ORAL ARGUMENT – 01/04/05
03-0753
UT & NCAA V. YEO

LAWYER: (TAPE STARTED LATE)...would lead to uncertainty both for schools and students as well as other negative consequences for both. And the third is that trying to draw an exception from Ms. Yeo would substantially undermine the bright line rule because many other student athletes could make similar claims.

Turning to the first reason. That students do not have a constitutional right to participate in extracurricular activities that would entitle them to due process. This court's decision in Stamos was correct: to broadly preclude such claims at the outset as not rising to the level of stating a claim under the Texas constitution. Drawing that line both prevents judicial micromanagement of the educational process in general, and the athletics in particular. And also recognizes that not every wrong that might be done to someone necessarily rises to the level of a constitutional violation.

The respondent argues that her claim is about reputation rather than about competition or eligibility. But looking at the remedy that she sought from the TC, as well as the remedy that the TC imposed, the court can easily see that what the case is about is about her eligibility to compete. The TRO that she obtained on the eve of the NCAA competition explains that the reason for its issuance is that she will be denied the opportunity to participate in the competition. It did not allow the university to provide her process, but instead focused on whether or not she would be able to swim in the meet.

When Ms. Yeo does make claims that concern her reputation, she is arguing that it will be the lack of her competing in the pool that will damage the reputation. In the words of her brief "that if is yanked from the pool that third parties will speculate about the reasons why and that that speculation about the reasons will lead to harm." But the core of her claim is that she be allowed to swim. She does not seek a remedy of a name clearing hearing. She does not seek any sort of process that might determine whether or not she was ever eligible. Instead she seeks the right to compete.

As she has framed her claim it is purely about eligibility and within the rule this court set down in Stamos. Stamos also provides a map to reach this result rejecting her claim based on reputation. Stamos was itself a brief opinion in discussing this. And we suggest that's because the rule that extracurricular activities do not rise to due process level was over_____.

Stamos cited the overwhelming majority of other courts that had reached the same result. And many of those cases in turn had string cites of other states and other courts that had reached an identical result. But we think that looking at a couple of the particular cases cited in Stamos would make the court comfortable that in fact the reputation based claim is not an exception.

O'NEILL: If we were to agree with you, do we need to address the NCAA's intervention claim or does that become moot?

LAWYER: We would suggest that the merits of that claim would become moot. I think the NCAA might suggest that the court should still speak to it because of their continuing interest in intervening in future cases. But if the injunction is vacated, then there is no interest that NCAA would have remaining in this litigation.

Within Stamos one of the decisions cited by this court, Kaso(?) from the NY State court system specifically rejected a stigma based argument that had been made by a parent of a student who had argued that he would be stigmatized, and the student would be stigmatized if he were declared ineligible. Another cited decision in Stamos from the Pennsylvania court quoted language from the 5th circuit explaining how injury from lost media exposure was too speculative and did not state a claim under the constitution. And a third case cited in Stamos from the 5th circuit itself rejecting an argument that had tried to re-frame the right to compete as being really about earning a living. It's clear from these decisions cited in Stamos in which the court relied that the rule stated in Stamos was meant to trump these types of reputation based attempts to plead around the bright line rule set out in Stamos.

In many ways the question of whether she's eligible and the question of whether she has a reputation claim are two sides of the same coin. She tries to distinguish between the actual question of eligibility verses the question of whether the university can declare her to be ineligible. But there is not a meaningful difference there.

The kind of evasion that this involves and the kinds of copycat claims that might arise are illustrated in the 3rd courts recent decision in UIL v. Hatten, which came down only a few months after the Yeo decision and uses a similar argument that the stigma attaching to an ineligibility determination created a constitutional right that entitled students to compete even though the UIL had declared them to be ineligible. In that case the stigmatizing effect cited in the record upholding the preliminary injunction was just that some newspaper articles had appeared talking about the case, and that that was embarrassing to the family. This illustrates the kind of difficult situation that the UIL or the Univ. of Texas or other state universities would be put in if there were a fact specific test that was used by lower courts instead of a bright line rule that this court had already set out in Stamos.

In particularly a fact specific test would in some circumstances elevate the preliminary relief either in the form of a TRO or preliminary injunction into something closer to final relief. What I mean by that is this. If a fact specific test were adopted, then it would be very difficult for an appellate court to step in in a particular case and say that the TC had abused its discretion in finding that a particular student didn't have a claim or wasn't eligible. And that would put both the university and the other students at the university in a very difficult situation. The reason at the university level is because of the NCAA's restitution rule, which provides that if an athlete competes while ineligible under an injunction and that injunction is later lifted, that the institution itself can

receive sanctions from the NCAA, that the teammates of that athlete may lose the records that they set or the awards that they were a part of winning and even the athletes themselves might lose awards. If a fact specific test rather than a bright line rule were adopted, the universities would find themselves in that position more and more often as lower courts would have relative impunity to issue these temporary injunctions, which even if later lifted on the merits on appeal would still have detrimental consequences for the university as well as for other students who competed who had not chosen to compete while ineligible.

MEDINA: The other side makes an argument that you shouldn't be allowed to intervene because you are protected or insulated from litigation by the student athlete. What's your response to that?

LAWYER: The NCAA's argument that they should be allowed to intervene is based on, as I understand the NCAA's argument, is based on their argument that what this case is really about is the application of NCAA rules. That it's not UT that's in a position to determine whether under NCAA rules Ms. Yeo was eligible to compete. Another way to frame that is that the injunction issued in this case had the practical effect of binding the hands of the NCAA even though they weren't actually a party. So for those two reasons, the NCAA suggested it has an interest that would allow it to intervene.

The respondent has argued that the bright line rule announced in Stamos is inconsistent with this court's decision in Than. First, Than is not about extracurricular activities at all. It's about the complete expulsion from a university raising a completely different kind of constitutional interest. And second, is the discussion about reputation in Than should be right in light of other federal due process cases that make clear that a plaintiff must in addition to claiming damage to their reputation show that the government violated some other protected interests. That's the stigma plus requirement set out in Paul v. Davis in 1976.

We suggest that here if the court reaches this question it should hold that competing in extracurricular activities cannot be the plus infringement part of the stigma plus infringement. That would provide the most certainty to lower courts about how to reconcile the guidance of Stamos with future claims that might be brought by other plaintiffs asserting that they have a right to compete.

HECHT: Is the injunctive part of this case moot?

LAWYER: It is not moot because of the way that the injunction was written. The injunction precludes the university from ever making a declaration that Ms. Yeo was ineligible in fact for the 2002 NCAA championships, or for any of the 2002-2003 swimming season. The injunction has an ongoing effect. Even today the university can't hold such a hearing. And the injunction also has a practical effect because of the way it operates with the NCAA's restitution rule. The injunction prevents the NCAA from taking action which also prevents the mootness in this case.

Turning to the second argument the way that a necessarily fact specific test would operate.

O'NEILL: To follow-up on J. Hecht's question. What happens if they can now declare her ineligible? What's the practical effect?

LAWYER: The NCAA would have its hands untied under the restitution rule.

MEDINA: _____ to retroactively sanction UT?

LAWYER: The NCAA would be authorized by the restitution rule to impose sanctions on the university or particular teams at the university or to remove awards that had been won by the student athlete.

MEDINA: Wouldn't this just be to the swimming team?

LAWYER: We would certainly hope. I think the rule is written in fairly broad terms.

MEDINA: How is that rule written?

LAWYER: The rule provides different levels of sanctions against the university, particular teams at the university. It provides that for example records set or titles won could be forfeited. As an example, if UT won the Big 12 swimming championship with an ineligible swimmer, Ms. Yeo in the pool, because of the temporary relief ordered in this case. And if the injunction is lifted the university is in the position of perhaps losing that championship to NCAA sanctions. But we urge the court nonetheless to reach that result because we are more concerned about the rule be applied in the next case. If the CA's decision remains the law, the university may be put in this situation more and more often as student athletes could go to court to challenge eligibility determinations and get injunctive relief that could force the university to field an ineligible athlete. Putting the university in the position of perhaps putting its awards at risk, its academics, its standing with NCAA at risk. And also subjecting the other athletes on those teams who did not go to court and most likely are eligible to losing team awards that they were a part of winning through no fault of their own at all.

Under the kind of test discussed by the CA, it's unclear how any university or student could know in advance whether they have the magic formula that will entitle them to a claim. The CA didn't set out a particular test that a student would have to meet. But instead enumerated some characteristics that Ms. Yeo happened to be from another country, that she happened to have competed in the Olympics for that country beforehand. But those are not rooted in any legal foundation that a subsequent court could apply to limit the scope of the exception drawn for Ms. Yeo. And we think there are many other student athletes that would be able to raise such claims.

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NCAA

LAWYER: If this case only involved a plaintiff's request for process from UT, the NCAA would not be here today. That would be a matter between Ms. Yeo and UT. But what Ms. Yeo asked for, the remedy that she requested was not limited to process and the court did not limit the relief that it granted to process. Instead, what the plaintiff wanted and what the court ordered was an order which put in an ineligible player back into the swimming pool at an NCAA championship event contrary to NCAA rules, and inconsistent with the decision of an NCAA subcommittee.

O'NEILL: If we were to agree with the university's position, do you agree that the NCAA's intervention issue would be moot? I understand that it would be helpful, but wouldn't it just be advisory?

LAWYER: I think that it is important that the lower court's decision be vacated. And certainly the NCAA would have the opportunity if that order is vacated to take action as its member colleges and universities have agreed. The NCAA's concern is that Ms. Yeo has created a blueprint for other athletes who find themselves ineligible, who seek to deliberately, cleverly keep from the litigation the main party in interest and that's the NCAA.

When this court decided the Jones case in 1999, this court determined that the NCAA has an absolute interest in litigation in which a student athlete is seeking an order allowing that athlete to participate while ineligible. And that that interest continues, not just at the time that the litigation was initiated, but beyond the contest that is at issue. Beyond the 2002 swimming championship here. Even beyond the time that the student athlete graduates, the NCAA maintains that interest. And our concern while we would love to see a finding favorable to the university, we would also ask that this court disapprove the CA's decision with respect to the NCAA's intervention.

The fact is, no matter how artfully crafted the pleading in this case, this case is all about the NCAA: it's rules, the application of its rules, the subcommittee's decisions, and the plaintiffs disagreement with the rules and the NCAA's decisions on her eligibility.

WAINWRIGHT: The TC issued a temporary injunction in March 2002. And the permanent injunction Nov. 2002. When did the NCAA intervene?

LAWYER: The lawsuit was initiated on March 20. There was a hearing to which we had no notice at 3 p.m. that afternoon. The championship started on the 21st. The TRO was issued at 4:40 p.m. We got notice of that TRO after business hours. We have young ladies sitting on the sidelines waiting to hear whether or not this plaintiff was going to be able to compete. Because if she competed other girls, other eligible athletes would have to sit out. And so overnight...

WAINWRIGHT: Now why is that?

LAWYER: Because there are only so many spots that are available in a championship event.

WAINWRIGHT: So one other girl would have had to sit out or other girls?

LAWYER: No. Ms. Yeo qualified in numerous events. So there were numerous girls who were detrimentally impacted by her participation directly.

WAINWRIGHT: And the NCAA's intervention was when?

LAWYER: 9:22 a.m. the next morning. By 9:31, the plaintiff had filed a motion to strike our intervention. The plaintiff is very critical of the NCAA for not having its witnesses here from Indiana to put on an evidentiary hearing. The fact is, in that 9 minutes that we were part of this case, we didn't have an opportunity to put on an evidentiary hearing. But that does not mean that there wasn't a record before the TC. As part of the information that we provided the court this morning, I have included behind Tab B excerpts from the plaintiff's petition itself. And I would direct the court's attention, and the highlights in those excerpts are mine, in particular to paragraphs 12 and 15, in which the plaintiff admits that it's the NCAA committee's decision with which she has a problem. With which she has a dispute. And when you look at page 3 and paragraphs 28, 32, 36, 38 what she is talking about is the right to compete. She uses that language in paragraph 28. She's not talking about a right to process from UT. She wants the right to compete.

And in the SMU case that we've cited in our brief, the court makes clear that all of the process in the world provided by UT, would make no difference, because the decision that was made was a decision by the NCAA. And the only entity with the authority to overturn that decision was the NCAA. So the remedy that she was requesting was requested of an entity who could not provide it.

O'NEILL: So if she had sued the NCAA and tried to bring them in and enjoin them from enforcing its rules what would have been the NCAA's position?

LAWYER: We would have been able to establish that she was not entitled to participate. We would have been able to put on testimony to demonstrate what the...

O'NEILL: But doesn't the NCAA pretty typically claim that they are not subject to this type of suit?

LAWYER: The NCAA under Tarkanian is not subject to state action claims. But the NCAA is routinely sued by student athletes and routinely defends its decisions in courts across the country. So the NCAA defends very vigorously its decision making. But we've never taken a position that we're immuned from suit.

BRISTER: So the effect of what you want us to do is vacate the injunction. You will do

something to UT, I suppose. You are not going to do anything Ms. Yeo. Correct?

LAWYER: Under rule 19.8, which was the subject of the Jones decision, this court agreed that the NCAA had an absolute interest to enforce what we call 19.8. 19.8 is a rule which colleges and universities have agreed upon that if one of their members plays an ineligible student athlete by virtue of a court order and that court order is later vacated, that the NCAA may take remedial action.

BRISTER: So you want to go back to the TC. So what's going to happen in the TC? Are we going to fight about the action you subsequently take against UT, because after all the championship meet is long over.

LAWYER: If in fact this court were to find favorably for UT, there would be no need...

BRISTER: Forget about UT. Assume they weren't here. I just want to know what you are asking for. The court may decide that we want you to be involved in the UT fight.

LAWYER: If in fact though there is no constitutional right to compete in the State of Texas and UT prevails, and the TRO and the permanent injunction is vacated, I think your honor has a point. That the matter does not need to go back to the TC. The NCAA would be pleased if this court would also disapprove the decision of the CA. But there would be no need for a trial at that point.

HECHT: To be fair to the respondent's position though. As I understand it, the claim about process is that if she had known earlier, she would have been able to help out herself and not let the university mess it up. So she's not really looking for a hearing that would have come out differently. She's looking at if you had told me sooner, I would have gone and fixed this and they wouldn't have messed it up.

LAWYER: I think it's important that we recognize which decision it is that is at issue. Nobody disputes. In fact, I think it's paragraph 5 or 7 in her petition that the plaintiff acknowledges that UT initially made a mistake. And she participated back in the Fall of 2001 while she was ineligible. Everybody agrees on that.

Ms. Yeo is suggesting, I should have had more time, I should have had a lawyer, I should have had a chance to get together with UT and talk. That was before the March hearing before the NCAA. The point is, all of the process in the world with UT, all of the prep time in the world would not change the fact that the only entity who could decide whether or not she had met those conditions that were attached to her reinstatement was the NCAA.

MEDINA: Shouldn't she have some notice of what those conditions are?

LAWYER: She was provided notice back in November that her eligibility was reinstated, but that it was reinstated conditioned upon her sitting out four regularly scheduled meets. And it's

at that time when the ____ meets were added to the schedule and the intermural meet was added to the schedule, so that she sat out those meets instead of those regularly scheduled. And when the NCAA looked at that they said, you know what? Those don't count. But it's that decision that prompted her to be ineligible for the championship which she claims she has a right.

MEDINA: That wasn't her decision. She relied on information to her detriment that was provided to her by the university.

LAWYER: That is correct. And that is unfortunate. Unfortunately the NCAA has to look to its member institutions to ensure compliance. Otherwise, there would be an incentive for colleges and universities to provide inaccurate information on which the student athlete would rely and, therefore, be in violation of the rules. So even if the student athlete was not at fault, the NCAA has consistently determined that the rule is the rule nonetheless.

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RESPONDENT

HENSON: We've always talked about Joscelin having been a superstar in the pool. But she a unique individual. She is a superstar in the classroom as well. She should be a poster child for what we want our student athletes to aspire to. But instead it almost appears as if she is on a most wanted poster by these two large organizations.

Her name is not Stamos. Her name is Yeo. And she truly is in a class by herself. We may all disagree about what should happen in this case, what the outcome should be. But there is one thing I think everybody would agree to and, that is, that Ms. Yeo throughout this entire case has acted with dignity, with courage and honor, and the many experienced Texas judges whose hands have touched this case up to this point have all agreed that these unique fact and circumstances compel a remedy for Joscelin Yeo.

I want to talk briefly about Stamos. If Mickey Stamos came into my office today and said, Ms. Henson, I've got a lot of money; I failed chemistry again...

O'NEILL: Fact intensive is one thing. The courts and universities and the NCAA have to have guidelines to go by. And this sort of fact specific world class athlete approach. it's hard for me to apply any sort of test that the university could latch on to and have any sort of certainty. Any athlete from any town in Texas could say, I'm a superstar, my professional possibilities are huge, and, therefore, I meet this test. There aren't many parameters that are laid out.

HENSON: I do think the Stamos test still exist. I think Mr. Stamos' case in terms of highschool athletics and there is no right to participate, that test still exist. So most of the cases and all the concerns that they have raised really are not affected by this case in anyway. In terms of what the Yeo decision tells us is that the student athlete has got to have the interest before they come on campus, before they start.

O'NEILL: But how do you measure that interest?

HENSON: I think that coaches and administrators recruit these superstars. They know one when they have one. They know when someone is just kind of a mediocre athlete verses someone who competes before coming to college and demonstrates that they compete at a professional level. That's what Ms. Yeo could establish.

WAINWRIGHT: So superstars have constitutionally protected interests and mediocre athletes do not?

HENSON: This court can decide with regard to where that test is going to be. The CA very narrowly decided that in this case where there's been a showing of this magnitude by the student athlete. Yes. They can reach to the student athlete and they can reach to the constitution when all of these bad acts happen. But in fact under the NCAA rules all student athletes are supposed to be treated with fairness and openness and honesty by the institution. They don't make distinction between superstars and nonsuperstars under the current existing rules. And so every student athlete should be benefitted.

But going back to what the test is. The test is, can you demonstrate an ability to compete at a professional level before you come on campus? and secondly, do you have a pre-existing reputation that shows immediately that you are able to capitalize on your public persona? That's what Joscelin Yeo showed. And to be honest with you, how many other 17 year olds or 18 years old before they come to college are going to be able to show those kinds of factors? Very unusual. Because most of those kids who are superstars and can compete at that level and have that public persona what do they do? They choose to cash out. They don't go to amateur athletics. And that's why this case really is very unique factual circumstances and why these facts established in this record, unlike all those string citations they say, all those cases of kids that are wannabees and hopefuls and wishes, this is a case where there are findings of fact, findings of fact that are undisputed, that she is in this category. She had that reputation. That she had this ability, this immediate ability but for the amateur rule to cash out.

MEDINA: Are you asking the court to create a separate status for superstar athletes verses mediocre athletes?

HENSON: No. I think the court is free to decide whatever to provide in terms of a rule here. But I think this court has these facts in front of it, and it's the only question that this court really has to decide is whether this case involving this particular athlete justifies...

OWEN: Let's suppose UT lured several superstar athletes away from Berkeley for a particular program, and in mid-season decided to cancel that program altogether. And under the NCAA's rules, all of those athletes were ineligible to compete for a period of time. Would they all have constitutional rights?

HENSON: I think there are some particular rules that deal with discontinued programs that would apply in that particular case.

OWEN: Let's assume that UT went out and thoughtfully lured away the superstar athletes from Berkeley and said we are going to create this stellar program. We are going to go to the top. And they recruit him, they bring him to UT, and for whatever reason UT decides to terminate the program in mid-season and shuts it down. Do those athletes have a constitutional cause of action against UT? And assume with me under the NCAA rules, all of those athletes would have to sit out for a period of time.

HENSON: No. Because I think there is a special rule when there's a discontinuation of a program that they were allowed to transfer.

OWEN: No. Assume with me the NCAA does not have that rule. Now do they constitutional rights against UT for terminating that program?

HENSON: I wouldn't think so. No.

OWEN: Why not?

HENSON: Because a student athlete doesn't have a right to say, You have to continue this sport. There is no right like that.

OWEN: If they don't have the right to say you have to continue this sport, why do they have the right to say you've got to let me compete?

HENSON: Because that's not what's at stake here. We're not saying you have a right to let me compete. We have a right here of a unique individual that has a reputation, that has rights before she got on campus, that they were going to damage on what they were going to do to her.

OWEN: Well all these people who were lured away from Berkeley are damaged. The rumor could be in the community that all of these girls were on steroids, which would be untrue. But that's what your brief posits. It said all of these speculation will happen and will damage their careers. Now why are they in any different position when UT summarily terminates its program and says, we're through with you all, we're not going to allow you to compete anymore.

HENSON: Because that's not something individual to the student. They are not stigmatizing that particular student. It's kind of like a sanction that goes against the entire program verses a sanction that is going to that specific student. That's in fact affecting that particular student's reputation and that particular student's interest that they have. If they have such an interest.

There is a difference between saying, Heah, we're just eliminating a program and that's tough luck. And it's affecting all of you verses what was being done here, which is this

young lady was being yanked from the pool at the very last minute, a death penalty sanction in essence in this kind of sport, and it's not just pure speculation. We have findings of fact not disputed. No challenges were made on the evidence or the sufficiency of the evidence. We have findings of fact that bind this court, that say she would have been harmed, that it was going to damage her, that it would have had an impact. So we don't have to worry about speculation because we have facts that bind this court.

HECHT: The argument is made though that this is going to be a hard rule to apply. And so we do look at the evidence and the facts to see if that's going to be the case. And despite the findings, it is a little hard to see how this athlete would have been stigmatized as badly as she said she would have been. But if that's the case, and as you say, we have to take the findings as they come to us, it wouldn't seem to me to be very hard to prove in lots of other cases.

HENSON: I really thought about this. Who is the student athlete that might come to mind? And I'm not a tennis fan. I wouldn't recognize her if she walked in here, but there's a gal that's 17 years old, she is from Russia, she is a superstar there. She won Wimbledon in tennis. If she had decided not to take the millions and instead wanted to come to UT and study and wanted to be an amateur athlete, then maybe this is the kind of student that if there is then a constant eligibility issue and she's absolutely innocent of it, that we might see as a Yeo situation down the road. But it takes that kind of thing for these facts to apply.

HECHT: But it seems to me it's just as likely as the rest of the athletic community would say, Oh, the poor girl got rooked by UT and it was never her fault at all. If anything, there would be more sympathy for her than stigma.

HENSON: We actually tried to put the findings in that it would have harmed her. That's a fact finding. And let me tell you. As someone who got this case late in the game after the horses were out of barn so to speak, it took us 70 hours as lawyers experienced in sports law, it took us 70 plus hours to understand the convoluted facts that had occurred in this case and try to sort through all of the issues and the rules and everything else. This was not something that we could ever put into a sound bite and say, Well it was really the university that just messed her eligibility up. It's just not something that could have been done. But again, that's a fact finding we have in this court.

OWEN: Don't we have this problem with basketball players for example and football players? I mean it seems like every year there are numbers of basketball players who leave college because they go into the professional programs. And don't we have lots of opportunities for these very fact specific types of incidences. You've got rights but you don't. And where do we draw the line?

HENSON: I think this court could say what the NCAA said 30 years ago in Goss v. Lopez was first decided. This is the easy answer for what the court could do. I have a law review article written by the former general counsel of the NCAA, John Kitchens, on the NCAA and due process from the Kansas Journal of Law & Public Policy in 1996. This is what the general counsel of the

NCAA said: He said in 1975, the SC decided Goss v. Lopez, that public highschool students without a hearing had been suspended from school for misconduct, were denied due process. The court found that the authority possessed by the state to prescribe and enforce standards of conducts in its school although concededly very broad must be exercised consistently with constitutional safeguards. The court allowed ready the process what a student facing a temporary suspension should be given notice and an opportunity to present its side of the case. Thereafter, the NCAA to avoid the possibility of a factual mistake and to ensure the opportunity of the input from the student athlete, in 1975 the NCAA adopted recommend Policy 13. Member institutions were advised to provide an informal hearing to a student athlete before declaring him ineligible for intercollegiate athletics. This pertained to both the situation where you have a committee of infractions finding, or in the case as we have here, the institution voluntarily declaring a person ineligible.

So thirty years ago, the NCAA came up with a recommended policy: Heah, if you're going to declare somebody ineligible, this is real simple. You tell them about it before you do it, and you give them that informal give and take. Which is all what the CA said to do in this case. That's not a whole lot.

HECHT: Again, is that so that they can challenge the facts or is it because it seems to me the athlete in this case argues not about the facts but that I could have done a better job than the university if I had known about it?

HENSON: Actually we do. I know that there is an argument by the AG that further process would be pointless because we don't dispute anything. Do we deny being a cheater? Yes, we do. Do we deny that her eligibility wasn't severe jeopardy by the time they finally told us about this thing. Of course not. We don't deny that her eligibility was in jeopardy. What we submit, because no one has ever heard this case, no one has ever heard all the facts that now exist, that there would have been a different change. Because Nov. 26 when the university unilaterally decided to declare her ineligible because of that Olympic waiver they didn't tell her about that. They didn't give her a choice. Someone could have argued for Leroy Sutherland, and I hate to defend Leroy because he doesn't deserve a whole lot of defense, that it was a confusing policy, it was being misinterpreted and misapplied, and there could have been an argument at least made at that point. But 2...

HECHT: But that is still an argument about the policy, not an argument about the facts. The facts are the facts.

HENSON: The fact is, did she have an Olympic waiver? Yes, she did. But the circumstances - this whole issue of what happens to you, it's not just what the facts are. But who is at fault, and what you've done to prevent the future. Those are all the factors that go into what happens to the person down the road. It's not just well who did what at what time? It's also about what the motive was and how they've decided to fix it. Those are all issues that need to be before the entity in terms of making decision-making. But we could have made a difference Nov. 26. We could have gone back to Berkeley at that time and gotten the appellate waiver. The NCAA was not...

HECHT: You don't know for sure.

HENSON: Don't know. Never had that opportunity. Likewise, on Nov. 30, that's when they decided on the four-meet penalty. And this is something UT had to agree to. This is not something - they didn't appeal it. They didn't challenge it. Now this is kind of like the federal sentencing guidelines. You put in certain facts and out comes the sentence in essence. And what happened was they put in the wrong facts. They were not clear in their articulation of whose fault this was, and the background that in fact Berkeley had violated the NCAA rules. They had violated her rules or her rights clearly under NCAA rules by not giving her that timely appellate due process hearing. So they had violated her rules and that's the only reason we're over here. That is a unique situation. That is not something that's come and that you have a major institution violating a particular student athlete's rights under due process. Never addressed about what impact does that now have about this Olympic waiver.

HECHT: If that argument had been made and Berkeley had not given the waiver, could they have intervened in this case?

HENSON: I don't think Berkeley could have intervened in this case. I can't imagine that. I just don't think they would have had a red dog in this hunt at this point.

HECHT: Well they don't want her competing.

HENSON: They can only do the one thing, which is they get to grant the waiver or not, but they must - they are required to give her that due process hearing and they failed to do so.

HECHT: But if that had been the argument here, that Berkeley did not give the waiver and did not give the hearing and, therefore, Judge, you should let her compete here. Wouldn't Berkeley have the right to - would have an interest in intervening or not?

HENSON: Berkeley might have had an argument to fuss about it when the NCAA and UT and all the entities are talking about it. But I think ultimately the decision-maker should be able to make a decision and take into account the fact that Berkeley has violated the rules. At some point Berkeley doesn't get to say we violate the rules, yet we still have this interest in keeping her out. I think those are mutually inconsistent...

HECHT: But they do get to say we didn't violate the rules.

HENSON: They can say that but that's not what happened. And in fact they did finally grant that appeal hearing, which again is a significant factor that we never got to pursue in a timely matter.

MEDINA: What interest does your client have in this matter if she's graduating?

HENSON: I think the court asked the question very clearly: What's going to happen to Ms. Yeo? Well they are not just going to go punish UT and take away a few things over at UT. We have a record on this in the court, because we have the vice chair of the NCAA management council, who is also the AD here at UT testifying. I said what are you going to do to Ms. Yeo? What do they want to do to her? They want to strip Ms. Yeo of her medicals for 2002 and all of her accomplishments. They want to put it on the web site and announce that they've done this. They typically hold a press conference to talk about it. They want to publicize this and make her an example of this is what happens when you fight us. And on top of that, their attitude was also not only are we going to take everything you did away in 2002. We're going to void 2003 as well. They were not satisfied to take away the medals for 2003. Their position was, she's not entitled to compete in NCAA her senior year, the next year. Now that's the kind of heavy-handiness that we're dealing with. And that's what they want to do to Ms. Yeo. That's part of the record.

O'NEILL: But really that's not part of our analysis. Presuming there were due process violations and presuming that the NCAA is acting in a terrible manner, and we still have to decide whether she has protected interest at this level of athletic competition. And we're still grappling with what kind of test that will be. So if you have the top 3 draft picks for quarterback in the country in college are they subject too?

HENSON: I think the better thing is to either go with a very simple test that says, you know, before you declare a student athlete ineligible, tell them about it and give them that informal give and take. I would apply that standard rule to all the athletes. And I think that's consistent with what the NCAA rules say today.

O'NEILL: How can we decide the process is due unless we first determine there is a constitutionally protected interest?

HENSON: And I would think that under the Goss v. Lopez line of case, that that is the appropriate measure. But that's a very simple applied to everybody. You don't have to go that far. You can go very simply to the kid has to make the showing that she's a professional before she comes on campus. This is a somebody that gets on campus and then starts doing really well. We're talking about someone who comes before they get on campus and they have that existing professionalism...

O'NEILL: Top 3 quarterback draft picks in the country.

HENSON: It's possible. Football typically would not be a case because you cannot go from highschool football to the pros.

HECHT: You give the reputation as two bases for constitutional interest argument. But the third one. Explain this one to me: Interest in the mutually explicit understanding between her and the school that the school would not jeopardize your eligibility.

HENSON: I don't think that's our strongest argument. That was based on the handbooks and the representations that were clearly made, that UT would not jeopardize her eligibility. That was a promise in writing that they made in particular. I think that's also consistent with the athletic welfare provisions of the NCAA rules that say we're going to take care of these students and we're not going to harm them. And so we believe that that was an alternative. But we certainly didn't urge that as the primary grounds.

HECHT: And that would be a much broader basis for a constitutional interest?

HENSON: Conceivably. But there is very specific language that we hook that to on the record, which is the representations made by the university to their student athletes about eligibility and compliance and what they were going to do for these students. So there was a hook to it.

HECHT: Surely no student athlete thinks that the school is going to jeopardize the athlete's eligibility.

HENSON: You would think not.

HECHT: I mean that would be their understanding.

HENSON: That would be. But there is a very specific promise provided by the university to its student athletes.

The NCAA's whole system is set up so that UT makes all the decisions. It really does make the decisions. UT is supposed to declare the student ineligible. They are supposed to impose the remedies, the punitive actions. Everything happens. And the whole system is based on that UT will have to do this. And if UT doesn't, there is a big hammer. Because the NCAA has a rule that says, You must enforce these rules and if you don't, we can do pretty much anything to you. And if you read some of the cases you can see what happens.

If you don't cooperate fully with the NCAA and jump when they say jump, and you just tell them how high, they can stop your program, they can suspend your program. It's very much a very big hammer. And during this time frame when Joscelin's case was going on, UT was being investigated for a major infraction dealing with their baseball team. Their world series trophy was subject to being taken away from them. And so to suggest that somehow UT couldn't carry the ball in this case when they have fought us at every place.

They fought us the TRO, they fought us at the injunction, they fought us by filing a bogus notice of appeal to try to supersede this thing. They haven't paid our attorney's fees when they said that they would since we were hired to help this athlete under NCAA rules on eligibility. They have done everything they can to fight this thing. And so for this issue to be, We can't trust UT to carry the ball is really untrue. And not made to the trial judge. So many of the technical arguments that the NCAA has made in their intervention were never made to the trial

judge. The trial judge deserved an opportunity to hear some of these arguments that they didn't preserve error on.

MEDINA: I'm still wrestling with the idea that you want this court to create a special subclass. When quite frankly there are many athletes that go to a school that are eventually drafted in later rounds and become great athletes, like Dan Marino. So why do you want this court to create a separate class. If the court does anything these rules should apply equally to all athletes.

HENSON: I agree. And I think the NCAA rules say that, that they are supposed to fair, open and honest to all student athletes. I think the prior policy 30 years ago was that all athletes would get that just simple notice before you are declared ineligible. And that simple give and take. That's all that's required before all these other horrible dominos were set into motion that created this tremendous fiasco for this student athlete that has done nothing wrong except try to swim and be a great student.

And this is a critical thing. There really is an issue here about fairness and equity and the good of the game. They talk about kids that were in the stands that couldn't swim because of Joscelin Yeo. There is no appellate record on that. They make that up. That is not in this appellate record. That was never presented to J. Davis.

O'NEILL: That's not a big leap. If she can't play somebody takes her place.

HENSON: But the NCAA had the very clear right to do this. This wasn't like basketball. This is swimming. This is a timed sport. You have so many kids that are eligible because of the time that they qualify for. They are fast. All the kids that qualified for that time get to participate whether there are 45 of them or 70 in that year. And what they do is, in the morning they have a competition where everybody who is qualified gets to swim. And then only the top 16 kids from those times in the morning qualify for the finals. If fairness and the good of the game and kids in the stands, if they were really concerned about that, it's the NCAA that can simply say we will let one more kid into the pool in the morning session. It doesn't upset the apple cart. Not at all. Because it's not a sport like basketball where you can only have five on the floor.

And so I really think this is not about anything other than the arrogance of power. Remember Berkeley took away - they granted the waiver. All this other stuff: the nit-picking about was the Olympic waiver semester good enough for the two semesters? Whether those facts meets counted. Whether the orange and white meet. All of this minutia, all this nit-picking should have been moot the day Berkeley said, you know we've gone to the faculty, this system works, we went outside athletics which is what is required to get them away from the spitefulness of the athletic department, and suddenly we have a solution. Berkeley says the waiver she was entitled to we granted. No ands, ifs or buts. No one said we can't do this anymore. It's too late. Berkeley granted the waiver. And by any rights game over. That should have been the end of this. But instead they wont' give her an opportunity to have her case heard. And there is nothing in that injunction that stopped them from giving her an injunction hearing on Thursday. We came in, we got that TRO on

Wednesday. Instead of spending hours and days fighting about the motion to dissolve the TRO and mandamus and going up to the CA, whether they could intervene or not. Why not give her the hearing right then, Thursday afternoon. She had a team of lawyers ready to go. And they didn't do that. There was nothing to stop them from that.

So this is not about common sense or sportsmanship. This is the red queen is in charge. And if you challenge them they make you pay. We are now litigating something for 3 years that involves conduct that goes back 5 years.

There have been lots of lawsuits against the NCAA. We've been criticized for not suing them. But if you go back to their motion to dissolve the TRO that they filed immediately and asked me to argue, this 27 page motion they handed me that morning and said we want to immediately argue this. They had a million arguments in there. They said, Well you can't sue us because we are not state action. Well we didn't sue them. You can't argue that our rules are arbitrary and capricious. We didn't make that argument. And over and over again they had arguments that were just plain silly, that were not part of this case.

Our case was Than and Stamos. Stamos is still the law. Than is very limited. This court made a unanimous decision. J. Enoch wrote that opinion. J. Hecht was on that court. J. Owen, I think that was your first or second day on the court. Ten years ago, Than was one of the first cases I think you heard.

OWEN: I remember Than far better than you will ever know.

HENSON: The thing that struck me about the Than case was how fact specific these procedural due process cases always are. And that's what really drove the lessen there.

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REBUTTAL

LAWYER: I need to make three points because a question was asked about whether or not Berkeley ought to be able to intervene? And in our briefs, we talk about the Tarkanian case. And the US SC has said that when a member school plays a student athlete who is ineligible, when that member school breaks the rules, the NCAA gets put in the position of stepping into the shoes of Berkeley and USC and Arizona and other schools across the country. And that it's the NCAA who is representing the interests of all of those other institutions against whom Joscelin Yeo had to compete. And so Berkeley certainly had an interest in this case. But the NCAA had that interest 1,200 times over of the other member institutions that were fielding eligible teams.

WAINWRIGHT: So could Berkeley have intervened?

LAWYER: Berkeley certainly had an interest in competing against eligible players. Berkeley also had an interest in ensuring that the integrity of a championship remained in tact.

Berkeley as a member of the NCAA had an interest in ensuring that student athletes couldn't run to a courthouse and get an injunction minutes before the games were start and displace other qualified student athletes. I think the answer is yes.

Counsel indicated her suggested test on what a protected interest might be. And I tried to write them down word for word. She said, whether or not the student athlete had demonstrated her athletic abilities at a professional level, can you capitalize on your athletic persona? These are frightening words for the NCAA. One of the basic principles of the NCAA is to keep a clear line in demarcation between amateur athletics and professional athletics. And if we create special rules for those that have a professional persona it undermines the entire idea that a student athlete is a student first, is a college student first.

MEDINA: Aren't all these athletes just revenue makers for the sports department anyway?

LAWYER: The NCAA has taken great steps to ensure that that is not the case.

MEDINA: How is that? Do you have students get a work program.

LAWYER: I understand that you and I may disagree on what the NCAA rules ought to be, what steps the NCAA ought to take in order to best protect the amateur status of the athletes. The fact is though and part of the pleadings that were filed with the court when we ran in the day of our championship was that the courts across the country have deferred to the decision-making of this private organization, that rather than issuing an injunction that overturned the decision of the NCAA committee, courts across the country have said we're going to let those athletic directors decide, those college presidents decide how those rules should be applied.

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LAWYER: I have two points. The first is that the respondent in departure from her brief argues that perhaps the Goss line of cases could be extended so that any student athlete has this type of interest that she's talking about. Goss itself talks about the total exclusion from the educational process. And Goss was in place when the Stamos decision came down and when the line of cases similar to Stamos came down in other states. And those other cases make clear that there's a difference between the total exclusion from the process and being excluded just from extracurriculars. Goss was a highschool case. If the Goss type reasoning were applied here, that could seriously undermine the ability of Stamos to limit the intervention into high school athletics. There is no meaningful distinction based on the types of legal arguments advanced between high school students and college students that would allow the court to draw that distinction.

Some of the criticisms being made by the respondent of the university's conduct are not really criticism that sound in due process at all. J. Hecht asked about whether the respondent really disputed the facts? And the counsel for the respondent's answer really suggested

that they don't dispute the facts. They don't dispute what the facts are. They dispute what the facts might have been if different things had happened in the course of this process. But what the facts might have been is not the kind of question that procedural due process claims can answer. Procedural due process is about adjudicating the facts as they actually are.

If the type of complaints raised by Ms. Yeo sounded anything, they might sound in a tort or in some other type of common law action. But they shouldn't rise to the level of constitutional violation that would create a duty both in this case and in all future cases to follow a particular course of conduct.