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THE IMPLICATIONS OF THE SUPREME COURT'S *NCAA V. ALSTON* DECISION AND WHY NEGOTIATION MAY BE KEY TO FENDING OFF FUTURE LITIGATION

Michele Lehat

Until the recent Supreme Court decision in *NCAA v. Alston*, the NCAA has operated as a monopoly over the now \$18.9 billion college athletics industry.¹ Historically, college athletes had zero bargaining power,² having been denied direct or indirect compensation in a variety of ways.³ Now, after the landmark decision, the status of player compensation is facing major change.

On June 21, 2021, the Supreme Court held that the NCAA's education-related compensation restrictions violate § 1 of the Sherman Act, subject to the "rule of reason analysis" under antitrust scrutiny.⁴ Student athletes could now receive non-cash educational benefits above the "cost of attendance," such as scholarships for graduate school and free laptops or musical instruments.⁵ For the first time, the NCAA would be regarded and treated as a business enterprise subject to antitrust laws,⁶ and as a result, athletes may now be closer to receiving fair compensation.⁷

While this decision is significant in many ways, the Court did not touch on matters outside of education-related compensation.⁸ Nonetheless, Justice Kavanaugh's concurrence goes a step

¹ *Finances of Intercollegiate Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> [<https://perma.cc/NS55-3EDW>] (last visited Oct. 4, 2021); see also *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2154 (2021) ("[The NCAA] do[es] not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market.").

² Ben Pickman, *Legislation Introduced Seeking to Provide Collective Bargaining Rights to College Athletes*, SPORTS ILLUSTRATED (May 27, 2021), <https://www.si.com/college/2021/05/27/legislation-introduced-collective-bargaining-rights-college-athletes-bernie-sanders> [<https://perma.cc/E7PH-JQ2E>].

³ Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *There's Never Been a Better Time for US College Athletes to Unionize*, GUARDIAN (May 27, 2021, 11:00 AM), <https://www.theguardian.com/sport/2021/may/27/college-sports-union-right-to-organize-act> [<https://perma.cc/TLJ4-9XKD>].

⁴ 15 U.S.C. § 1; *Alston*, 141 S. Ct. at 2144, 2151; see also Jason J. Montgomery & Wendy K. Arends, *NCAA v. Alston: Five Key Takeaways*, HUSCH BLACKWELL (June 22, 2021), <https://www.huschblackwell.com/newsandinsights/ncaa-v-alston-five-key-takeaways> [<https://perma.cc/6SNN-64DH>].

⁵ Timothy Z. LaComb, *Ninth Circuit Opens Door for Students to Receive Additional Benefits for Playing Sports, Finds NCAA Rules Violation of Antitrust Laws*, NAT'L L. REV. (June 17, 2021), <https://www.natlawreview.com/article/ninth-circuit-opens-door-students-to-receive-additional-benefits-playing-sports> [<https://perma.cc/JFV5-4K7D>]; see also Amy Howe, *NCAA Athletes Win 9-0 on Educational Perks as Kavanaugh Calls Out Ban on Direct Payments*, SCOTUSBLOG (June 21, 2021, 8:23 PM), <https://www.scotusblog.com/2021/06/ncaa-athletes-get-unanimous-win-on-educational-perks-as-kavanaugh-calls-out-limits-on-direct-payments/> [<https://perma.cc/7CN4-QPVA>].

⁶ W. Drew Kastner & Stephenie Wingyuen Yeung, *What Does the Future Hold for College Athletics After the Supreme Court Decision in NCAA v. Alston?*, JD SUPRA (July 2, 2021), <https://www.jdsupra.com/legalnews/what-does-the-future-hold-for-college-3787786/> [<https://perma.cc/JVD7-L6VD>].

⁷ *Id.*

⁸ Justice Kavanaugh stated:

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive. . . . The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

further by leaving open the possibility for future litigation. Kavanaugh opined that the NCAA's remaining compensation rules "raise serious questions" under antitrust laws.⁹ As a result, and absent appropriate legislation, the NCAA may be facing future litigation in matters of similar antitrust issues.¹⁰ For instance, questions regarding college athletes receiving endorsement deals based on their name, image, and likeness ("NIL") may soon be scrutinized by the courts under the same "rule of reason analysis."¹¹

With Kavanaugh's concurrence in mind, it may be prudent for the NCAA to step in and preemptively negotiate agreements with colleges and student athletes¹² to avoid impending litigation, which may prove expensive, inefficient, and unpredictable under exacting scrutiny.¹³ Through negotiation, the NCAA can retain some autonomy while also allowing players like Olivia Dunne, a gymnast of Louisiana State University who boasts 3.9 million followers on TikTok,¹⁴ to negotiate her own terms of endorsement compensation. Looking forward, with the NCAA no longer standing above the law,¹⁵ student athletes may want to start thinking about unionizing to attain greater bargaining power in negotiating with the NCAA.¹⁶

Alston, 141 S. Ct. at 2166 (Kavanaugh, J., concurring)

⁹ *Id.* ("I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws.").

¹⁰ Stuart Plunkett & Sam Bragg, *Antitrust Advisory: NCAA in Foul Trouble After Supreme Court Favors Student-Athletes*, ALSTON & BIRD (June 29, 2021), <https://www.alston.com/en/insights/publications/2021/06/ncaa-in-foul-trouble> [<https://perma.cc/9K8D-FXZF>].

¹¹ In fact, the NCAA has already proposed an interim NIL proposal. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/WTS4-H5H7>].

¹² Braeden Anderson & Michael Schmidtberger, *Compensating College Athletes: Moving the Ball Forward*, BLOOMBERG LAW (Aug. 12, 2021, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/compensating-college-athletes-moving-the-ball-forward> [<https://perma.cc/7HFU-BY3F>].

¹³ *Litigation Can Be Inefficient and Expensive. Why Litigate?*, PWC, <https://www.pwc.com/gx/en/services/forensics/dispute-services/litigation.html> [<https://perma.cc/Y6W9-XHGA>] (last visited Oct. 4, 2021).

¹⁴ Darren Rovell, *Ranking Top 20 College Athletes Who Are Favorites to Capitalize on Name, Image & Likeness*, ACTION NETWORK (June 30, 2021, 5:47 PM), <https://www.actionnetwork.com/ncaab/ranking-top-20-college-athletes-favorites-capitalize-name-image-likeness-july-1> [<https://perma.cc/QF2G-2XHS>].

¹⁵ *Alston*, 141 S. Ct. at 2169.

¹⁶ Kalman-Lamb, *supra* note 3 ("The only meaningful counterweight to the NCAA system's exploitative dynamics is unionization: the empowerment of athletes to defend their own interests as a collective.").