JOURNAL OF SPORTS LAW, POLICY AND GOVERNANCE
ISSN (O): 2584 – 1122

National Collegiate Athletic Association v. Alston: A new day in intercollegiate athletics in the United States

Charles J. Russo[1]

Abstract

A major controversy in intercollegiate athletics, and a major source of revenue for many colleges and universities, involves whether student athletes in the United States can benefit from the commercial use of the Names, Images, and Likenesses (NILs) such as when they are paid to be endorse products or be depicted in video games. In light of legal issues involving the use of student-athletes' NILs, combined with the fact that students-athletes in secondary schools in the United States are now benefitting from such arrangements, this article first examines the legal issues and litigation associated with this topic before reflecting on what it means and how it might shape the coming face of intercollegiate and interscholastic athletics in the United States as well as perhaps elsewhere.

Keywords

Names, Images, and Likenesses, NILs, intercollegiate athletics, student-athletes

[1] Panzer Chair in Education and Director of the Ph.D. Program in Educational Leadership in the School of Education and Health Sciences and Research Professor of Law in the School of Law at the University of Dayton, Dayton, OH; Visiting Professor in the Law School at the Sydney Campus of Notre Dame University of Australia.

✉ Charles J. Russo (crusso1@udayton.edu)

1. Introduction

On 21 June 2021, the United States Supreme Court issued a landmark decision in a case involving intercollegiate sports—a significant, almost unique, attraction in this Nation that is not as popular in other parts of the world. At issue was whether the National Collegiate Athletic Association,[2] the largest body regulating intercollegiate sports could deny student-athletes compensation for the use of what is commonly referred to as their Names, Images, and Likenesses or NIL, as discussed below, a term the Justices did not use in their analysis.

National Collegiate Athletic Association (*NCAA*) *v. Alston*[3] (*Alston*) was an uncommon unanimous judgment by the Supreme Court, a 9-0 opinion authored by Justice Neil Gorsuch, with a concurrence by Justice Brent Kavanaugh.[4] In what was, at its heart, an antitrust case, the Court affirmed earlier orders[5] that the limitations the NCAA placed on the ability of undergraduate student-athletes to receive compensation related to their athletic performances violated their rights under the Sherman Act. First enacted in 1890, the Sherman Act is a far-reaching federal antitrust law pursuant to which "[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, is declared to be illegal."[6] Moreover, the Sherman Act imposes sanctions on those who violate its provisions, regardless of whether they engaged in anticompetitive conduct.[7]

[2] See NCAA (2023). The NCAA, a member-led organization founded in 1904 as the Intercollegiate Athletic Association of the United States in large part due to stem the violence in college football, an issue Justice Gorsuch discussed in the Court's opinion. The NCAA, which adopted its present name in 1910, oversees the activities of more than 500,000 intercollegiate student-athletes across three divisions as its about 1,100 member schools in all 50 states, the District of Columbia, Puerto Rico, and Canada, compete for 90 championships in 24 sports. See also, NCAA (2023d).

[3] ___ U.S. ___, 141 S. Ct. 2141 (2021).

[4] NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 2141 (2021), at 2166 (Kavanaugh, J., concurring).

[5] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019), initially, a federal trial court, in an unpublished order, enjoined enforcement of the NCAA's rules limiting education-related benefits available to student-athletes. On further review, the Ninth Circuit, 958 F.3d 1239 (9th Cir. 2020), affirmed in favor of the plaintiffs leading the NCAA to appeal unsuccessfully to the Supreme Court, *cert. granted sub nom.* NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 1231 (2021), *aff'd*, ___ U.S. ___, 141 S. Ct. 2141 (2021).

[6] Sherman Act, 15 U.S.C. § 1. This section adds that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony …."

[7] Ibid. Those convicted violators of violations "… shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

In *Alston,* the Justices agreed that the lower courts properly applied what is known as the Rule of Reason[8] analysis, a judicial construct used in antitrust litigation. Rule of Reason analysis is "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's 'actual effect on competition'—especially its capacity to reduce output and increase price."[9]

In *Alston,* the Court found that the NCAA failed to prove a procompetitive justification to justify the limits it placed on the educational-related compensation student-athletes can receive as an unlawful restraint on trade, opening the door for them to receive payments when others use their NILs. In other words, the Court essentially rejected the NCAA's purported, but never codified, rules on amateurism which expect student-athletes to receive nothing in exchange for their participation other than tuition, room and board, and receiving their texts books. That is, the NCAA expected the student-athletes to "play[] for the love of the game"[10] even though their efforts generate significant amounts of revenues for their institutions and the NCAA[11] as well as the large salaries various officials garner.[12] The NCAA's rules, which forbade student-athletes from monetising their NILs seems was in a misplaced ideal that allowing individuals to profit from their efforts would have diminished the never defined concept of amateurism it purportedly seeks to advances.

In the wake of *Alston*, student-athletes have economic freedom possibly opening the door to allowing them all to reap financial benefits, not just the relatively few who earn NIL contracts. Just like all other students on their campuses, student-athletes "can now earn and accept money doing commercial endorsements, appearances and social media posts, writing books, hosting camps, giving lessons and performing various other commercial activities outside of their

[8] Because the trial court judge capitalised Rule of Reason, but the Supreme Court did not, for the sake of consistency, this article retains the original punctuation.

[9] NCAA v. Alston, 141 S. Ct. 2155 (internal citations omitted).

[10] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 802 F.3d 1049, 1078, note 22 (9th Cir. 2020).

[11] See, for example, Zimbalist (2023), reporting that "Division I athletics generated $15.8 billion in revenues in 2019.". See also, Associated Press (2022), additionally reporting that prior to the COVID shutdown the NCAA alone generated $1.12 billion in revenues in 2019.

[12] NCAA v. Alston, 141 S. Ct. 2151 (internal citations omitted). Justice Gorsuch pointed out that "The president of the NCAA earns nearly $4 million per year. … Commissioners of the top conferences take home between $2 to $5 million… College athletic directors average more than $1 million annually…. And annual salaries for top Division I college football coaches' approach $11 million, with some of their assistants making more than $2.5 million…."

schools, all without running afoul of NCAA rules."[13] Against this background, the remainder of this article is divided into two substantive sections. It begins by reviewing the judicial history of *Alston* before reflecting on its impact and implications in having ushered in a new day for student-athletes, particularly in higher education.[14]

2. Judicial history

2.1. Federal District Court

Alston began when Shawne Alston, a former running back on the football team at the University of West Virginia, and a former forward on the University of California's women's basketball team, Justine Hartman,[15] filed a class action suit[16] against the NCAA on behalf of a larger group of Division I athletes.[17] Representing the class, the plaintiffs claimed that the NCAA's cap on compensation for student-athletes violated the Sherman Antitrust Act.[18]

In 2019, following four years of extended pretrial proceedings,[19] a federal trial court in California "conducted a 10-day bench trial,"[20] meaning that the case was heard only by a judge

[13] Silas (2022).

[14] While some states have extended NIL to elementary and secondary education, this article highlights the impact of *Alston* on collegiate student-athletes.

[15] O'Connor (2022).

[16] Federal Rules of Civil Procedure, Rule 23(A). In class action litigation, subject to judicial approval, an individual or group of persons represents the interests of a larger group or class if having all members involved is impracticable, questions of law or fact common to the class are present, the claims are typical of the group, and the representatives will fairly and adequately protect the interests of the class.

[17] NCAA (2023a). The NCAA consists of Divisions, I, II, and III. Division I, which provides full scholarships in major revenue-generating sports such as basketball and football; there are more than 350 Division I, which is subdivided into I-A and I-AA, schools fielding more than 6,000 teams providing opportunities for more than 170,000 student-athletes to compete in their sports. The FBS includes major Division I-A athletic programs that compete for the national college football championship and Division I-AA. See Wilco (2020), explaining how the FBS, Division I-A differs from the Division I-AA from the Football Championship Subdivision (FCS) in terms of play-off structure and the numbers of players who can receive athletic scholarships. Some of the NCAA's 300 Division II programs provide scholarships for student-athletes. See, NCAA (2023b), this site did not provide details on the number of participants or sports. Division III, with more than 440 member institutions and 195,000 student-athletes, the most in any division, does not permit athletic scholarships but does offer about 80% of participants some form of academic grants or need-based scholarships. See, NCAA (2023c).

[18] The initial decision in this series of cases is published In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 311 F.R.D. 532 (N.D. Cal. 2015).

[19] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 375 F. Supp.3d 1058 (N.D. Cal. 2019). As identified in Westlaw, Alston resulted in twelve cases in its direct history and a total of twenty-six proceedings, including the Supreme Court's judgment. For the sake of brevity, this article only includes citation for the main cases.

[20] NCAA v. Alston, 141 S. Ct. 2151.

rather than the usual jury situation in American courts. In her lengthy opinion the judge applied the Rule of Reason in determining the relevant market,[21] which, she wrote, consisted of national markets for the student-athletes' labour, wherein each member of the class participated in their sport-specific markets.[22]

Applying Rule of Reason analysis, the court maintained that "an alternative compensation scheme that would allow limits on the grant-in-aid scholarships at not less than the cost of attendance and limits on compensation and benefits unrelated to education, but that would generally prohibit the NCAA from limiting education-related benefits, would be virtually as effective as the challenged rules in achieving the only procompetitive effect that Defendants have shown here."[23] However, the court did allow the NCAA's member institutions to provide assistance beyond tuition, room and board, and books by relying on their Student Assistance Academic Enhancement Funds in excess (AEF) of full cost-of-attendance grants-in-aid, limited only by the aggregate amount the NCAA distributes through these funds each year.[24]

According to the court, the NCAA's rules violated the Sherman Act because "the challenged restraints suppress competition and fix the price of student-athletes' services."[25] In so doing, the court rejected the NCAA's arguments that the promotion of amateurism was a sufficient basis on which to limit education-related compensation and that the goal of integrating student-athletes into their academic communities justified its actions.[26] The court thereby enjoined the rules limiting non-cash, education-related benefits such as those restricting scholarships for graduate school, post-athletic eligibility internships and payments for tutoring on top of grant-in-aid that Division I basketball and Football Bowl Subdivision (FBS) football players could receive as unreasonably restraining trade, in violation of Section 1 of Sherman Act absent evidence that this would have negatively impacted consumers' interest in these sports.

[21] NCAA v. Alston, 375 F. Supp.3d 1066-67.

[22] Ibid, para 1067.

[23] Ibid, para 1062.

[24] Ibid, paras 1072-23.

[25] Ibid, para 1097.

[26] Ibid, para 1102. The *Alston* court noted that while this amount was currently at $5,980, "[m]ost ... are received by only a few student-athletes each year." NCAA v. Alston, 141 S. Ct. 2165 (internal citations omitted).

The trial judge also thought that the NCAA's rules limiting compensation unrelated to education available to student-athletes did not violate the Sherman Act. The judge refused to enjoin policies limiting undergraduate athletic scholarships as well as other compensation related to athletic performance.

On the same day, in a separate order in the line of litigation leading to the appeal to the Supreme Court, in a brief order, the judge permanently enjoined the enforcement of the NCAA's rules.[27] The judge "enjoined [the NCAA] from agreeing to fix or limit compensation or benefits related to education that may be made available from conferences or schools to Division I women's and men's basketball and FBS[28] football student-athletes on top of a grant-in-aid."[29] Dissatisfied with the outcome, both sides sought further review at the Ninth Circuit.

2.2. Ninth Circuit

On appeal, the Ninth Circuit, in a relatively brief opinion,[30] including a concurrence,[31] conceded that the NCAA expressed a legitimate interest in preserving what it describes as its version of amateurism. Even so, the panel affirmed that the trial court did not clearly err in deciding that NCAA failed to establish that anticompetitive effects of its rules intended to preserve amateurism had such sufficient procompetitive effects so as to justify them when subject to Rule of Reason scrutiny. In addition, the court agreed that less restrictive alternatives to the current rules would have been just about as effective in serving its espoused procompetitive purposes of its current rules.

The Ninth Circuit further agreed that the trial court did not clearly err in maintaining that the NCAA's rules limiting compensation unrelated to education that student-athletes could receive

[27] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019).

[28] To put the significant amount of money at issue in Division I-A sports, the Brief for Respondents, at 5, 2021 WL 859705 (March 23, 2023), namely the class of students challenging the rules at issue specifies that "the NCAA's current broadcast contract for the [Division I) 'March Madness' basketball tournament is worth $19.6 billion; the FBS football conferences' current television deal for the College Football Playoff is valued at $5.64 billion."

[29] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939.

[30] In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2019).

[31] Ibid, para 1267 (Smith., C., concurring).

did not violate the Sherman Act. Finally, the panel affirmed that the injunction preventing the NCAA from enforcing its disputed rules was not impermissibly vague. Again dissatisfied, the NCAA appealed to the Supreme Court[32] which affirmed in favour of the student athletes.[33]

2.3. Supreme Court

2.3.1. Majority opinion

As author of the Supreme Court's unanimous opinion, Justice Gorsuch began his three-part opinion by noting that the Sherman Act was designed to "'enforc[e] a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources."[34] He then recounted how the federal trial court invalidated the NCAA's rules restricting the education-related benefits that institutions can offer student-athletes such as not permitting them to offer graduate or vocational school scholarships but "refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance."[35] He next indicated that NCAA alone challenged the trial court's order in the matter at issue.

Following his brief introduction, Justice Gorsuch turned to the first part of his opinion, which he divided into three sections, briefly tracing the history of intercollegiate athletics starting in the mid-nineteenth century, the development of the NCAA, and commercialism. He emphasised that as early as the 1920s, the NCAA was not concerned with amateurism as, commenting that, in particular, "[c]ollege football was 'not a student's game;' it was an 'organised commercial enterprise' featuring athletes with 'years of training,' 'professional coaches,' and competitions that were 'highly profitable,'"[36] characterising it as "a sprawling enterprise….a massive business,"[37] generating large sums of money identified earlier. The remainder of this first section reviewed the earlier litigation.

[32] *Cert. granted sub nom.* NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 1231 (2021)
[33] NCAA v. Alston, ___ U.S. ___, 141 S. Ct. 2141 (2021).
[34] Ibid, para 2147 (internal citations omitted).
[35] Ibid.
[36] Ibid, para 2150.
[37] Ibid.

Turning to the second major part of his order, Justice Gorsuch began his first of three sections by pointing out that the Court would "focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis"[38] because it is a joint venture, meaning that is a business activity involving or more persons or entities engaged in a single defined project. Justice Gorsuch summarily rejected this argument as lacking merit. He continued to rebuff the NCAA's assertion that Rule of Reason analysis was inapplicable because it is "a particular type of venture categorically exempt its restraints"[39] because even competitors such as its member institutions must establish a degree of coordination in order to facilitate competition. The problem as Gorsuch saw it was that the restraints the NCAA imposed simply went too far.

In the second part here, Justice Gorsuch was not persuaded by the NCAA's argument that the Court was bound by its earlier judgments in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,*[40] on the organization's ability to limit the extent to which member institutions could broadcast their football games. He rejected the NCAA's position that this case foreclosed the Court's ability to review the limits it placed on student compensation, a topic not at issue in the earlier case.[41]

Justice Gorsuch devoted the third subsection of this part of the opinion to rebutting the NCAA's incredulous claim that it "and its member schools are not 'commercial enterprises' and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience."[42] The NCAA added "that it seeks to 'maintain amateurism in college sports as part of serving [the] societally important non-commercial objective' of 'higher education.'"[43] Gorsuch later remarked that "[w]hile the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition"[44] of this term.

[38] Ibid, para 2155 (emphasis in original).

[39] Ibid, para 2157.

[40] 468 U.S. 85 (1984).

[41] NCAA v. Alston, 141 S. Ct. 2167. In his concurrence, Justice Kavanaugh dismissively made it "clear that the decades-old 'stray comments' about college sports and amateurism made in National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla. … were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.".

[42] Ibid, para 2158 (internal citations omitted).

[43] Ibid.

[44] Ibid, para 2163 (internal citations omitted).

In sum, in again rebutting the NCAA's arguments, Justice Gorsuch ended this part of the Court's judgment by rejecting the limits it placed on compensation for student-athletes as anti-competitive, noting that "until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—'competition is the best method of allocating resources' in the Nation's economy,"[45] including college sports.

Turning to the final substantive part of the Court's order, which he divided into three sections, Justice Gorsuch responded to other objections the NCAA raised to the trial court's application of the Rule of Reason. In the first part Gorsuch did not treat the NCAA as harshly as he could have because he generally agreed with some of its arguments such as that its interpretation of the Sherman Act does not require it to employ the least restrictive means of achieving its legitimate business purposes. Where he disagreed significantly was in describing the NCAA's rules as "'patently and inexplicably stricter than is necessary' to achieve the procompetitive benefits [it] had demonstrated."[46]

Justice Gorsuch took issue with the NCAA's claim that the Court "impermissibly redefined its product"[47] or redesigned it by rejecting its views about what amateurism requires and replacing them with its preferred conception. He handily rebuffed this contention, explaining that the Court could not defer to the NCAA's understanding of amateurism because the trial judge made it clear that its officials "had not adopted any consistent definition"[48] of the term because the rules and limits it applied on compensation changed markedly over time. He reasoned that the NCAAA made these modifications without regard to "considerations of consumer demand," and that some were "not necessary to preserve consumer demand,"[49] He thereby spurned the NCAA's response because "[n]ne of this is product redesign; it is a straightforward application of the rule of reason."[50]

At the outset of the last substantive section of the Court's judgment, Justice Gorsuch agreed with the NCAA that the judiciary should grant institutions leeway in operating their business

[45] Ibid, para 2160 (internal citations omitted).
[46] Ibid, para 2162 (internal citations omitted).
[47] Ibid.
[48] Ibid.
[49] Ibid, para 2163 (internal citations omitted).
[50] Ibid.

by not micromanaging then. Yet, Gorsuch disagreed with the NCAA that the trial or Supreme Court did so in negating its final three arguments. First, he rejected the NCAA's concerns that institutions could abuse post-athletic eligibility internships because the trial court's injunction afforded institutions considerable latitude in this regard.

Justice Gorsuch next rebuffed the NCAA's criticisms of the trial court for possibly setting the aggregate limit on awards institutions may grant for academic or graduation achievement to that set for parallel athletic awards, currently $5,980 per year,[51] because its rationale for doing so was unclear. He responded that if the NCAA truly sought certainty to ensure that such awards were education-related, it, and its member institutions, were free to set their own criteria.

Third, Justice Gorsuch was not convinced that the NCAA's hyperbolic contention that allowing in-kind educational benefits for graduate or vocational school as well as items such as computers and tutoring could be abused in such a way that institutions would give student-athletes such items as "'luxury cars' 'to get to class' and 'other unnecessary or inordinately valuable items' only 'nominally' related to education"[52] as misinterpreting the trial judge's injunction. Because nothing in the injunction prevents the NCAA and member institutions from limiting in-kind benefits, Gorsuch reiterated that it, as well as individual conferences and institutions are free to impose restriction in this regard that they deem appropriate.

In the final paragraph of his opinion Justice Gorsuch mused that some critics may regard the injunction at issue as not going far enough to rein in the NCAA while others may fear that it went too far in not adequality valuing the role of amateur athletics on college and university campuses. In upholding the injunction Justice Gorsuch rounded out the Court's judgment by agreeing with the Ninth Circuit that "[t]he national debate about amateurism in college sports is important. But our task as appellate judges are not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.' That review persuades us the district court acted within the law's bounds."[53]

[51] Ibid, para 2165.
[52] Ibid.
[53] Ibid, para 2166.

2.3.2. Justice Kavanaugh's concurrence

Justice Kavanaugh, an avid sports fan who has coached his daughter's basketball team,[54] began his relatively brief concurrence, which was much tougher on the NCAA than the Court, with three initial points. He began by observing that the Court did not review the legality of the NCAA's remaining compensation rules, limiting its analysis to having upheld the restrictions that the trial court had already enjoined those restrictions now enjoined.[55]

Second, Kavanaugh reiterated that that while the Court did not address the legality of the NCAA's remaining compensation rules, it established an analytical framework for doing so in the future. Consistent with his desired approach, Justice Kavanaugh believed that the NCAA's compensation rules should be subject to ordinary Rule of Reason scrutiny because "the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws."[56]

Third, in what must be viewed as a veiled warning to the NCAA, Justice Kavanaugh suggested that there are serious questions about whether those rules can pass muster under the Rule of Reason framework. He based his position on his doubts whether the NCAA can provide a justification by offering a legally valid procompetitive justification for its remaining compensation rules.

Kavanagh next disagreed with the NCAA's argument that consumers benefit from the restrictions it placed on student-athletes as circular logic. He pithily addressed the status quo by stating that "[p]rice-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[57]

Justice Kavanaugh went on to muse about the legality of the NCAA rules that remained in place even in conceding that they were not at issue. As such, he questioned the legality of the remaining restrictions on benefits for college athletes. He made it clear that while those

[54] Allen (2019).
[55] NCAA v. Alston, 141 S. Ct. 2167 (Kavanaugh, J., concurring).
[56] Ibid.
[57] Ibid, paras 2167-68.

restrictions were not before the court here, *Alston* created a framework that could lead to future challenges to the NCAA's restrictions.

For Justice Kavanaugh, the "bottom line" was that the NCAA and its member institutions unlawfully suppressed the pay of student-athletes, denying them any remuneration, while collectively generating billions of dollars in revenues annually. He conceded that while the NCAA can set standards about such matters as enrolment and class attendance, its business model using unpaid student-athletes to generate billions of dollars in revenue raises serious questions under the Sherman Act with no clear justification legally defending its remaining compensation rules.

Justice Kavanaugh suggested that ways around this morass in lieu of litigation are legislation and the creation of some form of collective bargaining or other negotiated agreements to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Of course, this final option would present all sorts of logistical challenges in determining how such negotiations would occur at the national, state, conference, or school level in addition to how long agreements would last and who would be covered.

Justice Kavanaugh began the final paragraph of his concurrence by recognising that "the NCAA and its member colleges maintain important traditions that have become part of the fabric of America…." Even so, he concluded that because "[t]he NCAA is not above the law,"[58] the traditions it created cannot justify its having constructed a massive money-raising enterprise on the backs of unfairly compensated student-athletes because no other American business can operate such a scheme without having to comply with the Sherman Act.

3. Discussion

In light of *Alston*, this section examines the NCAA's response and state laws regulating how student-athletes can benefit from using their NILs before reflecting on what it means moving forward in American intercollegiate athletics.

[58] Ibid, para 2169.

3.1. NCAA's response to *Alston*

Not surprisingly, within days of *Alston,* the NCAA adopted an interim NIL policy[59] which provides the following guide to college athletes, recruits, their families and member schools:

- *Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.*
- *College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.*
- *Individuals can use a professional services provider for NIL activities.*
- *Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school*.[60]

The interim policy allows individual member institutions and conferences to adopt their own additional rules. The interim policy emphasizes that "college sports are not pay-for-play," meaning that student-athletes cannot be paid for participating in their sport, while it "reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements." The NCAA's Division I board subsequently approved five clarifications to its interim NIL policy, reviewed as follows.[61]

3.2. Educating and monitoring current student-athletes

This addresses such topics as financial literacy, taxes, social media practices and entrepreneurship. While institutions can provide NIL education to boosters and prospects, the interim policy also asserts that, depending on state laws, institutional officials can require student-athletes to report NIL activities to the athletics department.

[59] See generally, NCAA (2023e).
[60] Hosick (2021).
[61] Durham (2022).

3.3. School support for student-athlete NIL activities

This applies to such items as allowing institutional officials to inform student-athletes about potential NIL opportunities and can work with NIL service providers to regulate "marketplaces" matching individuals with opportunities. The interim policy does forbid officials from negotiating on behalf of NIL entities or student-athlete to secure specific NIL opportunities. While the interim policy permits institutional officials to support their student-athletes by providing stock photos or graphics to either to them or NIL entities or arranging space on campuses where the parties can meet. Moreover, the interim policy allows officials to promote the NIL activities of student-athletes if they or NIL entities pays the appropriate rate for those advertisement but restricts their ability to do so while participating in required pre- and postgame activities as well as on-field or court celebrations and news conferences.

Another aspect of the interim policy prohibits officials from providing free services such as graphic designers, tax preparers, and/or contract reviews to student-athletes unless they are available to the general student body. Similarly, officials may not offer equipment in the form of cameras, graphics software, or computers to support NIL activities, unless that equipment is available to the general student body.

3.4. Institutional involvement with collectives and other NIL entities

In the first of three points, this item enables institutional personnel, including coaches, to assist NIL entities with fundraising through appearances or by providing autographed memorabilia but cannot donate cash directly to them nor can they be employed by or have an ownership stake in an NIL entity. This provision next allows officials to ask donors to provide funds to collectives and other NIL entities if they do not ask that these resources are directed toward specific sports or student-athletes. Finally, the interim policy permits institutional officials to provide tickets or suites at events to NIL entities through sponsorship agreement if their terms in doing so are the same as for other sponsors.

3.5. Enforcement of NCAA rules related to NIL policies

This item directs enforcement officials to review the facts of cases individually but only to pursue those clearly contrary to the interim policy's provisions. The interim policy does clarify

that enforcement staff and the NCAA's Committee on Infractions will presume violations occurred unless institutions clearly demonstrate that the behaviours in question are in line with existing NCAA rules and the interim policy. However, the interim policy does not address what levels of suspicion or burdens of proof are needed to proceed or to be able to discipline violators. This provision added that the focus of this NIL guidance is not meant to question the eligibility of student-athletes on campuses.[62]

3.6. State laws

Following *Alston*, about one half of the states have laws or executive orders in effect allowing student-athletes in higher education[63] to benefits from their NILs.[64] These laws share a variety of the following common features.[65] First, student-athletes are free to enter into NIL agreements and be represented by agents when forming such contracts. Second, there are few, if any limitations on the ability of student-athletes to benefit financially from their NILs except that they cannot be compensated directly by their institutions or sports conferences.

Third, institutional officials generally have discretion to create their own limits on such items such as using team logos or preventing student-athletes from forming contracts with industries including adult entertainment, alcohol, tobacco, firearms, and gambling. Fourth, consistent with the NCAA's interim policy banning so-called pay-for-play, NILs cannot be linked to activities contingent on their athletic participation or achievement. Fifth, laws usually limit the duration of contracts to the periods of student-athletes; eligibility with some dictating that they cannot extend past the time individuals participates in athletics at their institutions. Sixth, NIL agreements cannot conflict existing current institutional contracts.[66]

[62] Ibid. This report identified a fifth item, Third-party Administration of NIL Activities, but refrained from acting on it pending the need for future discussion as legal and political standards evolve..

[63] Nakos (2022). Although it is beyond the scope of this article, as of July 2022, athletic associations in at least seventeen states and the District of Columbia allowed students in secondary schools to benefit from their NILs.

[64] BCS (2023). Further, Arkansas, Missouri, New York, Oklahoma, and Texas prohibit the NCAA from imposing penalties if student-athletes assert their NIL rights. See, Charron (2023), for an update through February 2023. See also, King (2022), reporting that as of July 8, 2022, 29 states have passed legislation regulating or otherwise addressing how student-athletes can profit from their name, image, and likeness. Of those, twenty-four such laws are currently in effect. Those that are not yet in place are slated to take effect by July 2023 at the latest. An additional ten states have proposed legislation pending.

[65] Keller (2023); See also Nakos (2022).

[66] See for example, Wallace (2022), for discussion of various NILs.

4. Final reflections

As an initial observation, it is noteworthy that the Supreme Court Justices placed their ideological divides aside in unanimously rejecting the NCAA's argument that it was a special organization, devoted to "amateurism," exempting it from the limits the Sherman Act sets against entities operating essentially as monopolies. Instead, the Court acknowledged that the NCAA is subject to the same antitrust laws as all other organizations. In fact, as Justice Kavanaugh's concurrence highlighted, the NCAA is unlikely to receive future judicial dispensations from antitrust laws, especially as they apply to student athletes in its seemingly quixotic quest to preserve its vision of amateurism.

Like so many things in life, it seems that allowing student-athletes to benefit from their NILs is something on a mixed blessing as the process of moving forward is likely to be complex and far from certain. On the positive side, NIL laws and policies allow student-athletes, both female and male, not just their institutions, to benefit financially from their efforts[67] that provide their schools, the NCAA, and athletic officials with large sums of money.

A second benefit flowing from *Alston* is that players can monetize their NILs. For example, the largest of all such contract, albeit for a male high school basketball player, is valued at US $7,200,00 while a college football player signed the next highest NIL agreement for an estimated $3,700,000.[68] Hopefully student-athletes will gain financial management skills they can use in life and/ or seek professional assistance to help them take care of their earnings. As a kind of reality check, it is essential to remember that these figures are outliers as only a very select few student-athletes sign such contracts with many not earning anything because advertisers do not use their NILs.[69] Because various states have taken different approaches to NIL, it remains to be seen how consistently policies and rules regulating the income of student-athletes are applied in these jurisdictions and their institutions.

On what may be the downside, due to the NCAA's having failed to plan ahead in terms of affording student-athletes' opportunities to benefit from the commercial uses of their NILs, its

[67] Bilas (2022).

[68] Wojoton (2023).

[69] I express my thanks to my University President, friend, and colleague, Dr. Eric F. Spina, Ph.D. for his thoughtful feedback on this issue and the one below on "free agency."

status is arguably somewhat diminished. In light of the Court's having described the NCAA as "a sprawling enterprise…a massive business,"[70] not all will view restrictions on it as negatives. To this end, critics maintain that the NCAA has acted as a cartel that exceeded its reach[71] by, for instance, attempting to limit the benefits student-athletes could reap from their NILs while the two top college football coaches who benefit from the efforts of their players earn an incredible $9,300,000 and $8,500,000 annually.[72]

The first of a two-pronged potential negative this author fears is the loss of the NCAA's not so "revered tradition of amateurism"[73] that may never really have been in effect at least in terms of the resources sports raised for major institutions. Of course, while it is certainly reasonable for student-athletes to be able to benefit for their efforts, in an era of "one and done,"[74] whereby college basketball players, in particular, have played one season before leaving to earn massive salaries as professionals, where is the limit?

At the same time, because the NCAA had eased its rules allowing student-athletes to transfer institutions,[75] likely in pursuit of more playing time and perhaps greater NIL opportunities, intercollegiate sports risk entering an era of unfettered free agency not unlike the professionals where individuals move from one team to the next with no loyalty to anyone but themselves and their bank accounts. While again recognising the right of players to benefit from their NILs, one wonders how this may impact the educational dimension of "student-athlete" and the profound impact it might have on the face of intercollegiate sports.

With the money in NIL contracts risk turning college athletics into shamateurs[76] who are mercenary professionals in all but name only, one must wonder whether their roles as students be reduced to an after-thought at best. If this comes to pass, will there be any participants in big-time programs who play for the joy of the game as do their friends in Division-III non-scholarship schools who are true student-athletes?

[70] Ibid.

[71] Edelman (2021); Stauffer (2014).

[72] ESPN (2019).

[73] NCAA v. Alston, 141 S. Ct. 2157 (internal citations omitted). See, Banks (2022), for a discussion of amateurism in American sports.

[74] Lynch (2017).

[75] NCAA (2023f).

[76] The Economist (2021).

One could argue that the statement attributed to the Duke of Wellington that the battle at Waterloo was won "on the playing fields on Eaton"[77] may be hyperbole. Still, there is something to be learned from teamwork and group effort aimed at achieving hard fought victories that student-athletes may lose if their participation is motivated primarily by money.

5. Conclusion

Moving forward, this much is certain: college sports in the United States are going to continue to change as *Alston* affords student-athletes' opportunities to benefit from their NILs in ways that had the NCAA had previously banned. As to how much the face of college athletics will be transformed in this brave new world of college sports, stay tuned because it seems that change is the only constant.

References

Allen S (2019) Supreme court justice Brett Kavanaugh took in WCAC basketball title games in D.C. 26 February 2019, Washington Post. https://www.washingtonpost.com/sports/2019/02/26/supreme-court-justice-brett-kavanaugh-took-wcac-basketball-title-games-dc/.

Associated Press (2022) NCAA earns $1.15 billion in 2021 as revenue returns to normal. 2 February 2022, ESPN. https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal.

Banks A (2023) The Supreme court gets the ball rolling: NCAA v. Alston and Title IX. Northwestern University Law Review 117(2):549-576. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1509&context=nulr.

BCS (2023) Tracker: Name, image and likeness legislation by State. 28 July 2023, Business of College Sports. https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/.

Bilas J (2022) Why NIL has been good for college sports ... and the hurdles that remain. 29 July 2022, ESPN, https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain.

Charron C (2023) The state-by-state NIL legislation guide. 22 February 2023, The Student Press Law Centre. https://splc.org/2023/02/the-state-by-state-nil-legislation-guide/.

Durham M (2022) DI board approves clarifications for interim NIL policy. 26 October 2022, National Collegiate Athletic Association. https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx.

Edelman M (2021) Is the NCAA not only a cartel, but also an inefficient one? 24 June 2021,

[77] Lichfield (2015).

Forbes. https://www.forbes.com/sites/marcedelman/2021/06/24/why-break-up-the-ncaa-is-more-than-just-an-antitrust-rallying-cry/?sh=6a40ba797ace.

ESPN (2019) Clemson's Dabo Swinney tops salary list at $9.3M, passing Alabama's Nick Saban at $8.85M. 22 October 2019, ESPN. https://www.espn.com/college-football/story/_/id/27901802/clemson-dabo-swinney-tops-salary-list-93m-passing-alabama-nick-saban-885m.

Gou A, Erskine E, Romoser J (2022) Stat Pack for the Supreme court's 2021-22 term. 1 July 2022, SCOTUS Blog https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf.

Hosick M.B (2021) NCAA adopts interim name, image and likeness policy, NCAA: Interim policy goes into effect Thursday. 30 June 2021, National Collegiate Athletic Association. https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

Keller B (2023) Nil incoming: Comparing state laws and proposed legislation. 25 May 2023, Opendorse. https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation.

King A. H (2022) How US federal and state legislatures have addressed NIL. 13 July 2022, The National Law Review. https://www.natlawreview.com/article/how-us-federal-and-state-legislatures-have-addressed-nil.

Lichfield J (2015) Waterloo 200-year anniversary: The myths of the battle that changed history. Or maybe not. 12 June 2015, The Independent. https://www.independent.co.uk/news/world/world-history/waterloo-200year-anniversary-the-myths-of-the-battle-that-changed-history-or-maybe-not-10317108.html.

Lynch A (2017) The NBA's one-and-done rule has ruined the NCAA tournament. 20 March 2017, Fox Sports. https://www.foxsports.com/stories/college-basketball/the-nbas-one-and-done-rule-has-ruined-the-ncaa-tournament.

Nakos P (2022) How NIL legislation varies on a state-by-state basis. 8 July 2022, On 3 NIL. https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis/.

NCAA (2023) History. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/5/4/history.aspx.

NCAA (2023a) Our division I story. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/2/16/our-division-i-story.aspx.

NCAA (2023b) Our division II story. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/2/16/our-division-ii-story.aspx.

NCAA (2023c) Our division III story. National Collegiate Athletic Association. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/2/16/our-division-ii-story.aspx.

NCAA (2023d) Overview. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/2/16/overview.aspx.

NCAA (2023e) Student-athletes: Names, images, likeness. National Collegiate Athletic Association. https://www.ncaa.org/sports/2021/7/9/name-image-likeness.aspx.

NCAA (2023f) Student-athletes: Transfer terms. National Collegiate Athletic Association. https://www.ncaa.org/sports/2015/2/13/transfer-terms.aspx.

O'Connor J (2022) CAA, A-10 basketball players gain education-related benefits: CAA, A-10 member schools offering education-related benefits in men's, women's hoops. 8 July 2022, Richmond Times-Dispatch. https://richmond.com/sports/college/william-and-mary/caa-a-10-member-schools-offering-education-related-benefits-in-mens-womens-hoops/article_2e6dabdd-5ce9-5321-961f-a130d51bf094.html.

Silas J (2022) Why NIL has been good for college sports ... and the hurdles that remain. June 29 2022, ESPN. https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain.

Stauffer Z (2014) Does the NCAA rule college sports like a "Cartel"? 11 June 2014, PBS Frontlines. https://www.pbs.org/wgbh/frontline/article/does-the-ncaa-rule-college-sports-like-a-cartel/.

The Economist (2021) Why did the Olympics ditch their amateur-athlete requirement? 20 July 2021, The Economist. https://www.economist.com/the-economist-explains/2021/07/20/why-did-the-olympics-ditch-their-amateur-athlete-requirement.

Wallace A (2023) NCAA "NIL," student-athletes "Won:" the recommended approach for Indiana's name, image, and likeness legislation following NCAA v. Alston. Indiana Law Review 56(1):120-141. https://doi.org/10.18060/27145

Wilco D (2020) FCS championship: Everything you need to know. 13 January 2020, National Collegiate Athletic Association. https://www.ncaa.com/news/football/article/2020-01-11/fcs-championship-everything-you-need-know.

Wojoton N (2023) 10 highest NIL valuations in college, high school sports. 11 April 2023, List Wire. https://thelistwire.usatoday.com/lists/highest-paid-athletes-nil-valuations-deals-bronny-james-arch-manning/.

Zimbalist A (2023) Analysis: Who is winning in the high-revenue world of college sports? 18 March 2023, PBS News Hour. https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports.

Case Cited

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2020).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 802 F.3d 1049, 1078 (9th Cir. 2020).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 311 F.R.D. 532 (N.D. Cal. 2015).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 375 F. Supp.3d 1058 (N.D. Cal. 2019).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 2019 WL 1593939 (N.D. Cal. Mar. 8, 2019).

In re National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 958 F.3d 1239 (9th Cir. 2019).

National Collegiate Athletic Association v. Alston, ___ U.S. ___, 141 S. Ct. 2141 (2021).

National Collegiate Athletic Association v. Alston, ___ U.S. ___, 141 S. Ct. 1231 (2021), aff'd, ___ U.S. ___, 141 S. Ct. 2141 (2021).

National Collegiate Athletic Association v. Alston, 141 S. Ct. 2151.

National Collegiate Athletic Association v. Alston, 141 S. Ct. 2155.

National Collegiate Athletic Association v. Alston, 141 S. Ct. 2165.

National Collegiate Athletic Association v. Alston, 141 S. Ct. 2167.

National Collegiate Athletic Association v. Alston, 141 S. Ct. 2157.

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).