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The Fight for Pay: How the Supreme Court Ultimately May Use Antitrust Law to Allow Student-Athletes to be Paid

Josef Nilhas*

College athletics have always been, and likely will always continue to be, an incredibly unique American phenomenon.¹ At the head of this phenomenon is the National Collegiate Athletic Association (“NCAA”), which oversees nearly half a million student-athletes who compete across twenty-four sports every year.² Under the current NCAA rules, colleges may only pay for athletes’ legitimate educational expenses, and any athletes who are paid to play become ineligible.³ While these student-athletes have long been considered amateurs, debates over whether college athletes should be paid have increased in recent years.⁴ This was further intensified in September of 2019, when California Governor Gavin Newsom signed the Fair Play to Play Act into law.⁵ This Act, which becomes law in the beginning of 2023, will result in college athletes being allowed to financially benefit from their name, image, and likeness to promote products and companies for the first time ever.⁶

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¹ Gerard Baker, *To Understand America, Look to Its College Sports*, WALL ST. J. (Jan. 17, 2020), <https://www.wsj.com/articles/to-understand-america-look-to-its-college-sports-11579294201>.

² *Student-Athletes*, NCAA, <https://www.ncaa.org/student-athletes#:~:text=Nearly%20half%20a%20million%20NCAA,and%20access%20to%20academic%20advisor> (last visited Apr. 28, 2021).

³ Amy Howe, *Amid March Madness, Antitrust Dispute Over College Athlete Compensation Comes to the Court*, SCOTUSBLOG (Mar. 30, 2021), <https://www.scotusblog.com/2021/03/amid-march-madness-antitrust-dispute-over-college-athlete-compensation-comes-to-the-court/>.

⁴ Megan Ryan, *Debate Over Paying College Athletes Intensifying on Both Coasts*, STAR TRIBUNE (Sept. 20, 2019), <https://www.startribune.com/debate-over-paying-college-athletes-intensifying-on-both-coasts/560832872/>.

⁵ Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs Into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act.

⁶ S.B. 206, (Ca. 2019).

Soon, the Supreme Court could issue an opinion in *NCAA v. Alston* that would end this debate altogether by possibly allowing college athletes to be compensated for non-educational purposes. To fully understand the buildup to *Alston*, one must first look back to *NCAA v. Board of Regents of the University of Oklahoma*, where the Supreme Court found that the NCAA's television plan violated antitrust law.⁷ In making its decision, the Court held that the rules regarding eligibility standards for college athletes are subject to a different and less stringent analysis than other types of antitrust cases.⁸ As a result of this lower standard, the NCAA has always argued that antitrust law allows them to restrict athlete compensation to promote competitive equity and to distinguish college athletics from professional sports.⁹

Beginning in 2014, several Division 1 athletes sued the NCAA arguing that the restrictions on "non-cash education-related benefits" violates antitrust law under Section 1 of the Sherman Act.¹⁰ This led to a class action suit, where the student-athletes argued that the NCAA's restrictions violate antitrust law by preventing athletes from receiving fair-market compensation for their labor.¹¹ The district court ruled in favor of the athletes, saying that the NCAA must allow some academic benefits such as "computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies."¹² However, this apparent victory was quite limited in scope, as the court held that the NCAA could still limit cash or cash-equivalent awards for academic purposes.¹³ The Ninth Circuit affirmed the decision, concluding that the NCAA's practices violated antitrust law,¹⁴ and in December of 2020, the Supreme Court

⁷ *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

⁸ *Id.* at 103.

⁹ Transcript of Oral Argument at 30, *NCAA v. Alston* (Mar. 31, 2021) (No. 20-512, 20-520).

¹⁰ *Id.*

¹¹ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

¹² *Id.* at 1088.

¹³ *Id.*

¹⁴ *Alston v. NCAA* (*In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*), 958 F.3d 1239 (9th Cir. 2020).

granted certiorari to ultimately decide whether the NCAA's prohibition on compensating college athletes is a violation of federal antitrust law.¹⁵

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."¹⁶ The Supreme Court interpreted Section 1 as outlawing "only unreasonable restraints."¹⁷ Most often, restraints are analyzed under the "rule of reason,"¹⁸ which is a three step analysis that attempts "to distinguish between restraints with anticompetitive effect[s] that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."¹⁹ The NCAA believes its eligibility restrictions should be subject to a less stringent review because they are not really a commercial venture, and instead are an association to make collegiate sports possible as part of a greater educational mission of the university.²⁰

Even under the stricter "rule of reason" antitrust analysis, the NCAA believes they should prevail, arguing that the Ninth Circuit used the wrong definition of amateur when affirming the case.²¹ Pointing to the Court's decision in *Board of Regents* where they said the conception of amateurism is that student-athletes "must not be paid,"²² the NCAA's argument focuses on how their restrictions are positive, and "are so clearly procompetitive that their lawfulness under the antitrust laws can and should be determined early in litigation" under any standard of review.²³

The student-athletes in *Alston* argue that the NCAA's restrictions to protect amateurism do not create enough benefits for competition to offset the

¹⁵ Brief for Petitioner at 2, *NCAA v. Alston*, petition for cert. filed, No. 20-512, (U.S. Oct. 2020).

¹⁶ The Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

¹⁷ *Ohio v. Am. Express Co.*, 138 U.S. 2274, 2283 (2018).

¹⁸ *Id.* at 2284.

¹⁹ *Id.*

²⁰ Brief for Petitioner at 15, *NCAA v. Alston*, petition for cert. filed, No. 20-512, (U.S. Oct. 2020).

²¹ *Id.* at 16.

²² *Id.*

²³ *Id.* at 31.

harms they create.²⁴ There is also plenty of skepticism regarding how “amateur” NCAA athletics really are, considering college sports bring in over \$1 billion in revenue each year.²⁵ They argue that what the NCAA is essentially requesting from the Court is an “outright exemption” from federal antitrust law.²⁶ The athletes further argue that issuing such an exemption is inappropriate for the courts, and instead is more aptly suited for Congress to decide.²⁷

Supporting briefs have been filed in favor of both sides from a variety of groups.²⁸ One such brief filed by a group of states in favor of the NCAA, cautioned that if the lower court’s ruling is allowed to stand, colleges will be in a lose-lose situation by creating tremendous pressure to dramatically increase their athletic spending.²⁹ The result would be, they argue, that schools would be forced to either reallocate money from other areas such as educational programs or non-revenue sports, or not increase athletic spending at the price of no longer being competitive with other universities’ programs.³⁰ Several briefs have been filed on behalf of the student-athletes, including from the Biden administration,³¹ historians,³² and a group of former NCAA officials.³³ Whether arguing that these athletes should not be

²⁴ Brief for Respondents at 2, *NCAA v. Alston*, *petition for cert. filed*, No. 20-512, 20-520 (U.S. Oct. 2020).

²⁵ Victoria Lee Blackstone, *How Much Money Do College Sports Generate?*, ZACKS (Jan. 28, 2019), <https://finance.zacks.com/much-money-college-sports-generate-10346.html>.

²⁶ See Brief For Respondent, *supra* note 24.

²⁷ *Id.*

²⁸ See Howe, *supra* note 3 (observing that seven “friend of the court” briefs were filed in support of the NCAA, while fourteen briefs were filed in support of the student-athletes).

²⁹ Brief for Georgia et. al. as Amici Curiae Supporting Petitioners, *NCAA v. Alston*, *petition for cert. filed*, No. 20-512 & 20-520 (U.S. Oct. 2020).

³⁰ *Id.*

³¹ Brief for the United States as Amicus Curiae Supporting Respondents, *NCAA v. Alston*, *petition for cert. filed*, No. 20-512 & 20-520 (U.S. Oct. 2020) (Department of Justice acknowledging that the NCAA is “unusual” for purposes of antitrust law, but that NCAA’s eligibility rules should still be subject to the more stringent standard of review).

³² Brief of Historians as Amici Curiae Supporting Respondent, *NCAA v. Alston*, *petition for cert. filed*, No. 20-512 & 20-520 (U.S. Oct. 2020) (Arguing that the NCAA’s attempt to rely on amateurism as a way to validate their restrictions under antitrust scrutiny is “profoundly unfair,” as it led to some coaches and schools earning millions while students remained poor).

³³ Brief of Former NCAA Executives as Amici Curiae Supporting Respondent, *NCAA v. Alston*, *petition for cert. filed*, No. 20-512 & 20-520 (U.S. Oct. 2020) (Telling the justices that

considered amateur or that the NCAA is clearly profiting off their athletes who are not paid, these briefs all push for the Court to affirm the Ninth Circuit and hold that the NCAA's restrictions on "non-cash education-related benefits" violates antitrust law under the Sherman Act.

The Supreme Court heard the oral argument for *Alston* on March 31, 2021, and while a decision may not come about until sometime this summer, justices on both sides of the political spectrum were quite skeptical of the NCAA's defense regarding amateurism.³⁴ When the NCAA relied on the historical success of their approach, Justice Kagan said "I guess it doesn't move me all that much that there's a history to this if what is going on now is that competitors, as to labor, are combining to fix prices."³⁵ This concern was shared by Justice Kavanaugh, who believed that it seems like "the schools are conspiring with competitors, agreeing with competitors . . . to pay no salaries to the workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing."³⁶ Kavanaugh continued, "[a]nd that just seems entirely circular and even somewhat disturbing."³⁷ Several of the Justices used variations of "exploitation" in describing how the student-athletes are being treated.³⁸ However, despite the heavy skepticism, there seemed to be some hesitation to make any sort of sweeping changes. Justice Breyer discussed how the case was tough for him "because it's a unique product and it brings joy to a lot of people," and that he worries "about judges getting into the business of deciding how amateur sports should be run."³⁹

"the NCAA's professed commitment to 'amateurism' has become a way of preserving the market that the NCAA has come to dominate, rather than a means of protecting and benefitting college athletes." They further point out that despite a massive expansion in revenue raised by major sports, the percentage of revenue actually devoted to financial aid has decreased.)

³⁴ Dan Wetzel, *NCAA v. Alston: Supreme Court Not Impressed with Old Arguments, But How Will it Rule?*, YAHOO SPORTS (Mar. 31, 2021), <https://sports.yahoo.com/nca-as-stubborn-apatetic-nature-on-display-in-front-of-supreme-court-195237939.html>.

³⁵ Transcript of Oral Argument at 26, *NCAA v. Alston* (Mar. 31, 2021) (No. 20-512, 20-520).

³⁶ *Id.* at 33.

³⁷ *Id.*

³⁸ *Id.* at 17, 34.

³⁹ *Id.* at 48.

In the end, it can be extremely difficult to try to predict the outcome of any Supreme Court case based on how the oral arguments went, and that is no less true here. Based on the tone and flow of the arguments though, neither side seemed to have a clear five votes in their favor. However, there does seem to be a willingness by the Court to at least rule in favor of some incremental changes that benefit student-athletes. While the athletes hope for the Court to completely flip the script on the NCAA and find that their restrictions violate antitrust law, the NCAA hopes the Court will overturn the Ninth Circuit and fend off proponents of paying student-athletes for a little bit longer. Whatever the outcome may be, as more states and student athletes push for compensation, the NCAA's weak "amateurism" argument appears to be more exposed every time it is used. Could *Alston* be the case to finally defeat the NCAA's classic argument and change the game forever? Possibly, if the Supreme Court affirms this decision. But even if the Court overturns the case and rules in favor of the NCAA, it is clear that this fight would be far from over.

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