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The Ball is in the Supreme Court: NCAA v. Alston

BY [EMILY GAINES](#)/ ON MARCH 1, 2021



Photo by Andrew Horne from flickr

On December 16, 2020, the U.S. Supreme Court granted certiorari in *NCAA v. Alston*, a case concerning the applicability of federal antitrust law to NCAA restrictions on player compensation.¹ While the NCAA is no stranger to antitrust litigation, this is the first NCAA case before the Supreme Court in over thirty-five years, and has the potential to dramatically alter the future of college athletics.²

This case originated in March 2014, when several Division I football and basketball student-athletes filed suit against the NCAA and eleven of its athletic conferences.³ These student-athletes sought to dismantle the NCAA's entire compensation framework by arguing that NCAA rules limiting the compensation student-athletes may receive in exchange for their athletic services violated federal antitrust law.⁴ The NCAA defended its rules as procompetitive and necessary to safeguard amateurism, a key distinction between college and professional athletics.⁵ Judge Wilken of the District Court of Northern California sided with the student-

athletes, finding it unnecessary to restrict education-related benefits in order to preserve consumer demand for Division I football and basketball.⁶

The Ninth Circuit affirmed.⁷ Writing for a three-judge panel, Chief Judge Thomas held that Judge Wilken had properly applied the Rule of Reason in determining that the NCAA limitations on education-related compensation and benefits violate Section 1 of the Sherman Act.⁸ Chief Judge Thomas applauded Judge Wilken for “crafting a remedy that both prevents anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.”⁹ The NCAA obviously disagreed with the decision and petitioned the Supreme Court for a writ of certiorari. In its petition, the NCAA argued that its eligibility rules regarding compensation do not violate federal law, and that the Ninth Circuit’s decision threatens the ability of sports organizations and other joint ventures to define the character of their own products.¹⁰

As this litigation continues to unfold, several states have enacted legislation permitting college-athletes to be compensated. Most notably, on September 30, 2019, California Governor Gavin Newsom signed Senate Bill 206 into law.¹¹ This Act, commonly known as “The Fair Pay to Play Act,” authorizes California-based college athletes to profit from their names, images, and likeness (“NIL”).¹² Inspired by *O’Bannon v. NCAA*, this new California law allows college athletes to be paid for endorsement and sponsorship deals without jeopardizing their athletic eligibility.¹³ Since then, several other states have introduced similar legislation. In fact, Florida’s NIL law will be the first to go into effect this July.¹⁴ In response to increased state legislation on the issue of whether student-athletes should be compensated, the NCAA has articulated its commitment to modernize its rules to permit NIL benefits, but has failed to actually implement any changes thus far.¹⁵

The debate over whether college athletes should be compensated has also garnered Congress’ attention, and there is some consensus that this issue must be addressed at the federal level. The NCAA would certainly like the federal government to intervene in order to avoid a hodge-podge of state legislation (although they likely preferred to work with a Republican led Senate).¹⁶

In December 2019, Senators Chris Murphy (D-CT) and Mitt Romney (R-UT) announced the formation of a bipartisan working group to facilitate conversations surrounding these issues, with both senators acknowledging that the current rules are unfair to student athletes, especially those coming from low-income families.¹⁷ Since then, several bills have been introduced, but with the first state NIL law going into effect in July, it seems unlikely that Congress will be able to act swiftly enough to find a solution.

With oral arguments scheduled to begin next month, the Supreme Court will likely have the first word on the matter. At this moment, it is difficult to predict how the Court will respond to the NCAA’s arguments. The Supreme Court’s decision could certainly alter the NCAA’s

governance structure. However, the Court may also decide that the NCAA is entitled to create limitations on the compensation athletes are entitled to receive. Oral arguments will probably provide some clarity on where the Justices stand on the matter. Regardless of what the Supreme Court ultimately decides, its decision will surely impact the ongoing debate about college athletics, and hasten Congress to act on the issue.

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1. National Collegiate Athletic Association v. Alston, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/> (last visited Feb. 18, 2021).
2. The last NCAA case argued before the U.S. Supreme Court was Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).
3. In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061-62 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. NCAA v. Alston, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).
4. *Id.* at 1062.
5. *Id.*
6. *Id.* at 1110.
7. See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), cert. granted sub. nom. NCAA v. Alston, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).
8. *Id.* at 1244.
9. *Id.* at 1263.
10. Petition for a Writ of Certiorari, at i, 2, Nat'l Collegiate Athletic Ass'n v. Alston, 958 F.3d 1239 (2020) (No. 20-512), 2020 WL 7366281.
11. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).
12. *Id.* See also Charlotte Carroll, Tracking NCAA Fair Play Legislation Across the Country, Sports Illustrated (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws>.
13. See Michael McCann, What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?, Sports Illustrated (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.
14. See Florida Says "Show Me the Money" – Intercollegiate Athlete Name, Image and Likeness (NIL) Bill is Now Law, Foley & Lardner LLP (June 29, 2020), <https://www.foley.com/en/insights/publications/2020/06/florida-intercollegiate-athlete-nil-law>.
15. See Press Release, NCAA, Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions (Apr. 29, 2020), <https://www.ncaa.org/about/resources/media-center/news/board-governors-moves->

toward-allowing-student-athlete-compensation-endorsements-and-promotions; Dan Murphy & Adam Rittenberg, NCAA delays vote to change college athlete compensation rules, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules.

16. Ross Dellenger, As Congressional Power Shifts, NCAA Reform and Athletes' Rights Are Firmly in the Crosshairs, Sports Illustrated (Jan. 20, 2021), <https://www.si.com/college/2021/01/20/ncaa-athlete-rights-compensation-congress-nil>.
17. Press Release, Chris Murphy, Murphy, Romney Announce Bipartisan Working Group On Student Athlete Compensation & Related Issues (Dec. 5, 2019), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-romney-announce-bipartisan-working-group-on-student-athlete-compensation-and-related-issues>.