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Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism"

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The Supreme Court announced Wednesday that it would hear arguments in the long-running NCAA dispute over student-athlete compensation, granting and consolidating two cases, *National Collegiate Athletic Association v. Alston* and *American Athletic Conference v. Alston*, that seek to overturn a May decision by the U.S. Court of Appeals for the Ninth Circuit. The case will be argued in early 2021, with a decision expected by the end of June. This will be the first time in over 35 years that the Court has heard an antitrust matter involving college athletics.

NCAA v. Board of Regents

In 1984, the Supreme Court, in a 7-2 decision in *NCAA v. the Board of Regents*, stripped the NCAA of its control over television broadcast rights for college football games. Although the Court held that the NCAA's broadcast restrictions were in the nature of a *per se* illegal restraint on trade, the majority explicitly declined to apply a *per se* rule to the case because "a certain degree of cooperation is necessary if the type of competition that [the NCAA] seek[s] to market is to be preserved." The Court instead applied the less stringent Rule of Reason to the NCAA's restrictions because the NCAA needed "ample latitude" to play "a critical role in the maintenance of a revered tradition of amateurism in college sports." Writing for the majority, Justice Stevens advised future courts that "[it] is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." This language has allowed the NCAA for decades to argue for special treatment under antitrust law with regard to any of its bylaws that further amateurism. In his dissent, Justice White was concerned that the majority's opinion would not further the NCAA's stated purpose to "keep university athletics from being professionalized to the extent that profit making objectives would overshadow educational objectives." Some now argue that Justice White's fears have come to fruition – the NCAA has evolved into a monolith generating billions in revenues on the backs of student-athletes.

O'Bannon v. NCAA

The most recent case before *Alston* was a class action brought in 2009 by former UCLA basketball player Ed O'Bannon that challenged the NCAA's use of the images of former student-athletes for

commercial purposes. O'Bannon argued that a former student-athlete should be entitled to financial compensation for the NCAA's commercial use of his or her image, while the NCAA contended that paying its student-athletes would be a violation of its concept of amateurism. In 2014, Judge Claudia Wilken of the U.S. District Court for the Northern District of California found for O'Bannon, holding that the NCAA's rules and bylaws operate as an unreasonable restraint of trade violating federal antitrust law. In 2015, the Ninth Circuit rejected the NCAA's arguments based on *Board of Regents* and affirmed the NCAA's violation of the Sherman Act. The court stated "we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid." Both sides appealed to the Supreme Court—the NCAA challenged the court's affirmation that its compensation rules were an unlawful restraint of trade, and O'Bannon challenged the court's conclusion that preserving amateurism is an important goal and that any compensation athletes might receive had to be related to education. The Supreme Court declined to hear the case.

Alston v. NCAA

The current case was brought by former West Virginia football player Shawne Alston and others. In May of this year, the Ninth Circuit ruled that the NCAA violated Section 1 of the Sherman Antitrust Act when it limited schools from offering certain education-related benefits to student-athletes in Division I basketball and Football Bowl Subdivision football programs. The opinion affirmed an injunction issued by District Judge Claudia Wilken in *Alston v. NCAA* that would prevent the NCAA from adopting rules that prohibit member schools from limiting the non-cash education-related benefits that can be provided to student-athletes. The case does not focus on the contentious issue of pay for college athletes and concerns only non-cash benefits related to education, such as computers, science equipment, musical instruments, study abroad and post-graduate scholarships, and paid internships. Schools would not be required to provide these types of benefits, and individual conferences may restrict such benefits. The NCAA also still may set limits on compensation that is not education-based. However, that model may change radically next year with the NCAA Board of Governors' adoption of the *Final Report and Recommendations* of its Federal and State Legislation Working Group concerning modernization of the NCAA rules applying to student-athletes' rights to commercialize their name, image and likeness.

In *Alston*, the NCAA argued that *Board of Regents* required plaintiffs attacking an NCAA rule promoting amateurism to meet a heavier burden in a Rule of Reason analysis. The Ninth Circuit rejected the NCAA's arguments, noting that it had previously found the *Board of Regents* language relied upon by the NCAA to be dicta in its *O'Bannon* decision. In his concurring opinion, Judge Milan Smith states his concern that "[t]he treatment of Student-Athletes is not the result of free market competition" and instead "is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion." Judge Smith's concerns are consistent with the growing weight of academic opinions that the NCAA's amateurism rules should not enjoy a

special exemption from antitrust scrutiny. The amateurism rules, like any other trade association's rules, should be defensible under antitrust law only if they yield procompetitive benefits and enhance overall consumer welfare. (See, for example, literature published by Case Western Reserve Law Review, Michigan Law Review, Tennessee Law Review, Harvard Journal of Sports and Entertainment Law, Washington and Lee Law Review and The John Marshall Law Review.)

The Supreme Court

After the Supreme Court denied a request from the NCAA to freeze the lower court rulings, the NCAA in October successfully petitioned the Supreme Court to review the Ninth Circuit's decision. The NCAA argues that the Ninth Circuit's ruling "will fundamentally transform the century-old institution of NCAA sports, blurring the traditional line between college and professional athletes." On the other side, players argue that the top athletic teams are operating a system that acts as a classic restraint of trade in violation of Section 1 of the Sherman Act. Without those restraints, they argue that student-athletes would be compensated at a level more commensurate with their value to their universities, conferences, and the NCAA.

The Supreme Court's decision could fundamentally change the economics and structure of college sports. On the one hand, a decision holding that the NCAA's amateurism rules violate federal antitrust law could open the door to significant competition between schools for athletes and likely would lead to more benefits for players whose collegiate sports careers allow their schools, conferences and the NCAA to reap billions in television and other revenue. On the other hand, a decision siding with the NCAA could foreclose that type of competition, allowing the NCAA to maintain its restrictions on benefits for the nation's top student-athletes. The Court's decision also has implications for how the currently constituted Court views the Rule of Reason mode of antitrust analysis and how that analysis is properly applied to labor markets. We will continue to monitor this important case and will report back after the Supreme Court renders its decision.

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