# NO MORE TIME LEFT ON THE CLOCK: NAME, IMAGE, AND LIKENESS AS THE END OF THE LINE FOR STUDENT-ATHLETE COMPENSATION UNDER ANTITRUST LAW

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Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

—NCAA Constitution, Article II[1]

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## INTRODUCTION

Collegiate sports are an integral part of secondary education in the United States, and unlike anywhere else in the world,[2] collegiate sports in the U.S. is a billion-dollar industry. Whether people agree or disagree with the merits of the system that is currently in play, collegiate athletics play a relatively central role in our higher education system, reaching out and impacting almost all facets of university life. The direct profits of collegiate athletics impact the infrastructure of college campuses and allow individual students to attend college on scholarships that would not be available to them were it not for both athletic revenue and athletically motivated donations.[3] Collegiate athletics is a multibillion dollar industry,[4] making an obvious showing of the importance of the institution of college sports to our society.

Winning in athletics also impacts the brand of the university as a whole, which more often than not translates into a wide variety of positive impacts

2. *See, e.g.*, Blanca Izquierdo, *Opinion: College Sports: US vs. Europe*, TEXAN NEWS SERV. (Feb. 25, 2018), http://texannews.net/opinion-college-sports-us-vs-europe [https://perma.cc/5CC2-B3SX].

3. *See, e.g.*, Linda Emma, *The Importance of College Athletic Programs to Universities*, SEATTLE POST-INTELLIGENCER, https://education.seattlepi.com/importance-college-athletic-programs-univesties-1749.html [https://perma.cc/HYH9-C68Q].

4. *Id.*

for a school.[5] In terms of interest from prospective students, surveys have shown that approximately forty percent of U.S. high school seniors choose their college at least partly for its social life.[6] Schools with large and successful athletic programs have a reputation for being epicenters of social activity because of the important fact that athletics are a pivotal part of the American college experience as a whole. Having a successful athletic program also draws interest from brands who wish to engage in partnerships and other advertising opportunities. This commercial benefit contributes both to direct revenue and to an increase in visibility for the institution, creating a positive feedback loop of benefits centered around athletics.[7] Allegiance to college athletics also has an impact on university donors, and there is evidence to suggest that an athletic program that performs well, particularly when the most visible sports of football and basketball are winning, will increase the alumni donations to a university.[8]

Student-athletes, the individuals whose athletic prowess produces the positive impacts discussed above, have historically been largely uncompensated. When the National Collegiate Athletic Association ("NCAA") was initially established in 1906,[9] athletes were not given any form of scholarship.[10] Over the last century, student-athletes' ability to be compensated has made incredible progress, changing from being prohibited from receiving any scholarships to now being allowed to monetize their Name, Image, and Likeness ("NIL"). These changes have largely been driven by student-athletes' engagement in litigation against the NCAA, using antitrust law as a powerful sword for increasing their remuneration.

For the sake of illustration, this Note is going to follow a twenty-year-old student-athlete named Peter Playmaker. Peter Playmaker is our fictional starting wide receiver at the NCAA's secret favorite institution, the University of Amateur Athletics ("UAA"). Every Saturday, and on the occasional Friday night, Peter Playmaker plays in front of at least one hundred thousand fans and is watched by millions more on televisions across the country. In the school's bookstore, jerseys are sold with Peter's number. Large pictures of him in uniform hang there and throughout the rest of the UAA campus. Though his name does not appear on the back of the jerseys

5. *See* Jonathan Meer & Harvey S. Rosen, *The Impact of Athletic Performance on Alumni Giving: An Analysis of Microdata*, 28 ECON. EDUC. REV. 287, 294 (2009).

6. Emma, *supra* note 3.

7. *Id.*

8. *See* Meer & Rosen, *supra* note 5.

9. *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/X687-P4Z7].

10. *Colleges Adopt the 'Sanity Code' to Govern Sports: N.C.A.A. Bans Scholarships in Which Athletic Ability Is the Major Factor*, N.Y. TIMES, Jan. 11, 1948, at S1.

sold in the bookstore—as it is the school's tradition to keep the last name of the players off of the uniform[11]—every fan who buys the jersey knows they are buying Peter's jersey, and most pick the number for that very purpose. He signs autographs after games, where adoring fans who have been following his football career since high school, long before he committed to play at UAA, wait to take a picture with him. His face graces school produced advertisements and the front of the football game media guide each week, and he is more or less a fixture on the front page of the UAA Times and the local newspaper.

Over the years, the compensation given to Peter Playmaker for his efforts has increased, up until the present day, where Peter Playmaker is now able to make money off his NIL. Peter Playmaker is now able to engage in brand deals with companies who wish to capitalize on the celebrity that he has achieved from playing college football. He is also now able to teach camps and give lessons to those individuals who would pay to learn the tricks of the trade from a famous college football star.[12] This Note will argue that for Peter Playmaker, the money that he is able make off his NIL is going to be the summit of the metaphorical mountain of his money-making opportunities as an NCAA athlete. Thus, it is likely not worth it for him to attempt to sue the NCAA under antitrust law to earn a salary, which is what many individuals are calling for as the next step in student-athlete compensation.[13]

Part I of this Note will give an overview of the NCAA as an institution, take a look at how the compensation of student-athletes has evolved over the past century, and give a basic background of antitrust law as applied to the NCAA. Part II will examine prominent NCAA antitrust cases, take a closer look at the NCAA rule changes that followed the rulings, and review the impacts of those decisions. Part III will argue that NIL is the end of the line for the compensation of student-athletes under antitrust law, even though many argue that they should receive additional compensation, such as a salary, for their efforts. This Part will look deeply at how NIL provides a viable, less restrictive alternative that helps to tip the scales in favor of the

11. Based on the traditions of the University of Southern California and Notre Dame, bitter rivals who each uphold the tradition of nameless jerseys. *See* Gerald Elliott, *Why No Names on Jerseys in College Football?*, SPORTSREC (July 26, 2011), https://www.sportsrec.com/names-jerseys-college-football-8790028.html [https://perma.cc/4UVR-USWL].

12. *See* Tom Goldman, *A New Era Dawns in College Sports, as the NCAA Scrambles to Keep Up*, NPR: SPORTS (June 28. 2021, 5:01 AM ET), https://www.npr.org/2021/06/28/1010129443/a-new-era-dawns-in-college-sports-as-the-ncaa-scrambles-to-keep-up [https://perma.cc/G4U6-AKPS].

13. *See* Ian Millhiser, *The Supreme Court's Unanimous Decision on Paying NCAA Student-Athletes, Explained*, VOX (June 21, 2021, 12:56 PM ET), https://www.vox.com/2021/6/21/22543598/supreme-court-ncaa-alston-student-athletes-football-basketball-sports-antitrust [https://perma.cc/DX3Y-FQAW].

NCAA in an antitrust "rule of reason" analysis, which is the balancing test that courts use to weigh the anticompetitive effects of a practice against the procompetitive effects in order to decide if a practice is legal under the section one of the Sherman Act. The less restrictive alternative of NIL allows student-athletes to be freed from some of the anticompetitive harms of the NCAA's regulations, while still allowing the NCAA to reap the procompetitive benefits of preserving the market for collegiate sports by maintaining a difference between professional and collegiate sports. This Note will conclude with a strong orientation to what is next for student-athletes in this space and look at other leverage student-athletes may have in their fight for additional compensation.

Because student-athletes are continuing to mobilize and explore their options in terms of alternate forms of compensation, this Note aims to contribute to the relevant practitioner literature by analyzing the important NCAA cases of the past. This analysis will hopefully assist in (1) guiding future arguments student-athletes may attempt to make in order to increase their compensation and (2) evaluating the potential methods they could use. For student-athletes and those that wish to support them in their efforts, evaluating the reality of antitrust litigation against the NCAA going forward may help to orient the cause in a more productive and plausible direction. Additionally, this Note aims to address the strengths and weaknesses of the NCAA's past justifications for their rules, providing a beneficial look at how the courts have interpreted the NCAA's motives and actions in antitrust actions of the past in order to predict how they may react in the future.

## I. THE NCAA, EVOLVING STUDENT-ATHLETE COMPENSATION, AND ANTITRUST LAW

### A. THE NCAA

The NCAA is a behemoth of an organization. Across three different divisions, the NCAA regulates almost half of 1,000,000 student-athletes at more than 1,200 member institutions.[14] The member institutions sponsor more than 195,000 student-athletes who compete at the NCAA's 90 championships across 24 different sports.[15] The association is responsible for facilitating the legislative rule making process amongst its member institutions, planning and executing the championships in each sport, and managing programs with the intent to benefit student-athletes both

14. NCAA Resources, *How the NCAA Works - Association-Wide*, YOUTUBE (May 10, 2021), https://www.youtube.com/watch?v=AV016Wkpo2U [https://perma.cc/8K87-8EWY].

15. *Id.*

athletically and academically.[16] In order to participate in collegiate athletics in the United States, it is essentially a precondition for an academic institution to be a member of the NCAA. The only other option for a school to consider is the National Association of Intercollegiate Athletics,[17] which consists of less than three hundred universities and lacks the robust infrastructure of the NCAA.[18] For schools that wish to compete on a national stage, there is no feasible alternative organization to the NCAA.

The NCAA advertises the idea of a student-athlete who competes for a "love of the game" above all else, and who is first and foremost on campus at their respective institution to receive an education.[19] Heavily emphasized by the NCAA is the fact that most of their student-athletes do not go on to play professional sports.[20] Because of this, the NCAA argues that as an association, it does not serve as a developmental league for professional leagues, reinforcing its idea of student-athletes as "amateurs."[21] According to an NCAA report published in 2014, only two percent of NCAA student-athletes go on to play professional sports.[22] However, 254 of the 254 draft picks in the 2019 National Football League ("NFL") Draft were NCAA football players—showing just how much the NCAA is a pipeline to professional sports, whether it wants to emphasize this reality or not.[23] This is especially true in the sport of football, where the NFL has no developmental league akin to the National Basketball Association's G League or Major League Baseball's minor league farm system, so student-athletes who wish to one day play in the NFL have no choice but to attend college to wait out the three years they are required to be out of high school before they are eligible to enter the NFL Draft.[24]

The NCAA's idea of a student-athlete is sharply contrasted by the numerous lawsuits filed against the association by current and former

16. PAUL C. WEILER, GARY R. ROBERTS, ROGER I. ABRAMS, STEPHEN F. ROSS, MICHAEL C. HARPER, JODI S. BALSAM & WILLIAM W. BERRY III, SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 719 (6th ed. 2019).

17. *See NAIA vs NCAA*, NAT'L ASS'N OF INTERCOLLEGIATE ATHLETICS, https://www.naia.org/why-naia/naia-vs-ncaa/index [https://perma.cc/FA7Q-4YNG].

18. *College Divisions*, SMARTHLETE FOR ATHLETES, https://www.smarthlete.com/intercollegiate/divisions [https://perma.cc/U89A-K6X8].

19. WEILER ET AL., *supra* note 16 (quoting NCAA Constitution and By-Laws § 2.9 (2017–18).

20. *Id.* at 720.

21. *Id.*

22. NCAA, NCAA RECRUITING FACTS 2 (2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf [https://perma.cc/2DWX-BYA4].

23. *Football: Probability of Competing Beyond High School*, NCAA, https://www.ncaa.org/about/resources/research/football-probability-competing-beyond-high-school [https://perma.cc/H5WH-EFLA].

24. *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft [https://perma.cc/VB4F-ZR6U].

collegiate athletes who believe that they attended an NCAA member school not just to earn their academic degree but also to unlock earning potential as an athlete. The student-athlete plaintiffs in these cases have often found themselves arguing that they should have a right to make money off their NIL or that they should be paid by the institutions or the member schools because of the fact that their labor contributes to billions of dollars in revenue for the association.

1. History of the NCAA and the Compensation Provided to Student-Athletes

The precursor to the NCAA, the Intercollegiate Athletic Association of the United States, was founded in 1905 when President Theodore Roosevelt brought together the relevant stakeholders in order to attempt to institute rule changes that would make the game of college football safer.[25] During the previous season, in 1904, there were 18 deaths and 159 serious injuries resulting from collegiate football alone.[26] Often, the injured individuals were not student-athletes, but rather paid players hired by a school in order to play in games to beat its bitter rivals.[27] This mass chaos was negatively impacting the quickly growing sport, so the powers that be stepped in to attempt to make the game more palatable to the average viewer, who was not interested in watching a brutal game that could be described as somewhat similar to a Roman gladiatorial bout. Some of the new rules included the ten yards for a new set of downs and the introduction of the forward pass.[28] They also pushed for rules that made the very dangerous mass formations illegal and created of a neutral zone between the offense and defense that would make for less immediate collisions after the ball was snapped.[29]

After these important safety changes were made, the NCAA continued to grow, and its power expanded far beyond the creation of rules that governed sports on the playing field. In 1948, the NCAA adopted the "Sanity Code" in order to govern collegiate sports, and the code made the concept of "amateurism" its cornerstone.[30] Amateurism, according to the NCAA, dictates that student-athletes are not permitted to do anything that would subject themselves to "professionalism" or any sort of exploitation by

25. NCAA, *supra* note 9.
26. *Id.*
27. *See id.*
28. Peter Feuerherd, *How Teddy Roosevelt Changed Football*, JSTOR DAILY: EDUC. & SOC'Y (Sept. 10, 2016), https://daily.jstor.org/how-teddy-roosevelt-changed-football [https://perma.cc/RPV6-27KR].
29. Christopher Klein, *How Teddy Roosevelt Saved Football*, HIST.: HIST. STORIES (July 21, 2019), https://www.history.com/news/how-teddy-roosevelt-saved-football [https://perma.cc/LL95-GC88].
30. N.Y. TIMES, *supra* note 10.

commercial enterprises, though this idea has changed since its inception, which is a development that will be addressed later on in Part II of this Note. The early NCAA definition described an amateur as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."[31] In practice, amateurism has been a somewhat difficult concept to work with due to the lack of clear lines that demarcate what is and what is not an acceptable action of an amateur. Some of the changes that have been made to the definition over the years do not exactly align with earlier NCAA arguments, though it does not often care to admit that this is the case.

Initially, the NCAA Sanity Code banned scholarships that were based primarily on athletic ability and cited these scholarships as being a potential threat to amateurism.[32] This attempt to uphold the principles of amateurism backfired and the NCAA found itself facing more corruption than ever before, with universities, athletic department donors, and other alumni making illegal payments to student-athletes in order to entice them to come play at their institutions. Because of this, the NCAA voted in 1956 to allow scholarships that were based primarily on athletic ability, thinking that this would slow the under the table payments of student-athletes through above board regulation by the institutions and the NCAA.[33]

After *O'Bannon v. NCAA*,[34] which will be discussed in Part II, the NCAA responded to the court's holding by allowing full grant-in-aid, which meant schools could provide full tuition, fees, room and board, books, and a small amount of money for incidental expenses to their student-athletes to cover the cost of living.[35] Following the *O'Bannon* decision and the NCAA's initial reaction, there was a quiet period in terms of changes to the compensation of NCAA student-athletes. However, NIL would be the next seismic shift in this area, which will be discussed in length later on in Part II and Part III.

31. Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003) (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 34–35 (1998)).

32. N.Y. TIMES, *supra* note 10.

33. *See* Muenzen, *supra* note 31, at 260.

34. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

35. *See* Kord Wilkerson, NCAA v. Alston*: Tackling College Athlete Compensation*, MISS. COLL. L. REV.: BLOG (Sept. 3, 2021), https://mclawreview.org/2021/09/03/ncaa-v-alston-tackling-college-athlete-compensation [https://perma.cc/WRV3-B3NL].

2. The NCAA Legislative Process

The NCAA is governed by legislation, as the rules are created by member institutions' representatives through the legislative process. The legislative process is run by the NCAA Board of Governors, which includes representation from Division I, Division II, and Division III of the NCAA.[36] The Board of Governors creates association-wide committees, and together they suggest rule changes and new legislation to each division—who can then choose to adopt them or not.[37] This Note will be primarily analyzing Division I legislative changes, as most of the case law has involved litigation between Division I athletes and the NCAA. This is most likely due to the fact that Division I athletes bring in a large majority of revenue for the association,[38] and that Division II and III offer reduced amounts of athletic scholarship and no athletic scholarship respectively as compared to Division I.[39] Division I is the primary money-making branch of the association, with the Division I March Madness basketball tournament generating over one billion dollars annually.[40]

The Division I Board of Directors is responsible for over 180,000 Division I athletes at over 350 institutions, which range from very small to very large size student bodies and include both public and private schools.[41] The Board is composed of mostly university presidents.[42] Rules can be proposed for consideration as Division I legislation either by the NCAA Board of Governors, a member school or conference, or a Division I committee.[43] Conference sponsored legislation is reviewed by a Division I committee who first debates the ideas before recommending them to the Division I Council for approval as legislation.[44] After the Division I council votes on proposed legislation, the decision is subject to review by the Division I Board of Directors and is made official legislation after their approval.[45]

36. NCAA Resources, *supra* note 14.

37. *Id.*

38. *See Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics [https://perma.cc/E66N-B9NJ].

39. *Division II Partial-Scholarship Model*, NCAA, https://www.ncaa.org/about/division-ii-partial-scholarship-model [https://perma.cc/3C5M-JHXN]; *Play Division III Sports*, NCAA, https://www.ncaa.org/student-athletes/play-division-iii-sports [https://perma.cc/9Q2R-UNYP].

40. WEILER ET AL., *supra* note 16.

41. NCAA Resources, *How the NCAA Works – Division I*, YOUTUBE (Apr. 28, 2021), https://www.youtube.com/watch?v=d_M12OC27vI [https://perma.cc/9N2D-6HUK].

42. *How the NCAA Works*, NCAA, https://www.ncaa.org/champion/how-ncaa-works [https://perma.cc/E3AT-9A6V].

43. NCAA Resources, *supra* note 41.

44. *Id.*

45. *Id.*

The Power Five Conferences (Big 12 Conference, Atlantic Coast Conference, Pacific-12 Conference, Southeastern Conference, and the Big Ten Conference), form the "Autonomy Group," which the NCAA Division I Council has given more power than other conferences to make their own rules.[46] Schools outside of the Autonomy Group have the power to adopt the rules put in place by the group, but due to the disproportionately large budgets of the schools within the group as compared to the schools outside the group, many may not have the power to actually implement the changes in the same way as the Autonomy Group.[47] Certain added expenses that will be discussed later in this Note, such as stipends for student-athletes and a scholarship that includes money allotted for transportation and academic-related supplies, have been added by the Autonomy Group since it was created in 2014.[48]

3. The NCAA Enforcement Process

After a piece of NCAA legislation is violated and the violation has been brought to the attention of the NCAA, either through a tip from another institution or through the self-reporting mechanisms available, the NCAA enforcement staff reviews the information regarding the violation and works with the relevant institution, if they choose to cooperate.[49] If a violation is found to actually have occurred, there are four potential tracks for resolution.[50] The first is a "negotiated resolution," in which the NCAA Committee on Infractions ("COI") and the violating institution agree on the facts and the COI reviews and approves a report that is made jointly with the institution.[51] After the report is approved, the COI will independently come to a decision on the penalty.[52] Through the negotiated resolution method, there is no opportunity to appeal.[53] Second is the "summary disposition" method, in which the parties also agree on the facts of the case and draft a report; the COI reviews and makes a decision similar to the negotiated resolution method.[54] However, using the summary disposition method, an expedited hearing about the penalties can be requested, and there is also an

46. *Id.*

47. *See* John Wolohan, *What Does Autonomy for the "Power 5" Mean for the NCAA?*, LAWINSPORT (Feb. 11, 2015), https://www.lawinsport.com/topics/item/what-does-autonomy-for-the-power-5-mean-for-the-ncaa [https://perma.cc/TQ7D-84P5].

48. *Id.*

49. *Division I Infractions Proc*ess, NCAA, https://www.ncaa.org/enforcement/division-i-infractions-process [https://perma.cc/U73Q-HGX8].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

opportunity to appeal.[55] The main difference between the first two methods is that in a negotiated resolution, the violations and the level of the violations must be agreed upon before the COI reviews the case.[56] In a summary disposition, the institution and the NCAA agree on the level of the case, but they do not have to agree on the exact violations that were committed before the case is reviewed.[57]

The third method is the "written record hearing" track, where the enforcement staff's initial allegations are challenged by the institution because they cannot come to an agreement on the facts; the COI decides on the correct violations to be charged, as well as the penalties.[58] There is also an appeal option offered through this method.[59] The fourth and final option is the "full hearing" track, which is reserved for limited cases where there is little to no agreement between the enforcement staff and the institution.[60] The summary disposition, written record hearing, and full hearing methods all offer the opportunity to appeal.[61] The first two methods require the institution and the NCAA to come to a certain level of agreement.[62] Because of the cooperation of the institution, they are usually rewarded with less harsh penalties.

### B. NAME, IMAGE, AND LIKENESS

At the inception of the NCAA, student-athletes did not receive any form of compensation unless they could qualify for scholarships in some other way, unrelated to their athletic abilities. This Note has discussed developments that have allowed student-athletes to receive full scholarships for their athletic prowess and even some compensation beyond that amount; these developments will be discussed further in Part II. However, it was not until NIL took the stage that student-athletes were allowed to attempt to make substantial amounts of money during their time as NCAA student-athletes.

Name, image, and likeness are the three elements of the "right of

55. *Id.*

56. *See* NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: NEGOTIATED RESOLUTION (2019), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessNegotiatedResolution-FactSheet.pdf [https://perma.cc/4Z2G-DMLV].

57. *Id.*

58. NCAA, *supra* note 49.

59. *Id.*

60. NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: INFRACTIONS PROCESS OVERVIEW (2023), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessOverview.pdf [https://perma.cc/W2N8-RQZL].

61. *Id.*

62. *See* NCAA, *supra* note 49.

publicity," a legal concept that was introduced in a Harvard Law Review article authored by Louis Brandeis and Samuel Warren.[63] The right of publicity allows individuals to capitalize on their NIL and prevent others from using their NIL for unauthorized commercial purposes.[64] It is related to state-law publicity rights[65] and has no applicable federal statute, so student-athletes have been largely at the mercy of their state legislatures and the federal courts, the latter of which have made arguments regarding student-athletes' NIL in various antitrust analyses.[66]

In September of 2019, California began the avalanche of legislation in the NIL space with the passage of the Fair Pay to Play Act.[67] The Act allows college athletes to seek out and enter into endorsement deals and sponsorships, allowing them to take full control over their NIL, all without losing their collegiate scholarship eligibility.[68] This bill left California and the NCAA "at odds'' with each other, as the bill allowed for behavior that was contrary to NCAA rules at the time.[69] Shortly after the bill was signed, California State Senator Nancy Skinner commented on the fact that because the NCAA had frequently lost antitrust suits in the past, all that California had to do to win the disagreement was to stand their ground and wait for other states to follow their lead.[70] She argued that the NCAA would not want to risk losing an antitrust suit regarding the new state NIL legislation when the state legislatures of a large number of their member schools passed laws that permitted student-athletes to capitalize on their NIL.[71]

Other states did eventually follow California, but even before other states could act, the NCAA Board of Governors unanimously agreed that it

63. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *see* Ed Mantilla, *Name, Image, Likeness, and Interplay with Intellectual Property*, JD SUPRA (July 8, 2021), https://www.jdsupra.com/legalnews/name-image-likeness-and-interplay-with-5098268 [https://perma.cc/6Z6P-UZHD].

64. *See* Mantilla, *supra* note 63.

65. *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (2020).

66. *See* Mantilla, *supra* note 63.

67. CAL. EDUC. CODE § 67456 (West 2022); *see* Benjamin Tulis, *California Fair Pay to Play Act to Become Effective September 1, 2021*, JD SUPRA (Sept. 1, 2021), https://www.jdsupra.com/legalnews/california-fair-pay-to-play-act-to-1720393/https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act [https://perma.cc/8UZV-JBCS].

68. CAL. EDUC. CODE § 67456 (West 2022); Tulis, *supra* note 67.

69. *See, e.g.*, 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 [https://perma.cc/LX9Y-C6FY].

70. *See id.*

71. *See id.*

was time for a modernization of NIL rules.[72] While still maintaining a focus on "the collegiate model," and preserving amateurism, the NCAA instructed each division to create rules that would allow for student-athletes to monetize their NIL by January 2021.[73] The Division I Council delivered proposed changes, but due to a letter from the Department of Justice that cautioned the NCAA to consider the antitrust implications of its proposed rules, the Council delayed the vote indefinitely.[74] The Supreme Court's June 21, 2020 ruling in *NCAA v. Alston*,[75] which will be discussed at length in Part II, alluded to the idea that the NCAA should be cautious with other aspects of their rules that had not yet been challenged under the antitrust rule of reason.[76] This gentle nudge from the highest court in the land prompted the NCAA Board of Governors—on June 30, 2021—to issue a temporary rule change that permitted NIL activity even before the first few state NIL laws went into effect.[77] Now, the current NIL rules allow student-athletes to follow the laws of the state where their school is located; if their state does not have NIL legislation, student-athletes can engage in NIL activities as long as they are not violating the NCAA's temporary guidance.[78]

Currently, NIL is very lucrative for some student-athletes, and the methods of monetization are just beginning to take form. Bryce Young, the starting quarterback at the University of Alabama, a premier football program, had earned approximately $1,000,000 in solo endorsement deals by late July 2021, and has continued to earn since then.[79] At the University of North Carolina, the student-athletes are a part of a group licensing deal: the athletes earn money when uniforms bearing their name and number are sold, or for situations in which their photo is sold to an advertiser in a sponsorship deal.[80] Across the 1,200 member schools of the NCAA, the potential of NIL is shaping itself as student-athletes, administrators, and brands navigate this new space.

72. *See id.*

73. Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/E439-PNHU].

74. *See id.*

75. NCAA v. Alston, 141 S. Ct. 2141 (2021).

76. *See* Murphy, *supra* note 73; *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring).

77. *See* Murphy, *supra* note 73.

78. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/SLN5-XJXC].

79. Maria Carrasco, *Some College Athletes Cash In While Others Lose Out*, INSIDE HIGHER EDUC. (Oct. 12, 2021), https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out [https://perma.cc/X8N5-KPZZ].

80. Becky Sullivan, *UNC Becomes the First School to Organize Group Endorsement Deals for Its Players*, NPR: SPORTS (July 21, 2021, 3:57 PM ET), https://www.npr.org/2021/07/21/1018887697/unc-group-licensing-college-sports-players [https://perma.cc/E8PW-DC3V].

Looking towards the future, U.S. Representative Anthony Gonzalez has asked the House Energy and Commerce Committee to look at his proposed NIL bill.[81] However, it was made clear in June of 2021—through two Senate hearings—that a federal law is not necessarily imminent.[82] For the time being, it will be up to the NCAA and its member institutions to comply with state laws and ensure their regulations do not cause them to be back before the Court, arguing they are not in violation of antitrust law.[83]

### C. ANTITRUST AND THE NCAA

Antitrust law is intended to remedy unreasonable exercises of market power.[84] The first federal competition law, the Sherman Act, was enacted in 1890. Section one 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, or with foreign nations,"[85] and section two prohibits monopolies.[86] The Sherman Act—and the Clayton Act, which followed it—made great strides in giving plaintiffs the ability to challenge what they felt to be unreasonable exercises of market power. However, they provide little concrete guidance in creating definitive rules of illegality in the antitrust space.[87] Because of this, the courts have a large amount of power in the creation of these demarcations in antitrust,[88] and it is through this power that the court has shaped NCAA policy.

#### 1. Overview of Antitrust Claim Analyses

Antitrust claims are evaluated under one of three tests. The first is the "per se" analysis, where a practice is deemed unlawful without further analysis if there is "relatively little to be stripped away"[89] before it becomes apparent that there are anticompetitive effects, with these effects being almost inferred from the conduct itself.[90] Under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[91] a prominent antitrust case, horizontal price fixing and output limitations are normally said to be "per se'' illegal under antitrust law because of the fact that the likelihood of these practices

81. *See* Murphy, *supra* note 73.
82. *Id.*
83. *Id.*
84. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 93 (2005).
85. 15 U.S.C. § 1.
86. 15 U.S.C. § 2.
87. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 87 (2018).
88. *See id.*
89. *See, e.g.*, HOVENKAMP, *supra* note 84, at 108.
90. *See, e.g.*, Hovenkamp, *supra* note 84, at 83.
91. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

being sufficiently anticompetitive with a lack of procompetitive justifications is very high.[92] The second method under which antitrust claims are evaluated is the intermediary "quick look" test, which was used in *NCAA v. Board of Regents of the University of Oklahoma*.[93] The Court in *Board of Regents* expressed their analysis as a rule of reason analysis, but many of the shortcuts that they took indicate a "quick look" approach was actually used.[94] The Court held that the restraint at issue was anticompetitive "on its face," and for this reason did not require an estimate of output effects, while also diluting the market power requirement that is traditionally necessary in a rule of reason analysis.[95] The cases that qualify for a quick look are those that have similarities to unlawful per se restraints but for some reason warrant additional examination under a less truncated analysis.[96] The third test is the "rule of reason" analysis, under which "reasonable" restraints on competition survive antitrust scrutiny if the procompetitive effects of the practice outweigh the anticompetitive effects in a balancing test performed by the court.[97]

The first NCAA case to make it to the Supreme Court, *Board of Regents*, was important because it established two crucial precedents that would determine how courts would handle the NCAA in future antitrust cases. The first precedent was the fact that the NCAA was not a single entity, but rather a group of competitors engaged in horizontal cooperation. Because of this, the NCAA was subject to antitrust scrutiny under section one of the Sherman Act. Single entities are not subject to antitrust scrutiny under section one because under this section, there must be bilateral action to cause a violation. The single entity defense allows a party to attempt to show that they are a single entity that cannot be in violation of section one, as there would be no conspiracy between two parties.[98] The NCAA was unable to show this, thus leaving them vulnerable to future section one attacks. The second precedent established by *Board of Regents* can be viewed as being more positive for the NCAA than the first. The Court held that NCAA rules should not be evaluated using a "per se" analysis because of the fact that some horizontal restraints on competition have to exist in order for the

92. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).
93. *Bd. of Regents*, 468 U.S. at 100; *see* Hovenkamp, *supra* note 84, at 126.
94. Hovenkamp, *supra* note 84, at 126.
95. *Id.* (quoting *Bd. of Regents*, 468 U.S. at 113).
96. *See id.* at 122.
97. *Id.* at 83; *see* HOVENKAMP, *supra* note 84, at 107; Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 51 (2019).
98. *See* Pieter Van Cleynenbreugel, Single Entity Tests in U.S. Antitrust and EU Competition Law 5 (June 21, 2011) (unpublished manuscript), https://ssrn.com/abstract=1889232 [https://perma.cc/GAD8-8H3C].

NCAA's "product" of collegiate athletics to exist at all.[99] The NCAA rules, according to the Court, should always be tested under the "crucible" of the rule of reason,[100] and should be given the benefit of the presumption that their regulations are indeed procompetitive.[101] The Court emphasized that the decision to not subject the NCAA's rules to a "per se'' analysis was not because of their status as a nonprofit entity, or because of the Court's respect for the "amateurism" principle upheld by the NCAA, but rather because of the recognition that some of these restraints must be necessary for the NCAA to even exist.[102]

The *O'Bannon* court reemphasized the two precedents established by *Board of Regents*, reminding the courts that they "cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules,"[103] with no single entity defense or other exemption in the NCAA's favor. Additionally, the *O'Bannon* court further emphasized that although NCAA rules may be a part of the "character and quality of the [NCAA's] 'product,' " they should still be subject to a rule of reason analysis, under which they will only be upheld if there is a true procompetitive purpose that wins out in the balancing test the court performs.[104] Case law up until this point left us addressing NCAA rules on a case by case basis under the rule of reason, providing plenty of opportunities for litigation.[105]

2. Rule of Reason Analysis

The rule of reason requires that plaintiffs plead and prove that the defendants have sufficient market power to allow them to create harm, and that with this power, they have acted in a way that is anticompetitive.[106] The plaintiff's prima facie case focuses on whether or not "the restraint before the court require[s] an explanation,"[107] and if an explanation is required and the restraint is not deemed to be per se illegal, the defendant is asked to provide a procompetitive justification.[108] Generally, this procompetitive

99. *See Bd. of Regents*, 468 U.S. at 100–01.

100. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

101. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 100–01; Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes' Rights*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), https://harvardjsel.com/2020/08/ncaa-and-an-antitrust-exemption-the-death-of-college-athletes-rights [https://perma.cc/GW4D-M4HD].

102. *Bd. of Regents*, 468 U.S. at 100–01.

103. *O'Bannon*, 802 F.3d at 1079.

104. *Id.* at 1063–64 (quoting *Bd. Of Regents*, 468 U.S. at 102).

105. *See, e.g.*, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019).

106. Hovenkamp, *supra* note 84, at 83.

107. *Id.* at 106–07.

108. *Id.* at 107.

justification is not difficult for defendants to establish when, as is required by the rule of reason analysis, the procompetitive justification is a motivating factor for the restraint.[109] This aligns with the policy purpose of antitrust laws, where anticompetitive restraints are discouraged, but not completely outlawed, due to their potential to benefit society in terms of efficiency and wealth maximization.

Regarding the production of evidence, the plaintiff is first asked to produce evidence of the market power of the defendant and the use of such market power in a way that can be reasonably expected to create anticompetitive effects.[110] Without requiring the plaintiff to prove that the defendant has the ability to create the undesired impact on the market, we would not leave room for the possibility of efficiency being the explanation for the restraint, and as previously discussed, these efficiency justifications are to be encouraged under the policy of antitrust law.[111]

After the plaintiff is able to prove the defendant has sufficient market power and the anticompetitive use of said market power, the burden of proof is shifted to the defendant and evidence of a procompetitive justification for the restraint must be provided.[112] Because the defendant is the adopter of the restraint, and this can be viewed as an action done "self-consciously," the court is harsher when reviewing the evidence of the defendant's procompetitive justification than the plaintiff's evidence of the anticompetitive harm.[113] Courts may reject the defendant's evidence of a justification if there is an unmet burden of proof that the procompetitive effects from the practice outweigh the anticompetitive ones.[114] Even if it is proven that the restraint does indeed promote competitive balance, this may not be enough, as it is generally the object of a cartel to use anticompetitive actions to protect weaker participants.[115]

The NCAA has often argued that their restraints are justified due to the fact that they promote competitive balance between their member institutions.[116] There is currently an "arms race," in collegiate sports in which universities spend millions of dollars each year on coaches' salaries and the seemingly constant renovation of athletic facilities, all in the name of impressing the big time recruits.[117] The NCAA argues that the tenets of

109. *See id.*
110. *Id.*
111. *See id.*
112. *Id.* at 107–10.
113. *See id.* at 110.
114. *See id.*
115. *See id.*
116. *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 117 (1984).
117. Lora Wuerdeman, *Sidelining Big Business in Intercollegiate Athletics: How the NCAA Can*

amateurism dictate that the arms race must stop short of payment to the players.[118] This idea is not only justified in the name of amateur competition, but also in order to prevent the best players from funneling into the small group of schools that can afford to best compensate them. Though the playing field is not exactly even in terms of how much money various institutions may spend on their coaches or their facilities, the NCAA compensation rules create some level of uniformity in compensation amongst student-athletes across schools, capping their earning potential at the full cost of attendance plus some added costs that will be discussed in greater detail in Part II.

After a procompetitive justification is put forward by the defendant, the plaintiff has the opportunity to present a less restrictive alternative.[119] Less restrictive alternatives are practices that offer similar competitive benefits to the challenged practice with less anticompetitive harms than the challenged practice creates.[120] The analysis of potential less restrictive alternatives allows the court to perform what is often called the "balancing" of procompetitive and anticompetitive effects, and less restrictive alternatives often tip the scales in favor of plaintiffs in these actions.[121] The NCAA is often able to produce procompetitive justifications for the challenged restraints in actions against them, so the effectiveness of the less restrictive alternatives in the balancing test has tipped the scales on more than one occasion, as we will see in the following four cases.

*De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. CENT. L. REV. 85, 87 (2017).

118. *Id.* at 107.

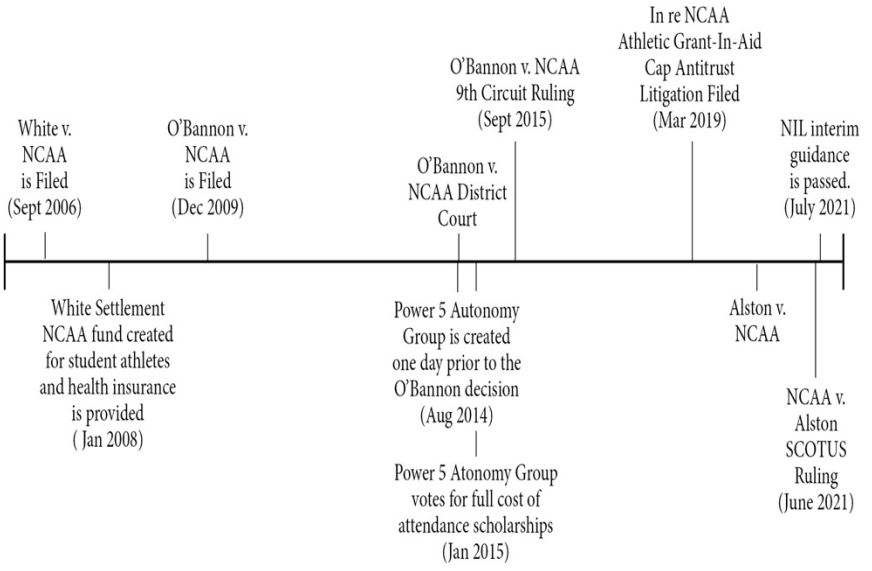
119. Hovenkamp, *supra* note 84, at 114.

120. *Id.*

121. *Id.*

## II. NCAA CASE LAW AND THE IMPACTS OF JUDICIAL RULINGS

FIGURE 1. Development of NCAA Name, Image, and Likeness Policy




### A. *WHITE V. NCAA*

*White v. NCAA*[122] is the antitrust case that started it all in terms of student-athletes' battle with the NCAA regarding compensation. Two former football players, Stanford's Jason White and UCLA's Brian Polak, and two former basketball players, University of San Francisco's Jovan Harris, and University of Texas at El Paso's Chris Craig represented the class in the suit,[123] alleging that the NCAA's grant-in-aid cap on financial aid awards to student-athletes was a violation of section one of the Sherman Act.[124] The suit was filed on their behalf by the College Athletes Coalition ("CAC"), which was an advocacy group that received support from the United

122. White v. NCAA, No. CV 06-0999-RGK, 2006 U.S. Dist. LEXIS 101374 (C.D. Cal. Oct. 19, 2006).

123. Tom Farrey, *Class Action Suit Against NCAA Clears Two Hurdles*, ESPN (Oct. 27, 2006), https://www.espn.com/college-sports/news/story?id=2640997 [https://perma.cc/A7K3-29X5]; Thomas A. Baker III, Joel G. Maxcy & Cyntrice Thomas, White v. NCAA*: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 75 (2011).

124. *White*, 2006 U.S. Dist. LEXIS 101374, at *1.

Steelworkers union.[125] The CAC had the mission of advocating for student-athletes in all areas, and by the time the suit was filed in 2006, they had garnered the support of over 20,000 current and former NCAA Division I football and basketball players.[126]

As it stood at the time of the complaint, the grant-in-aid cap allowed member schools to cover tuition, room and board, and books, and prevented them from giving the student-athletes financial assistance for other costs including travel, insurance, laundry, or other incidental expenses.[127] The plaintiffs argued that the NCAA imposed a horizontal restraint on competition through that cap,[128] and that the anticompetitive harm created by the cap on grant-in-aid was that it prevented institutions from competing with each other to offer the best financial aid packages equal to the full cost of attendance to their student-athletes.[129]

Presumably due to a fear that there may have been an unfavorable court ruling that would have pushed the NCAA past the limits it was willing to bend—and the potential for the NCAA to have to pay the treble damages the plaintiffs requested, which would have been an estimated three hundred to four hundred million dollars—the NCAA settled the case.[130] However, the NCAA maintained throughout the settlement process and after the settlement agreement was published that they had done nothing wrong. The plaintiffs agreed to a stipulation in the settlement that the agreement did not serve as a " 'presumption, concession, or admission' by the NCAA of any 'violation of law, breach of duty, liability, default or wrongdoing as to any facts or claims alleged or asserted in the action.' "[131]

### B. RULE CHANGES FOLLOWING THE *WHITE* SETTLEMENT

In the settlement, the NCAA agreed to provide a total of $218,000,000, to be available from the 2007–08 academic year through the 2012–13 academic year, for Division I institutions to use in order to enrich the lives of their student-athletes.[132] Over a three-year period, the NCAA also agreed to allow former student-athletes to file claims of reimbursement for "bona fide" educational expenses.[133] The reimbursement claims were to be made

125. Baker et al., *supra* note 123, at 75.
126. *Id.*
127. *White*, 2006 U.S. Dist. LEXIS 101374, at *1.
128. Baker, *supra* note 123, at 76.
129. *White*, 2006 U.S. Dist. LEXIS 101374, at *1.
130. Baker, *supra* note 123, at 76.
131. Baker, *supra* note 123, at 77 (quoting White v. NCAA, Stipulation and Agreement of Settlement, No. CV-09-0999 RGK, at 5 (C.D. Cal. filed Jan. 28, 2008).
132. *Id.*
133. *Id.* (quoting White v. NCAA, Stipulation and Agreement of Settlement, No. CV-09-0999

to a fund that had a ten million dollar maximum, so while there was an opportunity for individuals to collect on their previous expenditures, the amount available was fairly minimal given the fact that there were generations of student-athletes who paid for their own tuition, fees, books, and other academic equipment and supplies.[134] An additional part of the settlement was an NCAA rule that allowed Division I schools to provide year-round comprehensive health insurance to student-athletes and additional coverage to student-athletes who were injured while participating in NCAA sanctioned activities.[135] So after this quasi-victory, our very own Peter Playmaker would have been able to get year-round health insurance, as well as insurance to cover him in the unfortunate case of a torn ACL. However, he would still be unable to receive a stipend that would bring his scholarship up to an amount that would cover the complete cost of attendance at UAA, which is what brings us to *O'Bannon v. NCAA*.[136]

### C. *O'BANNON V. NCAA*

The *O'Bannon* decision brought the antitrust fight against the NCAA into a new echelon, achieving what *White* was not able to before the settlement. The named plaintiff, Ed O'Bannon, was a basketball star at the University of California Los Angeles.[137] O'Bannon was visiting a friend's home when he saw his friend's son playing a video game.[138] When he looked more closely at the screen, O'Bannon saw that his friend's son was actually playing a video game called *NCAA Basketball*, in which all of the characters on the screen resembled O'Bannon, his brother, and the rest of his teammates on the historic 1995 UCLA basketball team.[139] After finding out how much his friend had paid for the game, and realizing that he did not get any share of the profits despite the fact that he was one of the characters in the game, O'Bannon filed suit against the NCAA.[140] The other plaintiffs in the

RGK, at 10 (C.D. Cal. filed Jan. 28, 2008).

134. *Id.*

135. *Id.*

136. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

137. Harmeet Kaur, *Former College Basketball Star Who Sued the NCAA Says California's Fair Pay Bill Is 'Changing the Game'*, CNN (Sept. 14, 2019, 1:19 PM ET), https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd/index.html [https://perma.cc/QHB8-ACBZ].

138. *Id.*

139. *Id.* The 1995 UCLA Men's basketball team won a national championship after Ed O'Bannon scored thirty points and had seventeen rebounds in the title game. Zach Helfand, *Twenty Years Ago, Tyus Edney Saved UCLA's Last NCAA Title Run*, L.A. TIMES (Mar. 16, 2015, 7:05 AM PT), https://www.latimes.com/sports/ucla/la-sp-ucla-1995-champs-20150316-story.html [https://perma.cc/ZF5Y-T7YX].

140. *See* Kaur, *supra* note 137.

*O'Bannon* class action were current and former Division I men's football and basketball players who also received no compensation, though they too appeared as characters in the game.[141]

The *O'Bannon* suit was consolidated with *Keller v. Electronic Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litigation)*, a case in which the named plaintiff, Samuel Michael Keller, was a former starting quarterback for the Arizona State University and University of Nebraska football teams.[142] Like O'Bannon, Keller saw that his likeness was being used in the *NCAA Football* video game.[143] Despite the virtual character having the same jersey number, similar physical attributes and playing characteristics, and the same home state as Keller, Keller received none of the profits.[144] In the case of *NCAA Football*, the video game creator, Electronic Arts, Inc. ("EA"), took additional steps to ensure that the characters in its game were as close to the real life athletes as possible.[145] EA sent questionnaires to football team equipment managers at colleges across the nation in order to gather information about the mannerisms and physical attributes of the players on their teams; all of this was to help create the most accurate depictions of the players as they possibly could.[146] EA also allowed the individual playing the game to upload a college football roster so that each of the virtual characters could be named accurately after the players they were intended to resemble.[147]

For the first time in a court of law, the bench was tasked with answering the question of whether or not the rules that prohibit student-athletes from being paid for the use of their NIL should be subject to antitrust laws as an unlawful restraint of trade. The *O'Bannon* court held that the NCAA's amateurism rules, including the ban on compensation to student-athletes for the use of their NIL, was a violation of section one of the Sherman Act.[148] The remedy ordered by the district court was a remedy the NCAA had not yet seen before, which was to hold in trust five thousand dollars per year per student-athlete until they finished school.[149] The NCAA was allowed, by the district court, to prevent the member schools from funding these trust

141. *O'Bannon*, 7 F. Supp. 3d at 962–63.
142. Keller v. Elec. Arts Inc. (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1271 (9th Cir. 2013).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).
149. *Id.* at 983.

accounts with anything other than the money the school brought in from the use of the player's NIL.[150] The idea was that the students would be paid up to the limit imposed by the district court if the student actually contributed to the school earning five thousand dollars from the use of their NIL; thus, schools without the funds would not be made to find spare cash with which to pay their student-athletes in order to compete with other institutions that were able to pay them.[151]

On appeal, the NCAA first attempted to argue that there was no reason for the association to be in court in the first place due to the fact that the Court in *Board of Regents* so kindly gave them what they believed amounted to almost a blanket waiver on claims of antitrust liability, saying their amateurism rules were categorically consistent with the Sherman Act.[152] The NCAA argued that *Board of Regents* did not just declare that their amateurism rules were procompetitive, but that they were automatically lawful. The *O'Bannon* court quickly corrected this assumption and held that *Board of Regents* did no such thing for the NCAA.[153] The clarification of *Board of Regents* provided by the *O'Bannon* court was that the *Board of Regents* case stood for the idea that the Court recognized that there are procompetitive purposes to be served by the NCAA's amateurism rules. Because of this, these rules should not be struck down using a "per se" analysis. Furthermore, the NCAA should be given an opportunity to prove the validity of their rules on a case-by-case basis by showing procompetitive effects that outweigh any anticompetitive effects, and that there is a lack of available less restrictive alternatives that would achieve the same objectives.[154]

The NCAA went on to argue that even if it was subject to antitrust rule of reason scrutiny in general, this was not the correct case to scrutinize its rules.[155] It argued that under section one of the Sherman Act, its compensation rules could not be regulated by antitrust laws because of the fact that they are not compensation rules, but rather "mere 'eligibility rules' " that do not regulate commercial activity in any way.[156] The argument was that because amateurism is an essential component of the NCAA's product, and because amateurism means that student-athletes are not to be paid like professional athletes, the NCAA was able to declare that maintaining NCAA

150. *Id.*
151. *Id.*
152. O'Bannon v. NCAA, 802 F.3d 1049, 1063–64 (9th Cir. 2015).
153. *Id.*
154. *Id.*
155. *Id.* at 1064–65.
156. *Id.* at 1065–66.

eligibility means that students are not paid by anyone for the use of their NIL.[157]

The association then offered four procompetitive justifications including: "(1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education market."[158] The first, second, and fourth justifications have been discussed previously, but this Note has not yet touched on the third justification. The NCAA argued that if student-athletes were to be paid, it would alienate them from their peers, who were students but not athletes, and make it difficult for student-athletes to integrate into their schools' academic community.[159] The court quickly swatted this argument away, finding that other college students who make money from their jobs or even their NIL in capacities other than sports do not face this difficulty. Given the public support for student-athletes receiving additional compensation, this argument was flimsy from the very beginning.

The *O'Bannon* court found an injury in fact, given that the student-athlete plaintiffs were able to show that they would have been paid for the use of their NIL had the NCAA's compensation rules not prevented them from pursuing such opportunities.[160] The court held that the NCAA's compensation rules were more restrictive than necessary.[161] The rules were found to indeed regulate commercial activity, as commerce is a broad term that encompasses "almost every activity from which [an] actor anticipates an economic gain."[162] Given the large amounts of money brought in by the NCAA each year, it would be difficult to argue that the NCAA does not anticipate economic gain, and the court acknowledged the fact that there is "real money at issue here."[163] Additionally, the court emphasized that it is the substance of the rule, not the categorization, that is important when evaluating whether or not a particular rule is a restraint of trade.[164] The NIL rules at issue in *O'Bannon* clearly regulated the terms of potential commercial transactions between the student-athletes, their chosen schools, and any outside companies seeking to compensate them for their play or their

157. *Id.*
158. *Id.* at 1072.
159. *Id.* at 1075.
160. *Id.* at 1066–67.
161. *Id.* at 1074–75.
162. *Id.* at 1064–65 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 260b (4th ed. 2013)).
163. *Id.* at 1065.
164. *Id.*

NIL.[165] In this case, the substance of the rule overwhelmingly eclipsed the categorization as a "mere 'eligibility rule[].' "[166] The court found that raising the cap on compensation to the full cost of attendance was a valid less restrictive alternative that would benefit student-athletes and provide them with additional compensation while still providing the NCAA with an option to both enforce rules that uphold their tradition of amateurism and work to preserve the distinction between professional and collegiate sports, thus preserving the market competition for collegiate sports.[167]

The court did give the NCAA a small victory in holding 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."[168] The court found that giving student-athletes scholarships up to the full cost of their attendance was strictly within the line of amateurism principles because the money would be going to cover the very legitimate cost of attending schools, unlike professional athletes who can use their salary on whatever pleases them.[169] In a somewhat shocking statement, the court rebuked the district court, stating that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."[170]

In October of 2016, the Supreme Court of the United States declined to hear *O'Bannon v. NCAA*,[171] leaving the state of student-athlete compensation in the hands of the Ninth Circuit's ruling.

### D. RULE CHANGES FOLLOWING THE *O'BANNON* DECISION

The rule of reason analysis in this case provided students with the ability to choose a school that would provide them up to the cost of their attendance, but the court held that it "[did] not require more."[172] The Power Five Autonomy Group, discussed in Part I of this Note, was created the day before the district court ruling in *O'Bannon* in anticipation of the *O'Bannon*

165. *Id.*
166. *Id.*
167. *Id.* at 1075.
168. *Id.* at 1078.
169. *Id.* at 1075–76.
170. *Id.* at 1076.
171. O'Bannon v. NCAA, 580 U.S. 815 (2016) (denying the writ of certiorari); Michael McCann, *In Denying O'Bannon Case, Supreme Court Leaves Future of Amateurism in Limbo*, SPORTS ILLUSTRATED (Oct. 3, 2016), https://www.si.com/college/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court [https://web.archive.org/web/20230227215814/https://www.si.com/college/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court].
172. *O'Bannon*, 802 F.3d at 1079.

decision having an impact on scholarships and financial aid.[173] The Power Five Autonomy Group wanted to be able to act as a unit and do what needed to be done to not only comply with the ruling, but also to separate itself from the other NCAA conferences. In January of 2015, less than 6 months after the district court ruling, the Power Five Autonomy Group voted in favor of a proposal that allowed their member institutions to offer the full cost of attendance scholarships.[174]

This proposal to increase the full cost of attendance scholarship included an additional stipend to student-athletes that was not given before the *O'Bannon* ruling.[175] The amount of the stipend is calculated by the financial aid officers at each individual institution.[176] Guidance given by the Department of Education regarding how to calculate the cost of attendance is very minimal because before *O'Bannon*, the only reason that this calculation was used was to decide what the cap on an individual student's loans would be.[177] This new stipend has been a cause of controversy in the world of college athletics, with speculation that financial aid offices are now assisting schools in increasing their costs of attendance in order to pay larger stipends to their student-athletes.[178] Their larger stipends are intended to draw better recruits, with evidence that increasing a school's cost of attendance by $1,000 allows schools to increase between 2.07 and 4.35 spots in recruiting rankings.[179] Peter Playmaker now has the ability to receive paid trips home to his family and a stipend that will give him money to spend on food that is not provided by his program, as well as other incidentals and school supplies that he needs.

These changes of course increased the compensation being paid to student-athletes, but they are in no way uniform across conferences or institutions.[180] Getting a judicial ruling that in some way reprimanded the NCAA was an obvious breakthrough and an upgrade from the *White* settlement, in which the antitrust claims were not addressed because the case never made it to trial. Even given the small progress made in the increase to the full cost of attendance, student-athletes had further to go in terms of the

173. *See* Vincent "Trey" Tumminello, *The Changing Face of College Athletics: O'Bannon and Cost of Attendance*, MARTINDALE (Feb. 13, 2018), https://www.martindale.com/legal-news/article_taylor-porter-brooks-phillips-llp_2505989.htm [https://web.archive.org/web/20230227220432/https://www.martindale.com/legal-news/article_taylor-porter-brooks-phillips-llp_2505989.htm].

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.*

178. *See, e.g.*, *id.*

179. *See* John Charles Bradbury & Joshua D. Pitts, *Full Cost-of-Attendance Scholarships and College Choice: Evidence from NCAA Football*, 19 J. SPORTS ECON. 977, 983 (2018).

180. Tumminello, *supra* note 173.

broader compensation rules that would be argued against in *Alston*.

### E. *ALSTON V. NCAA* AS THE CASE THAT BROKE THE CAMEL'S BACK

*In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* would bring student-athletes and the NCAA back to the courthouse to once again to fight over the NCAA compensation rules.[181] The battle began in the United States District Court for the Northern District of California, where the NCAA was asked to defend a broader subset of rules that prohibited student-athletes from receiving compensation for education-related benefits beyond the cost of attendance, calculated by the financial aid offices of their institutions.[182]

Regarding the education-related benefits, the district court found that they affected interstate commerce, and under a rule of reason analysis, found the rules restricting the amount of education-related benefits an institution could provide to be undue restraints under section one of the Sherman Act.[183] The NCAA was unable to show that the restraints assisted in increasing the output in collegiate sports by providing more opportunities for student-athletes, or that they aided in maintaining a competitive balance among the member institutions.[184] Another hard blow for the NCAA was the lack of deference that the court had for the NCAA's concept of amateurism.[185] The court was unamused by the NCAA's inability to define "amateurism," and because the NCAA does allow student-athletes to be paid in certain ways, such as being paid a scholarship or the stipend that was discussed above, the idea of an amateur being someone who does not get paid did not sit well with the court.[186] The NCAA attempted to sell, as it had in the past, the idea that an "amateur athlete" is what creates the unique product that produces the incredibly large consumer demand for collegiate sports, but the court did not understand how the NCAA was unable to define the "[p]rinciple of [a]mateurism" that allegedly drove its consumer demand.[187] The court reasoned that the restraints created by the NCAA that capped education-related benefits in order to preserve amateurism were created without any real evidence that they would increase consumer demand, giving them little to no procompetitive benefit.[188]

Additionally, the plaintiffs were able to show that the increase in

181. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021).
182. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1062–63.
183. *Id.* at 1083.
184. *Id.* at 1070 n.12.
185. *See id.* at 1070–72.
186. *Id.*
187. *Id.* at 1074, 1070.
188. *Id.* at 1099.

student-athlete compensation that occurred after *O'Bannon* did not negatively impact consumer demand, as consumer demand for collegiate athletics had risen in popularity at incredibly high rates since the *O'Bannon* decision.[189] During the time between *O'Bannon* and *Alston*, student-athletes were able to receive up to the full cost of attendance, and there were even some student-athletes who received both their full grant-in-aid scholarship and a Pell grant.[190] The NCAA Student Assistance Fund also provided additional compensation to student-athletes in need in a way that strongly resembled pay.[191] The NCAA's worry from *O'Bannon* that contracts would have to be renegotiated because of student-athletes receiving more compensation never came to fruition, and it was found that the TV deals were continuously increasing in value.[192] The NCAA was unable to provide evidence that the bylaws limiting compensation were enacted based on consumer demand, including the bylaws that had once prevented full grant-in-aid being given to student-athletes.[193] Because of the seemingly arbitrary nature of the caps on compensation, and the success of the NCAA after the previous restrictions were rolled back, the district court sided with the student-athletes.[194]

The district court held the NCAA rules limiting athletic scholarship and other compensation related to athletic performance to be acceptable under antitrust law, but found the other NCAA rules limiting education-related benefits to be an unlawful restraint of trade.[195] Consistent with earlier NCAA jurisprudence, the court found that rules ensuring student-athletes were not entitled to receive virtually unlimited payments unrelated to their education to be acceptable.[196] These rules were deemed to have procompetitive benefits that outweighed the anticompetitive effects by taking care to maintain the difference between collegiate and professional sports through restricting payments to student-athletes in that unlimited payments would completely blur the market between the two leagues.[197] The rules limiting education-related benefits were found to be more anticompetitive with no valid procompetitive justifications, given that the NCAA already allowed a large amount of education-related benefits with no valid arguments as to why they could not be increased, and the court found a distinct difference between

189. *Id.* at 1078.
190. *Id.* at 1085.
191. *Id.* at 1064, 1072.
192. *Id*. at 1063.
193. *Id.* at 1074–75.
194. *Id.* at 1074.
195. *Id.* at 1074–75.
196. *See id.* at 1083.
197. *Id.*

student-athletes receiving education-related benefits and unlimited cash payments. Antitrust law has accepted the NCAA's argument about the need to maintain the distinctive product of the NCAA in order to preserve market competition, and this difference clearly shows that the NCAA is able to maintain their product without the restraint of capping education-related benefits. Also similar to the outcome in the *O'Bannon* case, the district court reinforced the "ample latitude" the court gives the NCAA to run itself and govern its member institution when the market restraints are reasonable.[198]

The Ninth Circuit affirmed the district court's decision in full, praising them for "[striking] the right balance" between leaving the student-athletes with no recourse in terms of the anticompetitive harm they were facing and preserving the distinctive product of college sports, which created the relevant market for analysis.[199] The court felt that uncapping certain education-related benefits would preserve the growing consumer demand for college sports just as well as the then-current compensation rules did.[200] Because these non-cash education-related benefits would be difficult to confuse with the salary of a professional athlete, they maintained a very clear cut line, which the NCAA argued was one of their highest priorities throughout the three cases discussed in this Note.[201]

The circuit court also distinguished *Alston* from *O'Bannon*, correctly calling *Alston* a broader case that targets the interconnected set of NCAA rules that limit the compensation student-athletes may receive, while *O'Bannon* was a narrower challenge to restrictions on compensation for NIL activities.[202] By the time the case reached the Supreme Court, a much narrower set of NCAA compensation rules would be at issue, though this case is widely touted in the popular discourse as being an NIL decision because of the movement that it spurred in the fight for student-athletes to have NIL rights.[203] The impact of this case, which includes the avalanche of change in the NIL space, will be discussed later on in this Note.

On March 31, 2021, the Supreme Court of the United States heard from the representatives of the NCAA and student-athletes.[204] The issue being

198. *See id.* at 1104 (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1075 (9th Cir. 2015)).

199. Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1263 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

200. *Id.* at 1250.

201. *See id.* at 1257–58.

202. *Id.* at 1254.

203. *See, e.g.*, Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, SPORTS ILLUSTRATED (June 29, 2021), https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling [https://web.archive.org/web/20230221080122/https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling].

204. *See generally* NCAA v. Alston, 141 S. Ct. 2141 (2021).

addressed was whether or not the subset of NCAA rules restricting education-related benefits to student-athletes was in violation of section one of the Sherman Act.[205] The NCAA argued that the courts should be deferential to its rules for two reasons: The first was that the Sherman Act is only meant to prohibit restraints that are "undue" and that its restraints could not fall into this category because their purpose was to preserve the market for collegiate sports by promoting amateurism.[206] The second reason was that because it considered itself to be a "joint venture" whose collaboration was necessary to offer the unique product of intercollegiate athletics, the courts should be less harsh when evaluating its restraints.[207] In *Broadcast Music, Inc.*, the Court held that because joint ventures can have procompetitive benefits and may be necessary for a product to exist, their arrangements should be evaluated under a more deferential standard and should not be stricken down too "reflexively" without an opportunity for the balancing test of the rule of reason.[208] However, the Court in *Alston* reasoned that even if the NCAA is to be considered a joint venture, it is a joint venture with monopoly power in the relevant market for intercollegiate athletic competition, so the NCAA's restraints were still properly subject to the rule of reason.[209] The NCAA did not contest the fact that it enjoys monopoly control in the market for collegiate athletes,[210] which stems from the fact that, as discussed above in Part I, there is no feasible alternative organization that schools or student-athletes can choose to be a part of in order to gain the same benefits that NCAA membership provides.

The NCAA also attempted to argue that its member schools were indeed not commercial enterprises to be regulated by the Sherman Act because it had the goal of maintaining amateurism only in order to serve the " 'societally important non-commercial objective' of 'higher education.' "[211] However, the NCAA did not contest the fact that its restraints affect interstate trade and commerce, which would thus subject it to the Sherman Act, or the fact that the Sherman Act had already been applied to other nonprofit organizations in the past.[212] The Court acknowledged that it was "unclear exactly what the NCAA [sought]" in relation to making an argument about its noncommercial purpose, and the Court clarified that whether commercial or not, the NCAA would be receiving no special

205. *Id.* at 2147.
206. *Id.* at 2151.
207. *Id.* at 2155.
208. *See generally* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).
209. *Alston*, 141 S. Ct. at 2155.
210. *Id.* at 2154.
211. *Id.* at 2158 (quoting Brief for Petitioner at 3, *id.* (No. 20-512)).
212. *Id.*

exemptions from the Sherman Act.[213] Along a somewhat parallel line of reasoning, the NCAA put forward the idea that since antitrust law does not require businesses to use the least restrictive means of achieving legitimate business purposes, it could not be held in violation of section one of the Sherman Act just because the student-athletes could put forward a less restrictive alternative than it was currently using.[214] The Court reminded the NCAA that while it did not have to use the least restrictive means of achieving its legitimate business purpose because that would be an erroneous and overly intrusive inquiry, its restraints were "patently and inexplicably stricter than necessary" to achieve the procompetitive benefits that it alleged, and there were viable less restrictive alternatives it could have used.[215]

Post-eligibility internships funded by institutions or conferences were discussed as being a form of compensation that should be provided to student-athletes.[216] The NCAA argued that these scholarships would be a very convenient way for NCAA member schools to circumvent the rules regarding compensation.[217] However, because the funding would come from the institutions and conferences, not donors, the Court felt there would be a low chance of having extravagant post-eligibility internships with extremely high salaries being offered under the rules.[218] Additionally, the Court pointed out that the NCAA had a large amount of leverage and opportunity in terms of policing phony scholarships.[219]

The Court engaged in a complete rule of reason analysis, as the Court in *Board of Regents* indicated should be done when evaluating NCAA rules, given the recognition by that Court that some of the restraints were essential to the NCAA's very existence.[220] Here, the Court found that the student-athletes had indeed shown the NCAA's restraints to have a collectively anticompetitive effect through the rules' suppression of collegiate athlete compensation across NCAA institutions.[221] When the burden was shifted to the NCAA to show that the rules collectively yielded a procompetitive benefit, the Court found that some of the rules were procompetitive to the extent that they prohibited compensation entirely unrelated to education and that this may have the effect of preserving the consumer demand for college

213. *Id.* at 2159.
214. *Id.* at 2161.
215. *Id.* at 2162 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019)).
216. *Id.* at 2164.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 2151.; NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).
221. *Alston*, 141 S. Ct. at 2166.

sports by keeping a clear line between collegiate and professional sports.[222] The student-athletes were then tasked with showing that there was a substantially less restrictive alternative in terms of rules that would achieve the same procompetitive effect as the challenged set of rules.[223] The student-athletes were only able to meet this burden on the education-related benefits.[224]

A unanimous Court held that the district court's holding was consistent with established antitrust principles and that the rules restricting education-related benefits were in violation of section one of the Sherman Act.[225] The Court reasoned that although courts do give substantial latitude to entities in order to create agreements that serve legitimate business interests, the NCAA cannot be immune from established antitrust principles simply because it believes that the restriction of these education-related benefits is a "product feature" for it.[226] The NCAA argued that the "product feature" created by these rules is amateurism, which serves a legitimate business interest by creating the unique product of the NCAA which establishes the relevant market for collegiate sports.[227] The rules were found to be stricter than necessary, although the Court was careful to enjoin only certain restraints in order to preserve the delineation between collegiate and professional sports, and thus preserve the demand for the distinct product.[228]

Justice Kavanaugh's concurrence in *Alston* produced quite a stir in the world of collegiate sports.[229] During the oral argument, Justice Kavanaugh asked very pointed questions about what the endgame of the *Alston* litigation would be: whether it was collective bargaining, as is traditional under labor law, or NCAA legislation.[230] With an obvious eye towards the future, he wrote a concurrence that was essentially a veiled threat to the NCAA.[231] He cautioned the NCAA regarding its remaining compensation rules, articulating that they might also raise serious questions under antitrust laws, and mentioned that he believed it lacks a legally valid procompetitive justification for its remaining compensation rules, though he did not name

222. *Id.* at 2153.
223. *Id.*
224. *Id.* at 2160–62.
225. *Id.* at 2166.
226. *Id.* at 2163.
227. *Id.* at 2151, 2162–63.
228. *Id.*
229. *See, e.g.*, Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh's Concurrence*, TIME (June 21, 2021, 6:24 PM ET), https://time.com/6074583/ncaa-supreme-court-ruling [https://perma.cc/4NVH-HQVJ].
230. Oral Argument at 01:03:58, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512), https://www.oyez.org/cases/2020/20-512 [https://perma.cc/SWD4-ANNF].
231. *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring); *see* Gregory, *supra* note 229.

the rules to which he was referring outright.[232] Perhaps the most pointed sentence in the opinion was Justice Kavanaugh's statement that the "NCAA's business model would be flatly illegal in almost any other industry in America."[233] He argued that "[p]rice-fixing labor is price-fixing labor," meaning that the NCAA should stay on its toes or take a serious look at the rest of its legislation if it wants to avoid seeing the hallowed halls of the Supreme Court again.[234] Justice Kavanaugh took it one step further, making this not just an antitrust issue but also a civil rights issue, by citing a brief filed by a group of African American antitrust lawyers who argued that African Americans from lower-income backgrounds are disproportionately impacted by the rules against student-athlete compensation.[235] Many believe that Justice Kavanaugh caused a sufficient scare that could continue to propel student-athletes forward in their fight for compensation.[236]

### F. RULE CHANGES FOLLOWING THE *ALSTON* DECISION

The *Alston* decision was about education-related benefits, not NIL, but the narrative in popular culture connects *Alston* and NIL for very good reason.[237] The warning that the Court gave the NCAA about the potential antitrust liability of its rules that were not reviewed in the case was the push that the NCAA needed in order to pass an interim policy that served as guidance for NIL activities. The policy, passed on June 30, 2021—just one week after the *Alston* decision—gives student-athletes two options for capitalizing on their NIL earning potential.[238] The first option is to allow student-athletes to follow the state law regarding NIL in the state where their institution is located, if their state has already adopted one.[239] The second option, for student-athletes at institutions located in a state without a state NIL law, is to participate in any NIL activity as long as it does not violate NCAA rules.[240] The policy also allows institutions to have some autonomy and adopt their own policies and guidance to protect their own student-athletes.[241]

In the past, one of the NCAA's main concerns has been regulating the contact professional agents and boosters have with student-athletes. Boosters

232. *Alston*, 141 S. Ct. at 2166–67.
233. *Id.* at 2167.
234. *Id.* at 2167–68.
235. *Id.* at 2168; *see* Gregory, *supra* note 229.
236. *See, e.g.*, Gregory, *supra* note 229.
237. Brandt, *supra* note 203.
238. Hosick, *supra* note 78.
239. *Id.*
240. *Id.*
241. *See id.*

are individuals who could be said to be a representative of the university's athletics interests.[242] The definition of a booster for NCAA compliance purposes encompasses everyone from individuals who have purchased only a single ticket to a university athletic event to large financial donors to the athletic department.[243] The interim policy allows student-athletes to have access to professional service providers to help them with NIL activities, as long as both the service provider and the student-athlete stay compliant with state laws and institutional rules.[244] Additionally, boosters are permitted to assist student-athletes with NIL activities as long as there are no impermissible recruiting inducements that would constitute "pay-for-play."[245] Under the no pay-for-play rule, the NCAA aims to prevent payments that are given to a student-athlete simply because they are a student-athlete.[246] An example of this would be money given to a student-athlete that is not given in return for some sort of work done by the student-athlete, such as a handout from a donor that is not given in exchange for a brand deal or other NIL opportunity.[247]

These rules are consistent with the NCAA's desire to maintain the difference between collegiate and professional sports, but represent a very dramatic change from when Peter Playmaker was unable to receive even a scholarship. Now, he is able to hire a marketing agent who can pursue brand partnerships and other opportunities for him. Playmaker now has a brand partnership with a national restaurant chain and an apparel company, and he has participated in social media campaigns and commercials for each of them.[248] He now sells apparel and memorabilia through his own online store and has even released a trading card.[249] He has also been able to enter into partnerships with charities of his choice and has helped them raise money for causes that are important to him. None of this would be possible without the interim NIL rules, all precipitated by the *Alston* decision.

242. UNIV. S. CAL.: OFFICE OF ATHLETIC COMPLIANCE, PLAYING BY THE RULES (2023), https://usctrojans.com/documents/2020/8/27/usc_trojans_athletic_compliance_playing_by_the_rules_min.pdf [https://web.archive.org/web/20230227233129/https://usctrojans.com/documents/2020/8/27/usc_trojans_athletic_compliance_playing_by_the_rules_min.pdf].

243. *Id.*

244. *See* Hosick, *supra* note 78.

245. *Id.*

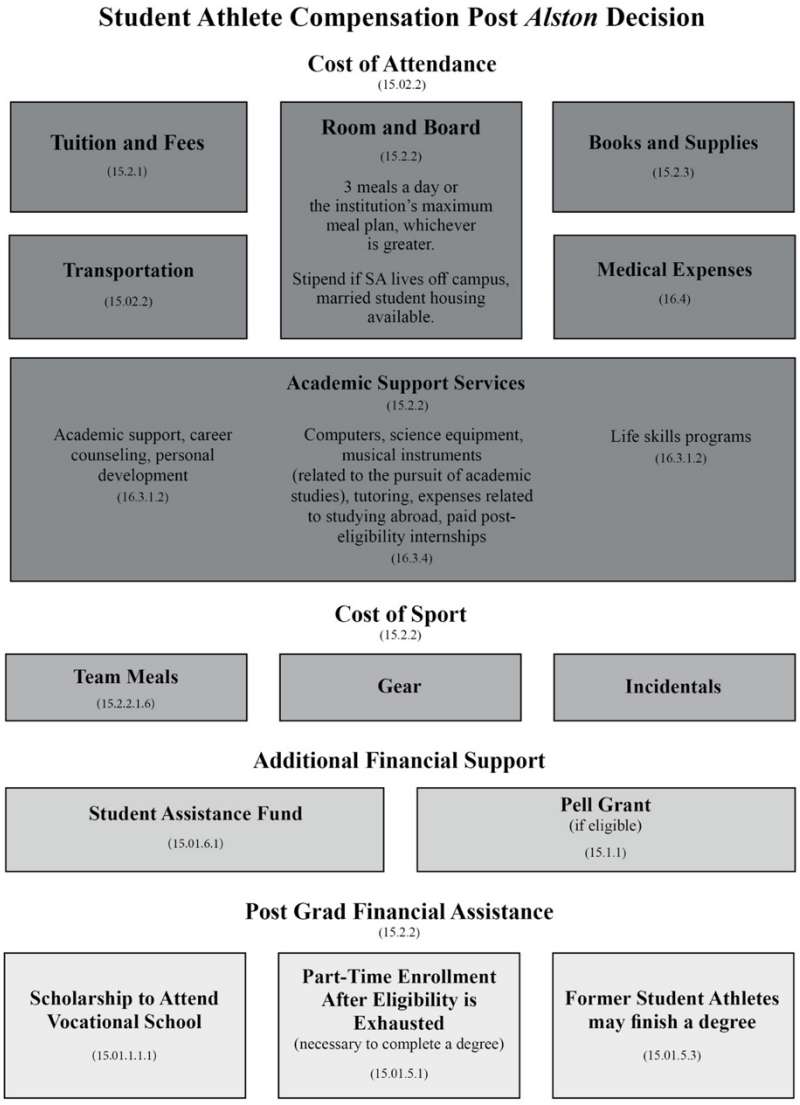
246. *See id.*

247. *Id.*

248. Based on real-life quarterback, J.T. Daniels at the University of Georgia. Press Release, Zaxby's, Zaxby's Adds UGA Quarterback J.T. Daniels to Its Roster (Aug. 17, 2021), https://www.zaxbys.com/news-media/zaxby-s-adds-uga-quarterback-j-t-daniels-to-its-roster [https://perma.cc/N78W-QLXD].

249. Based on real-life wide receiver, Velus Jones Jr. at the University of Tennessee, Knoxville. Tennessee Football (@Vol_Football), TWITTER (Apr. 25, 2022, 4:01 PM), https://twitter.com/vol_football/status/1518726800054104064?s=46&t=TUWUTV5wNg4Pl1oTfCNtxG [https://perma.cc/VF66-FRVS].

FIGURE 2. Student Athlete Compensation Post *Alston* Decision



## III. PREDICTIONS FOR THE FUTURE OF COLLEGIATE ATHLETE COMPENSATION

The *Alston* decision has brought student-athletes a long way, and now collegiate sports as a whole is in a place where it is time to look to the future of student-athlete compensation. With NIL and the interim NCAA guidance having been in action for an entire college football season, we have seen the impacts of the decision in many ways. The largest impacts so far have been in the realms of recruiting and transfers, with large athletic programs such as that of the University of Texas at Austin finding ways to capitalize on the opportunities. Offensive linemen at the University of Texas at Austin have been promised fifty thousand dollars per year as a part of a program called "Horns With Heart."[250] The "Pancake Factory" initiative, as it is being called, will provide the linemen with money in order to empower them to use their NIL rights to support their favorite charities.[251] Additionally, supporters of the university are providing all student-athletes who attend their school with the opportunity to participate in what is called the "Clark Field Collective."[252] This fund, run by alumni of the university, has received ten million dollars in financial backing in order to "create NIL opportunities for UT athletes who are looking to get their foot in the door."[253] This large fund was advertised to the top quarterback in the transfer portal, Quinn Ewers, who made the move from the Ohio State University to the University of Texas at Austin.[254] Many sports pundits and college football insiders have argued that this is the first big transfer of a student-athlete from one institution to another that is driven primarily by NIL opportunities and that this will certainly not be the last transfer of this kind.[255]

Other than just in terms of financial benefits for individual student-

250. Cole Thompson, *New NIL Program to Give Texas Offensive Lineman $50K to Play in Austin*, SPORTS ILLUSTRATED: FANNATION: LONGHORNS COUNTRY (Dec. 6, 2021, 3:10 PM ET), https://www.si.com/college/texas/news/texas-longhorns-offensive-line-horns-with-hearts-paid-hookem [https://web.archive.org/web/20230223011159/https://www.si.com/college/texas/news/texas-longhorns-offensive-line-horns-with-hearts-paid-hookem].

251. *Id.*

252. Zach Dimmitt, *UT Athletics to Be Funded by Clark Field Collective in $10 Million NIL Agreement*, SPORTS ILLUSTRATED: FANNATION: LONGHORNS COUNTRY (Dec. 3, 2021, 11:05 AM ET), https://www.si.com/college/texas/news/texas-longhorns-athletics-clark-field-collective-name-image-likeness [https://web.archive.org/web/20230223011250/https://www.si.com/college/texas/news/texas-longhorns-athletics-clark-field-collective-name-image-likeness].

253. *Id.*

254. *See* John Buhler, *Quinn Ewers Rumors: Texas Putting NIL Money on the Line to Land No. 1 Transfer QB*, FANSIDED (Dec. 7, 2021), https://fansided.com/2021/12/07/quinn-ewers-rumors-texas-football-nil-money [https://perma.cc/7SJ7-EQJU].

255. *See, e.g.*, *id.*; Jake Aferiat, *Why Former Top QB Commit Quinn Ewers Reportedly Intends to Transfer from Ohio State, Possible Landing Spots*, SPORTING NEWS (Dec. 3, 2021), https://www.sportingnews.com/us/ncaa-football/news/quinn-ewers-transfer-ohio-state-landing-spots/11004vyb20pyf1efi67w7v0p9k [https://perma.cc/A9S4-2QRS].

athletes, NIL has shifted the power dynamics in the landscape of collegiate athletics. Because NIL has given student-athletes a more substantial presence in the world at large, it has also allowed student-athletes to have bigger platforms in order to voice their opinions and concerns. It is believed that this greater representation will likely lead to student-athletes having a greater ability to negotiate with the NCAA over compensation rules. Each Division of the NCAA has a Student Athlete Advisory Committee that gives its members the ability to offer input and assist in crafting the proposed legislation, and these committees existed long before NIL came into play.[256] However, the student-athletes on these committees now have a voice that they did not have before, which may lead to greater strides being made in the NCAA legislative process without the need to litigate to create substantive change.

Justice Kavanaugh's concurrence in *Alston* and the underlying threat that it contained are likely enough to also give student-athletes additional bargaining chips that will allow them to make gains in this fight. It was the gentle threat of antitrust liability in the *Alston* decision, which was not about NIL in any way, and Justice Kavanaugh's more pointed concurrence that pushed the NCAA to pass the interim NIL legislation, so student-athletes may be able to leverage the NCAA's desire to stay out of the courtroom to make a change.

However, there remains a question as to whether or not NCAA student-athletes will be able to use antitrust once again as a sword to gain more in terms of compensation. Because NIL appears to be the perfect less restrictive alternative, and because antitrust law does not mandate that the least restrictive alternative be used, this Note will argue that *Alston* is the end of the line for collegiate athlete compensation under antitrust law.

### A. AVAILABILITY OF NIL AS THE PERFECT LESS RESTRICTIVE ALTERNATIVE

In antitrust law, the availability of a less restrictive alternative is vital for plaintiffs to be able to tip the scales in their favor during the rule of reason balancing test performed by the court. It is likely that in the future, student-athletes may have a difficult time convincing the court of a less restrictive alternative since NIL provides what seems like the best option in this space. NIL allows players to make money, so the market for their compensation is not fully depressed by the NCAA and its rules. However, NIL preserves the distinction between professional and collegiate athletes because student-

256. *See Division I Student-Athlete Advisory Committee*, NCAA, https://www.ncaa.org/governance/committees/division-i-student-athlete-advisory-committee [https://perma.cc/7G7R-KPD6].

athletes are not being paid a salary by the teams they play for, allowing the NCAA to remain a distinct product in the sports market and thus preserving the market for collegiate sports. In practice thus far, it appears that NIL allows everyone to have exactly what they want. The student-athletes have the ability to make money, with some players having high earning potential, but the NCAA is still able to hold on to its beloved concept of amateurism.

Naysayers of NIL as a valid less restrictive alternative to the NCAA's compensation rules initially argued that this option did not account for the thousands of NCAA student-athletes in non-revenue sports, which include essentially every sport that is not Division I men's football or Division I men's basketball.[257] However, this has proven not to be the case. In a study done by AthleticDirectorU and Navigate Research, 17 of the top 25 most valuable college athletes—in terms of NIL potential—from the 2019-2020 school year were athletes in these non-revenue sports.[258] Gymnastics, softball, baseball, women's tennis, and track and field were some of the sports that these athletes participated in,[259] which may shock those individuals who believed that only the revenue sports had real potential in this space.

While it is true that not all student-athletes will make money using NIL, NIL isn't as much about athletic ability as it is reach, and it has been proven that this reach is not necessarily attached to athletic performance in a revenue producing sport. Because of the prominence of social media and the ability it gives athletes to build their brand and find their target audience, whoever that audience may be, student-athletes in a large variety of sports have been able to find their niche.[260] Lexi Sun, a volleyball player at the University of Nebraska, is just one of the student-athletes from a non-revenue sport who has been able to partner with an apparel company in their particular sport, reaching not only the fan base of her university, but also young volleyball players across the country, in order to sell her apparel.[261]

Something very convenient about NIL is that it allows the market to work on its own to establish the market rate for student-athletes. Without the

257. Matt Haage, *Examining NIL Rights in College Athletics for "Non-Revenue" Sports*, THE CG SPORTS CO. (Apr. 22, 2021), https://www.cgsportsco.com/cejih-explains/examining-nil-rights-in-college-athletics-for-non-revenue-sports [https://perma.cc/4UDK-KQUQ].

258. AJ Maestas & Jason Belzer, *How Much Is NIL Worth to Student Athletes?*, ATHLETICDIRECTORU, https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes [https://perma.cc/98YZ-SP63].

259. *Id.*

260. *See* David Cobb, *As NIL Rules Go into Effect, These NCAA Athletes Moved Quickly to Profit from Name, Image and Likeness*, CBS: NCAA FB (July 1, 2021, 4:58 PM ET), https://www.cbssports.com/college-football/news/as-nil-rules-go-into-effect-these-ncaa-athletes-moved-quickly-to-profit-from-name-image-and-likeness [https://perma.cc/3VLR-C2PG].

261. *Id.*

NCAA having to get involved to set a rate of compensation that very well could be subjected to antitrust scrutiny, NIL allows student-athletes to make money when there is a market demand for their services. If they are worth the money, the market will find a way to utilize their services and pay them what it believes they are worth. Great success has been seen in this NIL era in terms of student-athletes bringing in large amounts of money, so while it is clear that someone out there is willing to pay them, it just likely will not be the NCAA any time in the near future.

Additionally, if the potential less restrictive alternatives that student-athletes would attempt to put forward in future antitrust litigation are rooted in labor law and the idea of student-athletes achieving the status of employees, they are likely to lose because of the fact that antitrust case law has continued to accept the NCAA's argument that maintaining the distinction between the NCAA and professional sports is necessary to preserve market competition. Calling a student-athlete an employee and paying them a salary while also requiring them to be an amateur would be illogical. As it stands, the differentiation between the NCAA and professional sports has been upheld to be a valid procompetitive purpose that the courts have taken care to uphold.

### B. ANTITRUST LAW DOES NOT MANDATE THE LEAST RESTRICTIVE ALTERNATIVE BE USED

While restraints should not be stricter than necessary to achieve legitimate business purposes, antitrust law under section one of the Sherman Act does not dictate that businesses must use the least restrictive means of achieving legitimate business purposes, as the Court emphasized in *Alston*, because this would be an "erroneous and overly intrusive inquiry."[262] Because of this, student-athletes may struggle to argue that just because they are not being compensated as much as they could be, the NCAA should be forced to make an adjustment to its business model that may jeopardize the entire enterprise. The Court has not yet struck down the idea of amateurism as a differentiating factor between collegiate and professional sports, so until that happens, it may be wise for student-athletes to exploit other avenues of increasing their compensation. Additionally, in order to fix the issues that the Supreme Court had with the NCAA's amateurism argument, it may be enough for the NCAA to simply rework its definition of amateurism in a way that expressly takes into account NIL opportunities and clearly states that being paid a salary is something that is not acceptable for an amateur. The lack of a coherent definition was an agitation for the Justices, but finding a

262. NCAA v. Alston, 141 S. Ct. 2141, 2146, 2162 (2021).

definition that incorporates the ability to make money within the NCAA guidelines may better serve the NCAA's purpose.

### C. POWER OF THE NCAA

The fact that the *Alston* decision and Justice Kavanaugh's concurrence amount to no more than a strong warning and a small slap on the wrist is a testament to the power of the NCAA as an institution in the United States. If it had been punished more severely, in a way that would impact lasting change, we may have seen changes greater than the interim NIL policy stemming from the decision.

Antitrust case law has shown the power of the NCAA, as even in what some would argue should have been an obvious ruling in *Alston* that obliterated the concept of amateurism, the Court still took care to not completely destroy the business model of the NCAA. Currently, student-athletes have to combat the power of the NCAA relatively on their own time and dime, as the member schools have a much greater incentive to comply with the regulations than they do to assist student-athletes in increasing their compensation.

It is likely that if student-athletes were to be further compensated, at least some of the money would be coming from the institutions themselves, which would significantly change the landscape of institutional budgets. Expensive coaches and flashy athletic facilities that are being constantly updated are all a part of the arms race that is recruiting in collegiate athletics, and if paying student-athletes from the institutional budget became a part of that arms race, it is likely that other expenditures would have to suffer. Because a large majority of the NCAA is comprised of smaller schools that benefit more from being a part of the NCAA than larger institutions do, schools may be more concerned with keeping their NCAA membership than they are with challenging certain aspects of the rules, leaving student-athletes to fight the good fight relatively on their own.

## CONCLUSION

This Note has reviewed the rich history of the NCAA, an organization that, as Justice Kavanaugh very bluntly stated, would be essentially illegal in any other industry in the United States. Through antitrust case law and NCAA rule changes, the compensation landscape of student-athletes in the United States has evolved from scholarships being illegal when connected to athletic ability[263] to allowing student-athletes to be given full cost-of-

263. N.Y. TIMES, *supra* note 10.

attendance scholarships, health insurance, and the ability to make money off of their NIL.

There is likely little room in antitrust law for student-athletes to grow from the *Alston* decision beyond the NIL opportunities that they see now. As it currently stands, the bottom line is that the NCAA will always have the ammunition of the procompetitive purpose of preserving the popularity of college sports and maintaining its product as distinct from professional sports. Though the Supreme Court did appear skeptical of this principle in *Alston*, it did not seize the opportunity to tell the NCAA that maintaining this distinction is no longer a valid argument. Additionally, the NCAA now has the less restrictive alternative of NIL, which allows student-athletes to capitalize on their own individual stardom at a price that is dictated by the demand of the market rather than the NCAA or institutions themselves. Peter Playmaker is now in a much better position than he was prior to the *Alston* ruling, but for the foreseeable future, his battle against the NCAA for additional compensation under antitrust law is likely a game with no more time left on the clock.