THE JUSTICIABILITY OF CHALLENGING THE NCAA RESTITUTION RULE

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I. INTRODUCTION

Before the 1996 college football season, Joel Casey Jones ("Jones"), a football player at Texas Tech University ("Texas Tech"), was declared ineligible for the season.[1] Texas Tech reported the ineligibility to the National Collegiate Athletic Association ("NCAA"), but Jones alleged that he relied on representations by Texas Tech to enroll in certain classes to remain eligible when, in fact, he would be ineligible.[2] Jones filed a declaratory action against the NCAA and Texas Tech in Texas state court.[3] The trial court issued a temporary injunction that (1) enjoined Texas Tech and the NCAA from taking any action that would prevent Jones from participating in football and, more importantly to this Article, (2) enjoined the NCAA from enforcing its Restitution Rule to punish either Jones or Texas Tech.[4] The NCAA Restitution Rule (NCAA Bylaw 19.12), the subject of this Article, provides that if an athlete obtains an injunction from a trial court preventing the NCAA from keeping the athlete off the court or field, but then an appellate court reverses said injunction, the NCAA may punish the athlete, team, and university.[5] The NCAA filed an appeal challenging the two part temporary injunction.[6] The central question here is whether a court *can*

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[1] NCAA v. Jones, 1 S.W.3d 83, 85 (Tex. 1999).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] NCAA, 2017–18 NCAA Division I Manual art. 19.12, at 345–46 (2007), available at http://www.ncaapublications.com/productdownloads/D118.pdf [hereinafter NCAA Manual].

[6] *Jones*, 1 S.W.3d at 85.

adjudicate a challenge to the validity or enforceability of the Restitution Rule or, in other words, is the issue justiciable.

Unsurprisingly, the Restitution Rule has been a subject of controversy. It has been criticized for interfering with the judiciary by denying access to the courts, or at least discouraging athletes from seeking judicial relief, and for encouraging institutions to disregard injunctions favoring athletes out of fear of being punished by the NCAA if the injunction is reversed, stayed, or vacated on appeal.[7] The Restitution Rule has been effective at "curtailing [NCAA] members' and college athletes' injunctive claims, and the success of those claims, against the NCAA."[8] One court has even characterized the Restitution Rule as "a direct attack on the constitutional right of access to the courts."[9]

Despite these valid constitutional concerns, under the typical circumstances, an injunction seeking to prohibit the NCAA from enforcing the Restitution Rule should be dismissed because it does not meet Article III's case or controversy requirement under the U.S. Constitution.[10] In other words, the issue is not justiciable. Much like Jones's case above, the typical circumstances include the following steps: 1) an athlete is first deemed ineligible to play; 2) the athlete sues the NCAA to enjoin it from enforcing the eligibility ruling and also from enforcing the infamous Restitution Rule; 3) the athlete wins the injunction at the trial court; and 4) the NCAA appeals its decision to an appellate court. It is important to note that at this point, the NCAA has not and cannot enforce the Restitution Rule because an appellate court has not yet vacated, stayed, or reversed the lower court's decision.[11]

This Article argues that, in Jones's case or under the typical circumstances, an athlete seeking an injunction prohibiting the NCAA from enforcing its Restitution Rule fails the case or controversy requirement in two ways under the federal court's

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[7] Brian L. Porto, *The NCAA's Restitution Rule: Bulwark Against Cheating or Barrier to Appropriate Legal Remedies?*, 20 Roger Williams U. L. Rev. 335, 337 (2015).

[8] Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Court . . . Until* Oliver v. NCAA, 11 Fla. Coastal L. Rev. 459, 520 (2010).

[9] Oliver v. NCAA, 920 N.E.2d 203, 216 (Ohio C.P. 2009).

[10] U.S. CONST. art. III.

[11] *See* NCAA Manual, *supra* note 5, at 345.

justiciability doctrine and, therefore, should be dismissed. First, an opinion on the Restitution Rule's validity or enforceability would constitute an advisory opinion, which is prohibited by Article III, because it adjudicates an issue that has not arisen in actual litigation and it is a hypothetical scenario.[12] Second, in the alternative, an injunction brought by an athlete is nonjusticiable because the plaintiff has not shown an injury-in-fact to sustain standing as required by Article III.[13] The U.S. Supreme Court requires that a plaintiff have an injury or "an invasion of a legally protected interest" that is "concrete and particularized[.]"[14] If a plaintiff is seeking an injunction, the threat of injury must be "real and immediate, not conjectural or hypothetical."[15] In Jones's case and under the typical circumstances, as explained above, an athlete cannot allege facts that the NCAA will enforce the Restitution Rule and cannot show that the injury is "certainly impending."[16]

This Article proceeds as follows. Part II will cover the Restitution Rule text, the major U.S. Supreme Court cases defining the justiciability doctrines of advisory opinions and standing, and the cases that have closely examined the justiciability of an injunction against the NCAA from enforcing the Restitution Rule. While justiciability doctrines in state courts may be different than in federal courts, the focus of this Article will be on how athletes may challenge the Restitution Rule in federal court or any state court with a similar justiciability doctrine like Texas. Part III will take the typical circumstances of an athlete, described above, and argue that courts should dismiss challenges to the Restitution Rule on advisory opinion and injury-in-fact grounds. Part IV provides a recommendation to student-athletes to help meet the justiciability requirements. Finally, Part V briefly concludes.

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[12] *See infra* Part III.

[13] *See id.*

[14] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[15] City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

[16] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (emphasis in original).

II. BACKGROUND

A. The NCAA Restitution Rule

The Restitution Rule, the subject of this Article, is the NCAA Bylaw 19.12.[17] It is a long rule that authorizes the NCAA Board of Directors of the NCAA to punish individual athletes, teams, and institutions in a variety of different ways.[18] The NCAA can erase individual performances, records, and awards, and it can vacate team victories, records, and awards.[19] Perhaps the most severe penalty is that the NCAA can even go as far as fining institutions and prohibiting them from participating in postseason play or national championships.[20] Any one of these punishments can deter athletes from seeking judicial relief, or, at least, the athlete will have second thoughts before suing in court. The full rule is reproduced below from the 2017–18 NCAA Division I Manual.

> *If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: (Revised: 4/26/01 effective 8/1/01, 11/1/07 effective 8/1/08)*
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> *(a) Require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;*

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[17] NCAA Manual, *supra* note 5, at 345–46.
[18] *Id.*
[19] *Id.* at 345.
[20] *Id.* at 345–46.

(b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

(c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;

(d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;

(e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;

(f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;

(g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;

(h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and

(i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.[21]

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[21] *Id.*

It is quite telling that the Restitution Rule has been in effect since 1975, but the NCAA has only enforced it once.[22] The Restitution Rule has had a vast impact: trial courts have been reluctant to grant injunctions in athlete ineligibility disputes, and universities have decided to not follow a valid injunction issued by a trial court out of fear that a possible reversal on appeal would lead to retributive penalties by the NCAA under the Restitution Rule.[23] The next Section will review the case law on what is constitutionally required to bring justiciable issues to a court.

B. Justiciability Doctrines: Advisory Opinions and Standing

Justiciability means that a court may appropriately resolve some disputes and not others. The source of this constitutional limitation is Article III, which limits federal courts from adjudicating "Cases" and "Controversies."[24] And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[25]

Courts cannot simply adjudicate any issue; there must be some requirements, and courts must ask several questions. What matters are justiciable by a federal court? Who is the right litigant to sue in a federal court? When is the appropriate time for a federal court to step in? By asking these questions, federal courts do not actively seek out social disputes to resolve. Instead, federal courts act passively and allow specific litigants to bring specific disputes to them. The what question can be answered by the prohibition of advisory opinions, and the who question can be answered by the doctrine of standing.

1. Advisory Opinions

One of the questions courts must ask is what matters are justiciable by a federal court. More fittingly, the question should be what matters are not justiciable. An advisory opinion is one matter that courts cannot adjudicate. "[T]he oldest and most

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[22] *See* Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976).

[23] *See* Porto, *supra* note 7, at 349–50.

[24] U.S. CONST. art. III.

[25] Raines v. Byrd, 521 U.S. 811, 818 (1997) (internal quotation marks omitted).

consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions."[26] This rule began in a letter from Chief Justice John Jay to President George Washington concerning the legality of treaties with France:

> *[T]he lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.*[27]

Chief Justice John Jay advised the President to turn to his executive department for legal advice to help preserve the separation of coequal branches of government.[28] The Court since has consistently held that if no actual case or controversy exists between adverse litigants, then an opinion by the court would be nothing more than an advisory opinion.[29] Texas, as we will later see, is one example of a state that also prohibits advisory opinions.[30]

The U.S. Supreme Court, in *MedImmune v. Genentech*, examined the advisory opinion prohibition in a declaratory judgment case involving a license agreement on a respiratory treatment drug patent.[31] While MedImmune did pay royalties to Genetech under the license agreement, MedImmune still sought a declaratory judgment that the underlying patent was invalid, unenforceable, or not infringed.[32] The Court emphasized that Article III still required that the dispute be "'definite and concrete, touching the legal relations of parties having adverse legal

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[26] C. WRIGHT & M. KANE, LAW OF FEDERAL COURT 65–66 (7th ed. 2011).

[27] Letter from John Jay, Chief Justice, to George Washington, President (Aug. 8, 1793) (available at http://press pubs.uchicago.edu/founders/documents/a3_2_1s34.html)

[28] *See id.*

[29] *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 361 (1911).

[30] *See infra* Section II.C.

[31] 549 U.S. 118 (2007).

[32] *Id.* at 121.

interests'; and that it be 'real and substantial'[.]"[33] What the dispute cannot be is "an opinion advising what law would be upon a hypothetical state of facts."[34] The Court held that MedImmune's royalty payment did not extinguish the case or controversy because Article III did not require MedImmune to break the license agreement, thereby subjecting itself to further liability, to sustain a case or controversy and the payment did not make the dispute hypothetical or abstract in nature.[35] The Court explained that a "rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."[36]

There are two major policy considerations in support of a rule that prohibits issuing advisory opinions. One is a "fitness" concern, that courts are best equipped to act when they have an actual controversy between adverse parties, and the other is a "separation of powers" concern, that courts lack the policymaking expertise and should not resolve constitutional questions until it is necessary to resolve a concrete dispute.[37]

2. Standing

The U.S. Supreme Court has developed the doctrine of standing to answer the who question: who the right litigant is to sue. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[38] The doctrine of standing requires a showing of an injury-in-fact, meaning "an invasion of a legally protected interest" that is "concrete and particularized[.]"[39] The Court has explained that "particularized" means that "it must affect the plaintiff in a personal and individual way[,]" and that "concrete" means "real,

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[33] *Id.* at 127 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240–41 (1937)).

[34] *Id.*

[35] *Id.* at 131, 137.

[36] *Id.* at 134.

[37] MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 282 (3d ed. 2007).

[38] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[39] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

and not abstract."[40] A plaintiff must put forth more than "'general averments' and 'conclusory allegations' . . . [and] speculative 'some day' intentions[.]"[41] If a plaintiff is seeking an injunction, the threat of injury must be "real and immediate, not conjectural or hypothetical."[42]

The U.S. Supreme Court case, *City of Los Angeles v. Lyons*, is illustrative of the injury-in-fact requirements for a prospective injunctive remedy.[43] In 1976, the plaintiff, an African American male, was stopped by Los Angeles police officers for a traffic violation, and although the plaintiff offered no resistance, he was seized and was put in a chokehold or neck restraint, rendering him unconscious and causing damage to his larynx.[44] The plaintiff did seek retrospective (damages) and prospective (injunction) relief, but to have standing for an injunction, he would have had to made the "incredible assertion" that all polices officers always choke any citizen or that the City authorized police officers to act in this manner, which he did not do.[45] The Court held that his allegation that police officers routinely apply chokeholds "falls far short of the allegations that would be necessary to establish a case or controversy between these parties."[46] In sum, the plaintiff failed to "establish a real and immediate threat that he would again be stopped[.]"[47]

The U.S. Supreme Court continued to refuse to find standing where the risk of a future injury is speculative in *Clapper v. Amnesty Int'l USA*.[48] *Clapper* involved a challenge to § 1881(a), an amendment to the Foreign Intelligence Surveillance Act ("FISA"), which allowed the Foreign Intelligence Surveillance Court to authorize surveillance of non-U.S. persons located abroad without demonstrating probable cause that the target is a foreign power or

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[40] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted).

[41] Friends of the Earth, Inc. v. Laidlaw Envtl Servs., Inc., 528 U.S. 167, 184 (2000) (internal citations omitted).

[42] City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

[43] *Id.*

[44] *Id.* at 97–98.

[45] *Id.* at 106.

[46] *Id.* at 105.

[47] *Id.*

[48] 568 U.S. 398 (2013).

agent of a foreign power.[49] The government merely needed to show that the person was reasonably believed to be located outside the U.S.[50] The plaintiffs, a group of organizations and attorneys whose clients were located abroad, alleged that the amendment required them to engage in sensitive international communications with their foreign clients whom they believed were likely targets of surveillance.[51] The plaintiffs sought a declaration that § 1881(a) is unconstitutional but also a prospective injunction against § 1881(a)-authorized surveillance.[52]

The *Clapper* Court held that the plaintiffs did not establish an injury-in-fact sufficient for Article III standing.[53] "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."[54] The Court further emphasized that "[a]llegations of possible future injury" is not enough for Article III injury-in-fact.[55] The *Clapper* Court held there was no injury-in-fact because it was "speculative whether the Government will imminently target communications to which [plaintiffs] are parties."[56] In support, the Court found that the plaintiffs did not have actual knowledge of the Government's targeting practices.[57] Instead, the plaintiffs assumed that their communications with their foreign contacts will be surveilled.[58] The Court also found that § 1881(a) of the statute authorizes, but does not mandate or direct, the surveillance that the plaintiffs feared.[59] "Simply put, [plaintiffs] can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target."[60]

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[49] *Id.* at 404.
[50] *Id.* at 404–05.
[51] *Id.* at 401.
[52] *Id.*
[53] *Id.* at 411.
[54] *Id.* at 409 (internal quotation marks omitted) (emphasis in original).
[55] *Id.* (internal quotation marks omitted) (emphasis in original).
[56] *Id.* at 411 (emphasis added).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 412.
[60] *Id.*

C. Cases on the Justiciability of Challenging the Restitution Rule

Because of the deterrent nature of the Restitution Rule, there are few cases where the Restitution Rule is the prominent subject matter.[61] There are even fewer cases where courts discussed the justiciability of challenging the NCAA Restitution Rule. Two examples concerned the same litigation in the Court of Appeals of Texas[62] and later reversed by the Supreme Court of Texas.[63] To clarify, while Article III only binds federal courts, many states like Texas have substantially similar justiciability doctrines.[64]

As described in the Introduction, Jones was a Texas Tech football player who was declared ineligible for academic reasons and sought an injunction against the NCAA from enforcing its Restitution Rule.[65] The trial court granted the injunction, and the NCAA appealed.[66] The Court of Appeals of Texas ruled that the injunction was inoperative because "there was no justiciable controversy or pending action between Jones and the NCAA or the NCAA and [Texas] Tech concerning the validity or enforcement of the restitution rule."[67] The court considered the issue—whether the Restitution Rule is valid or enforceable—as "hypothetical, 'iffy' and contingent."[68] An opinion by the court regarding that specific issue would be "purely advisory and beyond . . . [its] well-defined jurisdiction."[69]

The issue was further appealed to the Supreme Court of Texas, which ~~then~~ held that the court of appeals erred by

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[61] For a review of court opinions about the Restitution Rule, see Porto, *supra* note 7, at 343–58.

[62] NCAA v. Jones, 982 S.W.2d 450 (Tex. App. 1998), *rev'd*, 1 S.W.3d 83 (Tex. 1999).

[63] NCAA v. Jones, 1 S.W.3d 83 (Tex. 1999).

[64] *See*, *e.g.*, Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 774 (Tex. 2005) ("Standing to assert a constitutional violation depends on whether the claimant asserts a particularized, concrete injury."); Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993) ("Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department.").

[65] *Jones*, 1 S.W.3d. at 85.

[66] *Id.*

[67] *Jones*, 982 S.W.2d at 452.

[68] *Id.* (quoting Firemen's Ins. Co. of Newark, New Jersey v. Burch, 442 S.W.3d 331, 333 (Tex. 1968)).

[69] *Id.* (internal citations omitted).

concluding that the injunction became "inoperative merely because the NCAA had no pending action against either Texas Tech or Jones to enforce its restitution rights or to establish the validity of the Restitution Rule."[70] Instead, the injunction would only be inoperative if Jones or the NCAA "ceased to have a legally cognizable interest in the outcome of the appeal."[71] The court found that the NCAA had an interest in having the injunction invalidated so that it could impose penalties under the Restitution Rule.[72] The court also found that Jones still had a tangible interest, relying on Jones's representation to the trial court that he would be adversely affected if the NCAA were not enjoined from enforcing the Restitution Rule, such as erasing Jones's individual performances.[73] Thus, the Supreme Court of Texas reversed the court of appeal's judgment because both parties had a tangible interest with respect to the injunction enjoining the NCAA from enforcing the Restitution Rule.[74] The majority opinion placed great emphasis on whether both parties had "a legally cognizable interest[.]"[75]

Four of the nine justices on the Supreme Court of Texas, however, dissented— "The issue of this injunction's validity is now moot; to determine its validity, the court of appeals must issue an impermissible advisory opinion."[76] The dissent points to the fact that the Restitution Rule is contingent upon determining the validity of the injunction against enforcement of the rule and that the condition has not been met yet.[77] Specifically, the injunction against the NCAA's enforcement of the Restitution Rule has not been vacated, stayed or reversed.[78] Thus, the dissent followed closely with the court of appeals, arguing that the issue regarding the validity of the temporary injunction was no longer a live

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[70] *Jones*, 1 S.W.3d at 87.
[71] *Id.* (internal citations omitted).
[72] *Id.*
[73] *Id.* at 88.
[74] *Id.*
[75] *Id.* at 87.
[76] *Id.* at 88 (Abbot, J., dissenting).
[77] *Id.* at 89 (Abbot, J., dissenting).
[78] *Id.* (Abbot, J., dissenting).

controversy and to render an opinion would constitute an impermissible advisory opinion.[79]

III. ANALYSIS

As described in the Introduction, critics of the Restitution Rule have raised valid constitutional concerns regarding the rule. Under the typical circumstances, however, if an athlete seeks an injunction to preemptively prohibit the NCAA from enforcing its Restitution Rule, such a challenge must be dismissed. It does not meet Article III's case or controversy requirement because (1) an opinion on the issue would be an advisory opinion and (2) the plaintiff lacks an injury-in-fact to sustain standing.

First, an opinion on the validity of an injunction prohibiting the NCAA from enforcing the Restitution Rule would be an impermissible advisory opinion. In *MedImmune*, the U.S. Supreme Court held that the license agreement dispute was definite and concrete and not hypothetical or abstract.[80] The Court further stated that requiring a plaintiff to "destroy a large building, bet the farm, or (as here) risk treble damages . . . finds no support in Article III."[81] Making royalty payments did not transform the definite and concrete license dispute into one that was hypothetical.[82] In contrast to *MedImmune*, the issue as to whether the Restitution Rule is enforceable and valid, under the typical circumstances, is not a definite and concrete dispute but instead is hypothetical and contingent.

Again, the typical circumstances include: 1) an athlete is first deemed ineligible to play, 2) the athlete sues the NCAA to enjoin it from enforcing the eligibility ruling and from enforcing the Restitution Rule, 3) the athlete wins the injunction at the trial court, and 4) the NCAA appeals its decision to the appellate court. If the injunction prohibits the NCAA from enforcing the Restitution Rule before it ever is possible to enforce, the dispute is hypothetical. As four out of nine justices of the Supreme Court of Texas in dissent in *Jones* points out, the Restitution Rule specifically does not allow the NCAA to enforce it until an

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[79] *Id.* at 90 (Abbott, J., dissenting).

[80] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007).

[81] *Id.* at 134.

[82] *Id.* at 127.

injunction is vacated, stayed, or reversed.[83] Under the typical circumstances and under Jones's circumstances, this condition has not been met. A court is, therefore, asked to resolve a question—the validity or enforceability of the Restitution Rule—before the concrete dispute ever arises. Such a scenario is one that the *MedImmune* Court warned courts to not resolve: one that is hypothetical or contingent and not definite and concrete.[84] While the plaintiff did not have to risk treble damages by breaking a license agreement, there was still a definite concrete dispute between the litigants over the license agreement in *MedImmune*.[85] In contrast, under the typical circumstances or Jones's circumstances, the definite concrete dispute never arose, because the Restitution Rule was never enforced. In fact, the NCAA could not enforce the Restitution Rule even if it wanted to.[86] Opinions on the validity or enforceability of the Restitution Rule, thus, would be an impermissible advisory opinion.

Second, even if courts find that the dispute is not an advisory opinion, they should still dismiss challenges to the validity of an injunction prohibiting the NCAA from enforcing the Restitution Rule because there would be no injury-in-fact, and, therefore, the plaintiff would lack standing under Article III.

In *Jones*, the Supreme Court of Texas reversed the lower court and held that both Jones and the NCAA had "a legally cognizable interest in the outcome of the appeal."[87] Therefore, the Supreme Court of Texas held that an injunction prohibiting the NCAA from enforcing its Restitution Rule was operative and the appeal should not have been dismissed.[88] The U.S. Supreme Court, however, has reiterated many times that an injury-in-fact must not only be "an invasion of a legally protected interest[,]" but also is one that is "concrete and particularized[.]"[89] The Supreme Court of Texas only examined if each party had a tangible interest

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[83] *Jones*, 1 S.W.3d at 89 (Abbott, J., dissenting).
[84] *MedImmune*, 549 U.S. at 127.
[85] *Id.* at 127, 134.
[86] *See* NCAA Manual, *supra* note 5, at 345–46.
[87] *Jones*, 1 S.W.3d at 87.
[88] *Id.* at 87–88.
[89] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

in the outcome of the appeal; the court must also examine if the threat of injury was concrete or real.[90]

If Jones or another athlete seeks a prospective injunction prohibiting the NCAA from enforcing the Restitution Rule, the plaintiff must allege facts that support a threat of a real and imminent injury. In *Jones*, the plaintiff alleged that he would be adversely affected if the NCAA was not restrained from enforcing the Restitution Rule by possibly erasing individual performances.[91] Under the typical circumstances, an athlete would similarly seek to enjoin the NCAA from enforcing the Restitution Rule based on the fear that the NCAA may punish the athlete.

Both *Lyons* and *Clapper* tell us that these allegations are not enough for a plaintiff to cross the injury-in-fact threshold. Like *Lyons*, in which the plaintiff could not show facts that the Los Angeles police department *will* use the chokehold against him, Jones or another athlete cannot "establish a real and immediate threat" that the NCAA *will* enforce the Restitution Rule.[92] The NCAA has only enforced the Restitution Rule once in its history.[93] It is entirely unclear how many times the NCAA *could* have enforced the Restitution Rule in the past but chose not to enforce. I personally emailed an attorney at the NCAA and was told that the NCAA's Restitution Rule enforcement policy would not be disclosed to individuals, even for academic research.[94] Specifically, I was unable to obtain information on how the NCAA determines when to enforce the Restitution Rule or how many opportunities the NCAA could have enforced the Restitution Rule but chose not to enforce.[95] By not knowing if and when the NCAA will choose to enforce the Restitution Rule, Jones or another athlete cannot "establish a real and immediate threat" that the NCAA *will* enforce the Restitution Rule.[96]

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[90] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016).

[91] *Jones*, 1 S.W.3d at 88.

[92] City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

[93] *See* Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976).

[94] Email from Christopher Termini, Managing Director of Championships and Alliances, NCAA, to Jonathan Kim, University of Illinois College of Law (Apr. 10, 2018, 03:56 CST) (on file with the author).

[95] Email from Jonathan Kim, University of Illinois College of Law, to Christopher Termini, Managing Director of Championships and Alliances, NCAA (Apr. 08, 2018, 04:54 CST) (on file with the author).

[96] *Lyons*, 461 U.S. at 105.

The *Clapper* case is even more on point than *Lyons* to an athlete's situation. In *Clapper*¸ the plaintiffs' allegations that their communications with foreign contacts *will* be surveilled did not demonstrate an injury-in-fact because the allegations were merely speculative assumptions and did not show that the injury was "*certainly* impending."[97] The plaintiffs did not have actual knowledge of the government's targeting practices.[98] Similarly, as explained in the previous paragraph, Jones or other athletes do not have actual knowledge of the NCAA's Restitution Rule practices. I could not get this information after asking an attorney from the NCAA.[99] Jones or an athlete simply does not know whether the NCAA will enforce the Restitution Rule and, thus, cannot show the injury was "*certainly* impending."[100] Deterrence in filing suit against the NCAA, by itself, is not enough to show the threat of injury is real. In addition to *Clapper*, where the FISA statute authorized, but did not mandate or direct, surveillance that the plaintiffs feared, the Restitution Rule states that "the Board of Directors *may* take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions[.]"[101] Just like § 1881(a) of FISA, the Restitution Rule authorizes or allows, but does not mandate or require, the Board of Directors of the NCAA to punish the individual, team, or institution.[102]

Both *Lyons* and *Clapper* show that allegations of the NCAA's enforcement of the Restitution Rule against athletes are speculative assumptions, are not based on actual knowledge of the NCAA's enforcement practices, and therefore cannot "establish a real and immediate threat"[103] of an injury or establish the injury is "*certainly* impending."[104] In sum, a prospective injunction prohibiting the NCAA from enforcing the Restitution Rule would not sustain the Article III requirements because an opinion on the

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[97] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (emphasis in original).

[98] *Id.* at 411.

[99] *See supra* notes 94–95.

[100] *Clapper*, 568 U.S. at 409.

[101] NCAA Manual, *supra* note 5, at 345 (emphasis added).

[102] *Id.*; *Clapper*, 568 U.S. at 409.

[103] City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

[104] *Clapper*, 568 U.S. at 409.

validity of the injunction would be an impermissible advisory opinion and the plaintiff cannot show an injury-in-fact.

IV. RECOMMENDATION

All is not lost to an athlete who wishes to challenge the NCAA Restitution Rule in court. This part provides a recommendation to athletes on what steps to take to sufficiently meet the justiciability requirements. There are two main methods to meet these requirements.

First, the clearest way to ensure meeting the justiciability requirements is to wait until the NCAA enforces the Restitution Rule against the athlete. If the NCAA erases an athlete's individual performances, records, or awards, the athlete will have a definite concrete dispute with the NCAA. It will no longer be an issue that is hypothetical or contingent because the NCAA has, in fact, punished the athlete. Therefore, the athlete will show that the concrete dispute is outside the prohibition of advisory opinions. In addition, the athlete sustained an injury-in-fact, meeting Article III's standing requirements. In contrast to *Lyons* and *Clapper*, in which the plaintiffs were unable to show that the Los Angeles police *will* use the chokehold and that the government *will* surveille communication with foreign contacts, an athlete can show a real and tangible injury already sustained personally.[105] The athlete will not have to show any assumptions or speculations because the injury-in-fact occurred by the NCAA's actions. Therefore, by waiting until the NCAA enforces the Restitution Rule against the athlete individually, the athlete can clearly show that the dispute is outside the prohibition of advisory opinions and that the athlete sustained a tangible, real injury-in-fact.

Second, although more difficult to show, the athlete may seek a prospective injunction to prohibit the NCAA from enforcing the Restitution Rule if the athlete can show that the NCAA *will* enforce it. To avoid the prohibition on advisory opinions, the athlete must show that there is a dispute that is definite and concrete and not hypothetical or abstract.[106] The athlete can do

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[105] *Id.*; *Lyons*, 461 U.S. at 105.

[106] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007).

this, for example, if the NCAA informs the athlete that it will enforce the Restitution Rule if the injunction that the trial court issued is eventually reversed, stayed, or vacated by an appellate court. If the athlete alleges these facts, the athlete has made the dispute less hypothetical or contingent and more definite and concrete. The *MedImmune* Court reiterated that it cannot issue "an opinion advising what law would be upon a hypothetical state of facts."[107] By alleging that the NCAA *will* enforce its Restitution Rule, the athlete has shown that this dispute is no longer a hypothetical state of facts but a state of facts that will occur.

In addition, to showing an injury-in-fact, the athlete must "establish a real and immediate threat" [108] that the NCAA *will* enforce the Restitution Rule and that the injury is "*certainly* impending."[109] Again, the athlete may show a sufficient injury-in-fact if the NCAA informs the athlete that it will enforce the Restitution Rule against the athlete. Distinguishable from *Clapper*, in which the plaintiffs did not have actual knowledge of the government's targeting practices,[110] the athlete *does* have actual knowledge of the NCAA's Restitution Rule enforcement practices as it pertains to him or her. The athlete knows that the NCAA will enforce the Restitution Rule against him or her. By alleging this actual knowledge, the athlete has shown that the threat of injury is real and impending and enough to sustain an injury-in-fact.

If an athlete chooses to challenge the Restitution Rule on constitutional grounds, there are other hurdles such as showing that the NCAA is a state actor.[111] For purposes of just meeting the justiciability requirements, however, an athlete can allege enough facts in two ways. The best and easiest way is to wait until the NCAA enforces the Restitution Rule and punishes the athlete. A riskier but still possible way is if the NCAA informs the athlete that it *will* enforce the Restitution Rule against him or her.

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[107] *Id.*

[108] *Lyons*, 461 U.S. at 105.

[109] *Clapper*, 568 U.S. at 409.

[110] *Id.* at 411.

[111] For an argument on recognizing the NCAA as a state actor in some circumstances, see Vikram David Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415 (2011) (arguing that courts should adopt a functionalist approach to determine if the NCAA is a state actor).

V. CONCLUSION

Under Jones's circumstances or the typical circumstances, an adjudication of the validity of an injunction prohibiting the NCAA from enforcing its Restitution Rule should be dismissed because it fails Article III's case or controversy requirement in two respects. First, because the circumstances are hypothetical and contingent, before the NCAA ever can enforce the Restitution Rule, an opinion on the rule's validity is an impermissible advisory opinion. Because the NCAA has only enforced the Restitution Rule once in its history,[112] such a dispute will likely remain hypothetical and not concrete. Second, even if the dispute is not advisory, it fails the injury-in-fact requirement of standing. Jones, nor another athlete, can allege the necessary facts to sustain a real and immediate threat of injury. It cannot be conjectural, hypothetical or "speculative 'some day' intentions[.]"[113] Under Jones's circumstances and the typical circumstances, the plaintiff cannot show that the NCAA *will* enforce the Restitution Rule if the injunction was reversed, stayed, or vacated. Because an appellate court has not yet ruled that the injunction is reversed, stayed, or vacated, the NCAA *cannot* even enforce the Restitution Rule at that point.[114]

To meet the justiciability requirements laid out in this Article, an athlete will likely have to wait until the NCAA enforces the Restitution Rule against the athlete. An athlete can also seek a prospective injunction preventing the NCAA from enforcing the Rule if it already informed the athlete that it *will* enforce the Rule, but this method is riskier because a tangible concrete injury is easier to show that the threat of a future injury. If an athlete is unwilling to wait until the NCAA enforces the Restitution Rule and there are no special circumstances that show the NCAA *will* enforce it, under the typical circumstances, there is no live case or controversy under the meaning of Article III on two grounds: (1) advisory opinion reasons and (2) lack of injury-in-fact reasons. Litigants can put the cart before the horse by failing to consider the justiciability requirements to even bring the suit in the first

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[112] *See* Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976).

[113] Friends of the Earth, Inc. v. Laidlaw Envtl Servs., Inc., 528 U.S. 167, 184 (2000) (internal citations omitted).

[114] *See* NCAA Manual, *supra* note 5, at 345–46.

place. This Article provides some guidance to Jones and other student-athletes who wish to challenge the validity and enforceability of the NCAA Restitution Rule.