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## Voiding the NCAA Show-Cause Penalty: Analysis and Ramifications of a California Court Decision and Where College Athletics and Show-Cause Penalties Go From Here

Josh Lens

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Josh Lens

## Voiding the NCAA Show-Cause Penalty: Analysis and Ramifications of a California Court Decision, and Where College Athletics and Show-Cause Penalties Go From Here

19 U.N.H. L. REV. 21 (2020)

**ABSTRACT.** In late 2018, a Los Angeles County Superior Court judge sent shockwaves through college athletics by ruling that the NCAA’s Committee on Infractions (“COI”) unlawfully restrained now-former University of Southern California (“USC”) assistant football coach Todd McNair’s career when it imposed a “show-cause” penalty on him. Judge Frederick Shaller therefore declared NCAA show-cause penalties void under California employment law.

For decades, the COI has utilized show-cause penalties to punish individuals who break NCAA rules. Reserved for more egregious violations, universities and administrators long treated show-cause orders as scarlet letters, typically terminating or refusing to hire coaches subject to them. That trend has somewhat eased recently, however, as evidenced by notable examples such as head men’s basketball coaches Bruce Pearl and Kelvin Sampson securing employment at NCAA member universities after receiving the punishment.

After the COI imposed a show-cause penalty on McNair for his involvement in the infamous infractions case including USC and its now-former running back and Heisman Trophy winner Reggie Bush, McNair did not find potential employers as forgiving as those who hired Pearl and Sampson. McNair sued the NCAA, claiming a faulty investigation and infractions process and imposition of the show-cause penalty combined to end his college coaching career.

The case has proved to be a saga, with McNair ultimately losing his defamation claim against the NCAA. However, Judge Shaller invalidated the show-cause penalty under California employment law, leading to a very unsettled future for the NCAA, coaches, and other college athletics constituents. Those associated with, or interested in, college athletics should familiarize themselves with the enormous ramifications of Shaller’s decision, which is currently on appeal, in case courts continue to affirm it.

This Article details both show-cause orders and instances where coaches have received them yet gone on to successfully secure employment in college athletics. Next, the Article profiles McNair and describes both his involvement in the USC infractions case and litigation against the NCAA. The Article analyzes the merits of the NCAA’s appeal of Shaller’s decision and explores the immense ramifications of a potential affirmance of Shaller’s decision. The Article concludes by

suggesting alternate means of enforcing NCAA legislation that would not run afoul of California employment law.

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## I. INTRODUCTION

The NCAA's Enforcement Staff is investigating hundreds of allegations of NCAA rules violations involving dozens of universities throughout the NCAA's three divisions.<sup>1</sup> For cases involving universities competing in Division I athletics, the NCAA's Committee on Infractions ("COI") typically determines whether the allegations have merit.<sup>2</sup> When the COI concludes that an NCAA member university's employee violated an NCAA rule, it may impose a "show-cause" order to penalize the individual.<sup>3</sup> A show-cause order is the weightiest penalty the COI can level on an individual.<sup>4</sup> It signifies a major violation of NCAA rules.<sup>5</sup>

For now-former University of Southern California ("USC") football assistant coach Todd McNair, receipt of a one-year show-cause order essentially made him "radioactive" in college football, such that he has not been able to secure employment at a university despite his reputation as an elite recruiter who aided in building a football dynasty at USC.<sup>6</sup> McNair's unemployment caused him to suffer

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<sup>1</sup> See *Enforcement by the Numbers*, [ncaa.org/sites/default/files/Enforcement-Aug19.png](https://perma.cc/99K3-7DD3) [https://perma.cc/99K3-7DD3] (last visited Jan. 6, 2020) (providing data regarding investigations). Additionally, the Enforcement Staff is "processing" seven more cases involving 23 allegations and submitted 28 cases including 90 allegations to the NCAA's Committee on Infractions between February 1, 2018 and January 31, 2019; *Id.*

<sup>2</sup> *Division I Committee on Infractions*, [hereinafter "COI website"], [ncaa.org/governance/committees/division-i-committee-infractions](https://perma.cc/K2HA-YXL5) [https://perma.cc/K2HA-YXL5] (last visited Dec. 17, 2019) (describing COI generally).

<sup>3</sup> Committee on Infractions, *Division I Committee on Infractions: Internal Operating Procedures*, (Sept. 3, 2020) [hereinafter "COI IOPs"], [ncaa.org.s3.amazonaws.com/committees/d1/infraction/D1COI\\_IOPs.pdf](https://perma.cc/8HMD-5XXG) [https://perma.cc/8HMD-5XXG].

<sup>4</sup> See Nicole Auerbach, *The Perception and Reality of NCAA Show-Cause Penalties*, USA TODAY SPORTS (May 27, 2014, 7:15 PM), [usatoday.com/story/sports/college/2014/05/27/ncaa-show-cause-penalty-bruce-pearl-kelvin-sampson/9632273/](https://perma.cc/U9R6-6NW8) [https://perma.cc/U9R6-6NW8] (describing misconceptions of show-cause orders).

<sup>5</sup> See Michael McCann, *Ex-USC Coach Todd McNair Losing Trial to NCAA Shows Why Defamation Lawsuits Are Tricky to Win*, SPORTS ILLUSTRATED (May 21, 2018), [si.com/college/2018/05/22/todd-mcnair-usc-loses-ncaa-defamation-lawsuit](https://perma.cc/L4Y2-PAJG) [https://perma.cc/L4Y2-PAJG] (describing outcome of McNair's defamation claim against NCAA); see also Rob Harrington, *The Show Must Not Go On: NCAA Faces Enforcement Hurdle Following Court's Prohibition Against Show Cause Penalties*, NCBAR BLOG (Jan. 7, 2019), [ncbarblog.com/the-show-must-not-go-on-ncaa-faces-enforcement-hurdle-following-courts-prohibition-against-show-cause-penalties/](https://perma.cc/G8EG-38LM) [https://perma.cc/G8EG-38LM] (characterizing show-cause orders as "devastating" punishment reserved for serious offenses).

<sup>6</sup> See McCann, *supra* note 5 (describing outcome of McNair's defamation claim against NCAA); see also Harrington, *supra* note 5 (characterizing show-cause orders as "devastating" punishment

from depression, cash in his retirement account, drive for Uber, depend on food stamps for basic necessities, and watch his wife take a job as a parking lot attendant.<sup>7</sup> However, as a result of McNair's ensuing lawsuit against the NCAA, a California state court judge recently invalidated show-cause orders under a state employment statute.<sup>8</sup>

The ramifications of the court's decision, which is pending on appeal, are immense. In today's ultracompetitive college athletics, consistent and predictable penalties for rule breakers are paramount. It is problematic if coaches only from California universities are immune from show-cause penalties.<sup>9</sup> For example, a

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reserved for serious offenses).

<sup>7</sup> See Nathan Fenno, *Todd McNair Gets Back in the Game, With the Tampa Bay Buccaneers*, LOS ANGELES TIMES (Jan. 11, 2019, 1:35 PM), [latimes.com/sports/usc/la-sp-mcnair-buccaneers-usc-20190111-story.html](https://www.latimes.com/sports/usc/la-sp-mcnair-buccaneers-usc-20190111-story.html) [<https://perma.cc/2L5G-7V9K>] (describing McNair's career).

<sup>8</sup> See Maureen A. Weston, *Can A Sports Sanction Constitute an Illegal Work Restriction? A Review of NCAA v. Coach Todd McNair*, LAWINSPOUR (April 16, 2019), [lawinsport.com/topics/sports/tennis/item/can-a-sports-sanction-constitute-an-ilegal-work-restriction-a-review-of-ncaa-v-coach-todd-mcnair?category\\_id=155](https://www.lawinsport.com/topics/sports/tennis/item/can-a-sports-sanction-constitute-an-ilegal-work-restriction-a-review-of-ncaa-v-coach-todd-mcnair?category_id=155) (reviewing California state court decision invalidating McNair's show-cause order).

<sup>9</sup> See *id.* California has recently shown itself willing to challenge the NCAA. Richard C. Giller & Monica Parra, *Calif. Is Chipping Away at NCAA's Monopoly on Amateurism*, LAW360 (Dec. 24, 2019), [pillsburylaw.com/en/news-and-insights/calif-is-chipping-away-at-ncaas-monopoly-on-amateurism.html](https://www.pillsburylaw.com/en/news-and-insights/calif-is-chipping-away-at-ncaas-monopoly-on-amateurism.html) [<https://perma.cc/8LW9-A83P>] (examining recent legal scenarios whereby California has blazed a trail in challenging the NCAA). A recent happening in California brought attention to the issue of inconsistency among state laws that affect college athletics. In the fall of 2019, California passed a state law commonly referred to as the Fair Pay to Play Act, which contradicts current NCAA legislation by generally forbidding California universities from preventing student-athletes from receiving compensation from their name, image, and likeness beginning in 2023. See Michael McCann, *Key Questions, Takeaways From the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), [si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions](https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions) [<https://perma.cc/7XQC-BZEC>] (analyzing NCAA statement regarding potential changes to rules regarding name, image, and likeness). Additional politicians and states followed in California's trailblazing footsteps by introducing similar legislation. See *id.* (noting legislators in states including Florida, Illinois, New York, South Carolina, Nevada, Pennsylvania, Colorado, Kentucky, and Minnesota proposed, or plan to propose, similar bills). While similar, disparities often exist when comparing this new legislation offered by various states. See Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), [si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws](https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws) [<https://perma.cc/42D9-B8V9>] (summarizing various proposals). For example, a New York senator proposed a bill that would require universities to pay student-athletes directly and also requires universities to establish an injured student-athlete fund to compensate student-athletes who suffer career-ending or long-term injuries. *Id.* Two South

university may be more likely to hire a coach who received a show-cause order for his actions at a California university since the coach is legally protected from the penalty. Likewise, California universities may be more likely to hire coaches who were, or could be, recipients of show-cause orders, giving them an advantage by increasing their candidate pool compared to other universities.<sup>10</sup> Further, coaches at California universities may be more willing to engage in rule breaking activity, knowing they are immune from show-cause penalties.

The ramifications are exacerbated by the large number of cases currently under NCAA Enforcement Staff investigation, as many of them could result in show-cause penalties.<sup>11</sup> The fact that many of these cases likely involve high-profile universities, sport programs, and coaches amplifies the issue. For example, in the aftermath of a federal investigation into perceived corruption in men's college basketball, the University of Kansas received a formal Notice of Allegations from the NCAA Enforcement Staff that includes allegations of multiple Level I violations against successful head men's basketball coach Bill Self.<sup>12</sup> Self could be at risk of a show-

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Carolina lawmakers plan to file a proposal that would permit the state's largest universities to pay \$5,000-a-year annual stipends to student-athletes in profitable sports like football and basketball. *Id.* Further, some states have not introduced any legislation regarding student-athlete compensation, perhaps content to permit the NCAA time to alter its rules. See Jessie Balmert, *Pay College Athletes? Ohio Lawmakers Not Ready for That Yet*, CINCINNATI ENQUIRER (Oct. 2, 2019, 1:23 PM), [cincinnati.com/story/news/politics/2019/10/02/ohio-not-pushing-legislation-allow-student-athletes-profit-name-image-likeness/3840346002/](https://cincinnati.com/story/news/politics/2019/10/02/ohio-not-pushing-legislation-allow-student-athletes-profit-name-image-likeness/3840346002/) [<https://perma.cc/T7TA-N3E4>] (noting Ohio State University athletics director Gene Smith's concern regarding permitting student-athletes to monetize their name, image, and likeness). The fact that states could have legislation that both runs counter to NCAA legislation and varies between states left national media to wonder about repercussions. See Michael McCann, *California's New Law Worries the NCAA, But a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), [si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws](https://si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws) [<https://perma.cc/VKN2-YTYW>] (speculating that NCAA legal position strengthened due to numerous states potentially implementing varying laws). The issues resulting from the court's invalidation of McNair's show-cause order are similar.

<sup>10</sup> See Weston, *supra* note 8 (describing this as "significant" problem and advocating for any changes to the NCAA Enforcement Staff's authority to be national).

<sup>11</sup> See *Enforcement by the Numbers*, *supra* note 1 (providing data regarding Enforcement Staff's dozens of ongoing investigations).

<sup>12</sup> See Adam Zagoria, *After Kansas Receives NCAA Notice of Allegations, Louisville Among Schools Expected to Be Next*, FORBES (Sept. 23, 2019, 11:53 PM), [forbes.com/sites/adamzagoria/2019/09/23/after-kansas-receives-ncaa-notice-of-allegations-louisville-other-schools-expected-to-be-next/#3c71354f4941](https://forbes.com/sites/adamzagoria/2019/09/23/after-kansas-receives-ncaa-notice-of-allegations-louisville-other-schools-expected-to-be-next/#3c71354f4941) [<https://perma.cc/GJ3H-MASC>] (detailing likely next steps in NCAA investigation pertaining to corruption in men's college basketball). Self has been the head coach at Kansas for 17 seasons, during which time his many accomplishments include winning a

cause penalty.<sup>13</sup> Other universities that have received, or could receive, official notices of allegations from the NCAA stemming from investigations into men's college basketball include the University of Louisville, North Carolina State University, the University of Arizona, Auburn University, the University of Southern California, Oklahoma State University, Creighton University, Louisiana State University, the University of Maryland, and the University of Oregon.<sup>14</sup> Thus, highly decorated coaches are in NCAA Enforcement crosshairs: Self, Auburn's Bruce Pearl (discussed further beginning *infra* page 8), Sean Miller (three-time Pac-12 coach of the year recipient for his work at Arizona), former North Carolina State head coach Mark Gottfried (a 400-game winner now at California State University, Northridge), hall of famer and former Louisville head coach Rick Pitino, and Louisiana State's Will Wade (head coach of the 2019 Southeastern Conference champions).<sup>15</sup> Especially noteworthy is that a couple of these potential cases have close ties to California, where the legal status of show-cause orders is in question.<sup>16</sup> Further, universities such as Arizona and Oregon regularly compete against California universities in athletics and thus could be at a competitive disadvantage if California coaches are not subject to show-cause penalties for rule breaking.<sup>17</sup>

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national championship and Division I record fourteen straight regular season Big 12 Conference titles. *Kansas Athletics Directory: Bill Self Bio*, [kuathletics.com/coach/bill-self/](https://kuathletics.com/coach/bill-self/) [<https://perma.cc/6PGA-UZYS>] (detailing Self's career). Level I is the NCAA's most severe category of violation. *Violation Structure: Division I Infractions Process*, [ncaa.org/sites/default/files/Enforcement\\_Handout%20-%20Violation%20Structure.pdf](https://ncaa.org/sites/default/files/Enforcement_Handout%20-%20Violation%20Structure.pdf) [<https://perma.cc/GHL4-AN67>] (last visited Jan. 8, 2020).

<sup>13</sup> See Michael McCann, *Could NCAA's Latest Notice of Allegations Against Kansas End Bill Self?*, SPORTS ILLUSTRATED (Sept. 23, 2019), [si.com/college/2019/09/24/bill-self-kansas-jayhawks-ncaa-allegations-fbi](https://si.com/college/2019/09/24/bill-self-kansas-jayhawks-ncaa-allegations-fbi) [<https://perma.cc/LN85-78S6>] (detailing potential fallout from Notice of Allegations for Self).

<sup>14</sup> See Zagoria, *supra* note 12 (explaining that only North Carolina State University and Kansas received official notices to date; however, the federal proceeding related to corruption in men's college basketball implicated the other universities).

<sup>15</sup> See Pat Forde, *Are NCAA Sanctions Against Kevin Ollie a Sign of Things to Come for College Coaches?*, YAHOO! SPORTS (July 2, 2019, 4:36 PM), [sports.yahoo.com/are-ncaa-sanctions-against-kevin-ollie-a-sign-of-things-to-come-for-college-coaches](https://sports.yahoo.com/are-ncaa-sanctions-against-kevin-ollie-a-sign-of-things-to-come-for-college-coaches) [<https://perma.cc/CT9P-NX5Z>] (projecting impact of sanctions on now-former University of Connecticut head men's basketball coach Kevin Ollie).

<sup>16</sup> See Kaelen Jones, *Report: NCAA's Show-Cause Penalty Ruled Illegal by California Judge*, SPORTS ILLUSTRATED (Oct. 9, 2018), [si.com/college/2018/10/10/ncaa-show-cause-penalty-reggie-bush-usc-illegal-judge](https://si.com/college/2018/10/10/ncaa-show-cause-penalty-reggie-bush-usc-illegal-judge) [<https://perma.cc/B6XQ-YYFH>] (describing court ruling that invalidated show-cause orders).

<sup>17</sup> See *Pac-12 Sports & Championships*, [pac-12.com/content/pac-12-sports-championships](https://pac-12.com/content/pac-12-sports-championships) [<https://perma.cc/ED7H-W28R>] (last visited Sept. 10, 2020) (listing every conference member

Additionally, show-cause orders have become more lethal. Not only did the average length of show-cause penalties recently increase to over five years, the COI recently received authority to implement show-cause orders for a rule breaker's lifetime.<sup>18</sup> With the likelihood of more severe show-cause orders coming—many in high-profile situations—the NCAA, university administrators, college coaches, and other college athletics constituents must understand both the current status of show-cause orders and possible changes to their standing. Section II of this Article provides background on show-cause penalties and profiles several coaches who received them yet were able to successfully secure employment in college athletics. Such coaches include Auburn University head men's basketball coach Bruce Pearl and University of Houston head men's basketball coach Kelvin Sampson. Section III more fully introduces Todd McNair and details both his involvement in the NCAA infractions case and ensuing litigation against the NCAA, which resulted in a California judge invalidating show-cause orders. Section IV analyzes the merits of the NCAA's appeal of the order invalidating show-cause orders and details the immense ramifications for college athletics should courts continue to uphold the order. The article concludes by suggesting alternative measures the NCAA could take in place of or in addition to show-cause orders to attempt to mitigate the likelihood of NCAA rule breaking or punish those who engage in it.

## II. SHOW-CAUSE ORDERS

### A. Background and Procedure

The COI is an independent administrative body responsible for deciding infractions cases involving NCAA member universities and their employees.<sup>19</sup> Current and former university presidents, athletics directors, former coaches, politicians, and members of the legal community are among those who volunteer to serve as COI members.<sup>20</sup> The COI possesses authority to find facts, conclude violations of NCAA legislation, and prescribe appropriate penalties.<sup>21</sup>

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university's sport teams).

<sup>18</sup> *Division I Infractions Annual Report 2018-19*, [ncaa.org/sites/default/files/2018-infractions-annual-report\\_o.pdf](https://ncaa.org/sites/default/files/2018-infractions-annual-report_o.pdf) [<https://perma.cc/ZRE2-MZED>] (last visited Jan. 7, 2020) (providing information on NCAA infractions cases).

<sup>19</sup> COI website, *supra* note 2.

<sup>20</sup> *See id.*

<sup>21</sup> *Id.* The NCAA's Enforcement Staff investigates allegations of rule violations and decides whether to allege charges of rule violations against universities and/or their employees. *See Inside the Division I Infractions Process: Infractions Process Overview*, [ncaaorg.s3.amazonaws.com](https://ncaaorg.s3.amazonaws.com)

Among the penalties available to the COI is the show-cause order.<sup>22</sup> According to the COI's internal operating procedures, show-cause orders "run to an individual's conduct that violated NCAA legislation while on staff with a member institution."<sup>23</sup> A show-cause order essentially means that NCAA penalties attach to a rule breaker for a designated period of time and transfer to any university that hires the individual prior to expiration of the order.<sup>24</sup>

There can be two components to each show-cause order: its length and any specific provisions the COI includes.<sup>25</sup> The COI refers to show-cause orders with specific conditions or restrictions as "specific" show-cause orders, which it typically prescribes for an individual who either remains at the university where the individual committed the violations or has secured employment at another university.<sup>26</sup> Possible restrictions include practice and game suspensions and prohibiting recruiting activity (for example, see discussion of Bruce Pearl, beginning *infra* page 8).<sup>27</sup> Any restrictions on a coach prevent the coach from the ability to fully engage in a coach's normal job functions.<sup>28</sup> Thus, the fact that a coach cannot fulfill all job responsibilities due to a show-cause order with restrictions strains the rest of a coaching staff.<sup>29</sup> This additional burden threatens the stability

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/infractions/d1/gInc\_grphcs/D1INF\_InfractionsProcessOverview-FactSheet.pdf [https://perma.cc/EF3L-F6RJ] (last visited Dec. 18, 2019) (setting forth Division I infractions process).

<sup>22</sup> Committee on Infractions, *supra* note 3.

<sup>23</sup> *Id.*

<sup>24</sup> See Auerbach, *supra* note 4.

<sup>25</sup> See *id.* (citing current Auburn University head men's basketball coach Bruce Pearl's three-year show-cause order specifically barring him from "conducting any and all recruiting activities").

<sup>26</sup> Committee on Infractions, *supra* note 3.

<sup>27</sup> *Id.*

<sup>28</sup> See Ellen J. Staurowsky, Brian Menaker & Jeffrey Levine, *California Judge Rules NCAA's Show-Cause Order Violates State Law*, SPORTS LAW EXPERT (Dec. 12, 2018), sportslawexpert.com/2018/12/12/California-judge-rules-ncaas-show-cause-order-violates-state-law/ [https://perma.cc/U4NF-T5RV] (analyzing outcome of McNair's declaratory judgment claim).

<sup>29</sup> NCAA rules place a cap on the total number of individuals who can engage in coaching activities in a given sport. Nat'l Collegiate Athletic Ass'n, 2019-20 NCAA Division I Manual § 11.7 (2019) [hereinafter Manual]. Thus, NCAA rules preclude a university who hires or retains an individual subject to a show-cause order from, for example, simply hiring a temporary coach to recruit or coach in the penalized coach's place.

of the sport program and security of the remaining coaching staff.<sup>30</sup>

The COI has used show-cause orders to punish rule breakers for decades, but the penalty remains one of the NCAA's most misunderstood punishments.<sup>31</sup> Described as the NCAA's scarlet letter, it *can* end a coach's career, or at least blacklist a coach from finding work again for a certain period of time.<sup>32</sup> However, many falsely believe that imposition of a show-cause order requires a university to terminate a coach and that other universities may not hire the coach during the period of the penalty.<sup>33</sup> These misguided assumptions originate with an old misunderstanding of the penalty.<sup>34</sup> According to former COI chairman Gene Marsh, it is false to assume a show-cause order is a permanent scarlet letter preventing universities from hiring individuals subject to them.<sup>35</sup>

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<sup>30</sup> Staurowsky, *supra* note 28.

<sup>31</sup> Auerbach, *supra* note 4. The University of Nebraska-Omaha received the first show-cause penalty for playing an unsanctioned postseason football game in 1963. Joseph Duarte, *Coaches Finding Life After "Kiss of Death"*, HOUSTON CHRONICLE (Apr. 5, 2014, 9:49 PM), [houstonchronicle.com/sports/cougars/article/Coaches-finding-life-after-kiss-of-death-5379846.php](http://houstonchronicle.com/sports/cougars/article/Coaches-finding-life-after-kiss-of-death-5379846.php) [<https://perma.cc/E3S5-9M4J>] (profiling coaches who received show-cause orders). Since that time, hundreds of coaches have received show-cause penalties. Ron Kroichick, *Back on the Sidelines After Decade in Exile*, SFGATE (Dec. 23, 2007), [sfgate.com/sports/article/Back-on-the-sidelines-after-decade-in-exile-3234092.php](http://sfgate.com/sports/article/Back-on-the-sidelines-after-decade-in-exile-3234092.php) [<https://perma.cc/RM93-NWSX>] (describing career of Todd Bozeman, recipient of eight-year show-cause order).

<sup>32</sup> See Duarte, *supra* note 31. Show-cause orders have served as de-facto bans on college athletic employment for numerous now-former coaches. Alex Kirshner, *The NCAA's Method of Blackballing Coaches is Now Invalid in California*, SBNATION (Oct. 10, 2018, 9:37 AM), [sbnation.com/college-football/2018/10/10/17959082/ncaa-show-cause-todd-mcnair-california](http://sbnation.com/college-football/2018/10/10/17959082/ncaa-show-cause-todd-mcnair-california) (describing outcome of McNair case relative to show-cause orders).

<sup>33</sup> See Auerbach, *supra* note 4 (acknowledging that outside perceptions affect hiring and firing decisions).

<sup>34</sup> John Infante, *Where the Penalties Against Frank Haith Could Lead*, NEXT COLLEGE STUDENT ATHLETE (Jan. 22, 2013), [athleticsscholarships.net/2013/01/22/ncaa-penalties-frank-haith-show-cause-order.htm](http://athleticsscholarships.net/2013/01/22/ncaa-penalties-frank-haith-show-cause-order.htm) [<https://perma.cc/8XKD-DTKW>] (explaining that show-cause penalties do not necessarily end careers or even require a coach to lose his current position). However, coach non-renewal or outright firing depending on contract provisions is logical. Staurowsky, *supra* note 28 (explaining that restrictions on coach's ability to fully perform job functions burdens remaining staff).

<sup>35</sup> Auerbach, *supra* note 4 (noting Marsh currently works for a law firm in Birmingham and represented former Ohio State University head football coach Jim Tressel during an NCAA investigation that ultimately resulted in five-year show-cause order for Tressel). Marsh served on the COI panel that decided Kelvin Sampson's case discussed beginning *infra* page 10. See *id.*

Hiring or retaining a coach during the period of a show-cause penalty is not without consequences for the university, however. Such a move requires a university to jump through some procedural hoops.<sup>36</sup> In instances where a university retains or hires an individual subject to a show-cause, NCAA Bylaw 19.02.3 requires the university to demonstrate to the satisfaction of the COI (who imposed the penalty in the first place) why the university should not be subject to a penalty or additional penalty for failing to take appropriate disciplinary or corrective action regarding that individual.<sup>37</sup> Thus, if a university hires a coach with a show-cause order, it must “show cause” to the COI, which includes demonstrating why the university should not receive a penalty for hiring the coach and how it plans on monitoring him.<sup>38</sup> More specifically, when a university retains or hires a coach subject to a show-cause order, the COI essentially requires the university to prove that the coach has made amends and abides by the COI’s restrictions.<sup>39</sup>

If the coach violates NCAA rules during the period of the show-cause order, the university would face harsher penalties.<sup>40</sup> For example, if a university hires or retains a coach subject to a show-cause order and the coach commits an NCAA violation that the COI deems a Level I or Level II violation (the two most severe violation designations), such a violation can constitute an “aggravating factor” justifying more stringent penalties.<sup>41</sup> Additional penalties could include extreme measures such as prohibiting a sport program from engaging in competition,

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<sup>36</sup> See Staurowsky, *supra* note 28. The decision to retain or hire a coach subject to a show-cause is likely to result in scrutiny, however. See *id.* Many college athletics administrators and university officials wish to remain clear of compliance scrutiny and thus are less likely to knowingly place themselves in position where others question their commitment to rules compliance. See *id.*

<sup>37</sup> MANUAL, *supra* note 29, § 19.02.3.

<sup>38</sup> See *id.* § 19.9.5.4.

<sup>39</sup> See *id.* §§ 19.9.4, 19.8.5.4. The COI used to require universities hiring coaches subject to a show-cause to appear in front of it and show cause why the university should not receive additional punishment. See Infante, *supra* note 34 (citing 2004 University of Georgia case involving men’s basketball assistant coach Jim Harrick, Jr. as example). More recently, however, the onus on a university employing a coach subject to a show-cause lessened to making sure the coach abides by the COI’s restrictions and filing reports with the COI proving same. See *id.* The employing university no longer must attend a hearing, does not face a presumption of penalties, and does not have to hope that it can demonstrate to the COI’s satisfaction that it should not receive punishment. See *id.* (citing 2014 University of Tennessee case involving Pearl as example). This Article examines the significance of this change in more detail beginning *infra* page 28.

<sup>40</sup> Auerbach, *supra* note 4; see also IOPs, *supra* note 3.

<sup>41</sup> MANUAL, *supra* note 29, § 19.1, 19.9.3(n).

requiring the university to relinquish NCAA voting privileges, and prohibiting televised appearances.<sup>42</sup> Further, if the COI determined that the university failed to take appropriate disciplinary or corrective action regarding the coach, the COI could implement additional penalties, such as restriction of some or all athletically-related duties (unless the university showed cause why the additional penalties would be inappropriate).<sup>43</sup> Notably, “[d]ecisions regarding disciplinary or corrective actions involving personnel shall be made by the institution, but the determination of whether the action satisfies the institution’s obligation of NCAA membership shall rest solely with the Committee on Infractions or Independent Resolution Panel.”<sup>44</sup>

### ***B. Coaches Who Received Show-Cause Penalties Yet Secured Future College Athletics Employment***<sup>45</sup>

Current Southeastern Conference commissioner Greg Sankey has described show-cause penalties as “significant.”<sup>46</sup> However, as the following examples illustrate, in today’s world of big stakes college athletics, show-cause orders are not always a kiss of death to a coach’s career in college athletics.<sup>47</sup> Rather, they can serve as a temporary setback so long as the coach can find a university willing to look past the show-cause order and provide the coach with another chance.

#### 1. Bruce Pearl

Perhaps most famously (or infamously), the COI proscribed a show-cause penalty on Bruce Pearl for violations that occurred while he served as head men’s basketball coach at the University of Tennessee (“Tennessee”).<sup>48</sup> The violations

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<sup>42</sup> *Id.* § 19.9.7.

<sup>43</sup> *Id.* § 19.9.5.4.

<sup>44</sup> *Id.*

<sup>45</sup> Notable football coaches such as former University of Oregon head coach Chip Kelly and former Ohio State University head coach Jim Tressel, athletics directors, compliance staff members, assistant coaches, and volunteer coaches have received show-cause orders. *See* Duarte, *supra* note 31. However, this section focuses on noteworthy head men’s basketball coaches who received show-cause orders and subsequently were able to find employment.

<sup>46</sup> Auerbach, *supra* note 4 (noting Sankey served on COI).

<sup>47</sup> *See id.* (noting coaches Sampson and Pearl were able to find basketball-related employment while out of college coaching).

<sup>48</sup> *Id.* Pearl has been involved in a number of NCAA issues in his career—from secretly recording a phone call with a prospective student-athlete to try and get another university in

stemmed from a dinner at Pearl's home attended by three prospective student-athletes who were high school juniors on campus visits.<sup>49</sup> The COI concluded that Pearl informed the prospects that their attendance at the dinner violated NCAA rules and encouraged them to not disclose it to others.<sup>50</sup> Pearl failed to report the violations to the university and denied knowledge of them when university administrators and the NCAA Enforcement Staff interviewed him.<sup>51</sup>

The COI imposed penalties including a three-year show-cause order on Pearl.<sup>52</sup> As for the show-cause order's specific conditions, the COI prohibited Pearl from conducting any recruiting activities between August 24, 2011 and August 23, 2014.<sup>53</sup> Further, the COI required any university employing Pearl to file a report with the COI within 30 days of hiring him in which the university agreed to the recruiting restriction or sought a date to appear before the COI to contest it.<sup>54</sup> Every six months thereafter, the hiring university had to file reports detailing adherence to the restriction.<sup>55</sup>

Eventually hired as head coach by Auburn University ("Auburn") with five

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trouble thirty years ago while a University of Iowa assistant coach to more recently having one of his Auburn assistant coaches ensnared in a federal investigation into men's college basketball corruption. *See* Dave Skretta, *Auburn's Bruce Pearl Has Sheen of Sweat, Slime, and Success*, THE ASSOCIATED PRESS (Apr. 6, 2019), [apnews.com/bd3edaf566444bd0b7b8ff7337778cf4](https://apnews.com/bd3edaf566444bd0b7b8ff7337778cf4) (stating that Pearl is covered in Teflon).

<sup>49</sup> *See University of Tennessee Public Infractions Decision*, 1 (Aug. 24, 2011) [hereinafter "Tennessee case"], <https://i.turner.ncaa.com/sites/default/files/files/Tenn%20Public%20Inf%20Rpt.pdf> [<https://perma.cc/TEN4-ATB7>] (describing COI's conclusions on case involving men's basketball, football, and institutional violations). The COI's public infractions decisions do not identify involved individuals by name but numerous media outlets identified the relevant individuals. For example, *see* Auerbach, *supra* note 4.

<sup>50</sup> *See* Tennessee case, *supra* note 49 at 1. The off-campus interactions between members of the university's men's basketball staff and the prospective student-athletes visiting the university on "unofficial" visits violated NCAA recruiting legislation in effect at the time. *See id.* at 3–4.

<sup>51</sup> *Id.* at 1. The COI concluded Pearl's intentional violations of NCAA recruiting legislation, provision of false and misleading information, and attempts to influence others to furnish false and misleading information were contrary to NCAA principles of ethical conduct. *See id.* at 5.

<sup>52</sup> *Id.* at 14 (noting penalties were due to knowingly violating NCAA recruiting legislation, telling individuals to not disclose the impermissible activities, failing to report the violation, and providing false and misleading information to investigators).

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

months left on his show-cause penalty, Pearl worked for ESPN and SiriusXM between his tenures at Tennessee and Auburn.<sup>56</sup> When Auburn hired Pearl, the two parties achieved the (dubious?) distinction that it was the first time a university hired a coach with an active show-cause order.<sup>57</sup> At the time, then-athletics director Jay Jacobs and Pearl agreed that Auburn would not appeal Pearl's show-cause penalty, as Jacobs believed not appealing "was the right thing to do" in an effort to "respect the process."<sup>58</sup>

Pearl and dozens of Auburn fans celebrated outside Auburn Arena at the exact moment his show-cause penalty expired.<sup>59</sup> Pearl went so far as to pose for pictures and jump in celebration with his student-athletes, shouting, "Free at last!" before heading to his office to, of course, make recruiting calls and meet with a prospective student-athlete.<sup>60</sup>

Auburn's men's basketball program has achieved unprecedented success under Pearl, winning the Southeastern Conference championship and making the Final Four for the first time in program history in 2019.<sup>61</sup> Auburn rewarded Pearl's success (the first Auburn coach with 100 victories in his first five seasons and a program-record 74 wins over a three-year span) with a five-year contract extension in April 2019.<sup>62</sup> Looking back, Pearl describes his show-cause order as an "eligibility

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<sup>56</sup> See Auerbach, *supra* note 4 (noting, ironically, that one of Auburn's compliance staff members at time of Pearl's hiring was NCAA's lead investigator during NCAA investigation of Pearl).

<sup>57</sup> See James Crepea, *Bruce Pearl Celebrates with Auburn Fans, Team as NCAA Show-Cause Expires*, MONTGOMERY ADVERTISER (Aug. 24, 2014, 8:48 AM), [montgomeryadvertiser.com/story/sports/college/auburn/2014/08/24/bruce-pearl-celebrates-with-auburn-fans-team-as-ncaa-show-cause-expires/14524371/](http://montgomeryadvertiser.com/story/sports/college/auburn/2014/08/24/bruce-pearl-celebrates-with-auburn-fans-team-as-ncaa-show-cause-expires/14524371/) [<https://perma.cc/MEZ4-GS62>] (describing Pearl's reaction upon expiration of show-cause order).

<sup>58</sup> See Nicole Auerbach, *Auburn Will Not Appeal Bruce Pearl's Show-Cause Penalty*, USA TODAY (Apr. 22, 2014, 1:26 PM), [usatoday.com/story/sports/ncaab/sec/2014/04/22/college-basketball-auburn-tigers-coach-bruce-pearl-show-cause/8009379/](http://usatoday.com/story/sports/ncaab/sec/2014/04/22/college-basketball-auburn-tigers-coach-bruce-pearl-show-cause/8009379/) [<https://perma.cc/56JD-YEDY>] (describing ramifications of show-cause on Pearl's hiring).

<sup>59</sup> See Crepea, *supra* note 57 (noting Pearl's restrictions lasted 159 days into his tenure at Auburn).

<sup>60</sup> See *id.* (noting Pearl joked that a group picture with fans "has got to be a violation").

<sup>61</sup> See Emily Caron, *Auburn Signs Men's Basketball Coach Bruce Pearl to Five-Year Extension*, SPORTS ILLUSTRATED (Apr. 12, 2019), [si.com/college/2019/04/12/auburn-tigers-bruce-pearl-five-year-extension](http://si.com/college/2019/04/12/auburn-tigers-bruce-pearl-five-year-extension) [<https://perma.cc/QB7E-52LZ>] (noting an NCAA investigation led to Pearl spending three seasons away from the sidelines before Auburn hired him in 2014).

<sup>62</sup> See *id.* (stating extension extended Pearl's contract through 2023-24 season). The extension increases Pearl's annual salary from \$2.6 to \$3.8 million, with his salary increasing \$125,000

issue” that required him to “sit out” from coaching, during which time he was not in “good standing” with the NCAA.<sup>63</sup>

## 2. Kelvin Sampson

When there is a show-cause order in a coach’s background, it can be difficult for the coach to secure future employment in college athletics.<sup>64</sup> If the coach is fortunate and secures another coaching position, it is often at a smaller university and/or lower level of competition.<sup>65</sup> This is due to the onerous burden that typically accompanies a show-cause order requiring the hiring university to show both why there should be no penalty for hiring the coach and how the university plans to prevent the coach from committing violations.<sup>66</sup> Thus, when it comes to coaches who have been subject to show-cause orders, instances where a university hires a coach during the penalty period, like Auburn’s hiring of Pearl, are the exception.<sup>67</sup>

Instead, coaches stand a better chance at future employment in the college ranks after the show-cause penalty period expires.<sup>68</sup> Such was the case when the University of Houston (“Houston”) hired Kelvin Sampson as its head men’s basketball coach a year after expiration of the show-cause order which resulted from violations committed during Sampson’s tenure at the University of Indiana (“Indiana”).<sup>69</sup> In 2008, the COI imposed a five-year show-cause order on Sampson

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yearly after the 2019-20 season. See Josh Vitale, *Auburn, Coach Bruce Pearl Agree to New Five-Year Contract After Final Four Appearance*, USA TODAY (Apr. 13, 2019, 5:19 PM), [usatoday.com/story/sports/ncaab/sec/2019/04/12/auburn-coach-bruce-pearl-five-year-contract/34525090002/](https://www.usatoday.com/story/sports/ncaab/sec/2019/04/12/auburn-coach-bruce-pearl-five-year-contract/34525090002/) [<https://perma.cc/GR8B-DBFG>] (describing extension terms).

<sup>63</sup> See Auerbach, *supra* note 4 (noting Pearl counted down days until his show-cause order expired).

<sup>64</sup> See Andy Katz, *Sampson Receives NCAA’s Harsh Penalty*, ESPN (Nov. 25, 2008), [espn.com/mens-college-basketball/news/story?id=3725832](https://www.espn.com/mens-college-basketball/news/story?id=3725832) [<https://perma.cc/EK83-T8SE>] (describing example of former University of California-Berkeley head men’s basketball coach Todd Bozeman).

<sup>65</sup> See Duarte, *supra* note 31 (describing coaches subject to show-cause orders as “castoffs”).

<sup>66</sup> See Zach Osterman, *Former Indiana Coach Kelvin Sampson’s NCAA Penalty Ends*, USA TODAY (Nov. 26, 2013), [usatoday.com/story/sports/ncaab/2013/11/26/kelvin-sampson-former-indiana-hoosiers-coach-ncaa-penalty-ends/3745133/](https://www.usatoday.com/story/sports/ncaab/2013/11/26/kelvin-sampson-former-indiana-hoosiers-coach-ncaa-penalty-ends/3745133/) [<https://perma.cc/CMG9-PEBK>] (describing expiration of Kelvin Sampson’s show-cause period).

<sup>67</sup> See Auerbach, *supra* note 4.

<sup>68</sup> See Duarte, *supra* note 31.

<sup>69</sup> See *id.*

after he made impermissible recruiting calls while the head coach at the University of Oklahoma and then failed to adhere to COI penalties resulting therefrom while the head coach at Indiana, where he continued to make prohibited calls.<sup>70</sup> Sampson resigned from Indiana during the NCAA's investigation.<sup>71</sup>

In its public report, the COI expressed disappointment with the repeated nature of the violations, noting that Sampson "acted unethically both in his commission of these violations and by providing false and misleading information to investigators."<sup>72</sup> Thus, the COI prohibited Sampson from engaging in any recruiting activities or interactions with prospective student-athletes for a three-year period.<sup>73</sup> After the expiration of the three-year period, Sampson had to forego certain recruiting activities until the expiration of an overall five-year show-cause period.<sup>74</sup> The COI required any university that employed Sampson during the show-cause period to submit reports evidencing its understanding of the penalties and detailing how it would monitor Sampson's conduct to assure compliance with penalties.<sup>75</sup> Further, the president of the employing university would have to provide a letter to the COI affirming Sampson's compliance with the penalties at the conclusion of the show-cause period.<sup>76</sup> The COI went on to admonish Sampson and any employing university to both construe the penalties broadly and strictly adhere to them.<sup>77</sup> The COI permitted an employing university the opportunity to challenge the imposition of the penalties by scheduling an appearance to show cause why the penalties should not apply.<sup>78</sup>

Sampson appealed the COI's decision, asking the COI appeals committee to set

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<sup>70</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, *Indiana University, Bloomington Public Infractions Report*, 43 (Nov. 25, 2008), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102283> (detailing COI's findings and penalties) (hereinafter "Indiana Case").

<sup>71</sup> Katz, *supra* note 64 (describing COI's findings regarding Sampson).

<sup>72</sup> Indiana Case, *supra* note 70, at 43 (stating that Sampson's actions undermined "responsibility of a head coach to set an example of rules compliance and ethical conduct").

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at 44–45.

<sup>75</sup> *Id.* at 45–46.

<sup>76</sup> *Id.* at 46.

<sup>77</sup> *Id.* (providing example that Sampson should not provide his phone number to prospective student-athletes).

<sup>78</sup> *Id.* at 46–47.

aside the penalties because they were excessive.<sup>79</sup> Among the points Sampson argued on appeal was that the five-year show-cause penalty was too severe.<sup>80</sup> The appeals committee concluded that it had no basis on which to determine that the length of the show-cause order was excessive such that the COI abused its discretion.<sup>81</sup>

The COI's show-cause order essentially kept Sampson out of college basketball for five years and made it difficult, if not impossible, for a university to hire him during that period.<sup>82</sup> After resigning from Indiana and while he was subject to the show-cause order, Sampson served as an assistant coach for the NBA's Milwaukee Bucks and Houston Rockets.<sup>83</sup> During the period of the show-cause penalty,

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<sup>79</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee*, 6–7 (June 30, 2009), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102762> (providing findings regarding Sampson's appeal) (hereinafter "Sampson Appeal"). When the COI determines that a university or individual committed a rules violation and the COI prescribes a penalty, the university or individual may appeal to the Infractions Appeals Committee. See NCAA, Division I Infractions Appeals Committee, [ncaa.org/governance/committees/division-i-infractions-appeals-committee](https://perma.cc/9MY7-3P8J) [https://perma.cc/9MY7-3P8J] (last visited Dec. 18, 2019).

<sup>80</sup> Sampson Appeal, *supra* note 79, at 8 (noting Sampson also argued that one of the COI's findings was contrary to the evidence and that it had demonstrated bias against Sampson and predetermined his guilt).

<sup>81</sup> *Id.* at 9.

<sup>82</sup> See Osterman, *supra* note 66 (noting that penalties from Sampson's tenure at Indiana "plunged the program into a years-long rebuilding project")

<sup>83</sup> See Auerbach, *supra* note 4. Show-cause penalties do not directly affect an individual's ability to secure employment with a professional team, and NBA organizations have shown that they will hire former college coaches who, like Sampson, are subject to show-cause orders. See Ben Pickman, *Former Penn Coach Jerome Allen Hit With 15-Year Show-Cause Penalty*, SPORTS ILLUSTRATED (Feb. 26, 2020), [si.com/college/2020/02/26/jerome-allen-penn-basketball-show-cause-penalty](https://perma.cc/U7RD-NWSM) [https://perma.cc/U7RD-NWSM] (describing penalties resulting from Penn case). For example, see Bozeman, discussed *infra* page 14. Also consider former University of Pennsylvania ("Penn") head men's basketball coach Jerome Allen. Allen engaged in admissions fraud when he accepted bribes and other benefits from the family of a Penn applicant in exchange for designating the applicant as a men's basketball recruit in order to increase the likelihood that Penn would accept the applicant's admission application. See NAT'L COLLEGIATE ATHLETIC ASS'N, *University of Pennsylvania Negotiated Resolution – Case No. 00956*, 1–2 (Feb. 26, 2020), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102828> (describing Negotiated Resolution regarding Penn's men's basketball) (hereinafter "Penn case"). The COI concluded that Allen violated NCAA ethical conduct principles and requirements by acting dishonestly and in an unsportsmanlike manner. See *id.* at 4. Allen received a 15-year show-cause

Sampson was not worried that the scandal and fallout would brand him in a certain way.<sup>84</sup>

When considering possible candidates for its head coach opening in 2014, then-Houston athletics director Mack Rhoades vetted Sampson by speaking with Sampson's former employers and co-workers, as well as current and former NCAA officials.<sup>85</sup> Rhoades received extremely encouraging reviews and appreciated both Sampson's transparency about his mistakes and commitment to leading a first-class program in all areas.<sup>86</sup>

Sampson's success at Houston includes a trip to the Sweet 16 in 2019, which is about the time rumors circulated that the University of Arkansas would try to hire Sampson away from Houston.<sup>87</sup> Within days, Houston announced a six-year contract extension through the 2024-25 season for Sampson that included naming Sampson's son and lead assistant, Kellen, as head coach-in-waiting.<sup>88</sup>

### 3. Rob Senderoff

Sampson was not the only individual who received a show-cause penalty due to violations at Indiana. Current Kent State University ("Kent State") head men's basketball coach Rob Senderoff was an assistant coach under Sampson at Indiana who also received a show-cause penalty for involvement in the recruiting violations.<sup>89</sup> The COI concluded Senderoff assisted Sampson's attempt to evade the restrictions stemming from Sampson's Oklahoma tenure.<sup>90</sup> Those restrictions

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order for his role in the scheme. *See id.* at 8. The length of Allen's show-cause order matched the longest in COI history yet he was able to secure an assistant coaching position with the Boston Celtics. *See Pickman, supra* note 83.

<sup>84</sup> Auerbach, *supra* note 4 (noting Sampson began fielding calls regarding potential employment opportunities during show-cause period).

<sup>85</sup> Duarte, *supra* note 31.

<sup>86</sup> *See id.* (noting NCAA legislation Sampson violated at Indiana was no longer in place at the time the University of Houston hired Sampson).

<sup>87</sup> *See* Joseph Duarte, *Countdown to a Contract: How Kelvin Sampson, UH Reached New Deal*, HOUSTON CHRONICLE (Apr. 4, 2019), [houstonchronicle.com/sports/texas-sports-nation/college/article/Countdown-to-a-contract-How-Kelvin-Sampson-UH-13742220.php](https://houstonchronicle.com/sports/texas-sports-nation/college/article/Countdown-to-a-contract-How-Kelvin-Sampson-UH-13742220.php) [<https://perma.cc/2LH4-JFLK>] (describing timeline of Arkansas rumors and Sampson extension).

<sup>88</sup> *Id.* (noting Sampson stated he will finish his career at Houston).

<sup>89</sup> *See* Osterman, *supra* note 66 (noting Sampson and Senderoff do not discuss their show-cause penalties).

<sup>90</sup> *See* NAT'L COLLEGIATE ATHLETIC ASS'N, *Indiana University, Bloomington Supplemental Public*

prevented Sampson from initiating calls to prospective student-athletes.<sup>91</sup> However, Senderoff assisted Sampson by making both three-way calls that would include Sampson and “handoff” calls where Senderoff would initiate the call and give the phone to Sampson so it would appear Sampson did not (technically) initiate the call.<sup>92</sup> The COI concluded Senderoff’s knowing commission of these violations constituted unethical conduct.<sup>93</sup> The COI also determined Senderoff provided false or misleading information in the NCAA investigation.<sup>94</sup> After Senderoff’s appeal, largely alleging procedural errors in the infractions process, and reconsideration by the committee, Senderoff received a 30-month show-cause order through November 24, 2011.<sup>95</sup>

Also like Sampson, Senderoff found employment despite a show-cause penalty when Kent State hired him as an assistant coach a few months after Senderoff left Indiana.<sup>96</sup> At the time Kent State hired Senderoff, it had knowledge of the allegations against him in the pending Indiana case.<sup>97</sup> Regardless, Kent State hired him and self-imposed penalties and corrective measures on Senderoff.<sup>98</sup> Kent State’s hiring of Senderoff, who had been an assistant coach at Kent State previously, while awaiting the COI’s announcement of its findings and penalties was the ultimate showing of faith.<sup>99</sup> When the COI issued its findings and penalties

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*Infractions Report on a Request for Reconsideration by Former Assistant Coach A*, 1 (Feb. 20, 2009), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102512> (resolving issue whereby the COI found Senderoff committed unethical conduct in one of its findings despite enforcement staff failing to allege it against him).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (concluding Senderoff lacked credibility).

<sup>95</sup> *Id.* at 4.

<sup>96</sup> See Osterman, *supra* note 66 (noting NCAA rules Senderoff violated at Indiana are no longer in place).

<sup>97</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N, *NCAA Division I Infractions Appeals Committee Report No. 287 – Former Indiana University, Bloomington Assistant Men’s Basketball Coach*, 4 (Dec. 21, 2009), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102538> (releasing findings via News Release).

<sup>98</sup> See *id.* A COI appeals committee rejected Senderoff’s argument on appeal that the 30-month show-cause order was excessive, concluding there was no basis for such a conclusion. See *id.* at 12.

<sup>99</sup> Auerbach, *supra* note 4 (noting athletics director at Kent State at the time was Laing Kennedy).

from the Indiana case, Kent State and its athletics director at the time, Laing Kennedy, stood by Senderoff and kept him on staff despite his show-cause order.<sup>100</sup>

Within a couple of years, Kent State elevated Senderoff to head coach.<sup>101</sup> Kennedy's successor, Joel Nielsen, did not take lightly the decision to elevate Senderoff.<sup>102</sup> Nielsen spoke with Kent State's president about Senderoff's show-cause order and performed due diligence including examining Senderoff's track record since Senderoff's tenure at Indiana.<sup>103</sup> Senderoff acknowledges he is "incredibly fortunate that Kent State gave him a second chance."<sup>104</sup>

#### 4. Todd Bozeman

In its 1997 findings regarding a case involving now-former head men's basketball coach Todd Bozeman and the University of California – Berkeley ("UCB"), the COI described the underlying violations as "limited," yet resulting in "one of the most serious cases that the Committee on Infractions has considered in recent years."<sup>105</sup> The violations centered on significant cash payments to the parents of a student-athlete, which directly conflict with the basic principles underlying college athletics, as well as basic recruiting and extra benefit rules that all who participate in college athletics understand.<sup>106</sup>

More specifically, Bozeman agreed to pay \$15,000 annually (sometimes through a friend) to the parents of the prospective student-athlete, Jelani Gardner, for each year he played at UCB.<sup>107</sup> As a result of the arrangement, Bozeman agreed to pay

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<sup>100</sup> *See id.*

<sup>101</sup> *See Osterman, supra* note 66 (stating Senderoff does not worry about how others perceive him and whether his Indiana tenure still stains his reputation).

<sup>102</sup> *See Auerbach, supra* note 4 (explaining that Nielsen elevated Senderoff after Geno Ford left for Bradley University).

<sup>103</sup> *Id.* (noting Senderoff emphasized importance of hiring of a men's basketball coach for a university).

<sup>104</sup> Osterman, *supra* note 66 (expressing Senderoff's regret for commission of violations).

<sup>105</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, *University of California, Berkeley Public Infractions Report*, 1 (July 17, 1997), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102106> (releasing findings via NCAA news release) (hereinafter "UCB Case").

<sup>106</sup> *See id.* at 3.

<sup>107</sup> *Id.* at 2–3, 8 (noting that Bozeman recruited the prospective student-athlete to replace another talented student-athlete who departed UCB early). Bozeman presented evidence that he believed the payments were advances that the student-athlete would eventually repay from his future professional compensation. *See id.* at 8. The student-athlete's parents disputed this notion. *See id.* Regardless of whether the payment was a loan or a gift, making "payments

\$15,000 annually to the parents of the student-athlete, Jelani Gardner, for each year he played at UCB.<sup>108</sup> After a disagreement arose between Bozeman and the student-athlete's parents, the student-athlete transferred to another university.<sup>109</sup> The disagreement pertained to Gardner's decreased playing time during his sophomore year and resulted in Gardner's family notifying the NCAA of the illicit payments.<sup>110</sup> During the course of the ensuing NCAA investigation, Bozeman provided false and misleading information to both university and Enforcement Staff investigators.<sup>111</sup> Bozeman resigned after UCB determined he knew or should have known of the violations.<sup>112</sup>

The COI imposed an eight-year show-cause order on Bozeman for making the payments and being untruthful about them.<sup>113</sup> The length of the penalty was unprecedented at the time.<sup>114</sup> The COI noted that if UCB still employed Bozeman at the time it released its findings, UCB would have had to show cause why it should not be subject to additional penalties if it failed to take appropriate disciplinary action against Bozeman.<sup>115</sup> Further, should Bozeman seek employment or affiliation in an athletically-related position at an NCAA member university during the eight-year show-cause period, he and the involved university must appear before the COI to consider whether there would be a limit on Bozeman's athletically-

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violated fundamental recruiting and extra benefit legislation." *Id.* Media identified the student-athlete as Jelani Gardner. Andy Katz, *Bozeman Still Confident, Happy with Second Chance*, ESPN (Nov. 9, 2006), [espn.com/mens-college-basketball/preview2006/columns/story?columnist=katz\\_andy&sid=2654318](http://espn.com/mens-college-basketball/preview2006/columns/story?columnist=katz_andy&sid=2654318) [<https://perma.cc/LE4U-N4KQ>] (describing Bozeman's state of mind early in Morgan State tenure).

<sup>108</sup> UCB Case, *supra* note 105, at 3. The COI noted that Bozeman made some of the payments around the time he took part in another case in front of the COI in 1995 that centered on recruiting violations. *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> Kevin Van Valkenburg, *Making Up for Lost Time*, THE BALTIMORE SUN (July 9, 2006), [baltimoresun.com/news/bs-xpm-2006-07-09-0607090073-story.html](http://baltimoresun.com/news/bs-xpm-2006-07-09-0607090073-story.html) [<https://perma.cc/HU4F-44KD>] (describing Bozeman's relationship with his father and its effects on his career).

<sup>111</sup> UCB case, *supra* note 105, at 3 (explaining that provision of false and misleading information made the case "even more serious").

<sup>112</sup> *Id.* at 4 (describing the resignation as one whereby UCB "obtained" Bozeman's resignation).

<sup>113</sup> *See id.* at 6-7.

<sup>114</sup> *See Katz, supra* note 107.

<sup>115</sup> *See UCB case, supra* note 105, at 12.

related duties at the new university.<sup>116</sup>

After resigning from UCB, Bozeman worked as a scout for two NBA organizations and for Pfizer as a pharmaceutical representative.<sup>117</sup> Morgan State University (“Morgan State”) hired Bozeman after Bozeman’s eight-year show-cause order expired.<sup>118</sup> Morgan State hired Bozeman despite Morgan State’s athletics director receiving calls from concerned alumni discouraging the hire.<sup>119</sup>

Bozeman has not hidden from his past.<sup>120</sup> Bozeman describes the show-cause penalty as “a humbling experience and one that only helped [him] grow as a person and as a man.”<sup>121</sup> Knowing that he sabotaged his own coaching career, Bozeman acknowledges he made a major mistake due to “temporary insanity.”<sup>122</sup>

Eight years of success at Morgan State preceded a few recent years of subpar on-court results, and Morgan State elected to not renew Bozeman’s contract when it ended on April 25, 2019.<sup>123</sup>

The above examples illustrate instances where a coach received a show-cause order yet succeeded in finding employment at another NCAA member university. According to Todd McNair, however, the show-cause order he received led to USC not renewing his contract, precluded him from securing a coaching position in the college ranks, and ended his college coaching career.<sup>124</sup> These beliefs served as the basis for his (still ongoing) lawsuit against the NCAA.

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<sup>116</sup> *Id.* at 13.

<sup>117</sup> *See* Katz, *supra* note 107.

<sup>118</sup> *See* Osterman, *supra* note 66 (noting rarity of coaches returning to sideline after a show-cause penalty).

<sup>119</sup> *See* Katz, *supra* note 107 (noting alumni characterized Bozeman as “bad news”).

<sup>120</sup> *See id.* (pointing out that while Bozeman would not go into details about the payments, he clarified that he made them through a third party).

<sup>121</sup> *Id.* (noting that Bozeman initially believed he would be able to find employment during show-cause period).

<sup>122</sup> Van Valkenberg, *supra* note 110 (describing a poem regarding the incident Bozeman wrote and read at his father’s funeral).

<sup>123</sup> *See* Edward Lee, *Morgan State Declines to Renew Basketball Coach Todd Bozeman’s Contract*, THE BALTIMORE SUN (Mar. 20, 2019), [baltimoresun.com/sports/college/basketball/bs-sp-morgan-state-bozeman-20190320-story.html](https://baltimoresun.com/sports/college/basketball/bs-sp-morgan-state-bozeman-20190320-story.html) [<https://perma.cc/XW2V-FYSL>] (describing Morgan State decision to move on from Bozeman).

<sup>124</sup> *See* Fenno, *supra* note 7 (describing McNair’s testimony).

### III. TODD MCNAIR AND HIS CASE AGAINST THE NCAA

#### A. *Underlying Violation at USC*

One of the longest investigations in NCAA history began in 2006 when the NCAA commenced scrutinizing USC's athletics department regarding allegations of NCAA rules violations.<sup>125</sup> In September 2009, the NCAA formally alleged NCAA rules violations against USC, McNair, and other individuals.<sup>126</sup> In February 2010, numerous USC officials appeared before the COI for a hearing regarding allegations that violations occurred in three sports: football, men's basketball, and women's tennis.<sup>127</sup> Among those in attendance at the hearing was then-USC running backs coach Todd McNair.<sup>128</sup> McNair and his star pupil, Heisman Trophy winner Reggie Bush, would become the faces of one of the darkest periods in USC history.<sup>129</sup>

Todd McNair played running back at Temple University before enjoying an eight-year NFL playing career with the Kansas City Chiefs and Houston Oilers.<sup>130</sup> After the conclusion of his playing career, McNair coached running backs for the Cleveland Browns before then-USC head football coach Pete Carroll hired him for the same role in 2004.<sup>131</sup>

According to the COI, McNair was soon intricately involved in "a landscape of elite college athletes and certain individuals close to them who, in the course of their

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<sup>125</sup> George Dohrmann, *An Inside Look at the NCAA's Secretive Committee on Infractions*, SPORTS ILLUSTRATED (Feb. 18, 2010), [si.com/more-sports/2010/02/18/usc-coi](http://si.com/more-sports/2010/02/18/usc-coi) [<https://perma.cc/4DPW-FQUK>] (describing COI and infractions case process).

<sup>126</sup> See NAT'L COLLEGIATE ATHLETIC ASS'N, *University of Southern California Public Infractions Report*, 65 (June 10, 2010), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102369> (detailing COI's findings and penalties) (hereinafter "USC Case"). The COI's public infractions decision does not identify involved individuals by name but numerous media outlets identified them. For example, see Thamel, *infra* note 128.

<sup>127</sup> See USC Case, *supra* note 126, at 1.

<sup>128</sup> Pete Thamel, *NCAA Ends Hearing About USC Infractions*, NEW YORK TIMES (Feb. 20, 2010), [nytimes.com/2010/02/21/sports/ncaafotball/21usc.html](http://nytimes.com/2010/02/21/sports/ncaafotball/21usc.html) (detailing immediate reactions to hearing).

<sup>129</sup> Kyle Bonagura, *What to Know About Todd McNair vs. the NCAA*, ESPN (Apr. 17, 2018), [espn.com/college-football/story/\\_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq](http://espn.com/college-football/story/_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq) [<https://perma.cc/XW4P-J732>] (detailing McNair's lawsuit against NCAA).

<sup>130</sup> *Id.*

<sup>131</sup> See *id.*

relationships, disregard NCAA rules and regulations.”<sup>132</sup> According to the COI, the actions of these individuals “struck at the heart of the NCAA’s Principle of Amateurism.”<sup>133</sup> More specifically, the COI concluded McNair knew or should have known that Reggie Bush’s involvement with agents negatively affected Bush’s amateurism status under NCAA legislation.<sup>134</sup> More specifically, McNair participated in a phone call during which an agent attempted to get McNair to convince Bush to adhere to an agency agreement or reimburse the agent for money the agent provided to Bush and his family.<sup>135</sup> Further, McNair provided false and misleading information to the NCAA’s Enforcement Staff concerning his knowledge of the illicit activity.<sup>136</sup> McNair and USC unsuccessfully argued to both the Enforcement Staff and COI “that there was no convincing proof” of his involvement in and/or knowledge of the impermissible activity.<sup>137</sup> Finding McNair “not credible,” the COI concluded that McNair violated NCAA legislation prohibiting unethical conduct, a violation the COI described as “serious.”<sup>138</sup>

Due to its findings, the COI imposed a one-year show-cause penalty on McNair that ran from June 10, 2010 through June 9, 2011.<sup>139</sup> During that one-year period, the

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<sup>132</sup> USC CASE, *supra* note 126, at 1 (describing involvement of agents, “runners,” and “handlers”).

<sup>133</sup> *Id.* (noting that NCAA principle of amateurism states that education and physical, mental, and social benefits should motivate participation in college athletics).

<sup>134</sup> *See id.* at 4.

<sup>135</sup> *See id.* at 23 (describing two minute and 23 second phone call that took place at 1:34 a.m. on January 8, 2006).

<sup>136</sup> *See id.* at 4 (noting that McNair violated NCAA legislation by signing a document certifying he had no knowledge of NCAA violations when he in fact knew of them).

<sup>137</sup> *See id.* at 23–24 (describing inconsistencies in testimony throughout investigation).

<sup>138</sup> *See id.* at 24–27. For an in-depth analysis of possible NCAA and COI missteps in the McNair investigation and COI proceedings, *see* McCann, *supra* note 5.

<sup>139</sup> *See* USC Case, *supra* note 126, at 61. The COI also required McNair to attend the 2011 NCAA Regional Rules seminar at his own expense and certify his attendance if he remained employed at USC or worked elsewhere. *See id.* at 62. NCAA Regional Rules seminars are an NCAA legislation, athletics compliance, and associated issues educational forum designed to benefit participants with different responsibilities, backgrounds, experiences, and levels of expertise. NCAA, *Regional Rules*, [ncaa.org/about/resources/events/regional-rules-seminars](https://perma.cc/DY22-A754) [https://perma.cc/DY22-A754] (last visited Dec. 5, 2019) (providing information regarding Regional Rules seminars). Attendees include athletics administrators, coaches, and other campus administrators in the areas of financial aid, registration, and admissions. *Id.* As a result of other issues in the case, the COI imposed penalties on USC including four years of probation,

COI prohibited McNair from any on- or off-campus recruiting activities (e.g., calling or evaluating prospective student-athletes) or interactions with prospective student-athletes (or their parents or legal guardians) prior to their first full-time enrollment.<sup>140</sup> This prohibition applied to McNair throughout the one-year period if he remained employed at USC or found employment at another NCAA member university.<sup>141</sup>

The COI went on to require that if a university other than USC employed McNair during the one-year show-cause period, it must submit a report to the COI within 30 days.<sup>142</sup> In its report, the employing university must show both its understanding of the penalties and acknowledge the responsibility to monitor compliance with them.<sup>143</sup> Any university other than USC who employed McNair during the one-year period could challenge the continued imposition of the penalties by appearing before the COI to show cause why there should be no additional sanctions should McNair fail to comply with the penalties.<sup>144</sup>

The COI also required USC to submit annual reports during its four years of probation in which USC documented compliance with penalties.<sup>145</sup> Further, the president of USC or any other subsequent employing university had to provide a letter to the COI at the conclusion of the show-cause period affirming that McNair complied with the penalties.<sup>146</sup> If the president was unable to confirm McNair's compliance, the president had to inform the COI.<sup>147</sup>

By the time the COI issued its report and penalties, Carroll had left USC to

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a two-year football postseason ban, a one-year men's basketball postseason ban, recruiting restrictions in men's basketball, and vacation of regular and postseason wins in football, men's basketball, and women's tennis. See NAT'L COLLEGIATE ATHLETIC ASS'N, *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee Report No. 323 University of Southern California*, 2 (May 26, 2011), [web3.ncaa.org/lstdbi/search/miCaseView/report?id=102458](http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102458). The COI also required USC to disassociate itself from Bush. See *id.* at 2. Bush also had to return his 2005 Heisman Trophy. See Weston, *supra* note 8 (describing penalties stemming from USC case).

<sup>140</sup> See USC CASE, *supra* note 126, at 61.

<sup>141</sup> See *id.*

<sup>142</sup> *Id.* at 62.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *id.* at 62–63.

<sup>146</sup> *Id.* at 62.

<sup>147</sup> *Id.*

become head coach of the NFL's Seattle Seahawks.<sup>148</sup> USC hired Lane Kiffin to replace Carroll.<sup>149</sup> It appeared for a time that McNair would remain on USC's football staff under Kiffin.<sup>150</sup> However, when McNair's contract expired 20 days after his alleged involvement in violations went public, USC did not renew McNair's contract.<sup>151</sup> McNair has not since worked in college athletics. After several years of employment in non-football related, odd jobs, McNair served as offensive line coach at Village Christian School in Sun Valley, California in 2018.<sup>152</sup> In January 2019, the Tampa Bay Buccaneers hired McNair as running backs coach.<sup>153</sup>

McNair appealed the COI's finding of violation and associated penalties, asserting that a COI appeals committee should set aside the finding of violation because it was contrary to the evidence and resulted from procedural error.<sup>154</sup> McNair also appealed the one-year show-cause penalty.<sup>155</sup> McNair's appeal rose several issues, including: (1) the COI used false statements to support its unethical conduct finding against McNair; (2) the COI's adverse credibility determinations against McNair were clearly contrary to the evidence; (3) the Enforcement Staff denied McNair fair process when it excluded USC from participation in interviews; and (4) the COI had impermissible *Ex Parte* communications with the Enforcement Staff.<sup>156</sup>

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<sup>148</sup> See Bonagura, *supra* note 129. Despite numerous violations within his program while at USC, Carroll was not subject to a show-cause order. See Kevin Trahan, *USC Wanting Pete Carroll to Return is Now an Actual Coaching Rumor*, SBNATION (Oct. 19, 2015), [sbnation.com/college-football/2015/10/19/9566989/usc-coaching-search-pete-carroll-rumor](http://sbnation.com/college-football/2015/10/19/9566989/usc-coaching-search-pete-carroll-rumor) (describing rumor that USC had interest in hiring Carroll away from his NFL position). While McNair contends he had trouble securing employment for several years due to the show-cause and relevant issues at USC, Carroll and Bush both enjoyed long, lucrative NFL careers. See Weston, *supra* note 8.

<sup>149</sup> Bonagura, *supra* note 129.

<sup>150</sup> *Id.* (noting Kiffin and McNair overlapped as assistant coaches at USC from 2004 to 2006).

<sup>151</sup> *Id.*

<sup>152</sup> See Fenno, *supra* note 7 (describing McNair's legal saga).

<sup>153</sup> See *id.*

<sup>154</sup> See NAT'L COLLEGIATE ATHLETIC ASS'N, *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee Report No. 323 Former Assistant Football Coach University of Southern California*, 4 (April 29, 2011) [hereinafter "McNair Appeal"], [web3ncaa.org/lstdbi/search/miCaseView/report?id=102509](http://web3ncaa.org/lstdbi/search/miCaseView/report?id=102509) [<https://perma.cc/GF6Z-6G4K>] (announcing decision via news release).

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 5. Similarly, USC appealed the COI's finding of unethical conduct by McNair, arguing that the finding was "contrary to the evidence, based on incompetent evidence and

The appeals committee determined that the phone call between McNair and an agent was at the center of these issues.<sup>157</sup> The appeals committee concluded that the evidence met the requisite standard and gave deference to the COI's determination regarding McNair's (lack of) credibility.<sup>158</sup> Thus, the appeals committee upheld the COI's finding of an unethical conduct violation and one-year show-cause penalty in April 2011.<sup>159</sup>

## **B. McNair's Lawsuit Against the NCAA**

### 1. Litigation of Non-Declaratory Relief Claims

Following the unsuccessful appeal to the COI appeals committee, McNair sued the NCAA in California state court for \$27 million for "ruining his career" in June 2011.<sup>160</sup> McNair alleged that he suffered damage to his reputation and career because USC did not renew his contract.<sup>161</sup> McNair's complaint alleged seven causes

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compromised by procedural error . . . ." See NAT'L COLLEGIATE ATHLETIC ASS'N, *Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee Report No. 323 University of Southern California*, 17 (May 26, 2011, 2011), [<https://perma.cc/VGM7-JLHQ>] web3.ncaa.org/lstdbi/search/miCaseView/report?id=102458. The appeals committee determined that USC lacked standing to appeal the finding regarding McNair since it pertained to McNair and not the university. See *id.* Thus, the appeals committee concluded that the issue was moot for purposes of USC's appeal and it made no determination regarding it. See *id.*

<sup>157</sup> See McNair Appeal, *supra* note 154, at 6 (noting the COI determined the agent to be "credible in his report of the call").

<sup>158</sup> See *id.* at 7–8 (cautioning that COI determinations of credibility are not insulated from review).

<sup>159</sup> See *id.* at 1, 3–4, 10.

<sup>160</sup> See Weston, *supra* note 8. An economics expert testifying on McNair's behalf opined that the show-cause penalty cost McNair approximately \$2.8 million due to USC's decision not to renew his contract and subsequent inability to secure employment in college football industry. See Alexander Nguyen, *Reggie Bush's Scandal Costs Ex-USC Coach Millions, Economist Says*, TIMES OF SAN DIEGO (May 8, 2018), [timesofsandiego.com/sports/2018/05/08/reggie-bushs-scandal-costs-ex-usc-coach-millions-economist-says/](https://timesofsandiego.com/sports/2018/05/08/reggie-bushs-scandal-costs-ex-usc-coach-millions-economist-says/) [<https://perma.cc/3LAU-A2WH>] (describing trial testimony). McNair also sought punitive damages, a request that NCAA's counsel mocked. See Nathan Fenno, *Todd McNair Attorney Asks Jury for More Than \$27 Million in Closing Arguments*, LOS ANGELES TIMES (May 11, 2018, 2:08 pm), [latimes.com/sports/usc/la-sp-mcnair-ncaa-trial-20180511-story.html](https://latimes.com/sports/usc/la-sp-mcnair-ncaa-trial-20180511-story.html) [<https://perma.cc/8PMZ-NHCT>] (summarizing trial through closing arguments).

<sup>161</sup> McNair v. Nat'l Collegiate Athletic Ass'n, No. B245475, 2015 WL 8053286, at \*6 (Ct.App.2d 2015). The NCAA felt McNair failed to secure employment because he did not submit formal job applications – not because of the show-cause penalty. See Fenno, *supra* note 7. In its appellant's brief, the NCAA points out that McNair never applied for employment at a California university

of action: (1) libel; (2) slander; (3) interference with prospective economic advantage; (4) interference with contract; (5) breach of contract; (6) negligence; and (7) declaratory relief.<sup>162</sup> More specifically, McNair contended that the Enforcement Staff's charges were erroneous, biased, and based on false accusations.<sup>163</sup> Further, he challenged the fairness of the COI's process and contended that the COI's sanctions irreparably harmed his reputation.<sup>164</sup>

The result has been a long and complicated legal saga that every law school civil procedure professor could appreciate for exam fodder: (1) the parties (and legal system) spent a lot of time and resources focused on discovery, namely confidentiality of enforcement documents;<sup>165</sup> (2) the parties also haggled over the NCAA's peremptory challenges to trial judges;<sup>166</sup> and (3) the parties quibbled over the NCAA's special motion to strike under California's anti-SLAPP statute that argued the court should strike the non-defamation causes of action because they arose from the same injury.<sup>167</sup>

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after USC did not renew his contract. *See* Brief for Appellant at 19, *McNair v. NCAA*, No. Appellant's Opening Brief in Case No. B295359 (Ct.App.2d 2015) at pg. 19 [(hereinafter "NCAA Appellant's Brief")].

<sup>162</sup> *McNair v. Superior Court*, 6 Cal.App.5th 1227, 1231 (Ct.App.2d 2016). The appellate court struck many of these claims but permitted the defamation and declaratory judgment claims to proceed. *McNair v. Nat'l Collegiate Athletic Ass'n*, 2015 WL 8053286, at \*15. McNair's attorneys dropped the negligence claim prior to trial although it may have been a better vehicle for McNair to prove liability. *See McCann*, *supra* note 5 (acknowledging the benefit of hindsight). McNair's attorneys also dropped the breach of contract claim on the eve of trial. *See Fenno*, *supra* note 160. McNair's complaint did not mention the show-cause order or the relevant California employment statute. *See NCAA Appellant's Brief*, *supra* note 161 at 20.

<sup>163</sup> *See Weston*, *supra* note 8.

<sup>164</sup> *See id.* In its appellant's brief, the NCAA points out McNair's trial testimony that, while the NCAA investigation injured his reputation, McNair did not blame the show-cause order for any remunerative or reputational harm. *See NCAA Appellant's Brief*, *supra* note 161, at 25.

<sup>165</sup> For an in-depth discussion of issues related to confidentiality of NCAA Enforcement Staff documents and ramifications from *McNair* case for NCAA Enforcement process, *see* John Carlson, *McNair v. NCAA: What it Means for the NCAA Enforcement Process and How to Fix the Problem it Creates*, 5 ARIZ. ST. SPORTS & ENT. L.J. 89 (2015); *see also* *McNair v. Nat'l Collegiate Athletic Ass'n*, 234 Cal.App.4th 25 (Ct.App.2d 2015); *see also* Katelyn Hill, 2015 & 2016: *Annual Surveys: Recent Developments in Sports Law*, 27 MARQ. SPORTS. L.R. 543, 558 (2017) (surveying court decisions in 2015 and 2016 sports-related cases).

<sup>166</sup> *McNair v. Superior Court*, 6 Cal.App.5th at 1231 (rejecting NCAA's motion for second peremptory challenge to trial judge).

<sup>167</sup> *See McNair v. Nat'l Collegiate Athletic Ass'n*, 2015 WL 8053286, at \*6. SLAPP is the acronym for

After three weeks of trial and three days of jury deliberations, a Los Angeles County Superior Court jury voted nine to three in favor of the NCAA on McNair's defamation claim, which was the sole cause of action remaining for the jury to decide.<sup>168</sup> However, the judge has since granted McNair's motion for a new trial, concluding both that the jury did not possess sufficient evidence to support its finding and that the court should have disqualified the jury foreman, an attorney whose firm performed appellate work for the NCAA earlier in the case.<sup>169</sup> The NCAA appealed the order granting the new trial.<sup>170</sup>

## 2. Litigation of Declaratory Relief Claim

The court severed McNair's action challenging the show-cause penalty.<sup>171</sup> In his original complaint, McNair sought a declaratory relief determination that the COI's show-cause order violated California's Business & Professions Code § 16600 ("§ 16600").<sup>172</sup> Section 16600 states in relevant part that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."<sup>173</sup> McNair sought determination that the show-cause order provisions in the NCAA rules, under which the COI penalized him and which were a substantial factor in McNair's suffering of continuing harm, violated § 16600 and thus were void.<sup>174</sup>

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"strategic lawsuit against public participation." *Id.* at \*1 n.1 (citing *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 57 (2002)).

<sup>168</sup> See McCann, *supra* note 5 (characterizing decision as "a high-profile legal victory" for NCAA). For an in-depth analysis of why McNair did not succeed on his defamation claim, see McCann, *supra* note 5.

<sup>169</sup> See Nathan Fenno, *Attorneys for Former USC Assistant Todd McNair Push Back Against NCAA Appeal in Lawsuit*, LOS ANGELES TIMES (Nov. 19, 2019), <https://www.latimes.com/sports/story/2019-11-19/todd-mcnair-ncaa-appeal-response> (detailing recent case proceedings). Shaller's written order granting a new trial on the defamation claim specifically noted that his ruling invalidating the show-cause penalty remained intact. See Weston, *supra* note 8 (describing McNair's litigation against NCAA as a "saga").

<sup>170</sup> Fenno, *supra* note 169 (noting that McNair's case has reached appellate level four times already).

<sup>171</sup> Staurowsky, *supra* note 28.

<sup>172</sup> McNair v. The Nat'l Collegiate Athletic Ass'n, No. BC462891, 2018 WL 6719796 at § 2 (Cal.Super. Oct. 09, 2018).

<sup>173</sup> CAL. BUS. & PROF. § 16600 (West); see also McNair v. The Nat'l. Collegiate Athletic Ass'n, 2018 WL 6719796 at § 2.

<sup>174</sup> McNair v. The Nat'l. Collegiate Athletic Ass'n, 2018 WL 6719796 at § 2.

Both parties agreed that the court would decide this remaining issue on briefs and previously submitted evidence and that there would be no hearing.<sup>175</sup> After considering the issue, Judge Frederick Shaller issued a ruling on McNair's declaratory relief cause of action via his Final Statement of Decision ("Decision").<sup>176</sup>

After he determined that McNair's claim presented a sufficiently ripe controversy, Shaller's Decision analyzes whether declaratory relief was necessary and proper.<sup>177</sup> As part of his analysis, Shaller correctly notes the importance of the matter, stating "[w]hether and to what extent, § 16600 applies to the existing NCAA member contract is important not only to McNair but also to NCAA-member schools who have had their complementary rights to pursue their competitive business interests by hiring McNair similarly restrained and to other similarly situated staff members and schools."<sup>178</sup>

Shaller's decision cites to language in the COI's show-cause order prohibiting McNair

... from engaging in any on or off-campus recruiting at USC and if any NCAA member institution other than USC sought to employ McNair, then that institution must comply with the penalty imposed and, under NCAA Bylaw 19.5.2.2-(1), such institution is required to show cause why that institution should not be penalized for not complying with the 'penalties *restricting* the athletically related duties of McNair.'<sup>179</sup>

Shaller pointed out that, as a condition of NCAA membership, universities agree to be bound by NCAA legislation regarding show-cause penalties.<sup>180</sup> Shaller

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<sup>175</sup> See Staurowsky, *supra* note 28.

<sup>176</sup> See *McNair v. The Nat'l Collegiate Athletic Ass'n*, 2018 WL 6719796 at § 1 (issuing ruling on McNair's declaratory relief cause of action). Ironically, Judge Shaller is a USC alum whom the NCAA unsuccessfully sought to disqualify. See Weston, *supra* note 8; see also NCAA Appellant's Brief, *supra* note 161. Shaller's ruling regarding McNair's declaratory judgment claim could be the most impactful outcome of McNair's lawsuit. See Cameron Miller, *Sports Law Development of the Week: NCAA Show-Cause Order Issued to Former USC Coach Todd McNair Declared Illegal by California Judge*, SLA BLOG [blog.sportslaw.org/posts/sports-law-development-of-the-week-ncaa-show-cause-order-issued-to-former-usc-coach-todd-mcnair-declared-illegal-by-california-judge/](http://blog.sportslaw.org/posts/sports-law-development-of-the-week-ncaa-show-cause-order-issued-to-former-usc-coach-todd-mcnair-declared-illegal-by-california-judge/) [<https://perma.cc/GR3K-Y9L5>] (last visited Jan. 23, 2020) (analyzing Shaller's resolution of declaratory judgment claim).

<sup>177</sup> *McNair v. The Nat'l. Collegiate Athletic Ass'n*, 2018 WL 6719796 at § 10–11. As to ripeness, Shaller concluded there was a continued and concrete dispute over whether the show-cause order illegally harmed McNair by placing a restraint on his ability to secure employment at another NCAA member university. *Id.* at § 10.

<sup>178</sup> *Id.* at § 12. This was a matter of first impression. See Staurowsky, *supra* note 28.

<sup>179</sup> *McNair v. The Nat'l Collegiate Athletic Ass'n*, 2018 WL 6719796 at § 3 (emphasis added).

<sup>180</sup> *Id.*

cited McNair’s trial testimony in support of the conclusion that NCAA legislation “not only restricted, but was intended to restrict, McNair from securing unrestricted employment at any NCAA school during the original one year of the penalty.”<sup>181</sup> Shaller’s decision concluded that trial evidence proved that the penalty restricted McNair’s ability to secure employment at an NCAA member university during the one-year show-cause period and was a substantial factor in McNair’s continuing unemployment after the conclusion of the one-year period.<sup>182</sup> Thus, Shaller characterized McNair’s show-cause order as:

...in essence equivalent to a college coaching career-terminating sanction since no NCAA member school, including USC, would likely risk the exposure to sanctions that would impact their athletic programs and lucrative media-related and athletic program income or status by even considering hiring or retaining McNair at any later date after sanctions expired because his reputation was tainted by the penalty.<sup>183</sup>

Shaller’s decision addressed the NCAA’s argument that § 16600 is inapplicable to McNair.<sup>184</sup> First, the NCAA argued that the court should interpret the statute such that it related only to parties to a contract containing a restrictive employment provision.<sup>185</sup> Judge Shaller disagreed, concluding that the appropriate, broad interpretation of the statute rendered it applicable to “anyone” who is restrained by the contract.<sup>186</sup> In this case, the “contract” to which Shaller applied § 16600 is the relevant NCAA show-cause legislation that all NCAA member universities agreed to enforce as a condition of membership.<sup>187</sup> Shaller not only felt that the language of § 16600 was clear that the scope of the statute includes “anyone,” but he also cited the public policy and “obvious intent” behind the statute for reaching his conclusion.<sup>188</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at § 6.

<sup>184</sup> *See id.* at § 15.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* Shaller embraced “an expansive reading of § 16600 to apply its protections to McNair.” *See Miller, supra* note 176.

<sup>187</sup> *See Weston, supra* note 8 (noting that NCAA member universities agree to abide by NCAA bylaws and permit the NCAA to serve as sanctioning authority). For analysis of previous cases where plaintiffs unsuccessfully challenged the NCAA’s enforcement authority, *see Weston, supra* note 8 (referencing cases such as former University of Nevada-Las Vegas head men’s basketball coach Jerry Tarkanian’s unsuccessful challenge of a show-cause order on Constitutional Due Process grounds and cases where plaintiffs challenged show-cause orders on Constitutional, contract, or tortious interference claims).

<sup>188</sup> *McNair v. The Nat’l Collegiate Athletic Ass’n*, 2018 WL 6719796 at § 15 (describing public policy

In support, Shaller cited cases that construed the statute's term "restrain" broadly.<sup>189</sup>

Show-cause orders differ from non-compete agreements in that relevant NCAA legislation requires the imposition of show-cause orders on universities that hire individuals subject to show-cause orders.<sup>190</sup> Thus, McNair's show-cause penalty was not a non-compete agreement between McNair and USC or the NCAA.<sup>191</sup> Therefore, the NCAA also argued that: (1) every prior case interpreting application of § 16600 involved a contract between two parties and that an application of § 16600 outside "the context of contractual restraints" is unwarranted and (2) every prior case in which a court used § 16600 to invalidate a contractual provision involved a contract between an employer and former employer or business associate.<sup>192</sup> Shaller responded in his Decision that the absence of any authority did not preclude him from providing § 16600 "effect according to its clear wording and legislative purpose."<sup>193</sup>

The NCAA pointed out that no court had used § 16600 to void collective bargaining agreements or a restrictive regulation prohibiting the unlicensed practice of medicine, law, or accounting.<sup>194</sup> Thus, by analogy, the NCAA argued § 16600 should not apply to NCAA legislation or McNair's show-cause penalty.<sup>195</sup> In his Decision, Shaller agreed with McNair that arguments regarding regulation of unlicensed practice of medicine and collective bargaining agreements are totally inapposite to the application of § 16600; however, federal or state legislation, not private contract, authorize restrictions on practicing law, medicine, and accounting as well as collective bargaining agreements.<sup>196</sup> Thus, § 16600 is inapplicable to the

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of § 16600 as protecting "the important legal right of persons to engage in businesses and occupations of their choosing").

<sup>189</sup> *Id.* (stating that a broad interpretation of the term "restrain" is consistent with legislative intent disfavoring employment restrictions).

<sup>190</sup> *See* Weston, *supra* note 8 (anticipating that difference between non-compete agreements and show-cause orders may limit Shaller's Decision).

<sup>191</sup> *See id.* (noting that show-cause orders do not necessarily constitute a restraint on competition or on a direct employer-employee relationship).

<sup>192</sup> McNair v. The Nat'l Collegiate Athletic Ass'n, 2018 WL 6719796 at § 16.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (citing example of federal NLRA authorizing collective bargaining agreements that preempt state law interfering with federally legislated rights).

regulation of unlicensed practice of medicine, for example.<sup>197</sup>

Shaller doubled down on his reliance on broad statutory interpretation and legislative intent, stating, “[s]ince the express terms of § 16600 void ‘every’ ‘contract’ involving ‘anyone’ that ‘restrains’ a person from engaging in a lawful profession trade, or business, a logical and common sense construction that gives effect to every word of the statute leads to the conclusion that § 16600 applied to McNair and the restrictions imposed by the contract between NCAA and member schools.”<sup>198</sup> Concluding that § 16600 applies to the contractual restrictions imposed on institutional staff members of NCAA member institutions, Shaller found “even more” reason to void NCAA legislation regarding show-cause orders: NCAA member universities “are pervasive and therefore the restrictive covenants provide a much greater restriction than a single non-compete agreement between employee and employer or business partners.”<sup>199</sup>

Shaller concluded his Decision by declaring void the relevant NCAA legislation regarding show-cause orders in California due to their “unlawful restraint on engaging in a lawful profession pursuant to § 16600.”<sup>200</sup> In so ruling, Shaller concluded that NCAA legislation regarding show-cause orders violated fundamental contract law principles.<sup>201</sup> Thus, Shaller’s ruling places McNair’s show-cause order on equal footing with other non-compete agreements that states regulate by various means.<sup>202</sup>

The NCAA appealed Shaller’s judgment, and the case is pending before the California Court of Appeal, Second Appellate District (“Second District”).<sup>203</sup> The NCAA’s appeal characterizes Shaller’s decision as error in both form and substance: “Even without a live controversy for the court to adjudicate, it granted McNair relief of unprecedented scope for an unsubstantiated harm, based on faulty

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at § 18 (describing legislative intent as “promoting open competition and employee mobility”).

<sup>199</sup> *Id.* (opining that “McNair’s ability to practice his profession as a college football coach has been restricted, if not preempted, not only in Los Angeles and California, but in every state in the country”).

<sup>200</sup> *Id.* at § 19.

<sup>201</sup> *See* Harrington, *supra* note 5 (citing Shaller’s language describing the penalty as undue burden on a citizen’s right to pursue employment).

<sup>202</sup> Seth Myers, *An Intentional Foul: Corruption in NCAA Basketball & the Aftermath of the 2017 Scandal*, 15 DePaul J. Sports L. 65, 78 (2019) (describing recent corrupt incidents in college athletics).

<sup>203</sup> Giller, *supra* note 9.

interpretations of California law and in conflict with settled Commerce Clause jurisprudence.”<sup>204</sup> Thus, the NCAA requests that the Second District vacate Shaller’s decision for numerous reasons.<sup>205</sup>

First, the NCAA’s appeal argues that McNair’s request for declaratory relief is moot because McNair lacked any relationship with the NCAA for seven years and he testified he has no intention to return to college football.<sup>206</sup> Regardless, if McNair wished to pursue a position in college athletics, the show-cause penalty did not preclude him from doing so and, in any event, expired years ago.<sup>207</sup> Thus, there is no “actual controversy” between the parties and McNair lacks standing to pursue declaratory relief.<sup>208</sup> In response, McNair argues that he “continues to suffer from the stigmatizing effect of the NCAA’s show-cause penalty” and thus his action for declaratory relief is not moot, but rather justiciable.<sup>209</sup> McNair testified that the stigma of the show-cause penalty prevented him from securing employment with professional and college football teams including the Arizona Cardinals, Western Kentucky University, and Temple University (McNair’s alma mater).<sup>210</sup> According to McNair, because he continues to suffer from the stigma, a stigma which precludes him from securing college coaching employment, declaratory relief is not only proper, but the only effective remedy that can remove the stigma the NCAA inflicted on him.<sup>211</sup>

The NCAA also contends that Shaller abused his discretion by issuing a broad,

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<sup>204</sup> NCAA Appellant’s Brief, *supra* note 161, at 66.

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 41, 45.

<sup>207</sup> *See id.* at 41.

<sup>208</sup> *See id.* at 41–45.

<sup>209</sup> Brief for Respondent at 52, *McNair v. Nat’l Collegiate Athletic Ass’n*, No. B295359 (Ct.App.2d 2015) [hereinafter “McNair’s Respondent’s Brief”]. McNair goes on to argue that, even if the court determines his declaratory judgment claim is moot, a public interest exception applies since the effects of the show-cause penalty extend to numerous other coaches. *See id.* at 59.

<sup>210</sup> *Id.* at 53 (pointing out that other USC coaches who did not receive show-cause orders were able to secure employment with professional and college teams including the New York Jets, University of Alabama, and Temple University). However, note the growing number of coaches that universities and professional teams willing to hire a coach who is or was subject to a show-cause order discussed *infra* pages 8–16.

<sup>211</sup> *See id.* at 54–56. The NCAA notes that declaratory relief cannot credibly “rehabilitate” McNair’s reputation as long as the NCAA’s findings remain published in the COI’s written decision. *See* NCAA Appellant’s Brief, *supra* note 161, at 50.

sweeping declaration that the NCAA lacked authority to discipline coaches at California universities when McNair's request for relief was much more limited.<sup>212</sup> Along these lines, the NCAA's appeal also argues that decades of precedent have affirmed the NCAA's ability to enforce its regulations.<sup>213</sup> Further, trouncing on this NCAA obligation and upholding the trial court's application of § 16600 could result in sweeping invalidation of every professional regulation, including those of medical boards and state bars.<sup>214</sup> In response, McNair agrees that private associations may regulate their members; however, the NCAA goes "too far by positing that it may impose that sanction that was intended to forever deprive McNair the opportunity to coach . . . and intended to destroy McNair's career."<sup>215</sup> Additionally, McNair argues that the NCAA is uniquely distinguishable from other professional organizations and thus § 16600 invalidates NCAA regulations while not invalidating the other associations' regulations.<sup>216</sup> McNair contends that the "laws of the land" permit organizations like the state bar or medical board to regulate their professions; however, these laws do not extend to NCAA regulations, and thus the NCAA violated California's prohibition on the restraint of trade when it attempted to regulate McNair.<sup>217</sup>

In its appeal, the NCAA also argues that the Commerce Clause precludes application of § 16600 in the same way other courts used Commerce Clause jurisprudence to invalidate other state laws requiring the NCAA to execute additional procedures before penalizing member universities and employees.<sup>218</sup>

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<sup>212</sup> See NCAA Appellant's Brief, *supra* note 161, at 49.

<sup>213</sup> See *id.* at 11–12 (citing *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984)).

<sup>214</sup> See *id.* at 12 (describing risk of interfering with these organizations' ability to self-regulate as "untenable").

<sup>215</sup> McNair Respondent's Brief, *supra* note 209, at 62–63 (arguing that private associations may not regulate its members with impunity).

<sup>216</sup> *Id.* at 65; see also Giller, *supra* note 9.

<sup>217</sup> See McNair Respondent's Brief, *supra* note 209, at 65; see also Fenno, *supra* note 169 (indicating McNair's attorneys "dismissed" the NCAA's argument to the contrary).

<sup>218</sup> See NCAA Appellant's Brief, *supra* note 161, at 12 (citing *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993)). The NCAA used the Dormant Commerce Clause, which prohibits state laws that unduly burden interstate commerce, to successfully challenge a Nevada statute requiring the NCAA to provide additional due process protections to universities, coaches, and student-athletes following the Supreme Court's decision involving Tarkanian. See Weston, *supra* note 8 (describing as "notable" that NCAA did not cite the Dormant Commerce Clause at the trial court level). The NCAA may challenge recent California legislation permitting

McNair responds that the NCAA failed to raise its Commerce Clause argument at trial and thus may not do so on appeal.<sup>219</sup> Alternatively, McNair contends that the NCAA's reliance on the Commerce Clause goes too far as it would result in the inapplicability of § 16600 to any national associations stretching beyond California's borders.<sup>220</sup>

Finally, McNair and his attorneys argue that the appellate court lacks jurisdiction to review Shaller's decision.<sup>221</sup> McNair argues that the NCAA's appeal fails to undermine either of the trial court's independent bases for granting a new trial.<sup>222</sup> Thus, the appellate court should affirm the trial court's order granting a new trial.<sup>223</sup> Because that affirmance means that the trial court's judgment remains vacated, the appellate court "lacks jurisdiction to review the trial court's separate and non-appealable declaratory relief ruling."<sup>224</sup>

#### **IV. SHALLER'S DECISION: ANALYSIS, PREDICTIONS, AND RAMIFICATIONS IF COURTS CONTINUE TO UPHOLD IT**

##### ***A. Other Considerations for the NCAA's Appeal of Shaller's Decision***

Historically, the NCAA has enjoyed success when defending legal challenges to its Enforcement process.<sup>225</sup> However, Shaller did not defer to the NCAA, let alone

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student-athletes to accept compensation off their name, image, and likeness discussed *supra* page 3 under the Commerce Clause. See Michael McCann, *Does the NCAA's Threat to California Schools' Championship Access Hold Up?*, SPORTS ILLUSTRATED (June 25, 2019), [si.com/college/2019/06/25/ncaa-california-championships-fair-pay-play-law](https://si.com/college/2019/06/25/ncaa-california-championships-fair-pay-play-law) [<https://perma.cc/H4JL-N3B3>] (analyzing viability of NCAA president Mark Emmert's threat to ban California universities from participation in NCAA championship).

<sup>219</sup> McNair Respondent's Brief, *supra* note 209, at 65; Giller, *supra* note 9. The NCAA contends it properly preserved its Commerce Clause arguments. NCAA Appellant's Brief, *supra* note 161, at 63–64.

<sup>220</sup> McNair's Respondent's Brief, *supra* note 209, at 65–66.

<sup>221</sup> *Id.* at 12.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See Weston, *supra* note 8 (describing prior cases where NCAA successfully defended legal challenges to Enforcement authority and process); see also Harrington, *supra* note 5 (analyzing cases where NCAA successfully defended itself against legal challenges to enforcement prerogatives). The NCAA's track record of success has deterred most litigation, and because the NCAA abides by its own bylaws, courts have considered its adjudication lawful. Harrington, *supra*

acknowledge its role in protecting college athletics.<sup>226</sup> Further, the Second District Court of Appeal has taken a skeptical view of NCAA positions in previous years.<sup>227</sup> In fact, University of Notre Dame athletics director Jack Swarbrick mocked Shaller's ruling as "a quintessential California decision."<sup>228</sup>

While the NCAA faces an uphill battle appealing Shaller's decision, it has several sound arguments for overturning it. Note the issue of whether the NCAA may further its Dormant Commerce Clause argument on appeal is crucial, as at least one legal scholar believes it may be the NCAA's strongest ground for challenging Shaller's decision.<sup>229</sup> This is in large part due to the uniqueness of § 16600, which is notably favorable to individuals and may not apply neatly to any agreements between the NCAA and its member universities.<sup>230</sup>

More practically, one wonders if the continued employment and successes of coaches like Pearl and Senderoff, discussed beginning on pages eight and twelve, respectively, increase the likelihood of the Second District overturning Shaller's decision. As the NCAA points out in its appeal, the show-cause penalty "did not bar McNair from continuing to coach at USC or any other NCAA member institution."<sup>231</sup> However, Shaller concluded that McNair's show-cause penalty "had the effect of restricting McNair's ability to become employed at another NCAA member university during the one-year penalty period and was a substantial factor in

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note 5 (noting that "confluence of contract law, constitutional law, administrative law, and public policy imperatives have made the NCAA an elusive target for plaintiffs").

<sup>226</sup> See Harrington, *supra* note 5. Note, however, that Shaller's Decision will receive "scrutiny" and some commentators believe a court will eventually overturn Shaller's Decision. See *id.* (querying whether Decision will withstand scrutiny from other courts); see also Travis Knobbe, Maggie Yarnell, and Tony Siracusa, *Can a CA Court Stop the NCAA?*, LAST WORD ON COLLEGE FOOTBALL (Oct. 15, 2018), lastwordoncollegefootball.com/2018/10/15/can-a-ca-court-stop-the-ncaa/[https://perma.cc/TF4Q-PY4U] (predicting that a court will overturn Shaller's Decision, as it failed to account for the complex relationships that exist between NCAA, conferences, and member universities).

<sup>227</sup> Nathan Fenno, *NCAA to Appeal Decision Granting Former USC Assistant Todd McNair New Trial in Defamation Lawsuit*, LOS ANGELES TIMES (Jan. 30, 2019), <https://www.latimes.com/sports/sportsnow/la-sp-ncaa-todd-mcnair-appeal-20190130-story.html> (describing status of case and incidents where Second District Court of Appeal has ruled against NCAA previously).

<sup>228</sup> Harrington, *supra* note 5 (citing California's recent enactment of its own net neutrality law).

<sup>229</sup> Weston, *supra* note 8 (analyzing NCAA's prior success in use of Dormant Commerce Clause in lawsuits).

<sup>230</sup> See *id.* (describing application of § 16600 to relationship between NCAA and member universities as "unusual").

<sup>231</sup> NCAA Appellant's Brief, *supra* note 161, at 19.

McNair's continuing employment at an NCAA member school after the end of the one-year show-cause penalty up until the time of trial."<sup>232</sup> Shaller went on to decide that the COI's show-cause penalty against McNair was:

...in essence equivalent to a college coaching career-terminating sanction since no NCAA member school, including USC, would likely risk the exposure to sanctions that would impact their athletic programs and lucrative media-related and athletic program income or status by even considering hiring or retaining McNair at any later date after sanctions expired because his reputation was tainted by the penalty.<sup>233</sup>

However, coaches Pearl and Senderoff both received longer show-cause penalties yet serve as examples of individuals subject to show-cause orders who secured college athletics employment.<sup>234</sup> Recall that Auburn hired Pearl as its head coach while he was subject to a three-year show-cause order, much longer than McNair's one-year show-cause order that he claims precluded him from employment in college football.<sup>235</sup> Clearly, Auburn was willing to take the "risks" (e.g., exposure to sanctions) associated with hiring a coach subject to a show-cause penalty that Shaller concluded universities would not tolerate with respect to McNair.

For those who may contend that a university may be more likely to take on the risks of hiring an individual subject to a show-cause order for a head coach position (as opposed to an assistant coach position), recall Kent State's decision to hire Senderoff. Kent State hired Senderoff during the course of an NCAA investigation into his involvement with violations at Indiana University.<sup>236</sup> After the COI penalized Senderoff with a 30-month show-cause order, Kent State retained him as an assistant coach and eventually elevated him to serve as its head coach.<sup>237</sup> Given these (and other) examples, it is difficult to see how Shaller can conclude that McNair's show-cause order ended his ability to secure a college coaching position.<sup>238</sup>

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<sup>232</sup> Decision, *supra* note 176, at § 3.

<sup>233</sup> *Id.* at § 6.

<sup>234</sup> The one-year show-cause for McNair was "one of the lightest possible sanctions a coach could receive." See NCAA Appellant's Brief, *supra* note 161, at 19.

<sup>235</sup> For in-depth discussion of Pearl and Auburn, see page 8.

<sup>236</sup> For in-depth discussion of Senderoff and Kent State, see page 12.

<sup>237</sup> See Osterman, *supra* note 66.

<sup>238</sup> It appears as though another university is willing to stand by its head men's basketball coach despite the COI penalizing him with a show-cause order. In November 2019, the NCAA released information pertaining to recruiting violations that occurred at Seton Hall University. The case centered on the then-Seton Hall associate head men's basketball coach's impermissible tampering with a student-athlete while the student-athlete attended another university. See

Rather, it appears as though show-cause penalties are one of many factors universities must (and do) consider when making coach personnel decisions.<sup>239</sup>

Further, Bozeman received an eight-year show-cause penalty for violations occurring while Bozeman worked at a California university.<sup>240</sup> Thus, § 16600, the California employment statute Shaller used to invalidate McNair's show-cause penalty, was applicable at the time of Bozeman's violations and accompanying show-cause order, and when Morgan State hired Bozeman.<sup>241</sup> At the time of Bozeman's show-cause order, it was the lengthiest show-cause penalty in history.<sup>242</sup> However, it did not end his college coaching career. Thus, it is difficult to see how Shaller concluded that the show-cause order was intended to preclude, has precluded, and will preclude McNair from securing employment with NCAA member universities.<sup>243</sup>

In its appeal of Shaller's decision, the NCAA may also consider pointing out a subtle yet important change in the language the COI uses when administering

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NAT'L COLLEGIATE ATHLETIC ASS'N, *Seton Hall University Negotiated Resolution*, 1–2 (Nov. 15, 2019), [web3.ncaa.org/lstdbi/search/miCaseView/report?id=102803](http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102803) (providing outcome of case involving impermissible recruiting by Seton Hall University) (hereinafter "Seton Hall Case"). While not named by the NCAA, media identified current St. Peter's University head men's basketball coach Shaheen Holloway as the individual who committed the violations while employed at Seton Hall. See Associated Press, *St. Peter's Basketball Coach Holloway Suspended 4 Games*, WASHINGTON TIMES (Nov. 7, 2019), [washingtontimes.com/news/2019/nov/7/st-peters-basketball-coach-holloway-suspended-4-ga/](http://washingtontimes.com/news/2019/nov/7/st-peters-basketball-coach-holloway-suspended-4-ga/) (describing circumstances surrounding Holloway's suspension). As part of his case with the NCAA, Holloway received a 20-month show-cause order. See Seton Hall Case, *supra* note 238, at 8. Following the release of information pertaining to the NCAA's case and Holloway's show-cause order, St. Peter's released a statement stating that it and Holloway are committed to a culture of integrity and rules compliance and championing Holloway's collaboration and cooperation with the NCAA. See Jerry Carino, *Saint Peter's Basketball Coach Shaheen Holloway Suspended*, Asbury Park Press (Nov. 7, 2019), [app.com/story/sports/college/2019/11/07/shaheen-holloway-saint-peters/2516052001/](http://app.com/story/sports/college/2019/11/07/shaheen-holloway-saint-peters/2516052001/) [<https://perma.cc/MR2K-EA32>] (describing Holloway suspension). Thus, it appears as though St. Peter's will stand by Holloway despite the show-cause penalty.

<sup>239</sup> See Infante, *supra* note 34 (describing a university's decision whether to retain an individual subject to a show-cause as up to the university as opposed to COI and describing subtle yet important change in language COI has used when imposing show-cause penalties).

<sup>240</sup> See UCB case, *supra* note 105, at 7.

<sup>241</sup> See CA Bus & Prof § 16600, *supra* note 173; see also NCAA Appellant's Brief, *supra* note 161, at 53 (stating that § 16600 has been in effect since the 1800s).

<sup>242</sup> See Katz, *supra* note 107.

<sup>243</sup> See McNair's Respondent's Brief, *supra* note 209, at pg. 56, 62–63.

show-cause penalties. In the past, show-cause orders contained a requirement of a COI hearing where a university hiring or retaining the punished individual must attempt to satisfy the COI.<sup>244</sup> Consider the 2004 academic fraud case involving the University of Georgia and its men's basketball program.<sup>245</sup> The COI's written decision included the following language:

The former assistant men's basketball coach will be informed in writing by the NCAA that, due to his involvement in certain violations of NCAA legislation found in this case, if he seeks employment or affiliation in an athletically related position at an NCAA member institution during a seven-year period (April 17, 2004 to April 16, 2011), he and the involved institution shall be requested to appear before the Committee on Infractions to consider whether the member institution should be subject to the show-cause procedures of Bylaw 19.5.2.2-(I), which could limit the his (sic) athletically related duties at the new institution for a designated period.<sup>246</sup>

Under that language and operable legislation at the time, a university lacked guidance as to process or possible penalties when employing or retaining an individual subject to a show-cause order.<sup>247</sup> A university knew: (1) the procedure burdened it with showing cause why the COI should not punish the university and (2) permitted the COI to recommend termination or suspension of the university's NCAA membership.<sup>248</sup>

In contrast, consider the COI's language regarding McNair's show-cause order:

Should an institution other than USC employ the assistant football coach while these penalties are in effect, it shall submit a report to the Director – Committees on Infractions no later than 30 days after its first employment of him. The report shall set forth the employing institution's understanding of the above-listed penalties that are in effect at the time of employment and its responsibilities to monitor compliance. Pursuant to NCAA Bylaw 19.5.2.2-(1) it may challenge the continued imposition of the above-listed penalties restricting the athletically related duties of the assistant football coach by scheduling an appearance before the Committee on Infractions to show cause why it should not be penalized for failure to comply with the penalties.<sup>249</sup>

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<sup>244</sup> See Infante, *supra* note 34 (citing University of Georgia case as example).

<sup>245</sup> See *id.*

<sup>246</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, *University of Georgia, Public Infractions Report*, 29 (Aug. 5, 2004), [web3.ncaa.org/lstdbi/search/miCaseView/report?id=102223](http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102223) (disseminating results of University of Georgia academic fraud case) (hereinafter "Georgia Case").

<sup>247</sup> See Infante, *supra* note 34.

<sup>248</sup> *Id.*

<sup>249</sup> See McNair Appeal, *supra* note 154, at 3–4.

The Georgia (2004) and USC (2011) cases occurred seven years apart. When comparing COI language regarding imposition of the show-cause orders in the two cases, the COI removed a substantial burden on a university hiring or retaining an individual subject to a show-cause order.<sup>250</sup> The hiring or retaining university no longer must attend a hearing, there is no presumption of penalties for the university, and the university does not have to hope that it can demonstrate to the COI's satisfaction that the COI should not administer additional punishments on the university.<sup>251</sup> In doing so, the COI made it both more practical and palatable for universities to hire or retain individuals subject to show-cause orders. This change serves as another factor shedding doubt on Shaller's conclusions that: (1) McNair's show-cause was "a college coaching career-terminating sanction" and (2) show-cause orders are an unlawful restraint on engaging in a lawful profession under California law.<sup>252</sup>

Thus, while the NCAA should not have high hopes that a court will reverse Shaller's decision, it possesses many viable legal and practical arguments in attempting to persuade a court to do so.

### **B. Ramifications Should Shaller's Decision Stand**

In closing arguments at the trial on McNair's defamation claim, McNair's attorney told the jury, "[t]here's one thing I want you to remember. What you do in this case will have consequences for Todd McNair and consequences far beyond."<sup>253</sup> While the jury found in the NCAA's favor on the defamation claim, McNair's attorney's statement holds true for Shaller's decision voiding McNair's show-cause order. At the time of his ruling, Shaller was one of 489 Superior Court judges in Los Angeles County.<sup>254</sup> For a trial court judge with a relatively small domain, Shaller's decision created a nationwide controversy thrusting into national conversation the California lower court versus the NCAA's authority.<sup>255</sup> If the appellate court upholds Shaller's decision, the impacts would be immense. Further, the voiding of show-cause orders in other California jurisdictions, and possibly the entire state (if the case reaches California's Supreme Court), could encourage similar challenges to

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<sup>250</sup> See Georgia Case, *supra* note 246; see also McNair Appeal, *supra* note 154.

<sup>251</sup> See McNair Appeal, *supra* note 154 (citing COI language regarding Pearl's show-cause order).

<sup>252</sup> See Decision, *supra* note 176, at § 6, 19.

<sup>253</sup> Fenno, *supra* note 160.

<sup>254</sup> Knobbe, *supra* note 226 (analyzing Shaller's Decision).

<sup>255</sup> *Id.* (querying whether a lower-level state court judge can really interfere with complex relationship between NCAA, its conferences, and member universities).

show-cause orders in other states and create significant downstream effects.<sup>256</sup>

From a big picture perspective, Shaller's decision presents a danger to the NCAA in that it could lose a critical tool in its efforts to deter coaches and other staff members from breaking NCAA rules.<sup>257</sup> This would chip away at the NCAA's Enforcement power.<sup>258</sup> Prior to Shaller's decision, Big West Conference Commissioner Dennis Farrell expressed concern in an NCAA legal filing noting that Big West member universities could no longer rely on the NCAA's disciplinary mechanisms if Shaller voided show-cause orders in California.<sup>259</sup>

Shaller's decision could impact conference and NCAA composition. Before Shaller issued his ruling, Pacific Coast Conference ("Pac-12") Commissioner Larry Scott described this concern in an NCAA legal filing, stating that California universities, which make up one-third of the conference's membership, may be ousted from the NCAA as a result of Shaller's decision.<sup>260</sup> Scott opined:

[i]f California law prevents institutions in that state from honoring such commitments, it is hard to see how the Pac-12's Member Universities in California would continue to meet the requirements of NCAA membership. Thus, the Court's tentative ruling would place at risk the competitive and scholarship opportunities that flow from NCAA

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<sup>256</sup> Miller, *supra* note 176. While California law does not govern other states, a successful challenge to show-cause orders under California pro-employment laws could lead to similar challenges in other states. See Weston, *supra* note 8 (noting United States Supreme Court emphasized NCAA's status as a national entity as a critical fact in the case involving now-former University of Nevada-Las Vegas head men's basketball coach Jerry Tarkanian).

<sup>257</sup> See Myers, *supra* note 202 (describing effects of Shaller's decision as "far-reaching"); see also Harrington, *supra* note 5 characterizing show-cause penalty as "devastating"). Because the case involves one of the NCAA's "go-to punishments," the issue is "sensitive." Fenno, *supra* note 227 (citing Pac-12 Commissioner Scott's warning).

<sup>258</sup> Weston, *supra* note 8 (noting possibility of additional challenges to NCAA enforcement authority in other states if California courts uphold voicing of show-cause orders).

<sup>259</sup> Nathan Fenno, *Judge's Final Decision Confirms that NCAA Penalty Against Todd McNair Violated California Law*, LOS ANGELES TIMES (Oct. 9, 2018), [latimes.com/sports/sportsnow/la-sp-todd-mcnair-show-cause-20181009-story.html](https://www.latimes.com/sports/sportsnow/la-sp-todd-mcnair-show-cause-20181009-story.html) (describing Shaller Decision). A "potential area of vulnerability in [Shaller's Decision] may be its perceived failure to consider the impact it may have on the NCAA and its member universities to fulfill the enforcement function without coach discipline being left up to the state courts." Staurowsky, *supra* note 28. By voiding show-cause orders in California, Shaller's Decision results in an "imbalance" that would "erode NCAA enforcement capabilities . . ." Harrington, *supra* note 5 (predicting that NCAA's 50-state status may serve as basis to overturning Shaller's Decision).

<sup>260</sup> See Kyle Bonagura, *Judge Rules NCAA's Show-Cause Penalty Violates California Law*, ABC NEWS (Oct. 9, 2018), [abcnews.go.com/Sports/judge-rules-ncaas-show-penalty-violates-california-law/story?id=58397178](https://abcnews.go.com/Sports/judge-rules-ncaas-show-penalty-violates-california-law/story?id=58397178) (analyzing Shaller's Decision).

participation for the Pac-12's California Member Universities.<sup>261</sup>

In a statement released after Shaller's decision, the NCAA assured that it would explore all avenues to ensure that California universities could continue to abide by the same rules as other NCAA member universities.<sup>262</sup> However, it is not a stretch to imagine universities who belong to conferences that include a California university considering joining a different conference if coaches at California universities are immune from show-cause penalties.

Shaller's decision voiding McNair's show-cause order could affect how both coaches and athletics departments handle certain personnel matters. Universities increasingly spend an exorbitant amount of money on head coach salaries.<sup>263</sup> For example, in 2019, Clemson University head football coach Dabo Swinney's total pay amounted to \$9,315,600; the University of Alabama paid head football coach Nick Saban \$8,707,000; and the University of Michigan paid head football coach Jim Harbaugh \$7,504,000.<sup>264</sup> It is natural that universities seek to protect themselves against having to continue to pay coaches who run afoul of NCAA rules and bring negative publicity and sanctions on the universities.

Thus, universities, especially located in California, may seek to include or alter language in contracts with coaches that clarifies whether and how receipt of a show-cause penalty permits the university to fire the coach "for cause" and thus mitigates the financial responsibility the university owes the coach. For example, consider an employment contract between the University of Michigan ("Michigan") and head football coach Jim Harbaugh. Under the contract, if the NCAA concludes Harbaugh violated an NCAA rule, he "may be subject to disciplinary or corrective action as set forth in the applicable provisions of the Governing Rules (e.g., Article 19) of the NCAA Constitution, Operating Bylaws, and Administrative Bylaws, as amended" and/or the employment agreement, including termination.<sup>265</sup> If the COI ever

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<sup>261</sup> *Id.* (referencing Shaller's "tentative" ruling, that later became final via his Decision, invalidating show-cause orders). Shaller characterized Scott and Farrell's testimony as "completely speculative and irrelevant to the issue" and deemed it inadmissible. *See Fenno, supra* note 160.

<sup>262</sup> Bonagura, *supra* note 260.

<sup>263</sup> 2019 NCAA Coaches Salaries, [sports.usatoday.com/ncaa/salaries/](https://sports.usatoday.com/ncaa/salaries/), located at <https://perma.cc/2B89-G5QH> (providing 2019 salary information for college football coaches) (last visited Jan. 23, 2020).

<sup>264</sup> *See id.*

<sup>265</sup> Employment Agreement Between the University of Michigan and James J. Harbaugh, located at [media.mlive.com/wolverines\\_impact/other/Harbaugh%20employment%20agrmt.pdf](https://media.mlive.com/wolverines_impact/other/Harbaugh%20employment%20agrmt.pdf) (hereinafter "Harbaugh Contract") (last visited Jan. 23, 2020).

imposed a show-cause order on Harbaugh, he may seek to challenge it using similar arguments to McNair.<sup>266</sup> If a Michigan court applied Shaller's reasoning and/or accepted another argument and concluded that show-cause orders are void in Michigan, Harbaugh may have a valid argument that he is not "subject to disciplinary or corrective action as set forth in" Article 19, which includes the NCAA bylaw describing show-cause orders (Bylaw 19.02.3).<sup>267</sup> Thus, Michigan may not have as strong of a case for firing Harbaugh "for cause" under the relevant provisions of his employment agreement.<sup>268</sup> In that case, Michigan may have to resort to a termination without cause, which, under the terms of the employment agreement, would result in Michigan owing Harbaugh substantially more money.<sup>269</sup> Michigan, and universities with similar language in contracts with head coaches, may consider updating contractual language to specify that the COI's imposition of a show-cause penalty (as opposed to being "subject to" a show-cause), regardless of validity in the court system, constitutes "cause" in the event of termination.

Universities may seek to further protect themselves in sections of contracts with coaches that pertain to coaches' duties. Universities often list coaches' duties in their employment contracts with coaches.<sup>270</sup> For example, consider an employment contract between the University of Alabama ("Alabama") and head football coach Nick Saban. The employment contract requires Saban to "perform and administer to the reasonable satisfaction of the Director of Athletics the duties and responsibilities ordinarily associated with and performed by a head football coach at a major university that participates at the NCAA Division I-Football Bowl Subdivision level, including . . . recruiting . . . ." <sup>271</sup> While one cannot expect universities to foresee every possible scenario, consider one where the COI imposes a (valid) show-cause penalty on Saban that, similar to Pearl's and McNair's, precludes Saban from recruiting for an extended period of time. The employment contract permits Alabama to terminate Saban "for cause" if he neglects or is inattentive to his duties, which includes recruiting, or materially, intentionally, or

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<sup>266</sup> This assumes that the COI will continue to impose show-cause orders in all states despite Shaller's Decision.

<sup>267</sup> MANUAL, *supra* note 29, at § 19.02.3.

<sup>268</sup> See Harbaugh contract, *supra* note 265, at § 4.02.

<sup>269</sup> See *id.* at § 4.01.

<sup>270</sup> Head Coach Employment Contract Between the University of Alabama and Nick Saban, § 2.02(c) located at [media.ledger-enquirer.com/static/SEC-Coaching-Contracts/Alabama/Alabama-Sabans-signed-contract-Amend.pdf](http://media.ledger-enquirer.com/static/SEC-Coaching-Contracts/Alabama/Alabama-Sabans-signed-contract-Amend.pdf) (hereinafter "Saban Contract") (last visited Jan. 23, 2020).

<sup>271</sup> *Id.*

recklessly breaching or violating the contract.<sup>272</sup> However, if the COI precludes Saban from recruiting, Saban may argue that he has not neglected or been inattentive to recruiting duties or breached or violated the contract; rather, he is following the COI's prohibition on recruiting. Thus, Saban may contend that Alabama cannot fire him "for cause." While the show-cause penalty likely resulted from an NCAA violation for which the contract permits Alabama to terminate Saban "for cause," Alabama (and other universities with similar contract language) could clear up any potential confusion by amending the contract's language to reflect that the imposition of a show-cause order constitutes "cause" in the event of termination.<sup>273</sup> This would provide further protection to universities who seek to move on from coaches who run afoul of NCAA rules and mitigate the financial responsibility they have for coaches who receive show-cause orders.

Shaller's decision also affects the fairness of the playing field. Coaches from universities located in California jurisdictions (or the entire state) in which show-cause orders are void could seek employment at other universities within the jurisdiction (or state) without fear of the show-cause order hampering their competitiveness as applicants.<sup>274</sup> Similarly, out-of-state coaches with active show-cause orders could seek employment at California universities to avoid the application of the show-cause provisions.<sup>275</sup> The State of California includes more

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<sup>272</sup> *Id.* at § 5.01(b)(1), § 5.01(b)(2).

<sup>273</sup> Saban's employment contract permits Alabama to terminate him "for cause" when his conduct or a pattern of conduct constitutes or leads to a major violation. Saban Contract, *supra* note 270, at § 5.01(b)(7). Examples exist where universities have continued to retain coaches who commit significant NCAA violations despite, at least arguably, having the ability to fire them "for cause" because of the violations. For example, on June 15, 2017, the COI concluded the University of Louisville's men's basketball program engaged in wrongdoing involving escorts' interactions with current and prospective student-athletes. Michael McCann, *Rick Pitino's Contract Dispute and its Potential Impact on Larger NCAA Scandal*, SPORTS ILLUSTRATED (Oct. 14, 2017), [si.com/college/2017/10/14/rick-pitino-louisville-contract-dispute-ncaa-scandal-fbi-investigation](https://si.com/college/2017/10/14/rick-pitino-louisville-contract-dispute-ncaa-scandal-fbi-investigation) [<https://perma.cc/C87F-BALM>] (analyzing interplay of Pitino's breach of contract lawsuit against University of Louisville and federal investigation into wrongdoing in men's college basketball). As a result, the COI suspended Pitino for five games and concluded he "failed to adequately supervise and monitor his program." *Id.* From a plain reading of Pitino's contract with the University of Louisville, Louisville was "well within its authority" to fire Pitino for cause. *Id.* However, Louisville continued to employ Pitino for several months. *See id.* It was not until the fallout from the federal investigation into wrongdoing in men's college basketball, which implicated Louisville, that Louisville sought to terminate Pitino.

<sup>274</sup> Miller, *supra* note 176 (acknowledging that implication in NCAA violations could serve as strong deterrent itself, however).

<sup>275</sup> *Id.* (acknowledging both possibility that California universities may be unwilling to "flaunt"

than twenty universities who participate in Division I athletics, seven of which play FBS (Football Bowl Subdivision) football.<sup>276</sup> California universities would enjoy a competitive advantage if they could hire coaches who received show-cause orders without the same restrictions faced by universities in other states.<sup>277</sup> One could foresee a scenario where other states choose to statutorily immunize their own coaches from show-cause orders, effectively making coaching positions in those states more enticing relative to the rest of the country.<sup>278</sup> Another possibility is that Shaller's decision may deter the COI from issuing show-cause orders to coaches from California universities, making it harder for the NCAA to penalize coaches who break NCAA rules.<sup>279</sup>

Perhaps more practically, Shaller's decision may encourage coaches (and their attorneys) to analyze statutes and common law in other states to determine whether efforts to void show-cause orders in other jurisdictions could reach the same result.<sup>280</sup> If so, Shaller's decision may provide a valuable roadmap to other coaches seeking to reverse show-cause sanctions and mitigate their impediment to return to college coaching.<sup>281</sup>

Perhaps ironically, the impact of Shaller's decision on McNair is minimal.<sup>282</sup> His show-cause penalty expired in 2011 and, even with the passage of time, he

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NCAA rules in favor of state law and that coaches would have to exhaust litigation to void show-cause order).

<sup>276</sup> Kirshner, *supra* note 32 (explaining that Shaller's Decision could spare coaches from these universities from being subject to valid show-cause orders).

<sup>277</sup> Staurowsky, *supra* note 28 (noting that nine Division I conferences have full-time or affiliate members in California, including the Mountain West, Pac-12, Pioneer Football League, MPSF, Big Sky, Big West, West Coast, and Western Athletic Conferences).

<sup>278</sup> See Harrington, *supra* note 5.

<sup>279</sup> See Staurowsky, *supra* note 28 (citing examples of rule breaking to include coaches providing money to student-athletes or prospective student-athletes).

<sup>280</sup> Miller, *supra* note 176; see also Harrington, *supra* note 5 (explaining Shaller's Decision "may have provided something of a signaling function to future plaintiffs, the NCAA, and the public").

<sup>281</sup> See Miller, *supra* note 176 (citing former University of Southern Mississippi head men's basketball coach Donny Tyndall, who received a ten-year show-cause penalty in 2016 as an example).

<sup>282</sup> USC's football program has also rebounded from the case involving McNair and Bush over time. See Weston, *supra* note 8 (noting USC's victory in the 2017 Rose Bowl and fact that USC remains "a top brand in collegiate athletics").

remains unable to find employment at a university.<sup>283</sup> However, the declaratory judgment decision is not an insignificant victory for McNair, as it helps clear his name in the college athletics industry.<sup>284</sup> Further, McNair's crusade may spare future coaches from the "scarlet" show-cause order.<sup>285</sup> In doing so, McNair and Shaller led—and advanced—the charge to protect college coaches' individual rights.<sup>286</sup>

## V. CONCLUSION

For decades, the show-cause penalty has served as a powerful tool the NCAA and COI have wielded against individual rule breakers.<sup>287</sup> It cost many coaches their jobs and left them less likely to find college athletics employment. However, just as universities began to look past show-cause orders and give coaches subject to them a second chance, a recent California court decision jeopardized their validity in the state. This could lead to similar legal challenges in other states, as well as other extreme ramifications for college athletics.

The NCAA possesses strong arguments that an appellate court should overturn the California court decision. However, in an effort to further rules compliance, the NCAA and college athletics administrators should consider alternatives or supplements to the show-cause penalty in the event that Shaller's decision stands. One possible endeavor could be a more comprehensive education process for coaches. Currently, coaches must successfully pass an examination before they may permissibly recruit off-campus (e.g., for in-home visits with, or evaluations of, prospective student-athletes).<sup>288</sup> However, not surprisingly, the subject matter of this examination is NCAA legislation relating to the recruitment of prospective student-athletes.<sup>289</sup> The NCAA legislation that McNair violated did not pertain to recruitment of prospective student-athletes. Rather, the COI cited McNair with a

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<sup>283</sup> Miller, *supra* note 176 (characterizing impact on McNair as "far less drastic").

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> See Giller, *supra* note 9 (describing California's charge to protect the individual rights of both college coaches and student-athletes); see also Staurowsky, *supra* note 28 (questioning appropriateness of NCAA rules stripping away individual rights of coaches and pointing out that while courts traditionally defer to a private organization's self-governance, a recognized exception exists when the private association's rules violate public policy).

<sup>287</sup> See Auerbach, *supra* note 4.

<sup>288</sup> MANUAL, *supra* note 29 at § 11.5.

<sup>289</sup> *Id.*

violation of NCAA legislation prohibiting unethical conduct due to his involvement in the USC matter, which centered on NCAA amateurism principles and legislation.<sup>290</sup> While coaches receive education on NCAA legislation from compliance administrators on campus, it would benefit the NCAA to implement an education initiative requiring coaches to successfully pass a more comprehensive examination on NCAA legislation prior to engaging in coaching activities. If a coach sought to challenge this education initiative in court, under the California state employment law at issue in the McNair case for example, it is difficult to envision a judge overturning such a requirement meant to further education of, and compliance with, NCAA legislation.

The NCAA could also brace itself for the possibility of not being able to utilize and rely on show-cause orders by considering additional ways to further punish the employing university when its employee violates NCAA legislation, in addition to punishing the individual. This could include more commonly or stringently applying existing penalties such as levying heftier fines on the university for involvement in an infractions case, loss of the ability for a university's athletic contests to appear on television, and prohibiting a sport program from participating in postseason competition. Further, the NCAA and COI could emphasize and rely more on NCAA legislation that presumes head coaches responsible for actions of direct and indirect reporting individuals.<sup>291</sup> By putting universities at risk financially, taking away opportunities for exposure, and/or punishing head coaches for actions of subordinates, universities and head coaches would think twice about hiring an individual they suspect may run afoul of NCAA legislation and put them in the position McNair put USC.

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<sup>290</sup> See USC CASE, *supra* note 126, at 26-28.

<sup>291</sup> MANUAL, *supra* note 29, at § 11.1.1.1. For additional information regarding NCAA head coach responsibilities legislation, see Josh Lens, *NCAA Head Coach Responsibilities Legislation*, 14 DEPAUL J. SPORTS L. 33, 63, 65 (2018)(describing legislation and comparing to vicarious liability).