IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION

STATE OF OHIO,
STATE OF COLORADO,
STATE OF ILLINOIS,
STATE OF MINNESOTA,
STATE OF MISSISSIPPI,
STATE OF NEW YORK,
STATE OF NORTH CAROLINA,
STATE OF TENNESSEE,
COMMONWEALTH OF VIRGINIA,
STATE OF WEST VIRGINIA,
DISTRICT OF COLUMBIA, and
UNITED STATES OF AMERICA,

Plaintiffs,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,

Defendant.

Civil No. 1:23-cv-100
Judge John Preston Bailey

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment here.[1]

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States joined this action against Defendant National Collegiate Athletic Association ("NCAA") on January 18, 2024, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 of the Sherman Act prohibits "contract[s], combination[s], or

[1] The Plaintiff States and the NCAA have agreed to a parallel proposed Consent Judgment that would resolve the States' claims in this action.

conspirac[ies]" in restraint of trade or commerce." 15 U.S.C. § 1. The Sherman Act is designed to ensure "free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ." *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-1 (1958)).

The Amended Complaint alleges that the NCAA and its Division I members agreed to limit competition for student athletes. Former NCAA Bylaw 14.5.5.1 (the "Transfer Eligibility Rule") unjustifiably restrained the ability of college athletes to engage in the market for their labor.[2] The Transfer Eligibility Rule, which was in effect at the time the Amended Complaint was filed and is described in more detail below, imposed a one-year delay in the eligibility of certain college athletes transferring between NCAA member institutions and thus reduced competition in the labor market for college athletes. This rule increased the cost of student-athletes transferring to different institutions and made Division I institutions less interested in recruiting student athletes.

The Amended Complaint also alleges that NCAA Bylaw 12.11.4.2 (the "Rule of Restitution") furthers the anticompetitive effects of certain eligibility rules by deterring college athletes from challenging those rules. Under that rule, the NCAA can punish college athletes (and their associated institutions) that bring a legal challenge against the NCAA's eligibility rules and receive a court-ordered injunction barring enforcement of those rules, if the injunction

[2] Plaintiffs State of Ohio, State of Colorado, State of Illinois, State of New York, State of North Carolina, State of Tennessee, and State of West Virginia filed the initial Complaint in this action on Dec. 7, 2023. Plaintiff United States, along with Plaintiffs Commonwealth of Virginia, District of Columbia, State of Minnesota, and State of Mississippi joined this action via an Amended Complaint filed on January 18, 2024.

is later overturned or stayed. Concurrently with filing the initial Complaint, Plaintiffs sought a temporary restraining order to enjoin Defendant from enforcing the Transfer Eligibility Rule and the Rule of Restitution. ECF No. 2.

The Court granted Plaintiffs' request for a temporary restraining order, finding that Plaintiffs were likely to succeed on the merits and enjoining the NCAA from enforcing the Transfer Eligibility Rule and the Rule of Restitution. *Ohio v. National Collegiate Athletic Ass'n*, No. 1:23-CV-100, --- F.Supp.3d ---, 2023 WL 9103711 (N.D. W. Va. Dec. 13, 2023). The Court subsequently converted the temporary restraining order into a preliminary injunction upon agreement of the parties. ECF No. 63.

On April 17, 2024, the NCAA's Division I Council voted to withdraw the Transfer Eligibility Rule, modifying its bylaws to allow players to freely transfer multiple times without a year-in-residence requirement. This change was approved by the NCAA's Board of Governors on April 22, 2024. See *Division I Board of Directors ratifies transfer, NIL rule changes*, available at: https://www.ncaa.org/news/2024/4/22/media-center-division-i-board-of-directors-ratifies-transfer-nil-rule-changes.aspx.

The United States has now filed a proposed Final Judgment and Stipulation and Order, which are designed to ensure that the loss of competition alleged in the Amended Complaint is fully remedied and does not recur. Under the proposed Final Judgment, which is explained more fully below, the NCAA would be permanently enjoined from enforcing the former Transfer Eligibility Rule and prohibited from implementing similar rules in the future. The Stipulation and Order requires the NCAA to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time

for all appeals of any Court ruling declining entry of the proposed Final Judgment.

The United States and the NCAA have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendant NCAA

Defendant NCAA is an unincorporated association that acts as the governing body of college sports. Am. Compl. ¶ 17. The NCAA includes more than 1,000 member colleges and universities throughout the United States. *Id.* These member institutions are organized into three divisions, including Division I, which includes over 350 schools and allows for scholarships. *Id.* Division I schools compete with each other not only through athletic events but also in other upstream and downstream economic markets: for instance, NCAA Division I schools "compete against each other to attract television revenues," *Board of Regents*, 468 U.S. at 99, and, at issue in this case, "compete fiercely" in the labor market "for student athletes." *National Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 86 (2021). Through the NCAA Constitution and Bylaws, the NCAA and its members have adopted regulations governing all aspects of college sports, including the Transfer Eligibility Rule. The NCAA Constitution and Bylaws are adopted by the votes of member institutions and various NCAA councils, and they may be amended by votes of member institutions or NCAA councils. Am. Compl. ¶ 17. Accordingly, the rules set forth in the NCAA Constitution are horizontal agreements between the NCAA and its member institutions and among NCAA member institutions. *Id.*

An academic institution that wishes to participate in any meaningful way in the highest and most popular level of collegiate athletics must maintain membership in the NCAA and abide by its Division I rules, regulations, and bylaws. Am. Compl. ¶ 18. Failure to abide by these rules puts academic institutions at risk of punitive measures from the NCAA that include, among other things, reduced athletic scholarships, prohibitions on postseason eligibility, vacating of previously earned wins, and monetary fines. *Id.* Because the NCAA and its member institutions have monopsony power in controlling the highest and most popular level of college athletics, any individual who wishes to provide athletic services in exchange for full or partial payment of undergraduate tuition as well as other substantial benefits gained from competing at the highest level of collegiate athletics must by necessity attend an NCAA Division I member institution and has no option but to abide by its rules. Am. Compl. ¶ 19.

Participation in NCAA Division I athletics offers college athletes unique opportunities that are not available elsewhere: (i) the ability to exchange athletics services for the payment of the partial or full cost of an education plus room and board, (ii) high quality academic educational services, (iii) top-of-the-line training facilities, (iv) high quality coaches who will best be able to launch players to professional careers, (v) national publicity through national championships and nationwide broadcasting contracts, (vi) opportunities to profit from name, image, and likeness ("NIL") agreements, and (vii) competition at the highest level of collegiate athletics. Am. Compl. ¶ 20.

B. Relevant Markets

Within NCAA Division I athletics, the Transfer Eligibility Rule affects labor markets for athletic services in men's and women's Division I sports, wherein each college athlete participates in his or her sport-specific market. *See* Am. Compl. ¶ 27. Within these markets,

NCAA member institutions compete to attract and enroll elite-level college athletes. In so doing, NCAA member institutions secure the labor of these college athletes through in-kind benefits: specifically, scholarships, academic programs, access to modern training facilities, and training from premier coaches and their staff. *Id.*

Participation in NCAA Division I athletic competition confers significant and unique benefits to college athletes, such as the ability to showcase their skill before national audiences, gain exposure to professional team scouts, and compete against other elite college athletes. Am. Compl. ¶ 29. In addition, NIL agreements allow college athletes to benefit financially—sometimes for millions of dollars—from the aforementioned national exposure and elite competitive environment that NCAA Division I athletics provide. *Id.* There are no practical alternatives to NCAA Division I athletics for college athletes who seek these benefits. *Id.* at ¶ 30.

The relevant geographic market is the United States. NCAA member institutions are located across the country, and many college athletes are willing to enroll in schools far distant from home to pursue athletic opportunities. Therefore, those NCAA member institutions engage in competition in the relevant labor markets throughout the United States. Am. Compl. ¶ 28. Within the relevant geographic and labor markets, the NCAA maintains exclusive power, dictating the rules and regulations for participation Division I athletics through the Division I Council and NCAA member institutions. *Id.* at ¶ 32.

C. The Transfer Eligibility Rule

Under the Transfer Eligibility Rule, "[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a[n NCAA] member until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution." Am. Compl. ¶ 23 (quoting *NCAA Division I 2023-24*

Manual, Am. Compl. Ex. A at 165). Although the Transfer Eligibility Rule was a default rule that applied to all transfers, a separate rule created an exemption for the first time a college athlete transfers; thus, the Transfer Eligibility Rule in effect applied only to the second time (or more) that a college athlete transferred schools. *Id.* While the Rule barred a college athlete from competing during this one-year waiting period, it did not exempt college athletes from all the other requirements and obligations—including practicing, traveling with the team, and other commitments—of being a college athlete. *Id.* Under NCAA Bylaw 12.8.1, college athletes have five calendar years to complete four seasons of competitive eligibility in any one sport. See Am. Compl. Ex. A at 55. Thus, this one-year waiting period removed 20% of the total time available for the college athlete to complete her athletic career. College athletes were thus forced to weigh the one-year ineligibility period against the potential benefits of moving to a better opportunity at another school. Am. Compl. ¶ 7. While the Rule provided for the possibility of a waiver of the ineligibility period, the granting of the waiver was at the discretion of the NCAA and only after the college athlete had already enrolled in a new school. In practice, those waivers were inconsistently and arbitrarily awarded, and, in any event, the uncertainty of the waiver process itself was a deterrent to transferring. Am. Compl. ¶ 39.

D. The "Rule of Restitution"

The NCAA Bylaws contain what is commonly known as the "Rule of Restitution," which allows the NCAA to punish college athletes and their member institutions for actions taken in accordance with court orders if those orders are later revoked. Am. Compl. ¶ 25 (citing NCAA Bylaw 12.11.4.2, Am. Compl. Ex. A at 66-67). For example, under the Rule of Restitution, were a college athlete to challenge an NCAA bylaw preventing her participation, receive a court order enjoining the bylaw, and then go on to win a conference championship with her team that season,

the school would be at risk of having its wins later vacated by the NCAA if the court's order were reversed.

The obvious purpose and effect of the Rule of Restitution is to deter challenges to the NCAA's anticompetitive rules by discouraging athletes from protecting themselves and thus trying to deprive courts of the ability to grant effective relief. Am. Compl. ¶ 73. Under the Rule of Restitution, college athletes run the risk of personal punishment and the risk of subjecting their schools or teammates to harsh sanctions simply by following the terms of a court order. *Id.* The Rule of Restitution grants the NCAA the ability to decide for itself the rules of interim relief rather than the courts. *Id.* Plaintiffs argued, and the Court agreed, that any injunctive relief against the Transfer Eligibility Rule would need to be paired with injunctive relief against the Rule of Restitution. Am. Compl. ¶ 74; *Ohio v. NCAA*, 2023 WL 9103711, at *11-12.

E. Anticompetitive Effects

The Transfer Eligibility Rule restrained college athletes from freely moving among member institutions to improve their economic opportunity, personal growth, and well-being, a freedom afforded to other students at NCAA member institutions but not to college athletes. The Transfer Eligibility Rule produced direct anticompetitive effects in the relevant markets in three phases of the college athlete transfer process: (1) when college athletes were deciding whether to transfer, (2) when college athletes decided to transfer and were searching for a new institution to attend, and (3) when college athletes were denied eligibility to compete for one year after transferring to a new institution. *Ohio v. NCAA*, 2023 WL 9103711, at *5.

In the first phase, when college athletes were deciding whether to transfer, the Transfer Eligibility Rule discouraged college athletes from transferring to a different institution that may benefit their academic, athletic, mental, and financial well-being. *Ohio v. NCAA*, 2023 WL

9103711, at *5. College athletes, just like non-athlete college students, seek to transfer schools for any number of reasons, including but not limited to better academic, athletic, or financial opportunities elsewhere. College athletes also seek to transfer institutions for reasons having nothing to do with sports, for example, a desire to be closer to home. The Transfer Eligibility Rule dampened competition in the relevant markets by deterring college athletes from exploring better options within their sport-specific market. *Id.*

Second, the Transfer Eligibility Rule also artificially disadvantaged college athletes who choose to transfer a second time by reducing their attractiveness to potential destination institutions. *Id*. Second-time transfer college athletes were not able to apply for a waiver of the Transfer Eligibility Rule until after they had been accepted and enrolled at their new institution. Because the waiver process was discretionary and was inconsistently applied, member institutions that accepted a second-time transfer risked that the college athlete might not be eligible to compete for an entire academic year. This eligibility risk artificially deflated the value of a second-time transfer, creating an additional impediment in the market for college athlete labor. *Id.*

Third, the Transfer Eligibility Rule harmed college athletes transferring a second time by denying them the opportunity to compete in NCAA Division I athletic events for an entire academic year after transferring to a new institution. *Id.* at *6. NCAA Division I competition is the pinnacle of college athletics in the United States. Competing at this high level of athletics comes with immeasurable opportunities for personal, professional, and economic growth. For athletes seeking to continue competing professionally after college, NCAA Division I competition provides a unique platform to showcase athletic skills in front of national audiences

and professional scouts. The Transfer Eligibility Rule unjustifiably denied these benefits to affected college athletes for an entire academic year. *Id.*

F. The Transfer Eligibility Rule Lacks Procompetitive Justifications

In its opposition to Plaintiffs' motion for a temporary restraining order, NCAA argued that the Transfer Eligibility Rule is procompetitive, as it "aim[s] to promote academic success by minimizing the significant potential disruption from multiple transfers, promoting the benefits of team continuity and predictability, and protecting the viability of collegiate sports by preserving some level of competitive balance between programs and some level of continuity in the makeup of teams." ECF No. 32 at 9-10.

Ruling on Plaintiffs' motion for a temporary restraining order, the Court found that these purportedly procompetitive justifications were "uncompelling" and "pretextual." *Ohio v. NCAA*, 2023 WL 9103711, at *7. The Court was unpersuaded by the NCAA's argument that the Rule promotes academic success, noting that the Rule only bars competition, not participation in practices or other team activities. Thus, second-time transfers (who as a practical matter must train and attend practice to remain viable members of their teams) are likely to spend just as much time away from their studies as their teammates, save for a few hours of actual competition on gameday. *Id.* With respect to the NCAA's argument that the Transfer Eligibility Rule promotes team stability, the Court found that the NCAA Bylaws are silent as to the mid-season firing of coaches and contemplate first-time transfers. Accordingly, "the NCAA's stability argument [is] without merit given that there are currently no restrictions on first time transfers or coaches leaving," two circumstances that could also affect team stability. *Id.*

G. Less Restrictive Alternatives to the Transfer Eligibility Rule

To the extent the goals of the Transfer Eligibility Rule were to promote the academic well-being of college athletes and to prevent college sports from becoming a free agent market like professional sports leagues, the NCAA's other rules already promote these ends. Am. Compl. ¶ 82; *Ohio v. NCAA*, 2023 WL 9103711, at *8. For example, NCAA Bylaws already require college athletes to maintain progress toward degrees to be eligible to compete in NCAA events. NCAA Bylaw 14.4.1 requires college athletes to "maintain progress toward a baccalaureate or equivalent degree at that institution" to be eligible for intercollegiate competition at their college or university. Am. Compl. Ex. A at 150–51. In addition, NCAA Bylaw 20.2.4.13 requires member institutions to publish their progress-toward-degree requirements for college athletes, thus making these requirements available to college athletes at each institution. *Id.* at 367. Other NCAA Bylaws require minimum credit hour and grade point averages for college athletes to be eligible for competition. *Id.* at 151, 154. Additionally, NCAA Bylaws already prohibit in-season transfers within the same sport, ensuring that college athletics do not morph into a professional free agent system. Am. Compl. ¶¶ 84–86. In enjoining the Transfer Eligibility Rule, the Court found that these bylaws related to academic progress and in-season transfers accomplished NCAA's goals "without the unjustified restrictions imposed by the Transfer Eligibility Rule." *Ohio v. NCAA*, 2023 WL 9103711, at *8.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment addresses the loss of competition alleged in the Amended Complaint. Paragraph 22 permanently enjoins the NCAA from enforcing the Transfer Eligibility Rule or any substantially similar rule requiring a college athlete to maintain a period of residence or refrain from competition because of a transfer between

NCAA member institutions. Paragraph 22 of the proposed Final Judgment also prohibits the NCAA from enforcing the Rule of Restitution on any member institution or college athlete related to a college athlete's participation in intercollegiate competition following a transfer in reliance on this Court's orders.

Paragraph 23 of the proposed Final Judgment requires the NCAA to issue an additional year of eligibility to any qualifying college athlete who was previously deemed ineligible to participate because of the Transfer Eligibility Rule for a season or any portion of a season during or since the 2019-20 academic year. Those college athletes will have no fewer than six years to complete their four seasons of intercollegiate competition and thus will not be disadvantaged from having sat out a year because of the Transfer Eligibility Rule.

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph 30 provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, the NCAA agrees that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that the NCAA has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph 30 provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy

the loss of competition that the United States alleges would otherwise result from the continued application of the Transfer Eligibility Rule. The NCAA agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph 31 provides that if the Court finds in an enforcement proceeding that the NCAA has violated the Final Judgment, the United States may apply to the Court for appropriate relief, including contempt remedies and any additional relief to ensure the NCAA complies with the terms of the Final Judgment. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph 31 provides that, in any successful effort by the United States to enforce the Final Judgment against the NCAA, whether litigated or resolved before litigation, the NCAA must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Under the proposed Final Judgment, the United States may file an action at any time against NCAA for other Bylaws or claims not made in this action. Paragraph 23 states that only the United States' claims with respect to the Transfer Eligibility Rule as applied to Division I college athletes is resolved pursuant to the proposed Final Judgment, and that the proposed Final Judgment specifically does not apply to any Bylaws of NCAA Division II or NCAA Division III nor does it resolve any antitrust claims regarding those rules. The proposed Final Judgment applies only to the Transfer Eligibility Rule as applied to Division I college athletes and does not mean that the United States condones any other Bylaws of NCAA Division I or any of the Bylaws of NCAA Division II or NCAA Division III.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the NCAA have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or within 60 days of the first date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal*

Register unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Yvette Tarlov
Chief, Media, Entertainment, and Communications Section
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The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered continuing the litigation and seeking a full trial on the merits against Defendant. The United States is satisfied, however, that the relief required by the proposed Final Judgment is likely to ensure competition in the relevant markets by remedying the anticompetitive effects alleged in the Amended Complaint. Thus, the proposed Final Judgment is likely to achieve all or substantially all the relief the United States would have obtained through litigation but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public

interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Amended Complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo

determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F.

Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Amended Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section

shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: May 30, 2024

Respectfully,

/s/ Maximillian F. Nogay

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