCAA and the Power 5 conferences claimed that if college athletes received even "one penny more" than their scholarships, consumers would lose all interest in college sports. This so-called "amateurism" defense was debunked during the multi-week trial, which exposed the NCAA's and Power 5 conferences' true motivation in capping student-athlete benefits: keeping as much money for themselves as possible. The trial further demonstrated that the athletes generate billions of dollars for the NCAA and the conferences year-over-year, and that FBS football and Division-I basketball have become a massive commercial enterprise—not an extracurricular avocation—where the only "amateur" feature is the exploitation of student-athletes' work. Indeed, the exorbitant salaries for college coaches and athletic administrators (to name a few) often exceed those of their professional sports league counterparts.

The Power 5 conferences are now making the same type of arguments to Congress that they have already lost multiple times, over multiple decades, before the antitrust courts. Competition is not ruinous. Neither the NCAA nor any athletic conference should be granted antitrust immunity to restrict name, image, and likeness compensation to athletes (or to restrict anything else). The Power 5's multi-billion-dollar FBS football and Division-I basketball businesses deserve no greater protection from antitrust scrutiny than any other commercial enterprise. This is especially true, as a matter of public policy, because most of the athletes who generate these large revenues will never again have an opportunity to reap the economic benefits of their athletic efforts—the vast majority will never make it to a professional league, many more will not graduate, and many others are abandoned by their schools once their athletic eligibility has been exhausted. That the Power 5 conferences are motivated by self-interest—rather than the interests of the students they purport to safeguard—is plain from the face of their plea to Congress: if *third parties* are permitted to pay athletes for use of their names, images, and likenesses, then the Power 5 should be immune from liability for prohibiting *its members* from providing the same type of compensation to student-athletes.

The Power 5's transparent economic motivation is further demonstrated by their request that Congressional action also preempt state laws protecting student-athletes' personal property rights in their own names, images, and likenesses. This core personal property right has been a longstanding part of the common law and codified into state law.[2] Former NCAA Executive Vice President of Regulatory Affairs, Oliver Luck, acknowledged as much in 2015, stating that "the name, image, likeness for an individual is a fundamental right–that any individual controls his or her name, image and likeness–and I don't believe that a student-athlete who accepts a grant-in-aid simply waives that right to his or her name, image, likeness."[3] Yet, the NCAA and the Power 5 have reaped the financial rewards of, among other things, permitting video game makers to use players' names and likenesses, while fighting tooth-and-nail to prevent these student-athletes from sharing in the NCAA's and the conferences' financial gains. *See In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

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[2] *See, e.g.*, Cal. Civil Code § 3344(a) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.").

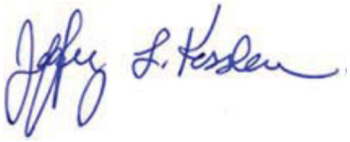
[3] Steve Berkowitz, *Oliver Luck brings own perspective to NCAA on O'Bannon name and likeness issue*, USATODAY.COM, Jan. 16, 2015, https://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331.

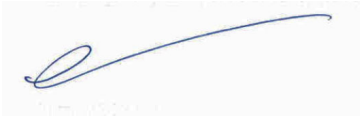
The Power 5 ask Congress for what they euphemistically call a "safe harbor"—but there is no doubt that what they really seek is immunity, *i.e.*, a license to violate antitrust law. Such immunity contradicts the policy behind the enforcement of the antitrust laws in this country, and thus is rarely given, and certainly should not be given here to a group of antitrust recidivists with billions in revenue and a proven agenda to limit their costs at the expense of college athletes. We urge Congress to decline the Power 5's invitation to afford them or any NCAA constituency such a license to continue to enrich themselves at the expense of the athletes, many of whom come from disenfranchised and economically deprived communities and backgrounds. College athletes are particularly vulnerable to exploitation and should not be deprived of their antitrust rights, which have proven critical in their protracted struggle to obtain a fairer system of benefits and compensation in light of the tremendous revenues that they generate and the sacrifices they make for their schools. History has proven that the forces of competition greatly benefit the public interest, and there is no reason to immunize NCAA conferences and members in any shape or form from complying with the antitrust laws.

Finally, insofar as the Power 5 conferences claim they need a federal antitrust exemption because many states are, consistent with longstanding personal property rights, passing laws to protect athletes' names, images, and likenesses, the Power 5 have it backwards. The fact that states across the country have recognized and responded to the disturbing ways in which college athletes are economically exploited illustrates why all participants in college athletics must be held to the law—not exempted from it.

If you or your staff have any questions about this subject, or the *NCAA Grant-in-Aid Cap* litigation, we would be pleased to answer them.

Respectfully,





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