House, et al. v. National Collegiate Athletic Association, et al. , Docket No. 25-4218 (9th Cir. Jul 09, 2025), Court Docket

Case 25-4218

Nos. 25-3722, 25-3835, 25-4137, 25-4150, 25-4190, 25-4218

In the
United States Court of Appeals
for the Ninth Circuit

In Re College Athlete NIL Litigation

GRANT HOUSE; ET AL
Plaintiffs-Appellants
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Defendants-Appellees

On appeal from the United States District Court
for the Northern District of California
D.C. No. 4:20-cv-03919-CW
Hon. Claudia Wilken, Judge Presiding

BRIEF OF PROFESSOR MICHAEL H. LeROY, MS. PAMELA SEIDENMAN AND ATTORNEY CHRISTINE D. BROWN AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Respectfully submitted,

BY: Christine Brown

Christine D. Brown
CHRISTINE BROWN & PARTNERS, LLC
2 Corporate Drive, Suite 252
Shelton, Connecticut 06484
(203)684-1834
christine@christinebrownsportslaw.com

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CORPORATE DISCLOSURE STATEMENT

Under FED. R. APP. PROC. 26.1 and 9TH CIR. R.29.A.4.e.1, I certify that I represent only my views as a professor who publishes research on legal aspects of athletic labor and NIL in intercollegiate sports, and teaches a professional degree course, "Collective Bargaining in Sports and Entertainment." I am a co-author of this amicus brief. I am employed as a full professor with an endowed chair appointment (LER Alumni Professor) by the University of Illinois at Urbana-Champaign, with a 100% appointment in the School of Labor and Employment Relations, and an affiliated appointment in the College of Law. I have no ownership interest in a company that is before this Court.

By: _____
Michael H. LeRoy

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STATEMENT OF INTEREST[1]

Prof. Michael H. LeRoy has published numerous law review articles since 2012 on the emerging professionalization of college athletics. All are sole author publications (articles on women's issues in college athletics have an asterisk): *The Reverse Logic of College NIL Contracts: A Legal Guide for the Perplexed*," J. COLL. & UNIV. L., Vol. 51 (forthcoming, 2026); **NCAA Women Athletes and NIL Pay Disparities: Are They Students Under Title IX, Employees Under Title VII, or Both?*, 93 U. CIN. L. REV. 979 (2025); **Are Collectives Joint Employers of College Athletes? An Empirical Analysis of NIL Deals and School Policies*," 34 MARQ. S. L. REV. 261 (2024); *Emancipating College Athletes from Amateurism under the Fair Labor Standards Act*, 44 BERKELEY J. EMP & LAB. L. 119 (2024); *Are College Athletes Employees under the Fair Labor Standards Act?*, 14 HARV. J. OF SPORTS AND ENT. L. 57 (2023); *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2022 UNIV. OF ILL. L. REV. 53 (2023); *The Professional Labor Market for Teenage Basketball Players: Disruptive Competition to the NCAA's Amateur Model*," 44 BERKELEY J. ENT. & SPORTS L. 1 (2022). As a professor who has taught student-athletes in football, men's basketball, baseball, gymnastics, tennis (women's), and track and field (women's) at the University of Illinois, Urbana-Champaign since 1986, and as Senate Chair of the UIUC Athletic Board (2016-2019), and Member (2014-2022), Prof. LeRoy has a professional interest in the equitable treatment of student-athletes.

Pamela Seidenman is the founder of Accelerate Equity. She built the Gender Equity Dashboard, the first resource that makes it easy to understand how every college is doing in meeting Title IX's goals. She has written about Title IX, gender equity, and sports in the Sports Business Journal and Sportico, and been interviewed for podcasts, radio programs, and other media. Ms. Seidenman has expertise in communications and fundraising and has spent much of her career in higher education. She studied Organizational Behavior at the Stanford Graduate School of Business and has an MA from Cambridge University and a BA from the University of Pennsylvania. She was a member of the women's ice hockey team at both Cambridge and Penn. As a former athlete and an influential businesswoman, Ms. Seidenman has a personal and professional interest in the equitable treatment of female athletes.

[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Attorney Christine D. Brown is an attorney with a focus on college athletics and more than 30 years of experience, leading major Title IX cases, guiding hundreds of administrative hearings, and helping people navigate complex, high-stakes legal challenges. Attorney Brown helps athletes, coaches, and teams protect their rights and seize new opportunities as they face the shifting landscape of college sports - from NIL and Title IX matters to scholarship disputes, transfers, and employment issues to discrimination, disability rights, and professional representation. As the mother of a college athlete, the sibling of a special needs individual and an attorney representing athletes nationwide, Attorney Brown has a personal and professional interest in the equitable treatment of all student-athletes.

STATEMENT OF THE CASE

In re College Athletics NIL Litigation is a landmark antitrust lawsuit filed by college athletes in federal district court that challenged NCAA rules that restrained their right to receive compensation for athletic services. After these actions were consolidated by the Federal Court for the Northern District of California, Judge Claude Wilken certified three damages classes (football and men's basketball, women's basketball, and all other sports), and one injunctive class (all four classes).

On November 3, 2023, the District Court ruled to exclude Prof. Barbara Osborne, an authority on Title IX compliance matters for universities and colleges, as an expert witness. This ruling created a structural conflict that harmed women athletes in the settlement agreement, approved on June 6, 2025, and dismissed evidence that clearly demonstrated why certification of the classes was wrong. Published studies, showing large gender disparities in NIL pay, provide data that the lack of representation for women athletes in this litigation perpetuates historical NIL disparities, and other inequities, for NCAA women athletes.

The settlement provides over 90% of monetary relief to male athletes. The justification for this allocation, which was recommended by economist Daniel Rascher, is that male sports generated the most revenue (1-MenkeER-0154).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. **Whether the District Court abused its discretion in granting the Plaintiffs/Appellants' motion to exclude Prof. Barbara Osborne as an expert on Title IX compliance at Defendants/Appellees' schools.**

2. **Whether the exclusion of evidence through the testimony of Prof. Osborne resulted in the District Court's erroneous certification of four classes and approval of a settlement agreement that was not fair, just, and reasonable.**

3. **Whether a structural conflict in the settlement classes benefits football and men's basketball players at the expense of all women athletes.**

4. **Whether the District Court Opinion Regarding Order Granting Motion for Final Settlement Agreement violated Fed. R. Civ. P. Rule 23(a)(4), and is reversible error under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).**

5. **Whether the District Court erred in approving monetary relief that violated Title IX and that rests on decades of discrimination that limited the ability of women's sports to generate revenue.**

INTRODUCTION

Olivia Dunne is likely the most significant social media influencer in the history of NCAA athletics, with over 10 million followers on social media platforms, and earning over $4.1 million during her final college season. Nonetheless, she filed a letter with the District Court in February 2025 objecting to the settlement agreement in this matter. Ms. Dunne said:

As such I object to the Settlement on the following grounds:

> There is a lack of transparency to how the calculations are being made for the estimate of lost NIL opportunities and if the same formula is being applied to all athletes across every sport. If I were to hire a law firm to represent me individually in this matter I would want to know how the valuation of damages was calculated specifically to me. This seems not to be the case. Especially in a case where the school provided no NIL data, athletes could not upload their own data to adjust and correct their estimate without filing a claim and waiving their right to opt out of the damages class. This left the athlete to have to make a decision without accurate information.

Letter Dated 1/31/2025 from Olivia Paige Dunne, Case 4:20-cv-03919-CW Document 695.

Ms. Dunne's straightforward logic and unassailable facts are at the heart of our arguments in this Amicus Brief. The settlement agreement, approved by Judge Claudia Wilken, perpetuates sex discrimination by the NCAA and Power Conferences. On the one hand, the District Court's opinion concluded: "Where, as here, the Court must conduct a new class certification inquiry for the purpose of determining whether to approve a proposed settlement, the Court must examine the

proposed settlement with a 'higher level of scrutiny for evidence of collusion or other conflicts of interest.'" *Opinion Regarding Order Granting Motion for Final Settlement Agreement, In Re: College Athlete NIL Litigation* (Case No. 20-cv-03919 CW), at 20-21 (quoting *in re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 976 (9th Cir. 2011)).

But the 76-page Opinion mentioned "women" a mere nine times. This is because the settlement agreement is almost entirely about the NCAA and Power Five conferences agreeing to allocate 90% of broadcast NIL damages to football and men's basketball players. Women's basketball players received a meager 5%. The remaining 5% was allocated for men's and women's athletes in other sports. *Declaration of Daniel A. Rascher, House et al. v. NCAA et al*., No. 4:20-cv-03919 CW, Doc. 494-3, (N.D. Cal. July 26, 2024), at 23 (see "Damage Class," left column, and damages).

This settlement was approved in violation of Fed. R. Civ. P. Rule 23(a)(4) and caselaw, including *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). Accordingly, this Court should vacate the settlement.

ARGUMENT

I. THE RULING TO EXCLUDE PROF. BARBARA OSBORNE AS A TITLE IX EXPERT RESULTED IN THE ERRONEOUS CERTIFICATION OF THE SETTLEMENT CLASSES BECAUSE THE EVIDENCE THAT WAS PRECLUDED DEMONSTRATES WHY CERTIFICATION WAS WRONG AND LED TO THE APPROVAL OF A SETTLEMENT THAT WAS NOT FAIR, JUST, AND REASONABLE.

When the District Court ruled on November 3, 2023, to exclude the NCAA's Title IX expert witness supporting its opposition to class certification, this ruling created a structural conflict that harmed women athletes in the settlement agreement. *In re: College Athlete NIL Litigation, Order Granting Plaintiffs' Motion to Exclude Barbara Osborne's Opinions from the Class Certification,* Case No. 20-cv-03919 CW (Nov. 3, 2023). Prof. Osborne opined that the proposed certification class of male athletes in Division I football, and men's basketball, would create a structural equity problem for all women athletes. *Id*. at 6. But the Court disagreed that women were structurally disadvantaged by a BNIL class that was tailor-made for football and men's basketball:

> The Court agrees with Plaintiffs that Osborne's opinion about the feasibility of making BNIL payments to student-athletes in a manner that complies with Title IX is unreliable. Osborne acknowledged that the opinion at issue is not based on any independent or empirical studies. *See Osborne Dep. Tr.* at 183-84; see also *id.* at 179-80.
>
> …
>
> Osborne opined that Dr. Rascher's BNIL model and the payments it contemplates 'are not compatible with Title IX, and in particular, Title IX's financial assistance provisions, equal opportunities provision, and equal treatment provision' because the model 'forces schools to treat male and

> female student-athletes differently and offer them vastly disparate benefits.' See id. at 15.

Id. at 18.

Empirical studies show that Prof. Osborne's conclusions regarding Title IX were correct. Her lengthy expert report concluded:

> 20. Of the roughly 113 total student-athletes at each institution who would receive a revenue share under the Broadcast Model in each year of the class period, at least 86.7% are male student-athletes….
> 28. Here, Plaintiffs' Broadcast Model seeks to overwhelmingly compensate male student-athletes in the two primary "revenue-generating" sports (football and men's basketball) at a rate of 98 players per school. It then includes a token number of women (15) in the form of the women's basketball team, but intentionally excludes all other female student-athletes. The Model also ignores the deliberate balancing of support provided throughout athletic departments to the men's and women's athletic programs, as required by Title IX.

Expert Report, Prof. Barbara Osborne, Case 4:20-cv-03919-CW Document 251-3, Filed April 4, 2023, at 10, 14.

Two empirical studies strongly support Dr. Osborne's testimony and expert opinion. Prof. LeRoy's study, *Are Collectives Joint Employers of College Athletes? An Empirical Analysis of NIL Deals and School Policies*, 34 MARQ. SPORTS L. REV. 261 (2024), used an anonymized database of NIL deals from a Power Conference school for the 2022-2023 season. This study showed a nearly identical disproportion in NIL earnings for football and men's basketball, and a virtually identical, tiny share earned by women, as Prof. Osborne estimated in her rejected opinion.

Table 1
NIL Deals by Gender and Sport in a Power Five Conference School (2022-2023)

Men's Athletics	
Baseball	$3,534
Football	$3,267,089
Men's Basketball	$1,658,775
Men's Golf	FERPA
Men's Tennis	FERPA
Men's Track & Field	$11,280
Men's Total	**$ 4,949,678**
Women's Athletics	
Soccer	$2,710
Softball	$234,955
Volleyball	$3,466
Women's Basketball	$282,985
Women's Golf	FERPA
Women's Track & Field	$2,898
Women's Total	**$527,014**
Total (Excluding FERPA Deals)	**$5,476,692**
Total (Including FERPA Deals)	**$5,608,647**
Total of FERPA Deals	**$ 131,955**

Id. at 287 (Table 1).

Prof. LeRoy's most recent study, *NCAA Women Athletes and NIL Pay Disparities: Are They Students Under Title IX, Employees Under Title VII, or Both?*, 93 U. CIN. L. REV. 979 (2025), used data from the NCAA's website to compare self-reported NIL deals by men's and women's basketball players in 2024. Basketball was analyzed because it "provides the clearest direct comparison for men

and women. According to the NCAA, there are 362 men's, and 350 women's Division I basketball teams." *Id*. at 1003. The study found a similar disparity between men's and women's NIL, more than 10:1 in favor of men. *Id*. at 1005.

Adding to the gender disparities wrought by NIL, the House settlement is disproportionately harming women's sports teams. According to "Getting House'd, Dropped Collegiate Sports in the House v. NCAA and NIL Era," an online tracker website, in 2025 53 women's sports teams in Division I, II and III have been dropped, compared to 40 for men's teams. See https://almanac.mattalkonline.com/house-era-drops/ (with filters set for "2025," "M/W," and "Sport Div."). Among Division I schools, 14 women's teams have been dropped in 2025, compared to 8 for men's teams.

Fed. R. Evid. 702 allows expert testimony if it is (a) specialized in a way that would help a court understand evidence, (b) based on facts or data, (c) the product of reliable principles, and (d) offers a reliable application to facts in the case. When a district court does not accept an expert due to that person's research methodology, this ruling can be reversed. *City of Pomona v. SQM North America Corp*., 750 F.3d 1036 (9th Cir. 2014) (reversing the District Court's ruling to exclude an expert witness under Fed. R. Evid. 702). The District Court excluded the expert's testimony because the Environmental Protection Agency did not approve his

methodology. In reversing that ruling, the Ninth Circuit held that credibility and contested facts regarding scientific methods are questions for the factfinder, not grounds for exclusion. *City of Pomona* at 1044 ("The judge is 'supposed to screen the jury from unreliable nonsense opinions but not exclude opinions merely because they are impeachable," quoting *Alaska Rent–A–Car, Inc. v. Avis Budget Grp., Inc*., 738 F.3d 960, 969 (9th Cir.2013)).

This reasoning applies to In re: College Athlete NIL Litigation, Order Granting Plaintiffs' Motion to Exclude Barbara Osborne's Opinions from the Class Certification, where the District Court made a similar error to the District Court in *City of Pomona*: "The District Court's resolution of this debate was an abuse of discretion and sufficient grounds for reversal." *Id*. at 1049. Had the District Court not excluded Prof. Osborne's testimony, the evidence produced would have clearly prevented it from certifying the classes as it did, in error. In hindsight, Prof. Osborne's gender disparity estimates have proved to be accurate and prescient.

II. A STRUCTURAL CONFLICT IN THE SETTLEMENT CLASSES BENEFITS FOOTBALL AND MEN'S BASKETBALL PLAYERS AT THE EXPENSE OF ALL WOMEN ATHLETES

The revenue sharing cap in the Final Settlement is a second structural conflict: it favors football and men's basketball players to the detriment of all women athletes. As a result, football and men's basketball players compete for revenue sharing and NIL deals in zero-sum athletic department budgets against

women athletes in much less remunerative sports. Adam Wells, *Texas CFB's NIL Budget Reportedly Sits Between $35-40M Ahead of 2025 Season*, BLEACHER REPORT (April 30, 2025), ("the Longhorns roster currently costs somewhere 'between $35 million and $40 million' that includes money from the revenue-sharing allotment that is expected to be around $20.5 million plus payouts from the school's official NIL collective, the Texas One Fund").

Current information for basketball further demonstrates the gender-based, structural conflict in the settlement agreement. Third-party firms use data analytics to estimate an athlete's NIL value. On3, an industry leader, explains: " Using a proprietary algorithm, the On3 NIL Valuation establishes a baseline value that helps athletes, schools, and brands negotiate roster contracts and marketing opportunities more effectively." Shannon Terry, *Roster Value*, ON3 (July 29, 2022). Recently, On3 acquired Rivals, an industry leading platform for tracking, reporting, and ranking teams by sports and individuals across major NCAA sports. *The Ownership Group Behind On3 Acquires Rivals and Forges Partnership with Yahoo Sports*, ON3 (April 30, 2025).

NIL valuations for men's and women's basketball teams appear in 2025 Industry Ranking Basketball Team Recruiting Rankings, RIVALS (accessed on September 10, 2025), and Industry Ranking Basketball Team Recruiting Rankings, RIVALS (accessed on September 10, 2025). Duke, ranked #1, had an average NIL

valuation of $1.1 million, followed by Arizona ($1 million), Houston ($943,000), and Arkansas ($708,000). But for women, no teams are ranked or otherwise displayed. There is no apparent explanation for the lack of any *team* NIL ranking for women basketball players in 2025, but it is reasonable to infer that there is less market information to calculate an NIL value for women to produce a team ranking. The evidence that is available since July 1st (on which payments for revenue share have begun, and are reflected in the September NIL basketball valuations) show that when men's and women's basketball players are under the same revenue sharing cap, women face a structural barrier for pay.

NIL pay disparities are structural when athletic programs opt-in to the revenue sharing part of the settlement agreement. Opting-in incentivizes them to pay more for men than women because so much of their revenue derives from football and men's basketball. In the absence of reliable NIL valuation data from On3 or another NIL value estimator, schools bid against each other for acquiring men's basketball players. Meanwhile, the women's NIL market lacks data to support a robust market. In a key footnote in Order Granting Plaintiffs' Motion to Exclude Barbara Osborne's Opinions from the Class Certification, at 2, n.1, Judge Wilken acknowledged:

> Dr. Rascher's BNIL model is described in more detail in his report…. Because those (BNIL) payments would have been derived from the broadcast revenues that each conference made for each of the relevant sports, and men's sports generate more broadcast revenues than women's sports, the payments

> contemplated by Dr. Rascher's BNIL model would have been higher for male student-athletes relative to female student-athletes.

The effects of completely ignoring Title IX (as the District Court did by excluding Prof. Osborne's Title IX expertise) are baked into a settlement that presents an ongoing structural conflict for all women athletes.

The result of the expert's exclusion is a settlement agreement that is unjust and should not be approved. The Court is familiar with this type of intolerable differential treatment among class members in a settlement agreement. Approximately 15,000 Black employees sued their employer for employment discrimination in *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003). A consent decree provided for a paltry payment of $7.3 million in relief (by our calculations, $486 per unidentified class member) less reversion and an opt out credit. *Id*. at 944. In return, Boeing received a broad release from discrimination-related liability. *Id*. at 947.

The settlement was vacated on grounds of abuse of discretion by the District Court judge. The Court ruled:

> Finally, the decree sets up a two-tiered structure for the distribution of monetary damages, awarding each class representative and certain other identified class members an amount of damages on average sixteen times greater than the amount each unnamed class member would receive…. The

> record before us does not reveal sufficient justification … for the large differential in the amounts of damage awards…. On this ground … the District Court abused its discretion in approving the settlement.

Id. at 945.

Viewing the totality of evidence, showing that collegiate women athletes are vastly undercompensated for their NIL, this is another *Staton* case involving two highly differentiated tiers– football and men's basketball players, and the only named class of women athletes, basketball players.

III. THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENT VIOLATED RULE 23(A)(4) AND CONFLICTS WITH AMCHEM PRODS., INC. V. WINDSOR, 521 U.S. 591 (1997)

Rule 23(a)(4) states: (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: … (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. Rule 23(a)(4). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), is a lodestar for court review of settlements involving highly varied and individual claims: "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent (citations omitted)." Summarizing its impact, Judge Sidney R. Thomas noted: "*Amchem Prods., Inc. v. Windsor* … heralded a new era of judicial scrutiny of class action

certification and settlement." *Epstein v. MCA, Inc.*, 179 F.3d 641, 651 (9th Cir. 1999) (J. Thomas, dissenting).

Judge Thomas said that "there must be 'structural assurance of fair and adequate representation for the diverse groups and individuals affected' (citation omitted). The class representative 'must possess the same interest and suffer the same injury shared by all members of the class he represents' (citation omitted). *Hanlon v. Chrysler Corp*., 150 F.3d 1011 (9th Cir. 1998), superseded, overruling recognized by *DZ Reserve v. Meta Platforms, Inc*., 96 F.4th 1223 (9th Cir. 2024). *Hanlon* explained that *Amchem* "found that the clashing interests of present and future claimants presented insurmountable conflicts for class counsel who could not possibly provide adequate representation to both groups as required by Rule 23(a)(4)" (citation omitted). *Id*. at 1020.

Prof. LeRoy's two empirical studies demonstrate that the settlement agreement failed to meet the Ninth Circuit's standard for a "higher level of scrutiny for evidence of … conflicts of interest" as required in In re *Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 976 (9th Cir. 2011)— a demanding standard that emanated from *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (holding that the "specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.").

While the Opinion quoted these passages in June 2025, it did not rigorously consider then-known NIL disparities between men and women college athletes. As a result, plaintiffs in the Women's Basketball Class (Class 2), Additional Sports Class (Class 3), and Injunctive Relief Settlement Class (Class 4) are like the plaintiffs with highly varied asbestos exposure claims in *Amchem*. These House classes have suffered, or will suffer, NIL injuries in ways that are highly varied from the Football and Men's Basketball Class (Class 1). As in the case of *Amchem* plaintiffs, the interests of women in the present settlement are "not aligned" in "significant respects" with football and men's basketball players. *Id*. at 626. The settlement in *Amchem* "eliminated all present and future claims against asbestos manufacturers, with class counsel attempting to represent both groups of plaintiffs," but the Supreme Court "found this dual representation to be particularly troubling, given that present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving funds for their future needs and protecting the total fund against inflation." *Hanlon* at 1020.

The *Amchem* situation compares to the misalignment between all women athletes in Classes 2, 3, and 4, relative to the men in Class 1: "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named

plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 943 (9th Cir. 2015).

Ninth Circuit decisions routinely apply this standard. *Small v. Allianz Life Insurance Company of North America*, 122 F.4th 1182, 1202 (9th Cir. 2024); *Anders v. California State University, Fresno*, 2024 WL 177332, *1 (9th Cir. 2024); *Kim v. Allison*, 87 F.4th 994, 100 (9th Cir. 2023); and *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978).

The *Order Granting Motion for Final Settlement Agreement*, at 27, attempted to ascertain whether athletes were vigorously represented and concluded that this high standard was met. But its justification focused on athletes *as a whole* without contemplating whether women were vigorously represented: "the record shows that Class Counsel have prosecuted this litigation *vigorously on behalf of all settlement class members*." *Id*.

This justification failed to address the concerns of women. The Opinion focused its *Amchem* analysis, instead, on the possible structural conflict between the three damages classes and the injunctive class: "The Court is not persuaded that a conflict exists between members of the Damages Settlement Classes and members of the Injunctive Relief Settlement Class…." *Id*. at 71.

Relatedly, the District Court's settlement order was contrary to fairness standards that were used to approve a final settlement by the same District Court in *Alex Carter et al. v. U.S. Soccer Federation*, 2:19-cv-01717-RGK-AGR, Civil Minutes, General, Document 320 (Filed Aug. 11, 2022). Like the *House* case, women athletes were certified in classes in a lawsuit that challenged inequitable compensation and conditions of competition. Like the NCAA, the U.S. Soccer Federation centrally administered media contracts that disproportionately favored men at the expense of women athletes. The District Court in *Carter*, Civil Minutes-General at 4, used a four factor test for the fairness of the settlement: "A class action is presumed to be fair when: '(1) the settlement is reached through arm's length agreement, (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3) *counsel is experienced in similar litigation*, and (4) the percentage of objectors is small (italics added)(citation omitted).'"

The District Court's settlement order praised plaintiffs' lead attorneys for their "work and experience in representing student athletes (which) has been excellent," Final Order at 24, in reference to *NCAA v. Alston*, and indirectly to *O'Bannon v. NCAA*, Final Order at 44. The *Alston* case involved NCAA restrictions on educational benefits that affected men and women athletes without any differentiation by sex. *Alston* had no Title IX component, no gender disparity claims, and no court ruling regarding gender disparities in the District Court, Court

of Appeals for the Ninth Circuit, and U.S. Supreme Court. The *O'Bannon* case also had no gender class conflicts because it only dealt with antitrust claims related to the NCAA's bar against athlete compensation for video games involving men's basketball and football— the class that is receiving 90% of the damages in the present action.

The District Court's conflation of Class Counsel's experience in *Alston* and *O'Bannon* with the present settlement in *House*—which involves *separate* classes of men's and women's athletes— is contrary to the settlement factors that this Court used in *Carter v. U.S. Soccer Fed.* (2022), Civil Minutes- General at 4. In short, the Court never considered whether "counsel is experienced in similar litigation" involving separate men's and women's classes. The Court also made the unsupported assertion that "Class Counsel were well informed about the strengths and weaknesses of class members' claims before and during settlement negotiations," Final Order at 28. But this could not be true because the District Court dismissed the only proffered expert witness on Title IX matters, an educational rights law that is the main legal preserve of equitable treatment of women's athletes. The District Court certified a class without adequate representation and the settlement should not have been approved because it reflects inadequate representation on the part of female athletes.

The review of past payments reflects a discriminatory market. Any settlement for damages based on a loss of NIL payments that looks solely at historic payments without looking for other explanations is not fair, just, and reasonable. The settlement that was approved forces women further to compete against the men in injunctive relief settlement for anyone that opts in. Had the women been adequately represented they not only would have received a fairer distribution of the dollars but also would have protected women's interest in the injunctive relief. Ironically, by the time the settlement was approved there was two additional years of evidence that was never considered. The only evidence considered by the District Court was past payments when the discriminatory acts took place, which was an abuse of discretion.

IV. THE DISTRICT COURT ERRED IN APPROVING MONETARY RELIEF THAT VIOLATED TITLE IX AND THAT RESTS ON DECADES OF DISCRIMINATION THAT LIMITED THE ABILITY OF WOMEN'S SPORTS TO GENERATE REVENUE

The District Court erred in approving settlement terms that violate Title IX. The settlement should have distributed monetary relief proportionally to the approximately 47% of female athletes and 53% of male athletes in the class, as required by Title IX. Instead, the settlement provides over 90% of monetary relief to male athletes. The justification for this lopsided allocation, which was recommended by economist Daniel Rascher, is that football and men's basketball

generated the most revenue (1-MenkeER-0154). What Rascher failed to take into account is the decades of discrimination during which media agreements grossly undervalued women's sports and limited their ability to generate revenue.

Revenue brought in by various sports was shaped by gender discrimination, not by anything the athletes did. The NCAA largely controls how much revenue various sports generate, primarily through negotiating media (broadcast) agreements, and through marketing and venue selection. An evaluation of these media agreements demonstrates that the NCAA repeatedly made choices that limited the revenue potential of women's sports.

The District Court did not have access to an evaluation of these agreements that demonstrate a) how significantly they undervalued women's sports, b) that the NCAA accepted far less revenue per viewer of women's sports compared to men's, c) that the NCAA neglected to grow the revenue potential of women's sports, and d) that the structure of these agreements restricted the ability of women's sports to attract sponsors, which limited their revenue potential. Without this evidence, the District Court incorrectly assumed that basing monetary relief on past revenue was a reasonable and fair approach.

The settlement should have distributed monetary relief proportionally to male and female athletes, as required by Title IX. It should not have used past agreements

that undervalued female athletes and limited their ability to generate revenue as a justification for awarding over 90% of damages to male athletes.

A. Media rights for women's college sports have been vastly undervalued for decades

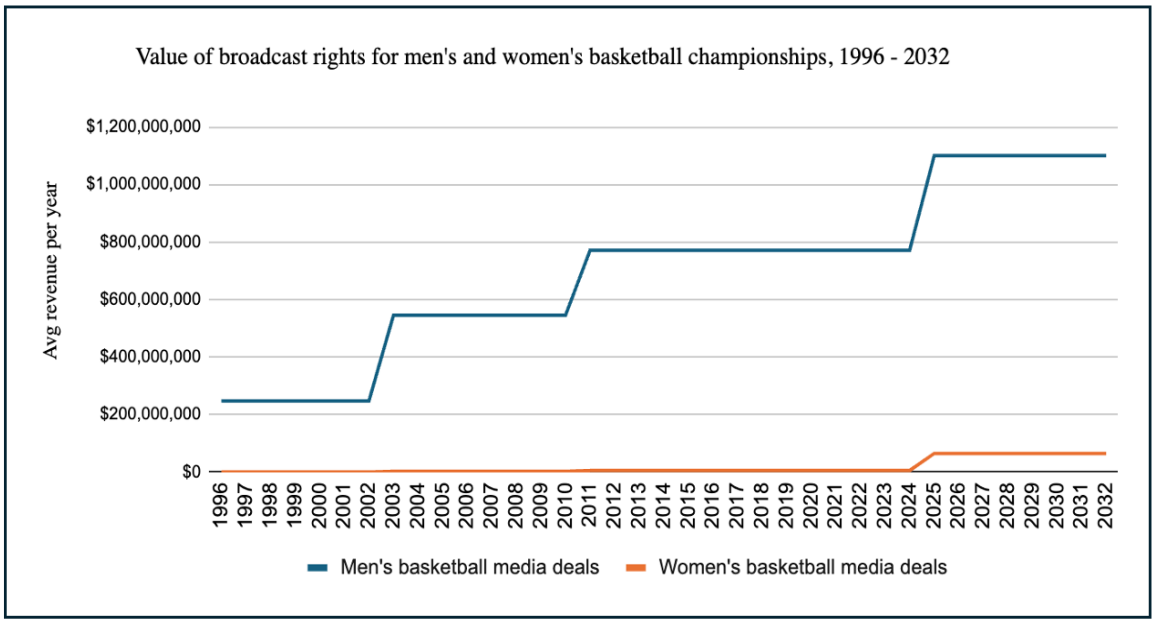
Media rights for women's college sports have been vastly undervalued for decades. In 1996, the NCAA negotiated a deal with ESPN for broadcast rights to the women's D1 basketball tournament and eighteen other NCAA tournaments for an average of just under $2.7 million per year, of which the NCAA attributed $479 thousand per year to women's basketball (Larry Stewart, *Women's Basketball Final Four Moving to ESPN: Television: Officials laud deal that will add day of rest between semifinals and final and provide coverage of earlier rounds*, Los Angeles Times, December 8, 1994, https://tinyurl.com/3njjwxnk).[2, 3] The same year, the NCAA negotiated a deal with CBS/Turner for broadcast rights to the men's D1 basketball tournament for an average of $242 million per year -- **over 500 times as much as the agreement for women's basketball** (*CBS Retains NCAA Rights*,

[2] The amount paid in these multi-year deals varies from year to year. In the absence of annualized payment information, our analysis uses an annual average.

[3] In referring to the 2011 media deal with ESPN, Kathleen McNeely, the NCAA's chief financial officer, said that the NCAA attributed 15.9% of ESPN revenue to women's basketball (Alan Blinder, *N.C.A.A. Acknowledges $13.5 Million Budget Gap Between Men's and Women's Tournaments*, The New York Times, June 26, 2021, https://tinyurl.com/yx4zyyas). Our analysis uses this same percentage to calculate how much revenue from the 1996 and 2001 ESPN deals is attributable to women's basketball.

CBSNews.com, November 18, 1999, https://tinyurl.com/5462v8hr). The value of the women's basketball media rights as a percentage of the men's remained below 1% until 2025, when the value increased to just under 6%.

The following figure shows the average amount per year that the NCAA earned from media deals with CBS/Turner for rights to the men's basketball championship and from ESPN for rights to the women's basketball championship from 1996 - 2032 (Joe Flint, *Turner Broadcasting and CBS partner on $10.8-billion NCAA deal*, Los Angeles Times, April 22, 2010, https://tinyurl.com/nheztjpp; and *Turner, CBS and the NCAA reach long-term multimedia rights extension for NCAA Division I Men's Basketball Championship*, NCAA.org, April 12, 2016, https://tinyurl.com/5zwb8nzs; and *NCAA Consolidated Financial Statements, August 31, 2020 and 2019*. NCAA.org, visited August 11, 2025, https://tinyurl.com/3kjekwkk; and Jessica Golden, NCAA and ESPN ink 8-year, $920 million media rights deal, CNBC.com, January 4, 2024, https://tinyurl.com/tt5y829b).



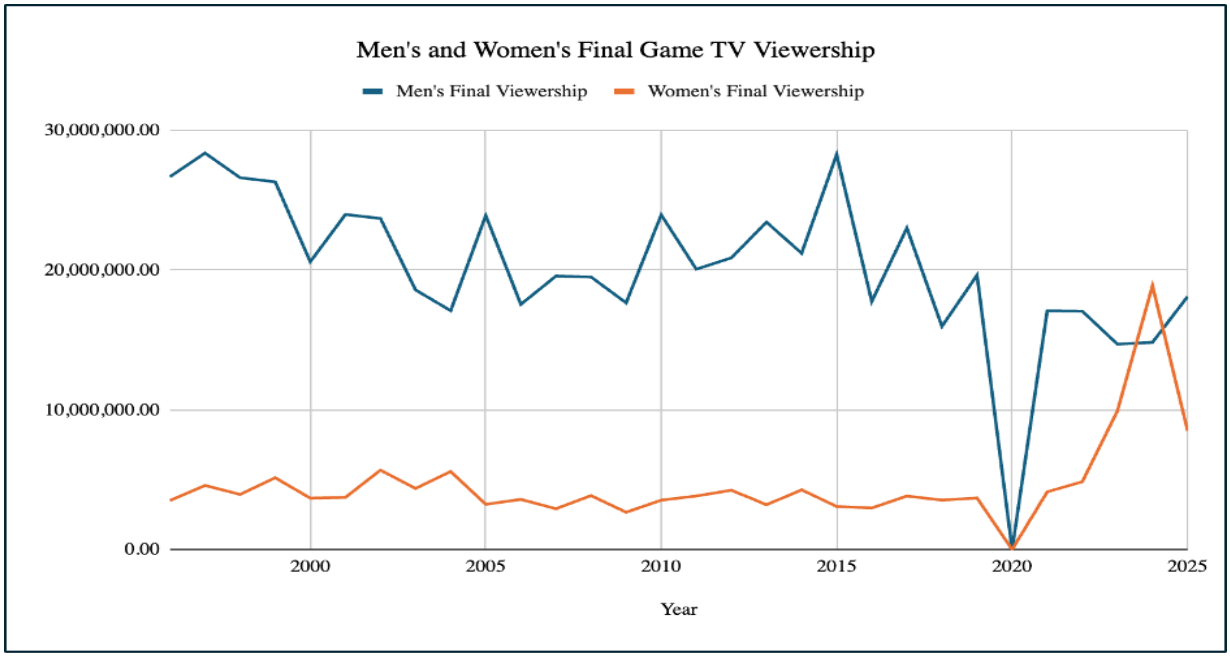
B. Differences in TV viewership do not account for the disparity in value of these media rights agreements

The disparity in the value of media deals could be justified if they accurately reflected differences in TV viewership – and if the NCAA invested similarly in marketing for men and women, because marketing impacts viewership.[4] However, differences in TV viewership do not explain why women's basketball was valued at less than 1% of the men's game over the course of decades.

TV Viewership of the women's basketball tournament averaged 18% of viewership of the men's tournament from 1996 – 2019 and 59% of the men's from

[4] The media agreements guaranteed the NCAA a steady stream of revenue from CBS/Turner and ESPN. In turn, these media companies earned revenue from selling advertisements to sponsors. Larger viewership translates to more lucrative sponsor agreements for the media companies.

2021 – 2025 (*NCAA Men's Final Four Ratings Hub*, Sports Media Watch, visited August 11, 2025, https://tinyurl.com/msadwxux; and *Women's Final Four Ratings Hub*, Sports Media Watch, visited August 11, 2025, https://tinyurl.com/42hvdd2; and *Record crowds, rising ratings and resurgent champions highlight 2025 NCAA basketball championships*, NCAA.org, April 11, 2025, https://tinyurl.com/ma4y8pmn).[5] Had the NCAA done more to publicize the women's tournament, viewership would have increased. The figure below shows TV viewership of the final game of the men's and women's basketball championships from 1996 – 2025.



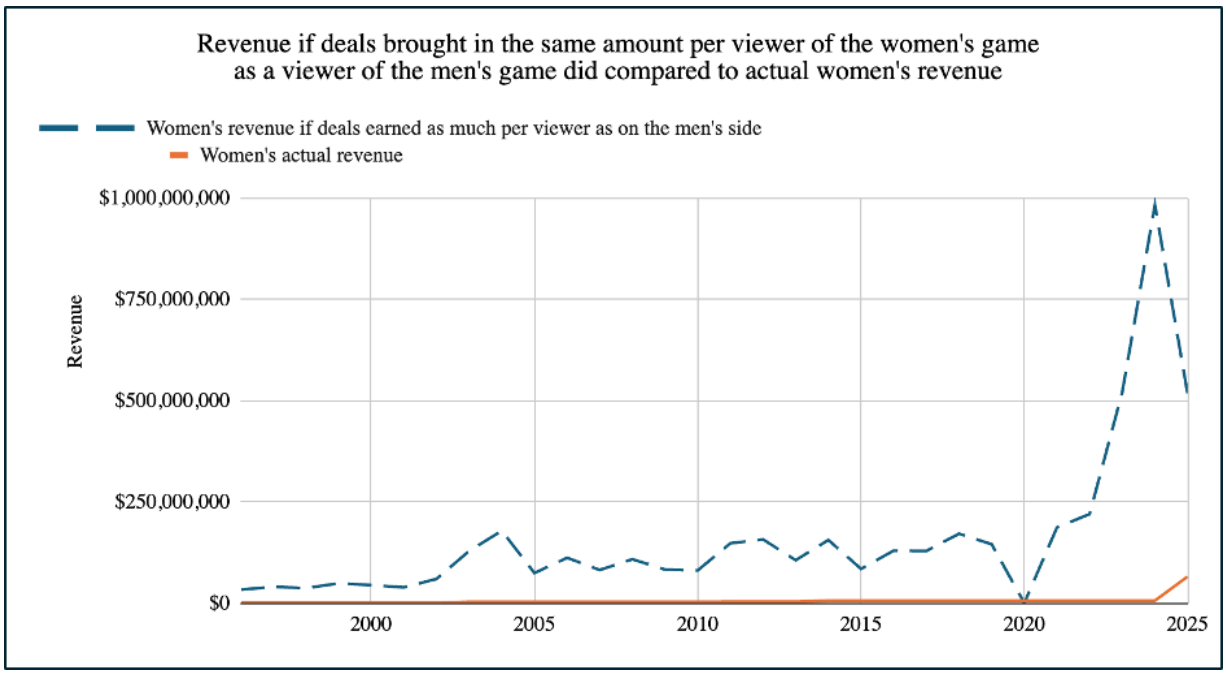
[5] Viewership data for all 63+ games in each tournament is not publicly available. We use viewership of the final championship game as a proxy.

Accounting for differences in viewership, the NCAA negotiated media rights agreements that generated revenue per viewer that was much higher on the men's side. In 1996, the men's rights agreement generated **$9.27** per viewer; the women's rights agreement generated **12 cents** per viewer. In 2025, the men's rights agreement generated **$60.77** per viewer; the women's rights agreement generated **$7.65** per viewer. Inflation aside, the NCAA agreed to deals that did not bring in as much revenue for a viewer of the women's game in 2025 as it received for a viewer of the men's game thirty years ago.

1. An additional $4.6 billion would have been generated had the NCAA negotiated media agreements that valued each viewer of the women's game equally to each viewer of the men's game

From 1996 – 2025, the deals for women's basketball media rights generated just over $163 million in total. The rights for men's basketball brought in $17.9 billion. Had the NCAA negotiated agreements that valued viewers of the men's and women's games at the same amount per viewer, the **women's deals would have brought in $4.8 billion**, producing an additional $4.6 billion in revenue for the NCAA.

The figure below shows (in orange) how much women's media rights were worth each year. It also shows (in blue) how much media rights would have been worth if agreements were negotiated such that each viewer of the women's game brought in the same amount of revenue as a viewer of the men's game each year.



2. Current media rights for women's basketball also fall short

The current media deal between the NCAA and ESPN, which runs from 2025 – 2032, continues to undervalue the women's game. In the wake of discoveries in 2021 that the NCAA was providing a very different experience to male and female athletes at their respective tournaments (Sedona Prince, *Comparison of weight room facilities at the men's and women's basketball tournaments*, TikTok post as seen on X, March 19, 2021, https://tinyurl.com/3uzjjf8z), the NCAA commissioned law firm Hecker & Fink LLP to conduct a gender equity review (Kaplan Hecker & Fink LLP, *NCAA External Gender Equity Review - Media & Sponsorship Addendum*, Desser Sports Media, Inc, August 3, 2021, https://tinyurl.com/y7j6e2fh). The review included an analysis of the NCAA's media and sponsorship rights, conducted by sports media experts Ed Desser and John Kosner. They estimated that

the women's basketball tournament was worth between $81 million and $112 million per year and recommended that it be made available for broadcast rights on its own, rather than bundled with other championships.

Desser and Kosner noted that because the NCAA bundled the women's basketball rights with rights to 20 - 40 other championships, ESPN was the sole media company that could accommodate broadcasting such a wide range of sports and number of hours. Perhaps because of this, the NCAA did not put the rights to women's basketball up for competitive bid over the past two decades. Desser and Kosner point out that by eliminating competing bids, the NCAA failed to use one of the most fundamental negotiating tactics to increase the value of a contract (Ibid).

C. The NCAA was negligent in not taking reasonable actions to grow revenue from women's sports

The NCAA did little over the years to increase the revenue potential of women's sports. If they had devoted as much publicity to the women's tournament as to the men's, we would likely have seen significant increases in TV viewership, which in turn could have been leveraged to negotiate more lucrative media deals, thus, increasing revenue. Also, the NCAA would likely have moved the women's championship games to larger venues, as they did for men.

Researcher Lindsay Gibbs studied NCAA coverage of the men's and women's tournaments in 2017. On the NCAA website, she found 495 headlines on

men's basketball compared to 108 on women, which translates to the NCAA giving men almost five times as much coverage as women. (Lindsay Gibbs, *The dramatic discrepancy in coverage between the men's and women's NCAA basketball tournaments: Even the NCAA's own website shows a stark gender bias*, THINKPROGRESS, the Center for American Progress, April 3, 2017, https://tinyurl.com/yc7medzr).

The NCAA made other choices that resulted in less publicity for women's sports. They did not allow the women's game to use the "March Madness" trademark until 2022 and the "NCAA March Madness Live" app did not include the women's tournament until that year (Kaplan Hecker & Fink LLP, *NCAA External Gender Equity Review - Media & Sponsorship Addendum*, Desser Sports Media, Inc, August 3, 2021, https://tinyurl.com/y7j6e2fh). Also, the media deal on the men's side resulted in every game being shown live and in full beginning in 2011 (Joe Flint, *Turner Broadcasting and CBS partner on $10.8-billion NCAA deal*, Los Angeles Times, April 22, 2010, https://tinyurl.com/nheztjpp). This did not happen on the women's side until 2021 (Rick Nixon, *Game times and broadcast information announced for 2021 NCAA Division I Women's Basketball Championship*, NCAA.com, February 19, 2021, https://tinyurl.com/4k6wxc7c). Fewer women's games meant less broadcast time and less time for commercials, which lowered the value of the women's tournament for the broadcast partner. By

failing to televise all women's tournament games in 2011, not allowing the women's game to use the "March Madness" logo, and leaving the women's game out of the app, the NCAA failed to promote women's basketball and increase revenue generation.

1. Despite sellout crowds, the NCAA has not moved the women's championship to larger venues.

The NCAA has full control over where the championships are held. Over the years, the NCAA greatly increased the size of the venues for the men's final, but it has not increased the venue size for the women's final. The 1996 women's final was held at Charlotte Coliseum, with a capacity of **24,000**. The 2025 final was held at the Amalie Arena, which holds **19,500**. Meanwhile, the 1996 men's final was held at Meadowlands Arena which has a capacity of just over **20,000**. The 2025 men's finals were held at the Alamodome, with a capacity of **72,000** (*NCAA Attendance and Sites statistics*, 1939 - 2024, NCAA.org, 2024, https://tinyurl.com/yc673ndc; and *2025 NCAA WOMEN'S FINAL FOUR FACTS AND FIGURES*, NCAA.org, 2025, https://tinyurl.com/bdhkrujk; and Gabby Jimenez, *NCAA releases attendance numbers for Men's Final Four weekend in San Antonio*, ksat.com, April 16, 2025, https://tinyurl.com/2zhvd9px).

We compared attendance at the final game to the capacity of the venue.[6] From 1996 - 2025, attendance as a percentage of capacity was nearly identical for the men's and women's championships (97% and 98% respectively). Thus, the smaller arenas in which the NCAA held the women's tournament did not reflect a lack of fan interest in the game. Not only was there lost revenue from ticket sales, more fundamentally, this demonstrates yet another way in which the NCAA did not take reasonable actions to grow the game and its associated revenue.

D. The NCAA structured media agreements in ways that limited sponsors from supporting women's sports, which suppressed revenue from women's sports.

The NCAA gave CBS/Turner exclusive rights to negotiate corporate partnerships and sponsorships for all 90 NCAA championships, even though the network only broadcasts the men's D1 basketball tournament (*NCAA Corporate Champions and Partners*, NCAA.com, visited September 5, 2025, https://tinyurl.com/fz5scysz; and Rachel Bachman, *NCAA Corporate Sponsorships Are for 90 Championships. They Revolve Around One*, The Wall Street Journal, May 13, 2021, https://tinyurl.com/2wsw9t7w). However, the Corporate Partners

[6] Venue capacity information has been gathered across numerous sources including official venue information, NCAA media guides, and NCAA news coverage. We omit the year 2020, when the championships were cancelled due to Covid. We also omit 2021, when arena size and capacity were managed differently for the two tournaments during Covid.

Program "earmarks just 0.1% to any NCAA Championship other than men's basketball" (Kaplan Hecker & Fink LLP, *NCAA External Gender Equity Review - Media & Sponsorship Addendum*, Desser Sports Media, Inc, August 3, 2021, https://tinyurl.com/y7j6e2fh). ESPN has had broadcast rights to tournaments in dozens of sports over the years but does not have the right to negotiate sponsorship deals that use NCAA trademarks or other intellectual property. This creates a conflict of interest. CBS/Turner is unlikely to go out of its way to line up sponsors for ESPN. Instead of helping a rival network, its interests are better served when brands sponsor the men's tournament, as CBS/Turner keeps more of that revenue. Also, because ESPN is limited in its ability to sell sponsorships for the women's tournament, it is in a stronger position to negotiate for lower priced media rights, resulting in women's basketball generating less revenue (Pamela Seidenman, *Women's college athletes are about to lose billions: House v. NCAA ignores what really drives revenue in college sports*, Sports Business Journal, March 27, 2025, https://tinyurl.com/bp4sdxt7).

CONCLUSION

The Settlement Agreement has damages and injunctive relief models that tilt heavily in favor of men. Women were not represented with the same effectiveness because the four classes divide damages and future earnings in a zero-sum, BNIL

allocation. The Court of Appeals should rule that the settlement agreement conflicts with Rule 23(a)(4).

The Court should have ensured that damages were allocated proportionally, in accordance with Title IX. Furthermore, the Court should have rejected the settlement's allocation of 90% of monetary damages to men, because the economic analysis the Court relied upon rests on decades of discrimination that limited the ability of women's sports to generate revenue. We encourage the Court of Appeals to abandon the settlement as it is not "fair, reasonable, or adequate" under Rule 23(e).

CERTIFICATE OF COMPLIANCE

I am the attorney in this matter. This brief contains 6,607 words, including 206 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5)(6). I certify that this brief is an amicus brief and complies with the word limit of FRAP 29(a)(5). Cir. R. 29-2(c)(2). Or Cir. R. 29-2(c)(3).

By: Christine Brown
_____
Christine D. Brown, Esquire
CHRISTINE BROWN & PARTNERS, LLC