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## Why Antitrust, Not Unionization, is the Answer to Underpayment of Student-Athletes

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# WHY ANTITRUST, NOT UNIONIZATION, IS THE ANSWER TO UNDERPAYMENT OF STUDENT-ATHLETES

## ABSTRACT

*This Comment examines whether student-athletes should be allowed to unionize and collectively bargain for their rights and will present a legal argument against the unionization of student-athletes. The reasoning behind this argument is that student-athletes are not employees, and therefore, are not able to unionize. Even if student-athletes were categorized as employees, they would struggle to collectively bargain for their rights due to various states' laws that prohibit public employees from unionizing. Rather, this Comment argues that the answer to solving college athlete underpayment is through the remedies that can be provided in antitrust law. The reasoning behind this argument is that student-athletes are independent contractors, and revenue-generating college athletics programs are guilty of price-fixing the cost of labor for these student-athletes' services.*

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## INTRODUCTION

Student-Athletes are talented, hardworking individuals who have dedicated their young lives to excelling in specific sports. As amici describe, Student-Athletes work an average of 35–40 hours per week on athletic duties during their months-long athletic seasons, and most work similar hours during the off-season to stay competitive. At the same time, most of them do their best to succeed academically, managing to devote on average another 40 hours per week to classes and study. Nevertheless, their coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate. In addition to lessening their chances at academic success because of the time they must devote to their sports obligations, Student-Athletes are often prevented from obtaining internships or part-time paying jobs, and, as a result, often lack both income and marketable work experience. Meanwhile, the grueling hours and physical demands of college sports carry significant health risks, such as sleep deprivation, stress, broken bones, and even potential brain damage. Despite their best efforts, however, fewer than 5% of Student-Athletes will ever play at a professional level, and most of those lucky few will stay in the pros only a few short years. In short, the college years are likely the only years when young Student-Athletes have any realistic chance of earning a significant amount of money or achieving fame as a result of their athletic skills.<sup>1</sup>

Judge Milan Smith’s concurring opinion in the United States Court of Appeals for the Ninth Circuit’s decision in *Alston v. NCAA*, whose majority opinion was later affirmed by the Supreme Court in the 2020 term, provides a cogent depiction of the plight of many collegiate student-athletes. This troubling reality has caused some people to call for student-athletes to be allowed to unionize and collectively bargain for their rights.<sup>2</sup>

This Comment examines whether student-athletes should be allowed to unionize and collectively bargain for their rights and will present a legal argument against the unionization of student-athletes. Part I explains why

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<sup>1</sup> *Alston v. NCAA* (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring), *aff’d*, 141 S. Ct. 2141 (2021).

<sup>2</sup> See, e.g., Dan Wolken, *Opinion: Allowing college athletes to unionize could be the answer to the NCAA’s problems*, USA TODAY (May 27, 2021, 5:37 PM), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2021/05/27/allowing-college-athletes-unionize-could-help-solve-ncaa-problems/7476234002/>.

student-athletes should not attempt to unionize. However, not all hope is lost for student-athletes. In Part II, this Comment explains why antitrust law could be the cure to underpayment of student-athletes.

### I. SHOULD STUDENT-ATHLETES ATTEMPT TO UNIONIZE?

To properly address whether student-athletes should attempt to unionize, this Comment will first explain how unionization works. Next, the question whether student-athletes are employees will be tackled. Then, some potential issues that could arise in the context of student-athlete unionization will be addressed.

#### A. *How Does Unionization Work?*

A union is “[a]n organization formed to negotiate with employers, on behalf of workers collectively, about job-related issues such as salary, benefits, hours, and working conditions.”<sup>3</sup> The right to form a union in the United States is governed by the National Labor Relations Act (“NLRA”).<sup>4</sup> Section 7 of the NLRA provides three basic rights for workers.<sup>5</sup> The first basic right is the right to form, join, and assist labor organizations.<sup>6</sup> The second is the right to collectively bargain through representatives chosen by the workers.<sup>7</sup> The third is the right for workers to engage in “concerted activities” in order to advance and protect their interests.<sup>8</sup> Some examples of concerted activities include picketing and striking.<sup>9</sup> Section 8(a) of the NLRA prohibits employer interference with these Section 7 NLRA rights.<sup>10</sup> If an employer does impermissibly interfere with workers’ Section 7 NLRA rights, then an employer can be subject to penalties imposed by either the National Labor Relations Board (“NLRB”) or the federal courts.<sup>11</sup>

Unionization is important because analysis shows that unionization helps workers.<sup>12</sup> Unionization helps workers through “higher wages; more and better

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<sup>3</sup> *Union*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>4</sup> 29 U.S.C. § 151; *see* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 475 (5th ed. 2020).

<sup>5</sup> 29 U.S.C. § 157; *see* MITTEN, *supra* note 4, at 475.

<sup>6</sup> 29 U.S.C. § 157; *see* MITTEN, *supra* note 4, at 475.

<sup>7</sup> 29 U.S.C. § 157; *see* MITTEN, *supra* note 4, at 475.

<sup>8</sup> 29 U.S.C. § 157; *see* MITTEN, *supra* note 4, at 475.

<sup>9</sup> MITTEN, *supra* note 4, at 475.

<sup>10</sup> 29 U.S.C. § 158(a); *see id.*

<sup>11</sup> MITTEN, *supra* note 4, at 475.

<sup>12</sup> *See, e.g.*, Matthew Walters & Lawrence Mishel, *How unions help all workers*, ECON. POL’Y INST. (Aug. 26, 2003), <https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf>. *But see* Richard A. Epstein, *The Decline Of Unions Is Good News*, HOOVER INST. (Jan. 27, 2020), <https://www.hoover.org/research/decline-unions-good->

benefits; more effective utilization of social insurance programs; and more effective enforcement of legislated labor protections such as safety, health, and overtime regulations.”<sup>13</sup> Accordingly, since student-athletes do not receive any of these advantages, it is easy to recognize why student-athletes would be attracted to the idea of unionization.

### *B. Are Student-Athletes Employees?*

In order to determine whether student-athletes can unionize, one must first determine whether student-athletes are employees. This is because the NLRA only protects “employees at private-sector workplaces.”<sup>14</sup> “Excluded from coverage under the [NLRA] are public-sector employees . . . , agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors . . .”<sup>15</sup>

Jennifer A. Abruzzo, General Counsel for the NLRB appointed by President Biden,<sup>16</sup> asserted in a September 2021 memorandum that student-athletes (specifically, “scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions”) are employees.<sup>17</sup> This idea stems from Abruzzo’s belief that student-athletes fulfill the common-law employee test.<sup>18</sup> An employee is “[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”<sup>19</sup> The employer’s right to control the details of work performance is crucial to the determination whether a hired party is an

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news (“The ensuing higher labor costs, higher costs of negotiating collective bargaining agreements, and higher labor market uncertainty all undercut the gains to union workers just as they magnify losses to nonunion employers, as well as to the shareholders, suppliers, and customers of these unionized firms. They also increase the risk of market disruption from strikes, lockouts, or firm bankruptcies whenever unions or employers overplay their hands in negotiation. These net losses in capital values reduce the pension fund values of unionized and nonunionized workers alike.”).

<sup>13</sup> Walters & Mishel, *supra* note 12.

<sup>14</sup> *National Labor Relations Act*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> (last visited Apr. 6, 2022).

<sup>15</sup> *Are You Covered?*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/are-you-covered> (last visited Apr. 6, 2022).

<sup>16</sup> *The NLRB Welcomes Jennifer Abruzzo as General Counsel*, NAT’L LAB. RELS. BD. (July 22, 2021), <https://www.nlr.gov/news-outreach/news-story/the-nlr-welcomes-jennifer-abruzzo-as-general-counsel>.

<sup>17</sup> *Subject: Statutory Rts. of Players at Acad. Institutions (Student-Athletes) Under the Nat’l Lab. Rels. Act*, No. MEMORANDUM GC 21-08, 2021 WL 4502333, at \*2 (Sept. 29, 2021) [hereinafter NLRB Memo GC 21-08].

<sup>18</sup> *Id.*

<sup>19</sup> *Employee*, BLACK’S LAW DICTIONARY (11th ed. 2019).

employee.<sup>20</sup> Other factors (the “*Reid* factors”) relevant to the inquiry whether a worker is an employee are: (1) “the skill required,” (2) “the source of the instrumentalities and tools,” (3) “the location of the work,” (4) “the duration of the relationship between the parties,” (5) “whether the hiring party has the right to assign additional projects to the hired party,” (6) “the extent of the hired party’s discretion over when and how long to work,” (7) “the method of payment,” (8) “the hired party’s role in hiring and paying assistants,” (9) “whether the work is part of the regular business of the hiring party,” (10) “whether the hiring party is in business,” (11) “the provision of employee benefits,” and (12) “the tax treatment of the hired party.”<sup>21</sup> In support of Abruzzo’s assertion that student-athletes are employees, she presents evidence that student-athletes perform services for their respective universities and the National Collegiate Athletic Association (“NCAA”), that student-athletes receive significant compensation, and that student-athletes are subject to substantial control by the NCAA and their respective universities.<sup>22</sup>

While Abruzzo’s arguments are compelling, they stand in contrast to the vast majority of case law.<sup>23</sup> *Berger v. NCAA* is one such case that is illustrative of the state of the law.<sup>24</sup> In *Berger*, former women’s track and field student-athletes at the University of Pennsylvania sued the University of Pennsylvania, the NCAA, and more than 120 other NCAA Division I universities and colleges alleging that student-athletes are employees who are entitled to a minimum wage under the Fair Labor Standards Act (“FLSA”).<sup>25</sup> The United States Court of Appeals for the Seventh Circuit affirmed the United States District Court for the Southern District of Indiana’s ruling stating that “*as a matter of law . . . student athletes are not employees under the FLSA.*”<sup>26</sup>

In *Berger*, the court says that “[a] majority of courts have concluded—albeit in different contexts—that student athletes are not employees.”<sup>27</sup> The court then

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<sup>20</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

<sup>21</sup> *Id.* at 751-52.

<sup>22</sup> NLRB Memo GC 21-08, *supra* note 17, at \*2.

<sup>23</sup> See generally Jonathan L. Israel, *Repeat After Me: College Athletes Are Not School Employees Under the FLSA*, FOLEY & LARDNER LAB. & EMP. L. PERSPS. (Nov. 6, 2017), <https://1npdf11.onenorth.com/pdfrenderer.svc/v1/abcpdf11/GetRenderedPdfByUrl/Repeat%20After%20Me%20College%20Athletes%20Are%20Not%20School%20Em.pdf?url=https%3a%2f%2fwww.foley.com%2fen%2finsights%2fpublications%2f2017%2f11%2frepeat-after-me-college-athletes-are-not-school-em?format=pdf&attachment=false>.

<sup>24</sup> *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

<sup>25</sup> *Id.* at 289.

<sup>26</sup> *Id.* at 294 (emphasis added).

<sup>27</sup> *Id.* at 291.

goes on to cite a few of these cases.<sup>28</sup> On the other hand, the court could only find “two courts [that] reached the opposite conclusion.”<sup>29</sup> And those cases came from “over fifty years ago.”<sup>30</sup> Moreover, these two cases can be distinguished because “the student athletes in those cases were also separately employed by their universities.”<sup>31</sup>

It is important to weigh the authority of these divergent opinions. On one hand, NLRB General Counsel memoranda only provide “policy guidance.”<sup>32</sup> They lack the authority to carry out goals of changing the law.<sup>33</sup> On the other hand, *Berger* exemplifies the power of precedent, in which an “earlier decision provides a reason for deciding a subsequent similar case the same way, and a series of related precedents may crystallize a rule having almost the same force as statutory rule.”<sup>34</sup> Accordingly, unless there is a sudden and great shift in the courts, it appears that student-athletes are not employees. The most current copy (although not updated since the Biden administration has taken the helm) of the Department of Labor’s Field Operations Handbook sums this up best:

As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and *interscholastic athletics* and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the [National Labor Relations] Act and do not result in an employer-employee relationship between the student and the school or institution. Also, the fact that a student may

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<sup>28</sup> *Id.* at 291-92.

<sup>29</sup> *Id.* at 292. These courts are the Colorado Supreme Court and the Court of Appeal of California, Second Appellate District, Division One. *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953); *Van Horn v. Indus. Accident Comm’n*, 219 Cal. App. 2d 457 (1963).

<sup>30</sup> *Berger*, 843 F.3d at 292.

<sup>31</sup> *Id.*

<sup>32</sup> *General Counsel Memos*, NAT’L LAB. RELS. BD. (last visited Apr. 7, 2022), <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>.

<sup>33</sup> Gregg E. Clifton & Bernard G. Dennis III, *NLRB’s General Counsel Uses Prosecutorial Authority to Assert Student-Athletes Are Employees*, NAT’L L. REV. (last visited Apr. 7, 2022), [https://www.natlawreview.com/article/nlr-s-general-counsel-uses-prosecutorial-authority-to-assert-student-athletes-are#google\\_vignette](https://www.natlawreview.com/article/nlr-s-general-counsel-uses-prosecutorial-authority-to-assert-student-athletes-are#google_vignette).

<sup>34</sup> William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976).

receive a minimal payment for participation in such activities would not necessarily create an employment relationship.<sup>35</sup>

### C. *Other Issues with Unionization*

Even in the unlikely scenario student-athletes were deemed to be employees, other issues with unionization would lie in the way of unionization being the answer to solving student-athletes' issues.

First, there are numerous issues with public sector employees. As stated above, the NLRA does not cover public sector employees. Additionally, numerous states prohibit public sector employees from unionizing.<sup>36</sup> This is an issue because “the overwhelming majority of [college athletics] competitors are public colleges and universities over which the [National Labor Relations] Board cannot assert jurisdiction.”<sup>37</sup> However, Abruzzo believes that this issue could be circumvented under the joint employer theory of liability.<sup>38</sup> Under the joint employer theory of liability, Abruzzo believes that student-athletes are both employees of their respective universities and the NCAA.<sup>39</sup> Therefore, student-athletes could unionize because the NCAA is a private entity.<sup>40</sup> This attempted circumvention is problematic. The joint employer theory of liability is an issue that “puzzle[s] and divide[s] the courts.”<sup>41</sup> Considering that courts have not even deemed student-athletes employees of their own universities, it is difficult to imagine courts going even a step further and declaring that student-athletes are employees of the NCAA. This is especially true in the context of college football, where the NCAA receives almost no revenue. This is because “[t]he Division I College Football Playoff and bowl games are independently operated,

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<sup>35</sup> *Field Operations Handbook Chapter 10: FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits*, U.S. DEP'T OF LAB. (Mar. 31, 2016), [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch10.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf) (emphasis added).

<sup>36</sup> See Sean Gregory, *Here's the Road Ahead for College Athletes After Union Setback*, TIME (Aug. 18, 2015, 9:24 PM), <https://time.com/4002245/after-union-setback-heres-the-road-ahead-for-college-athletes/> (“Other states limit, or prohibit, public employees from unionizing altogether: college athletes at the University of Alabama, for example, have no constitutional or statutory right to collectively bargain. So a mass push to unionize athletes at public schools isn't entirely practical.”).

<sup>37</sup> Nw. Univ., 362 NLRB 1350, 1352 (2015).

<sup>38</sup> NLRB Memo GC 21-08, *supra* note 17, at \*4.

<sup>39</sup> *Id.*

<sup>40</sup> See *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 532 (Ct. App. 2002) (The NCAA is “a nonprofit organization of collegiate athletic conferences and other institutions.”).

<sup>41</sup> Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 648 (2012) (internal citation omitted).



and the NCAA does not receive revenue from these events.”<sup>42</sup> Moreover, much of the revenue from the regular season goes to the individual athletic departments and the conferences, not the NCAA.<sup>43</sup> Interestingly, because of the way college athletics is structured, the NCAA Men’s Basketball Division I Tournament (commonly known as “March Madness”) constitutes over 90% of the NCAA’s revenues,<sup>44</sup> and “[o]f 90 NCAA championships, only five (all in Division I) generate at least as much money as they cost to run: men’s basketball, men’s ice hockey, men’s lacrosse, wrestling and baseball.”<sup>45</sup> Outside of the players who play in March Madness, basically no other student-athletes are contributing to the NCAA’s pot of funds. Yet, Abruzzo believes that scholarship football players at Division I FBS colleges and universities are entitled to receive funds from the NCAA. The idea that someone can be an employee of an organization to which they provide little monetary benefits to is difficult to imagine. As an analogy, just because lawyers are governed by their state bar organizations does not mean that they are employees of their state bar organizations.

Second, there are issues with what interests the broad category of student-athletes share. As noted above, certain sports generate more money than others. Additionally, certain athletic departments generate more money than others.<sup>46</sup> “Nearly half a million college athletes make up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA’s 90 championships in 24 sports across 3 divisions.”<sup>47</sup> It is difficult to imagine framing which groups of student-athletes would unionize. Moreover, if certain men’s sports teams were able to collectively bargain for more extensive benefits than women’s teams in the same athletic department, that could violate Title IX.<sup>48</sup> Furthermore,

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<sup>42</sup> *Where Does the Money Go?*, NCAA, <https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx> (last visited Apr. 4, 2022).

<sup>43</sup> See Andy Wittry, *In FY20, revenue from media rights rose for most of the Power 5, NCAA distributions decreased for (almost) all*, OUT OF BOUNDS WITH ANDY WITTRY (June 9, 2021), <https://andywittry.substack.com/p/in-fy20-revenue-from-media-rights?s=r>.

<sup>44</sup> Tim Parker, *How Much Does the NCAA Make Off March Madness?*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp> (last updated Mar. 16, 2022).

<sup>45</sup> *Where Does the Money Go?*, *supra* note 42.

<sup>46</sup> See *College Football Value Rankings*, WALL ST. J., [https://graphics.wsj.com/table/NCAA\\_2019](https://graphics.wsj.com/table/NCAA_2019) (last visited Apr. 8, 2022).

<sup>47</sup> *What is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> (last visited Apr. 8, 2022).

<sup>48</sup> See Todd A. Cherry, Note, *Declining Jurisdiction: Why Unionization Should Not Be the Ultimate Goal for Collegiate Athletes*, 2016 U. ILL. L. REV. 1937, 1992 (concluding that “only providing benefits to revenue-generating men’s athletic teams would conflict with Title IX, which requires universities to provide substantially equal athletic opportunities for men’s and women’s athletic teams.”). Title IX refers to Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964. 20 U.S.C. §§ 1681 et seq.

the unionization of certain student-athletes could come at the expense of other student-athletes.<sup>49</sup> Accordingly, it appears that unionization is not the answer to student-athlete underpayment. But there are areas of law outside of labor law that could hold the solution.

## II. POTENTIAL ANTITRUST REMEDIES

The remedies that can be provided in antitrust law are the answer to student-athlete underpayment. The workings of antitrust law are first described below to establish why this is the case. Next, this Comment discusses why student-athletes are independent contractors. Then, there is an explanation of how college athletic departments are price-fixing the labor of student-athletes. After that, plaintiffs' past successes in pursuing antitrust claims in the arena of college sports are highlighted.

### A. *How Does Antitrust Law Work?*

Antitrust law is “[t]he body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination.”<sup>50</sup> It “is where the law meets the economic markets.”<sup>51</sup> Additionally, in the spirit of this journal, scholars have supported the idea that antitrust law is a “companion piece of federal corporate governance law.”<sup>52</sup> The main statutes that govern federal antitrust law in the United States include the Sherman Antitrust Act and the Clayton Antitrust Act.<sup>53</sup> These statutes are not too complex.<sup>54</sup> Rather, they are “short, general statements.”<sup>55</sup>

Because of their brevity, the judiciary has had to interpret what these statutes mean when applied to varied conduct. It is likely no surprise, then, that the interpretations of these statutes—and antitrust law generally—have shifted over the last century. Many of these changes reflect shifting views on Congress’s legislative intent in passing the statutes. As these views change, certain judicially created rules have

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<sup>49</sup> See Roberto L. Corrada, *College Athletes in Revenue-Generating Sports As Employees: A Look Into The Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 209 (2020) (“[T]he only schools that may be able to complete a successful financial transition to a system in which student athletes are deemed employees at least in the short term are athletes in Division I Power 5 Conference schools.”).

<sup>50</sup> *Antitrust law*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

<sup>51</sup> ANDREA AGATHOKLIS MURINO & BRIAN N. DESMARAIS, *ANTITRUST LAW FUNDAMENTALS* (LexisNexis 2020).

<sup>52</sup> Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns*, 51 DRAKE L. REV. 307, 320 (2003).

<sup>53</sup> ANDREA AGATHOKLIS MURINO & BRIAN N. DESMARAIS, *supra* note 53.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

come and gone, but the common law–like nature of antitrust practice continues to build on itself.<sup>56</sup>

One of the recent areas that antitrust practice has evolved is in the realm of college athletics. The Sherman Act is “[a]n 1890 federal statute that prohibits direct or indirect interference with the freely competitive interstate production and distribution of goods.”<sup>57</sup> Section 1 of the Sherman Act is most applicable to college athletics.<sup>58</sup>

In order to state a claim under section 1 of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality, a “quick-look” analysis, or a rule of reason analysis; and (3) that the restraint affected interstate commerce.<sup>59</sup>

The question whether the regulation of college sports satisfies the three elements of the Sherman Act has been the subject of much litigation, with varying results.<sup>60</sup>

Despite the economic differences between for-profit and non-profit organizations, antitrust law is applicable to both forms of organizations.<sup>61</sup> One area where this rings true is within collegiate sports.

Historically, collegiate sports had been a wholly amateur endeavor with little commercial impact and thus were shielded from antitrust liability. Few could argue, however, that modern college sports have [not] become big business, and accordingly, a tension has been created between attempts to retain the purity of amateur sport and the desire to maximize the revenue potential of collegiate athletic programs. Attempts by organizations such as the NCAA to regulate college sports have engendered litigation to determine whether such measures run afoul of the federal antitrust laws.<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Sherman Antitrust Act*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

<sup>58</sup> See Richard E. Kaye, Annotation, *Application of Federal Antitrust Laws to Collegiate Sports*, 87 A.L.R. Fed. 2d 43 (2014 & Supp. 2020). The Clayton Act is not really applicable to any federal antitrust litigation regarding college sports. It is “[a] 1914 federal statute amending the Sherman Act to prohibit price discrimination, tying arrangements, and exclusive-dealing contracts, as well as mergers and interlocking directorates, if their effect might substantially lessen competition or create a monopoly in any line of commerce.” *Clayton Act*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

<sup>59</sup> Kaye, *supra* note 58, at 43.

<sup>60</sup> *Id.*

<sup>61</sup> *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982). See Tomas J. Philipson & Richard A. Posner, *Antitrust in the Not-for-Profit Sector*, 52 J.L. & ECON. 1, 1-2 (2009).

<sup>62</sup> Kaye, *supra* note 58, at 43.

### B. *Student-Athletes Are Independent Contractors*

An independent contractor is defined as:

Someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it . . . It does not matter whether the work is done for pay or gratuitously. Unlike an employee, an independent contractor who commits a wrong while carrying out the work usu[ally] does not create liability for the one who did the hiring.<sup>63</sup>

Student-athletes seem to fit this definition squarely.

First, student-athletes do “undertake a specific project” by playing for their respective teams.

Second, while student-athletes do “receive[] instructions from a coach while preparing for and playing . . . games,” they are “not otherwise controlled by the coach.”<sup>64</sup> Essentially, student-athletes, akin to independent contractors, just contract their services out for the season while not being controlled like an employer controls an employee. The recent loosening of the transfer portal restrictions on student-athletes is indicative of this reality.<sup>65</sup> The transfer portal has shortened the duration of time that student-athletes are in exclusive relationships with their universities in contrast to some of the *Reid* factors relevant to the inquiry whether a worker is an employee that were discussed above.<sup>66</sup>

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<sup>63</sup> *Independent contractor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>64</sup> *Hanson v. Kynast*, 494 N.E.2d 1091, 1096 (Ohio 1986).

<sup>65</sup> *See, e.g.*, Ryan Glasspiegel, *LSU Loses Entire Basketball Team to Transfer Portal, NBA Draft After Will Wade Firing*, N.Y. POST (Apr. 1, 2022, 4:48 PM), <https://nypost.com/2022/04/01/entire-lsu-basketball-roster-chooses-to-leave-team-after-will-wade-firing/> (“The transfer portal, in practice, creates a college athlete free agency every year. The LSU players are capitalizing on that, and who knows, maybe some will get a ‘strong ass’ offer and choose to return.”).

<sup>66</sup> The counterargument could be made that duration of time is not indicative of whether an individual is an employee because of the existence of seasonal employment. The *Reid* factors, discussed *supra*, should, however, be analyzed in the aggregate. While duration of time alone is not strong enough to categorize someone as an independent contractor rather than as an employee or vice versa, various *Reid* factors together are sufficient. This article addresses some of these factors. Others are not addressed expressly but can be inferred as supportive of the assertion that student-athletes are not employees. *See, e.g.*, Laine Higgins, *College Athletes Who Cashed in Have a Painful New Homework Assignment: Their Taxes*, WALL ST. J. (Apr. 14, 2022, 9:18 AM), <https://www.wsj.com/articles/college-sports-taxes-nil-endorsements-11649928654> (“Most athletes qualify as ‘self-employed individuals’ on their tax return and need to submit a 1099 form for each gig they book.”). Accordingly, if the Internal Revenue Code does not treat student-athletes as employees, then the NLRA should not do so either. There should be congruence across the federal government.

Third, some student-athletes do the work for pay (scholarships) and some student-athletes do the work gratuitously (walk-ons).

Fourth, student-athletes who commit a wrong while carrying out their work usually do not create liability for their universities.<sup>67</sup>

Accordingly, student-athletes appear to be independent contractors.

### *C. College Athletic Departments Are Price-Fixing the Labor of Student-Athletes*

Price-fixing is defined as “the artificial setting or maintenance of prices at a certain level, contrary to the workings of the free market.”<sup>68</sup> Fixing the price of labor, which is known as wage-fixing, is a form of price-fixing.<sup>69</sup> Because “price-fixing agreements are illegal per se under the Sherman Act,” wage-fixing is illegal per se under the Sherman Act.<sup>70</sup>

While the NCAA has recently agreed to let student-athletes earn money from their fame, student-athletes are still disallowed from being paid directly by their universities beyond the cost of attendance.<sup>71</sup> If students-athletes truly are independent contractors, as this Comment argues, then the current rules set around student-athlete pay appear to be the paradigm of wage-fixing. Accordingly, college athletic departments are price-fixing the labor of student-athletes, and the courts need to resolve this.

### *D. Antitrust Success in the Past*

As the prominent cases below illustrate, the courts are willing to levy antitrust penalties against the NCAA.

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<sup>67</sup> See, e.g., *Hanson*, 494 N.E.2d at 1096 (holding that a college lacrosse player who committed wrongful acts during a game was “not the agent of the university at the time he is playing the game of lacrosse”).

<sup>68</sup> *Price-fixing*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>69</sup> *United States v. Jindal*, 2021 WL 5578687, at \*5 (E.D. Tex. Nov. 29, 2021), *reconsideration denied sub nom.* *United States v. Rodgers*, 2022 WL 889942 (E.D. Tex. Mar. 25, 2022).

<sup>70</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); see *Jindal*, 2021 WL 5578687, at \*5.

<sup>71</sup> Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html>.

### I. NCAA v. Board of Regents of the University of Oklahoma

Prior to *NCAA v. Alston*, *NCAA v. Board of Regents of the University of Oklahoma* was the leading case in collegiate antitrust law.<sup>72</sup> It arose out of a broadcasting rights dispute.<sup>73</sup> The origins of this case were when the NCAA entered into contracts with the American Broadcasting Company (“ABC”) and the Columbia Broadcasting System (“CBS”) in 1981.<sup>74</sup> Under these contracts, ABC and CBS would be granted exclusive carrying rights of NCAA football games for the 1982-85 college football seasons.<sup>75</sup> In return, ABC and CBS paid a specified “minimum aggregate compensation to the participating NCAA member institutions” of \$131,750,000 during this period.<sup>76</sup>

Under this broadcasting plan, each team was given the right to negotiate with the networks under some restrictions.<sup>77</sup> The first (although not technically a restriction, it still had extensive influence) was a recommended fee that the NCAA set for telecast categories.<sup>78</sup> The recommended fee was larger for certain telecasts that were seen as more valuable than others.<sup>79</sup> In descending order, the recommended fees were in the following categories: (1) national telecasts, (2) regional telecasts, (3) Division II, and (4) Division III football games.<sup>80</sup>

The second was an “appearance requirement.”<sup>81</sup> Under the appearance requirement, ABC and CBS would have to showcase at least 82 different teams during two two-year periods: the 1982-83 college football seasons and the 1984-85 college football seasons.<sup>82</sup>

The third was an “appearance limitation.”<sup>83</sup> Under the appearance limitation, no team was eligible to appear on television more than six times total and more

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<sup>72</sup> See Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 289 (1993).

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

<sup>74</sup> Susan Marie Kozik, Comment, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*, 61 CHI.-KENT L. REV. 593, 598 (1985).

<sup>75</sup> *Id.*

<sup>76</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 93 (1984). While this sounds like a substantial amount of money, the NCAA’s revenue from its licensing and television agreements for 2021-24 will be worth around \$3.5 billion. Christina Gough, *NCAA television and licensing rights revenue 2011-2024*, STATISTA (Mar. 20, 2020), <https://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement/>.

<sup>77</sup> *Bd. of Regents*, 468 U.S. at 93.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

than four times on a national telecast during each of the respective two-year periods. Additionally, these television appearances had to be divided equally between ABC and CBS.<sup>84</sup>

A group of 63 NCAA member universities, including the University of Oklahoma and the University of Georgia, began a group called the College Football Association (“CFA”) in 1977.<sup>85</sup> According to University of Georgia law professor James Ponsoldt, the reason that the CFA was formed was that “[p]eople were just fed up with the NCAA’s parochialism, power grab, etc., but also they wanted more money, they wanted to maximize and they wanted their fans to be able to see them on TV.”<sup>86</sup> In 1981, the CFA negotiated a television contract with the National Broadcasting Company (“NBC”).<sup>87</sup> This contract would have given each CFA football team a greater number of television appearances.<sup>88</sup> Accordingly, it would have increased the total revenues of each of the CFA members.<sup>89</sup> Due to this contract, the NCAA threatened to impose sanctions on CFA members’ athletic departments.<sup>90</sup> In response to this threat, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association sought and obtained a preliminary injunction in the United States District Court for the Western District of Oklahoma that prevented the NCAA from intruding upon the CFA-NBC contract.<sup>91</sup> However, the \$180 million television contract never came to fruition.<sup>92</sup> CFA Executive Director Chuck Neinas reasoned that the deal never happened because “[a]lthough a number of CFA members expressed interest in the NBC agreement there was a continued concern about the possibility of the NCAA initiating enforcement procedures.”<sup>93</sup>

After a full trial, the district court held that the NCAA violated sections 1 and 2 of the Sherman Act.<sup>94</sup> “The District Court defined the relevant market as

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<sup>84</sup> *Id.*

<sup>85</sup> *The College Football Association announced Monday that its attempt...*, UPI (Dec. 14, 1981), <https://www.upi.com/Archives/1981/12/14/The-College-Football-Association-announced-Monday-that-its-attempt/7716377154000/> [hereinafter *CFA Announcement*].

<sup>86</sup> Mark Weiszer, *Fall Saturdays will never be the same*, ONLINEATHENS.COM, reprinted in *College Football Association*, WIKIPEDIA (Apr. 6, 2019, 1:20 AM), [https://en.wikipedia.org/wiki/College\\_Football\\_Association](https://en.wikipedia.org/wiki/College_Football_Association).

<sup>87</sup> Kozik, *supra* note 74, at 599.

<sup>88</sup> *Bd. of Regents*, 468 U.S. at 95.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Kozik, *supra* note 74, at 599.

<sup>92</sup> *CFA Announcement*, *supra* note 85.

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

<sup>94</sup> Kozik, *supra* note 74, at 599.

‘live college football television’ because it found that alternative programming has a significantly different and lesser audience appeal.”<sup>95</sup> This relevant market had been restrained in three fashions.<sup>96</sup> First, the “NCAA fixed the price for particular telecasts.”<sup>97</sup> Second, the NCAA’s “exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors.”<sup>98</sup> Third, the NCAA’s “plan placed an artificial limit on the production of televised college football.”<sup>99</sup>

The NCAA asserted that their television policy (1) protected gate attendance of its members and (2) maintained a competitive balance between its members.<sup>100</sup> However, this reasoning was rejected due to a lack of evidence.<sup>101</sup>

The United States Court of Appeals for the Tenth Circuit affirmed the district court’s decision except for the boycott holding.<sup>102</sup> Further, the Tenth Circuit held that the NCAA television plan constituted illegal *per se* price-fixing because it eliminated competition between college football television producers.<sup>103</sup> The NCAA then appealed this decision, and the Supreme Court granted certiorari.<sup>104</sup>

The Supreme Court affirmed the decision of the Tenth Circuit, deciding to apply the rule of reason test to this case rather than deeming it illegal *per se* because of the nature of college football and its academic tradition.<sup>105</sup> The Court found that the question presented in this case was whether the challenged restraint enhanced competition.<sup>106</sup> The Court decided that the challenged restraint did not enhance competition.<sup>107</sup> Instead, it curtailed output and hindered NCAA schools from responding to consumers’ preferences, consequently restricting competition.<sup>108</sup>

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<sup>95</sup> NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 95 (1984).

<sup>96</sup> *Id.* at 96.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 600. The only part of the decision that was not affirmed by the Tenth Circuit was the district court’s finding that the NCAA’s “exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors.” *Bd. of Regents*, 468 U.S. at 95.

<sup>103</sup> Kozik, *supra* note 74, at 600.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 601.

<sup>106</sup> *Id.* at 602.

<sup>107</sup> *Bd. of Regents*, 468 U.S. at 120.

<sup>108</sup> *Id.*



Justice Byron White, a former All-American halfback at the University of Colorado, dissented in the case.<sup>109</sup> He asserted that the NCAA's television plan was reasonable due in part to the noneconomic values of amateurism and educational value in intercollegiate athletics.<sup>110</sup>

Justice White's reasoning was not accepted, and college athletics continued its journey into becoming the commercial juggernaut it is today. Long gone were the days of college athletics as Justice White had experienced them when he was a student-athlete.

## 2. O'Bannon v. NCAA

*O'Bannon v. NCAA* was once called "the most important decision ever on amateurism in college sports."<sup>111</sup> This dispute arose out of a peculiar case of video game rage.<sup>112</sup>

"In 2008, Ed O'Bannon, a former All-American basketball player at UCLA, visited a friend's house, where his friend's son told O'Bannon that he was depicted in a college basketball video game."<sup>113</sup> This video game was produced by EA Sports.<sup>114</sup> "The friend's son turned on the video game, and O'Bannon saw an avatar of himself."<sup>115</sup> O'Bannon was surprised to see this avatar of himself because he "had never consented to the use of his likeness in the video game, and he had not been compensated for it."<sup>116</sup>

The next year in 2009, "O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC), the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use, in federal court."<sup>117</sup> O'Bannon complained "that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act."<sup>118</sup>

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<sup>109</sup> Kozik, *supra* note 74, at 603.

<sup>110</sup> *Bd. of Regents*, 468 U.S. at 135 (White, J., dissenting).

<sup>111</sup> Michael A. Carrier, *How Not to Apply the Rule of Reason: The O'Bannon Case*, 114 MICH. L. REV. FIRST IMPRESSIONS 73, 80 (2015).

<sup>112</sup> See generally Victoria L. Dunkley, M.D., *Video Game Rage*, PSYCHOLOGY TODAY (Dec. 1, 2012), <https://www.psychologytoday.com/us/blog/mental-wealth/201212/video-game-rage>.

<sup>113</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* NIL is an acronym that stands for "Name, Image, and Likeness." It "is a term that describes the means through which college athletes are allowed to receive financial compensation. NIL refers to the use of an athlete's name, image, and likeness through marketing and promotional endeavors. This can include autograph signings,

A similar case had been filed by former Arizona State University and University of Nebraska starting quarterback Sam Keller around the same time.<sup>119</sup> Both cases were consolidated in the United States District Court for the Northern District of California.<sup>120</sup> The NCAA filed a motion to dismiss under the First Amendment's right-of-publicity.<sup>121</sup> Both the district court and the United States Court of Appeals for the Ninth Circuit denied the motion to dismiss, ruling that the use of O'Bannon's and Keller's NILs were not protected under the First Amendment's right-of-publicity.<sup>122</sup> In November 2013, this case was certified as a class action.<sup>123</sup> The class was deemed "all current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men's basketball team or on an NCAA Football Bowl Subdivision . . . men's football team."<sup>124</sup> These student-athletes' NILs "may be, or have been, included or could have been included in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees."<sup>125</sup>

The cases against EA and the CLC were settled.<sup>126</sup> The crux of the case became (1) whether the NCAA's compensation rules were subject to antitrust laws and (2) if so, whether they were an unlawful restraint of trade.<sup>127</sup> Additionally, the plaintiffs in this case raised the issue of compensating student-athletes.<sup>128</sup> District Judge Claudia Wilken held on August 8, 2014 that Division I colleges and universities may pay their men's basketball or FBS student-athletes a share of the revenue made from licensing these athletes' NILs.<sup>129</sup> She also prohibited the NCAA from disallowing student-athlete compensation.<sup>130</sup> However, Wilken additionally determined that the NCAA could cap the amount of this pay at \$5000.<sup>131</sup>

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product endorsements, social media posts, and more." *Everything You Need to Know About NIL*, ICON SOURCE (last visited Apr. 25, 2022), <https://www.iconsource.com/everything-about-nil.html>.

<sup>119</sup> *O'Bannon*, 802 F.3d at 1055.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1055-56.

<sup>125</sup> *Id.* at 1056.

<sup>126</sup> Meghan R. Price, Case Note, *O'Bannon v. National Collegiate Athletic Association: A Cinderella Story*, 22 JEFFREY S. MOORAD SPORTS L.J. 179, 181 n.17 (2015).

<sup>127</sup> *Id.* at 181-83.

<sup>128</sup> *Id.* at 182-83.

<sup>129</sup> *Id.* at 184.

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

<sup>131</sup> *Id.*

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, except for vacating the district court's \$5000 determination.<sup>132</sup> The Ninth Circuit held that the NCAA's compensation rules are subject to antitrust regulation.<sup>133</sup> First, the NCAA's claim that *Board of Regents* declared the NCAA's amateurism rules "valid as a matter of law" was rejected.<sup>134</sup> Second, it was determined that the NCAA's compensation rules regulate "commercial activity."<sup>135</sup> It was decided that Division I college football and men's basketball are commercial activity because both the players and the schools anticipate economic gain from their activities.<sup>136</sup> Third, it was determined that there were significant anticompetitive effects within a relevant market.<sup>137</sup> This relevant market was defined as the "college education market."<sup>138</sup> The Ninth Circuit agreed with the NCAA that the NCAA's compensation rules promoted amateurism and integrated student-athletes with the respective schools' academic communities.<sup>139</sup> However, the Ninth Circuit rejected the NCAA's claims that their compensation rules promoted competitive balance among NCAA schools and improved output in the college education market.<sup>140</sup> Fourth, it was determined that there was a substantially less restrictive alternative to the NCAA's rules.<sup>141</sup> This substantially less restrictive alternative was to cap the proper amount of scholarships at the cost of attendance.<sup>142</sup> The Ninth Circuit disagreed with the district court and determined that allowing students to receive cash compensation for their NILs was not a viable alternative.<sup>143</sup> The Ninth Circuit stated that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."<sup>144</sup> Therefore, it would surrender the student-athletes' status as amateurs.<sup>145</sup>

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<sup>132</sup> *O'Bannon*, 802 F.3d at 1079.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1061.

<sup>135</sup> *Id.* at 1064.

<sup>136</sup> *Id.* at 1065.

<sup>137</sup> *Id.* at 1070.

<sup>138</sup> *Id.* at 1072.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1074.

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

<sup>143</sup> *Id.* at 1076.

<sup>144</sup> *Id.* at 1078.

<sup>145</sup> *See id.* at 1079 ("At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status.") (citing *NCAA v. Bd. Of Regents*, 468 U.S. 85, 101-02, 104 (1984)).

Chief Judge Sidney Thomas concurred in part and dissented in part in this case.<sup>146</sup> He would have affirmed the \$5000 award granted by the district court.<sup>147</sup> He asserted that the NCAA's compensation rules should not be analyzed under the preservation of amateurism but rather the preservation of popular demand for college sports.<sup>148</sup> He believed that the district court's evidentiary findings supported the idea that the \$5000 award would not significantly reduce college sports demand.<sup>149</sup> Therefore, the district court's entire judgment should have been affirmed.<sup>150</sup> While Judge Sidney Thomas's dissenting opinion did not represent the Court here, he would get a chance five years later to write a majority opinion regarding antitrust and collegiate sports in the Ninth Circuit's decision in *Alston v. NCAA*.<sup>151</sup>

### 3. NCAA v. Alston

*NCAA v. Alston* is the most recent high-profile case concerning federal antitrust law and collegiate athletics.<sup>152</sup> This dispute arose out of a group of challenges to the NCAA's cap on the value of athletic scholarships.<sup>153</sup> These challenges, filed between 2014 and 2015 during the *O'Bannon* litigation, were led by former West Virginia University running back Shawne Alston and former University of California, Berkeley basketball center Justine Hartman.<sup>154</sup> These challenges were certified as a class action under the *Alston v. NCAA* umbrella and consolidated into one case, which would analyze whether the NCAA's limits on student-athletes' compensation violated federal antitrust law.<sup>155</sup> The plaintiffs argued that if the NCAA's limits were not in place at the time that they had competed in collegiate athletics, they would have received greater compensation

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<sup>146</sup> *Id.* at 1079 (Thomas, C.J., concurring in part and dissenting in part).

<sup>147</sup> *Id.* at 1083.

<sup>148</sup> *Id.* at 1081.

<sup>149</sup> *Id.* at 1083.

<sup>150</sup> *Id.*

<sup>151</sup> See *Alston v. Nat'l Collegiate Athletic Ass'n (In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 208 L. Ed. 2d 504, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 208 L. Ed. 2d 504, 141 S. Ct. 972 (2020), and *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021).

<sup>152</sup> See Michael McCann, *Justice Ginsburg's Supreme Court Replacement to Shape Sports Industry*, SPORTICO (Sept. 22, 2020, 11:27 AM), <https://www.sportico.com/law/analysis/2020/justice-ginsbergs-supreme-court-replacement-to-shape-sports-industry-1234613502/>.

<sup>153</sup> Michael McCann, *NCAA Asks Supreme Court to Review Scholarship Cash Limits*, SPORTICO (Oct. 20, 2020, 2:55 AM), <https://www.sportico.com/law/analysis/2020/ncaa-supreme-court-challenge-to-amateurism-1234615100/>.

<sup>154</sup> *Id.*

<sup>155</sup> *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1065 (N.D. Cal. 2019), *aff'd*, *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

for their athletic services that they were entitled to have.<sup>156</sup> The NCAA insisted that its rules capping the value of athletic scholarships are pro-competitive.<sup>157</sup> It gave two reasons: (1) “the limits help preserve the demand for college sports because consumers value amateurism as Defendants define it,” and (2) “the rules promote integration of student-athletes into their academic communities, which in turn improves the college education they receive in exchange for their services.”<sup>158</sup>

The question presented in this case was whether “the law compel[s] the NCAA to allow member schools to compete for recruits by offering financial benefits that reflect recruits’ actual value.”<sup>159</sup> In an opinion by the same author as *O’Bannon’s* district court decision, Judge Claudia Wilken of the United States District Court for the Northern District of California ruled that the law does compel the NCAA to expand financial benefits to athletes beyond what the prior rules had allowed.<sup>160</sup>

First, the district court determined that *O’Bannon* is not preclusive.<sup>161</sup> The district court identified “material factual differences” between the *Alston* and *O’Bannon*.<sup>162</sup> Some of these differences include: (1) “the identity of class members”<sup>163</sup> and (2) “the rules and rights at issue.”<sup>164</sup>

Second, the district court determined the relevant market in this case.<sup>165</sup> The relevant market was the market of student-athletes selling their “labor in the form of athletic services” to colleges and universities in return for scholarships and other benefits that the NCAA allowed student-athletes to receive.<sup>166</sup>

Third, the district court determined whether there were anticompetitive effects within this relevant market.<sup>167</sup> The district court found that there indeed were anticompetitive effects within this relevant market.<sup>168</sup> It was determined that schools exercised monopsony power which artificially capped the fair value

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<sup>156</sup> *Id.* at 1062.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> McCann, *supra* note 153.

<sup>160</sup> *In re Nat’l Collegiate Athletic Ass’n Ath. Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1110.

<sup>161</sup> *Alston v. Nat’l Collegiate Athletic Ass’n*, 958 F.3d 1239, 1248 (9th Cir. 2020), *aff’d*, 141 S. Ct. 2141 (2021).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

of student-athletes' services.<sup>169</sup> The district court asserted if not for the challenged restraints, student-athletes would indeed receive higher compensations.<sup>170</sup> The district court illustrated this point by pointing to evidence such as the "palatial athletic facilities and seven-figure coaches' salaries" in collegiate athletics.<sup>171</sup> The district court pointed out that it seemed as if schools were allowed to spend on virtually anything except for direct financial support for student-athletes.<sup>172</sup> Accordingly, there were "significant anticompetitive effects in the relevant market."<sup>173</sup>

Fourth, the district court determined whether the NCAA had procompetitive justifications for their restrictions on student-athletes' athletic scholarships.<sup>174</sup> The district court accepted the NCAA's procompetitive justifications with respect to the NCAA's limits on cash compensation "untethered to education,"<sup>175</sup> but not as to its restrictions on "non-cash education-related benefits."<sup>176</sup> The district court said that the concept of amateurism in NCAA athletics does not directly foster consumer demand.<sup>177</sup> The opinion pointed out that the NCAA permits other payments above a student-athlete's cost of attendance and that these challenged rules: (1) "do not follow any coherent definition of amateurism . . . or even 'pay,'"<sup>178</sup> and (2) these payments have not had a negative effect on consumer demand for college sports, which "remain[] exceedingly popular and revenue-producing."<sup>179</sup> Moreover, the district court found the NCAA's economic expert unreliable because of the expert's failure to recognize many important aspects of consumer demand for NCAA sports.<sup>180</sup> Meanwhile, the district court found the student-athletes' experts persuasive in light of evidence finding that there have not been any negative effects on consumer demand for NCAA sports in light of some recent increases in compensation for student-athletes and the evidence the student-athletes proffered from survey respondents.<sup>181</sup> The district court did not go as far as to allow unlimited payments unrelated to education to student-athletes, though.<sup>182</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1249.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1248.

<sup>174</sup> *Id.* at 1249.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1249-50.

<sup>181</sup> *Id.* at 1250.

<sup>182</sup> *Id.* at 1250-51.

The district court acknowledged how important consumer demand was to maintaining a difference between college sports and professional sports.<sup>183</sup> Some of the NCAA's rules that the district court approved included: (1) "the COA limit on the grant-in-aid,"<sup>184</sup> (2) "limits on compensation unrelated to education,"<sup>185</sup> and (3) "limits on cash awards for graduating or other academic achievements."<sup>186</sup> However, the district court disapproved the NCAA's restrictions on "non-cash education-related benefits."<sup>187</sup>

Fifth, the district court analyzed less restrictive alternatives.<sup>188</sup> Two alternatives were rejected for allowing "professional-style cash payments."<sup>189</sup> However, a third alternative was seen as viable.<sup>190</sup> This alternative would do three things. First, it would "allow the NCAA to continue to limit grants-in-aid at not less than the [COA]." Second it would "allow the [NCAA] to continue to limit compensation and benefits unrelated to education." Third, it would "enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future."<sup>191</sup>

The district court then listed out some of the education-related benefits that the NCAA would not be allowed to prohibit.<sup>192</sup> These benefits included: (1) computers, (2) science equipment, (3) musical instruments, (4) other items related to academics, (5) post-eligibility scholarships, (6) tutoring, (7) study-abroad costs, and (8) paid post-eligibility internships.<sup>193</sup> The district court permitted the NCAA to cap these awards, but they could not cap it at an amount below \$5600, "the existing limit on aggregate athletic participation awards."<sup>194</sup> However, an individual conference or school within the NCAA could cap awards below this amount because conferences do not "dominate" the relevant market as the NCAA does.<sup>195</sup> The district court asserted that this less restrictive

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<sup>183</sup> *Id.* at 1250.

<sup>184</sup> *Id.*

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

<sup>186</sup> *Id.* at 1250-51.

<sup>187</sup> *Id.* at 1251.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

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

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

<sup>195</sup> *Id.* at 1251-52.

alternative would not turn student-athletes into professionals.<sup>196</sup> The district court even said that this less restrictive alternative would not significantly increase the NCAA's costs because the NCAA would save money from decreased enforcement costs.<sup>197</sup>

Sixth, the district court put forth the remedy for the plaintiffs in this case.<sup>198</sup> The remedy was to implement the less restrictive alternative described in the preceding paragraph via a permanent injunction.<sup>199</sup> The remedy did give the NCAA some flexibility in how they would implement this less restrictive alternative.<sup>200</sup> For example, the schools' athletic departments could pay students directly or they could pay students after the fact when sufficient proof of purchase would be shown to the athletic department.<sup>201</sup> Finally, the point that individual conferences or schools within the NCAA could cap awards was reiterated.<sup>202</sup> This injunction was stayed pending resolution of a timely appeal when Judge Sidney Thomas and the United States Court of Appeals for the Ninth Circuit decided *Alston* a little over a year after the district court's March 2019 decision in the peculiar time period of May 2020.<sup>203</sup>

The Ninth Circuit began by explaining that the *stare decisis* and *res judicata* issues in *Alston* would be reviewed *de novo*.<sup>204</sup> Moreover, it was explained that factual findings are reviewed for clear error while legal conclusions are reviewed *de novo*.<sup>205</sup> In describing the clear error/clearly erroneous standard for the review of factual findings, Judge Sidney Thomas whimsically stated that the factual findings of the district court are not clearly erroneous unless they "strike[] us as wrong with the force of a five-week-old, unrefrigerated dead fish."<sup>206</sup> Also, the permanent injunction granted by the district court was reviewed for an abuse of discretion.<sup>207</sup>

The Ninth Circuit decided that the district court correctly decided that *O'Bannon* did not foreclose *Alston* as a matter of *stare decisis* and *res judicata*.<sup>208</sup>

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<sup>196</sup> *Id.* at 1252.

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

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1253 (*quoting* *Prete v. Bradbury*, 438 F.3d 949, 968 n.23 (9th Cir. 2006) (internal citation omitted)).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*



They supported this assertion by showing distinguishing facts differing *O'Bannon* and *Alston*.<sup>209</sup> These distinguishing facts are critical because “[a]ntitrust decisions are particularly fact-bound.”<sup>210</sup> Moreover, the Ninth Circuit explained that the NCAA bore the burden of proving that *Alston* should be foreclosed as a matter of *res judicata*.<sup>211</sup> The Ninth Circuit reasoned that the NCAA did not satisfy this burden because the antitrust claims in *Alston* arose after the *O'Bannon* record closed in August 2014.<sup>212</sup> The Ninth Circuit put forth that these new claims included “permissible above-COA payments alongside a growth in revenues from FBS football and D1 basketball.”<sup>213</sup>

Next, the Ninth Circuit ruled that “[t]he district court properly granted judgment on the Student-Athletes’ Sherman Act § 1 claim.”<sup>214</sup> They analyzed this ruling under a three-step framework:

- (1) Student-Athletes bear[] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market;
- (2) if they carry that burden, the NCAA must come forward with evidence of the restraint’s procompetitive effects;
- and (3) Student-Athletes must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.<sup>215</sup>

The Ninth Circuit decided that “[t]he district court properly concluded that the Student-Athletes carried their burden at the first step of the Rule of Reason.”<sup>216</sup> The Ninth Circuit ruled this way because of the belief that student-athletes lack viable alternatives to play sports at an elite level after high school outside of the NCAA.<sup>217</sup>

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<sup>209</sup> *Id.* at 1253-55.

<sup>210</sup> *Id.* at 1253.

<sup>211</sup> *Id.* at 1255.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1256.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* (internal quotation marks omitted) (citations omitted).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1257. Quare whether this was or is still true. *See, e.g.,* Michael LoRé, *After Successful Inaugural Season, Overtime Elite Wants To Keep Forging Alternative Path To Pro Basketball*, FORBES (Mar. 22, 2022, 8:00 AM), <https://www.forbes.com/sites/michaellore/2022/03/22/overtime-elite-to-build-off-of-successful-inaugural-season/?sh=12c1bcde3df9> (“Founded in March 2021 by Overtime co-founders and former WME executives Dan Porter and Zack Weiner, Overtime Elite (OTE) offers prospects who leave high school and forfeit their NCAA eligibility a six-figure contract plus bonuses, the ability to profit off their name, likeness and image (NIL), equity in Overtime, an education including life skills like financial literacy and media training, but most importantly, an alternative path to the professional ranks with the NBA the dream destination for most, if not all.”).

In the second step of the three-step framework, the Ninth Circuit ruled that “the district court fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.”<sup>218</sup> In line with the district court, the Ninth Circuit found the NCAA’s procompetitive justification of amateurism unpersuasive in regards to the NCAA’s former compensation procedures.<sup>219</sup>

In the third step of the three-step framework, the Ninth Circuit determined that the district court “did not clearly err” in determining the least restrictive alternative.<sup>220</sup> First, the Ninth Circuit said that “[t]he district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do.”<sup>221</sup> It was reasoned that the uncapping is not congruous to professional salaries.<sup>222</sup> Moreover, the Ninth Circuit asserted that these “limited” costs would not “repel college sports fans.”<sup>223</sup> Second, the Ninth Circuit determined that “[t]he district court did not clearly err in finding that this LRA will not result in significantly increased costs.”<sup>224</sup> The Ninth Circuit said that in addition to being supported by the record, it was “commonsense” that the new education-related benefits would actually save the NCAA money because otherwise the NCAA would have spent even more money on enforcing the caps that they previously had set.<sup>225</sup>

Lastly, the Ninth Circuit examined the district court’s injunction.<sup>226</sup> The Ninth Circuit determined that the district court’s injunction was proper, and the injunction was affirmed.<sup>227</sup> The NCAA contended that the district court’s injunction went too far.<sup>228</sup> However, the Ninth Circuit combated this contention by determining that the injunction was not unreasonably vague, nor did the injunction usurp the NCAA’s role.<sup>229</sup> Conversely, the student-athletes contended that the district court’s injunction did not go far enough.<sup>230</sup> The student-athletes wanted the Ninth Circuit to uncap all NCAA compensation limits, including

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<sup>218</sup> *Alston v. NCAA*, 958 F.3d 1239, 1260 (9th Cir. 2020), *aff’d*, 141 S. Ct. 2141 (2021).

<sup>219</sup> *Id.* at 1257-60.

<sup>220</sup> *Id.* at 1260.

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

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

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

<sup>224</sup> *Id.* at 1262.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1263.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1263-64.

<sup>230</sup> *Id.* at 1263.

those unrelated to education.<sup>231</sup> However, the Ninth Circuit reasoned that the NCAA had the procompetitive justification of distinguishing college sports from professional sports.<sup>232</sup> Therefore, the NCAA's restrictions on payments unrelated to education should stay intact.<sup>233</sup>

To conclude his opinion, Judge Sidney Thomas repeated an observation from his concurrence in *O'Bannon*: "The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law and under the appropriate standard of review."<sup>234</sup> Therefore, the Ninth Circuit held that the district court correctly determined that the NCAA's limits on education-related benefits did not "play by the Sherman Act's rules."<sup>235</sup> Accordingly, the district court's liability determination and injunction were affirmed.<sup>236</sup>

As referenced at the beginning of this article, Judge Milan Smith penned a spirited concurring opinion in *Alston*.<sup>237</sup> Judge Smith joined the opinion in full, however, he wanted to express some concerns about the outcome.<sup>238</sup> He wrote that "the current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case (Student-Athletes) of the fundamental protections that our antitrust laws were meant to provide them."<sup>239</sup> He detailed the unfairness and the plights he believes that student-athletes unfairly endure.<sup>240</sup> In contrast, he discussed how NCAA colleges and universities bring in billions of dollars from college athletics.<sup>241</sup> Rather frankly, Judge Smith stated that "the law is a ass—a idiot."<sup>242</sup> Judge Smith believes that student-athletes are not competing within a free market.<sup>243</sup> Instead, he believes that the NCAA is a cartel.<sup>244</sup> The concurring opinion

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1264.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1265 (quoting *O'Bannon v. NCAA*, 802 F.3d 1049, 1083 (9th Cir. 2015) (Thomas, J., concurring in part and dissenting in part)).

<sup>235</sup> *Id.* (citation omitted).

<sup>236</sup> *Id.* at 1266.

<sup>237</sup> *See id.* at 1266-71 (Smith, J., concurring).

<sup>238</sup> *Id.* at 1266.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1267 (quoting *Collins v. Virginia*, 138 S. Ct. 1663, 1681 (2018) (Alito, J., dissenting)) (quoting CHARLES DICKENS, *OLIVER TWIST* 277 (Wordsworth Ed. 1992) (1867)).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

criticized the precedents of the *Board of Regents* and *O'Bannon* cases described above for not preserving economic freedom.<sup>245</sup> Judge Smith argues that the courts should get rid of the precedent established in these two cases which allows defendants to keep on doing as they are doing if they can justify their anticompetitive actions by proving procompetitive effects in a collateral market.<sup>246</sup> Instead, Judge Smith argues that the Ninth Circuit should follow the reasoning of United States Court of Appeals for the District of Columbia Circuit in *Smith v. Pro-Football, Inc.*<sup>247</sup>

In *Smith*, the D.C. Circuit held that the National Football League Draft violated the Sherman Act.<sup>248</sup> Although the NFL asserted that the NFL draft had procompetitive effects for the league, the D.C. Circuit rejected this argument because of the anticompetitive effects within the defined “market for players’ services.”<sup>249</sup> Therefore, the NFL draft was not permissible under the second step of federal antitrust law’s rule of reason analysis.<sup>250</sup> However, because the National Football League Players Association has agreed to sanction the NFL Draft through various collective-bargaining agreements, the NFL Draft is still in existence today.<sup>251</sup> In Judge Smith’s view, a “cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws.”<sup>252</sup> Therefore, he would like to overturn this method of examining antitrust cases in a dispute that directly raises the issue.<sup>253</sup>

On October 15, 2020, the NCAA along with a group of NCAA conferences petitioned for a writ of certiorari in *NCAA v. Alston*.<sup>254</sup> NCAA chief legal officer, Donald M. Remy, released a statement after the petition was filed which succinctly summed up the NCAA’s arguments:

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<sup>245</sup> *Id.* at 1267-69.

<sup>246</sup> *Id.* at 1271.

<sup>247</sup> *Smith v. Pro-Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

<sup>248</sup> Eriq Gardner, *Rookie Abuse*, SLATE (Apr. 23, 2009, 5:57 PM), <https://slate.com/culture/2009/04/in-1970-james-yazoo-smith-sued-the-nfl-to-shut-down-the-draft-what-happened-next.html>.

<sup>249</sup> *Alston*, 958 F.3d at 1269.

<sup>250</sup> *Id.*

<sup>251</sup> Gardner, *supra* note 248.

<sup>252</sup> *Alston*, 958 F.3d at 1271.

<sup>253</sup> *Id.*

<sup>254</sup> Stacey Osburn, *NCAA statement regarding Supreme Court petition for Alston case*, NCAA (Oct. 15, 2020, 10:32 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case>; see Mike Leonard, *Supreme Court to Review NCAA Student-Athlete Compensation Case*, BLOOMBERG (Dec. 16, 2020, 8:38 AM), <https://www.bloomberg.com/news/articles/2020-12-16/ncaa-s-athletic-scholarship-caps-to-get-supreme-court-review> (“The NCAA’s top conferences also filed a parallel petition.”).

Today, the NCAA asked the U.S. Supreme Court to grant review of the Alston/Grant-in-Aid case. The 9th U.S. Circuit Court of Appeals is applying antitrust laws to NCAA student-athlete rules inconsistently with other federal circuits and indeed the Supreme Court itself. The ruling blurs the line between student-athletes and professionals, conflicts with prior appellate court decisions, appoints a single court to micromanage collegiate sports, and encourages never-ending litigation following every rule change. The decision extends beyond the NCAA's ability to govern college sports throughout the country, affecting how other joint ventures operate. It is critical for the Supreme Court to address the consequential legal errors in this case so that college sports can be governed, not by the courts, but by those who interact with and lead students every day. Together with our conferences that were individually sued in this matter, we will continue to defend the line between professional sports and college sports.<sup>255</sup>

On November 9, 2020, the student-athletes filed an opposition brief in the case.<sup>256</sup> On November 24, 2020, the NCAA and the conferences filed reply briefs in the case.<sup>257</sup> On December 16, 2020, the United States Supreme Court granted the petition to hear *Alston* with the NCAA and the conferences as consolidated petitioners.<sup>258</sup> The NCAA and the student-athletes both had attorneys comment on the case.<sup>259</sup> Remy released another statement stating:

We are pleased the U.S. Supreme Court will review the NCAA's right to provide student-athletes with the educational benefits they need to succeed in school and beyond. The NCAA and its members continue to believe that college campuses should be able to improve the student-

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<sup>255</sup> Osburn, *supra* note 254.

<sup>256</sup> See Ryan M. Rodenberg (@SportsLawProf), TWITTER (Nov. 11, 2020, 6:05 AM), <https://twitter.com/SportsLawProf/status/1326496346262687744>.

<sup>257</sup> See Sam C. Ehrlich (@samcehrlich), TWITTER (Nov. 24, 2020, 10:24 AM), <https://twitter.com/samcehrlich/status/1331272469303291904>.

<sup>258</sup> Robert Barnes & Rick Maese, *Supreme Court will hear NCAA dispute over compensation for student-athletes*, WASH. POST (Dec. 16, 2020, 10:08 AM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html).

<sup>259</sup> Darren Heitner, *Supreme Court Will Hear A Sports Law Case That Could Destroy The NCAA's Restrictions On Athletes*, ABOVE THE LAW (Dec. 16, 2020, 12:13 PM), [https://abovethelaw.com/2020/12/supreme-court-will-hear-a-sports-law-case-that-could-destroy-the-ncaas-restrictions-on-athletes/?utm\\_campaign=Above%20the%20Law%20Daily&utm\\_medium=email&\\_hsmi=103361071&\\_hsenc=p2ANqtz-9uBetNxlhkD-n03zfYFuQQ2MnqJvOFrdMRI-E7gWb6g15arUzpackejKrXaTothFJc\\_m59mxqRUd9Gfz—AVbBQ0t2qg&utm\\_content=103361071&utm\\_source=hs\\_email&rf=1](https://abovethelaw.com/2020/12/supreme-court-will-hear-a-sports-law-case-that-could-destroy-the-ncaas-restrictions-on-athletes/?utm_campaign=Above%20the%20Law%20Daily&utm_medium=email&_hsmi=103361071&_hsenc=p2ANqtz-9uBetNxlhkD-n03zfYFuQQ2MnqJvOFrdMRI-E7gWb6g15arUzpackejKrXaTothFJc_m59mxqRUd9Gfz—AVbBQ0t2qg&utm_content=103361071&utm_source=hs_email&rf=1).

athlete experience without facing never-ending litigation regarding these changes.<sup>260</sup>

Considering how rarely the Supreme Court grants a petition of certiorari<sup>261</sup> and the Supreme Court's previous rejection of *O'Bannon*,<sup>262</sup> Jeffrey Kessler, a lead attorney for the student-athletes said that he was "surprised"<sup>263</sup> that the Supreme Court took *Alston*. However, Kessler said that his team felt "very confident"<sup>264</sup> about their position in *Alston* and that they were "looking forward to having this case heard."<sup>265</sup> Oral argument was heard by the Supreme Court on March 31, 2021, and the Supreme Court's decision for *Alston* was released on June 21, 2021.<sup>266</sup>

In this June 2021 9-0 opinion written by Justice Neil Gorsuch, the U.S. Supreme Court affirmed the decisions of the district and circuit courts.<sup>267</sup> First, the Court concluded that the district court properly used the rule of reason analysis rather than a quick-look analysis.<sup>268</sup> Second, the Court determined that the *Board of Regents* case discussed above did not create binding precedent that supported the NCAA's current compensation structure.<sup>269</sup> Third, the Court

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<sup>260</sup> Stacey Osburn, *U.S. Supreme Court grants petition for Alston case*, NCAA (Dec. 16, 2020, 10:10 AM), <http://www.ncaa.org/about/resources/media-center/news/us-supreme-court-grants-petition-alston-case>.

<sup>261</sup> See McCann, *supra* note 153 ("cert is ordinarily granted about 1% to 2% of the time").

<sup>262</sup> See Amanda Christovich, *NCAA Asks Supreme Court to Review Alston Case*, FRONT OFFICE SPORTS (Oct. 15, 2020), <https://frontofficesports.com/alston-supreme-court-request/> ("the petition identifies the exact same legal issues previously raised by the NCAA with respect to the prior O'Bannon litigation that the NCAA lost, and the Supreme Court declined to review those issues at that time").

<sup>263</sup> *Supreme Court agrees to hear NCAA athlete compensation case*, ABC NEWS (Dec. 16, 2020, 10:19 AM), <https://abcnews.go.com/Sports/supreme-court-agrees-hear-ncaa-athlete-compensation-case/story?id=74760159>.

<sup>264</sup> Heitner, *supra* note 259.

<sup>265</sup> *Id.*

<sup>266</sup> Amy Howe, *NCAA athletes win 9-0 on educational perks as Kavanaugh calls out ban on direct payments*, SCOTUSBLOG (Jun. 21, 2021, 8:23 PM), <https://www.scotusblog.com/2021/06/ncaa-athletes-get-unanimous-win-on-educational-perks-as-kavanaugh-calls-out-limits-on-direct-payments/>.

<sup>267</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>268</sup> *The Supreme Court 2020 Term: Leading Case: III. Federal Statute: Federal Statute and Treaty: Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, 135 HARV. L. REV. 471, 474 [hereinafter *Harvard Alston Case Note*]. A rule of reason analysis is defined as "[t]he judicial doctrine holding that a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on the totality of economic circumstances." *Rule of reason*, BLACK'S LAW DICTIONARY (11th ed. 2019). The quick-look analysis is an "abbreviated version of the rule of reason analysis, the court does not need to conduct the rigorous analysis of the market and anticompetitive effects that the rule of reason requires. Instead, the plaintiff need only show a form of market injury." *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW (last visited Apr. 10, 2022), <https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests>. The quick-look analysis is "sometimes given to joint ventures." *Harvard Alston Case Note, supra*, at 474.

<sup>269</sup> *Harvard Alston Case Note, supra* note 268, at 474.

determined that the NCAA is a commercial enterprise subject to enforcement under the Sherman Act.<sup>270</sup> Fourth, the Court held that lifting the cap on educational benefits that student-athletes can receive did not constitute impermissible judicial micromangement.<sup>271</sup>

Justice Brett Kavanaugh wrote a fiery concurring opinion.<sup>272</sup> Kavanaugh asserted that the “NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”<sup>273</sup> He said that “the NCAA’s business model would be flatly illegal in almost any other industry in America” because of the way the NCAA restricts its student-athletes through wage-fixing.<sup>274</sup> Kavanaugh ended his concurrence by saying that “[t]he NCAA is not above the law.”<sup>275</sup>

### CONCLUSION

The underpayment of student-athletes is a serious problem. Student-athletes deserve fair wages at a market rate.<sup>276</sup> While unionization is not the answer to underpayment of student-athletes, the remedies that can be provided in antitrust law seem to be the answer. As illustrated above, it appears that the courts are willing to impose antitrust penalties on the NCAA. Justice Kavanaugh has thrown the perfect alley-oop pass, and it is time for the right plaintiffs to make a slam dunk.

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*; *Alston*, 141 S. Ct. at 2163-64.

<sup>272</sup> *See Alston*, 141 S. Ct. at 2166-69 (Kavanaugh, J., concurring).

<sup>273</sup> *Id.* at 2166.

<sup>274</sup> *Id.* at 2167.

<sup>275</sup> *Id.* at 2169.

<sup>276</sup> Based on the student-athlete, this market rate may not be more than the student-athlete is currently receiving since independent contractors do not have to be paid minimum wage. *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015).

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