POLICY BRIEF

AMERICAN ECONOMIC LIBERTIES PROJECT

Playing By the Rules: Bringing Law and Order to the NCAA

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Two and half years ago, the Supreme Court found in *National Collegiate Athletic Association v. Alston* that NCAA rules limiting education-related benefits—meaning scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships—were illegal restraints of trade under the Sherman Antitrust Act. The Court rejected the mythical and amorphous notion of "amateurism" the NCAA used to justify limiting athlete compensation, and the Court described the NCAA's litigation position as a request for "immunity from the normal operation of the antitrust laws."[1] The NCAA's cartel over college athletics was fractured, and it opened a path for college athletes to finally collect the fruits of their labor. The response from the NCAA, conferences, and universities has revealed a deeply broken system built on hypocrisy and exploitation.

The NCAA is an association of athletic conferences, colleges, and universities.[2] It is chiefly tasked with setting and enforcing rules governing college athletics and organizing, overseeing, and promoting championships in a wide range of college sports.[3] The NCAA

1 *Nat'l Collegiate Athletic Ass'n v. Alston,* 594 U.S. ___, 141 S. Ct. 2141, 2147, 2166 (2021).

2 The NCAA divides athletic programs into three divisions. Division I is the most elite and consists of 350 schools and over 170,000 college athletes. It is divided into the Football Bowl Subdivision (FBS), the Football Championship Subdivision (FCS), and a third subdivision that does not include football.

The FBS is even further divided into the Power Five (the SEC, ACC, Pac-12, Big 12, and Big Ten athletic conferences); the Group of Five (the AAC, Conference USA, Mid-American, Mountain West, and Sun Belt conferences); and a handful of independent schools (e.g., Notre Dame). To complicate things even further, the Power Five conference members are also known as "autonomy schools," meaning the NCAA has granted them authority to pass certain of their own rules because they have more resources than their Division I brethren.

This paper focuses on the legal and economic issues surrounding Division I sports and FBS football, which are the most lucrative and the chief target of lawsuits and congressional hearings. Division II and Division III schools present related but unique issues, particularly at Division III schools that do not offer athletic scholarships.

3 NCAA, *Mission and Priorities*.

boasts that it is "dedicated to the well-being and lifelong success of college athletes."[4] But as the *Alston* Court emphasized in its ruling against the NCAA, the organization is an admitted monopolist that uses its power over college athletics to artificially restrain and suppress college athletes' compensation, based on the notion that college athletes are students first, amateur athletes second, and never employees.[5] At the same time, the NCAA, universities, administrators, and coaches collect billions in revenue from those athletes' labor. Now, faced with the prospect of having to share the wealth, and a judiciary that has declared its conduct illegal, the NCAA and its members are turning to Congress for help.

The NCAA wants an exemption from the normal application of our antitrust and labor laws, so that it can continue to deny college athletes any compensation for their hundreds or thousands of hours of labor. Such an exemption would fly in the face of over a century of legal precedent that is steeped in the notion that consolidated economic power is inherently in conflict with the democratic ideals on which our nation is built.

By exploring how money flows through college athletics and how the NCAA has flouted our antitrust and labor laws to keep that money in the hands of a few, this report argues that the NCAA does not need or deserve such special treatment from Congress. It is the athletes—whose blood, sweat, and tears bring adoring fans to stadiums and television screens and billions of dollars to their schools—who need protection from the college athletics cartel the NCAA leads. The NCAA should be granted no such exemption.

SHOW ME THE MONEY

In the United States, college athletics have become an integral part of higher education, both in terms of admissions and the college experience. High school students compete fiercely for athletic scholarships that are both their tickets to college degrees and Olympic training programs, and the only viable path to becoming a professional athlete in leagues like the NBA or NFL. At the same time, the fandom that fosters fierce loyalty to universities is valuable to universities' alumni relations and is often a centerpiece of student life.

Division I athletic programs also generate enormous amounts of money, nearly $16 billion in 2019, collected from a number of sources, most notably television contracts.[6] More than

4 NCAA, *Overview*.
5 *Alston*, 141 S. Ct. at 2154.
6 Andrew Zimbalist, *Analysis: Who is winning in the high-revenue world of college sports?*, PBS NewsHour (Mar. 18, 2023); NCAA Research, *15-Year Trends in Division I Athletics Finances* ("NCAA Revenue Report"), at 19–20. We use the 2019 figure because 2020 and 2021 revenues were skewed by the COVID-19 pandemic.

half of Division I revenue is generated by the Power Five conferences,[7] and as of 2023, the Power Five conferences have television contracts valued at over $3 billion.[8]

The distribution of this money among those that do the work is blatantly inequitable: 35% of Division I's $15.8 billion in revenue is spent on administrators' and coaches' salaries while only 19% goes toward athletes' financial aid and medical treatments.[9] The raw data is even starker. The highest paid college football coach, Nick Saban of the University of Alabama, is paid $11 million per year while the average head college football coach's salary is $6.5 million. The highest paid men's basketball coach, Bill Self of the University of Kansas, is not far behind, with a new contract valued at over $10 million per year while the average head men's basketball coach salary is $3.5 million. The head of the Southeastern Conference is paid $3.7 million per year, the Ohio State athletic director is paid $1.5 million per year, and the former president of the NCAA received $2.99 million per year. Meanwhile, only 58% of college athletes receive any financial aid,[10] and the average athletic scholarship is approximately $18,000 per year.[11] This means college athletes are not immune from the student loan debts that saddle so many other college graduates—20% of them leave school with $40,000 or more of debt.[12] Furthermore, across sports, the NCAA's restrictions on athlete compensation broadly redistribute revenue away from sports where athletes are predominantly Black and low-income, and toward sports with predominantly White and higher-income athletes.[13]

This regime is also blatantly anti-competitive, the result of a strict set of rules promulgated by the NCAA to promote so-called "amateurism" in college athletics.[14] Broadly speaking, these rules prohibit college athletes from accepting any compensation beyond scholarships and other education-related benefits for their participation in intercollegiate athletics. Prior to the *Alston* decision in 2021, the prohibition applied to endorsement contracts, more commonly known as NIL (name, image, and likeness) deals. That rule has been lifted, albeit temporarily and only with respect to payments from third parties, such as commercial sponsorships.[15] College athletes are still prohibited from receiving any

7 ***NCAA Revenue Report***, supra note 6, at 19.
8 Steve Berkowitz, ***NCAA's Power Five conferences are cash cows***, USA Today (May 19, 2023). A significant portion of this revenue comes from the College Football Playoff (CFP), which does not fall under the NCAA umbrella and has a contract with ESPN worth $470 million per year. Ralph D. Russo, ***CFP expansion could increase annual revenue to $2 billion***, AP News (June 11, 2021). CFP revenue is expected to increase to at least $2 billion when the playoff expands from 4 teams to 12 next year. ***Id.***
9 ***NCAA Revenue Report***, supra note 6, at 19.
10 NCAA, ***NCAA Recruiting Facts***.
11 ***Average Per Athlete***, ScholarshipStats.com (2020).
12 NCAA & Gallop, ***A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes***, at 13 (2020).
13 Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo, and Nicole F. Ozminkowski, ***Who Profits From Amateurism? Rent-Sharing in Modern College Sports***, NBER Working Paper No. 27734 (Oct. 2020).
14 NCAA, ***Division I Manual*** (2022).
15 NCAA, ***Interim NIL Policy***.

payments, NIL or otherwise, from the NCAA, conferences, and schools, meaning they cannot receive any revenue from the broadcasts of games they play in, the endorsement of apparel brands the schools require them to wear, or the schools' sale of apparel bearing their jersey numbers.[16] And NIL deals cannot be used as recruiting tools or performance-based incentives, despite coaches regularly receiving six- and seven-figure bonuses for winning regular- and post-season games. In other words, the NCAA still imposes substantial limits on college athlete compensation in the name of amateurism.

THE ECONOMIC REALITY OF COLLEGE ATHLETICS

College athletes, in men's and women's sports alike,[17] are reaping benefits from the NCAA's interim NIL policy, through endorsement deals and even charitable endeavors.[18] NIL collectives, which have sprung up across the country, "generate and pool revenue raised through contributions from a wide variety of sources, including boosters, businesses, fans, and more … to create opportunities for student-athletes to leverage their NIL in exchange for compensation."[19] College athletes are also on the cusp of sharing the revenue from Division I's lucrative television contracts through state legislation.

In the face of this new economic freedom for college athletes, and the prospect that it will need to permit other forms of compensation as well, the NCAA argues that compliance with our antitrust and labor laws, and sharing revenue with athletes, will be financially unsustainable for universities and their athletic departments. It is true that most Division I athletic programs' expenses exceed their revenue. In 2019, FBS schools had a median negative net revenue of $18.8 million and only 25 athletic departments had a surplus.[20] And so the NCAA claims that universities will shutter their non-revenue generating athletic programs, that Title IX compliance will be impossible, and that college sports as we know it will end.

16 NCAA, *Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities*, at 4 (Oct. 26, 2022).
17 WNBA Commission Cathy Englebert described NIL deals as a "huge positive" for women's basketball, allowing the league to benefit from the enormous followings players already have when they join the WNBA out of college. Erik Spanberg, *Engelbert sets priorities for new season*, Sports Business Journal (May 8, 2023).
18 Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, Bleacher Report (Aug. 16, 2022); SI Staff, *The Biggest NIL Earners in Women's Sports From 2022*, SI.com (Dec. 22, 2022); David Eckert, *How an NIL initiative is making a difference for Ole Miss athletes — and Oxford families*, Mississippi Clarion Ledger (May 1, 2023).
19 *Name, Image, and Likeness (NIL) Collectives*, IRS Taxpayer Advocate Service (Apr. 10, 2023). The IRS recently advised that donations to NIL collectives do not serve a charitable purpose and are not tax exempt, an announcement that is likely to have a chilling effect on booster donations to those endeavors. Ross Dellenger, *IRS Says Donations Made to Nonprofit NIL Collectives Are Not Tax Exempt*, SI.com (June 9, 2023). Whether boosters will reroute their money to college athletes through other ventures is an open question.
20 *NCAA Revenue Report*, supra note 6, at 9.

But the truth lies in the numbers discussed above. By banning revenue sharing and forcing amateurism rules onto its athletes, the NCAA has simply allocated college sports revenue to bloated administrator and coach salaries and lavish facilities. The NCAA, the universities, and senators argue that NIL deals and collectives have made college athletics the "Wild West," but Texas A&M just fired its head football coach midseason, a decision that will cost the public university an estimated $100 million.[21] Changing NCAA rules will simply reallocate more of those resources back to college athletes. If college athletes can negotiate for better wages and working conditions, schools will be incentivized to behave more responsibly in their hiring decisions, so they can afford to bring in the best athletes. And perhaps this is why the men sitting at the top of the college sports pyramid are so upset.

Nick Saban told *Sports Illustrated* earlier this year, "[A]ll the sudden, guys are not going to school where they can create the most value for their future. Guys are going to school where they can make the most money."[22] This from a man who just signed an eight-year coaching contract worth almost $100 million.[23] The University of Arkansas's athletic director, Hunter Yurachek, confusingly carped during a visit to Capitol Hill that players are opting to stay in college to earn money from NIL deals instead of exiting prior to graduation to join professional leagues.[24] Mr. Yurachek just used an offer from Auburn University as leverage to secure an annual salary of $1.5 million from Arkansas.[25] And Big Ten Commissioner Tony Pettiti, whose predecessor received a $20 million buyout,[26] testified at a Senate Judiciary Committee hearing that college athletes shouldn't consider financial factors when making recruiting decisions.

These people also claim that paying athletes would detract from their experiences as students. However, the decisions they make for their athletic departments are driven by profit motives, not the academic needs of college athletes. Football players' graduation rate hovers at around 65%, and men's basketball players' rate is 47%, while the general student body graduates at a rate of 69%.[27] Yet their seasons grow longer and longer and require more and more travel, all in the service of more lucrative television contracts. Recent conference realignments put Stanford and UC Berkeley in the ACC (the *Atlantic Coastal* Conference) and will require basketball players to travel from the West Coast to

21 Ricky O'Donnell, *Jimbo Fisher's historic buyout at Texas A&M shatters college football record for fired coach*, SB Nation (Nov. 12, 2023).
22 Ross Dellenger, *Alabama Coach Nick Saban Weighs in on NIL, Player Safety and NCAA Rules Changes*, SI.com (Mar. 7, 2023).
23 Aaron Suttles, *Alabama approves Nick Saban contract making him highest-paid coach in football*, The Athletic (Aug. 23, 2022).
24 Stewart Mandel, *Advice to the SEC's lobbyists: Stop pretending this isn't professional sports*, The Athletic (June 7, 2023).
25 Robert Stewart, *Arkansas to extend Yurachek amid Auburn AD search*, Rivals (Oct. 31, 2022).
26 Shawn Windsor, *Jim Delany's $20 million exit prize from Big Ten is absurd. Here's why*, Detroit Free Press (Mar. 5, 2019).
27 NCAA Research, *Trends in NCAA Division I Graduation Rates*, at 24, 26 (Nov. 2022).

the East Coast four times in a five-month basketball season.[28] This places enormous time demands on college athletes, who frequently spend around 30 to 40 hours a week on their sport.[29] Finally, it bears mentioning that no earnings restrictions or "protections" apply to the general population of college students. Social media influencers thrive on campus and residential assistants are unionizing, all while participating in the full college experience of classes and campus life.[30]

The American concept of an amateur student-athlete has been erased by the demands that schools themselves place on them. Division I schools treat their athletes like employees in every way but compensation. They control the nature, degree, and manner in which the athletes perform their athletic duties; the athletic services rendered require highly particular skills; the athlete's opportunity for profit in the form of financial aid depends on their athletic skills; the schools invest heavily in athletic facilities and equipment for the athletes; and the athletes are an integral part of the school's ability to maintain an athletic program.[31] When courts have eschewed these facts in the past to hold that college athletes are not employees, they have done so based on the notion of amateurism that the Supreme Court has now rightly rejected.[32] The economic reality of college athletics has changed.

WHY WE HAVE ANTITRUST AND LABOR LAWS

The United States has laws that are meant to address the very problems that both college athletes and the NCAA face today. The Sherman Act was born in 1890 of "a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[33] It was passed at a time when trusts controlled by a handful of plutocrats had a stranglehold on commerce in the United States, and it "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[34] Thus, Section 1 of the Sherman Act outlaws agreements in restraint of trade (e.g., price-fixing, market allocation, refusals to deal, and bid-rigging), and Section

28 Brendan Marks, *ACC's Jim Phillips reinforces decision to expand, suggests basketball tournament may not include all members*, The Athletic (Oct. 25, 2023). The ACC pointed out not that the realignment was good for athletes but instead that "[t]his is a chance for (schools) to bring their programs and their brands out to different markets that are national cities and have a media presence." *Id.*

29 Brian Wakamo, *Student Athletes Are Workers — They Should Get Paid*, Institute for Policy Studies (Oct. 24, 2019).

30 Grace Kay, *College Campuses: A Hot Spot For Social Media Influencers*, Forbes (July 29, 2019); Kate Gibson, *Undergraduates across the country are unionizing college workforces*, CBS News (Apr. 15, 2022).

31 See *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen,* 835 F.2d 1529, 1535 (7th Cir. 1987) (summarizing factors used to determine if an individual is an employee).

32 *E.g. Berger v. Nat'l Collegiate Athletic Ass'n,* 843 F.3d 285, 291 (7th Cir. 2016).

33 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

34 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

2 outlaws monopolies, attempts to monopolize, and conspiracies to monopolize.[35] The agreements among universities to deny college athletes compensation, maintained by NCAA rules, are blatant violations of this law, with wealthy universities exploiting athletes from lower-income backgrounds.

Furthermore, there is no doubt that that the Sherman Act applies to labor markets like the one in which college athletes exist.[36] Senator John Sherman himself stated, "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors*."[37] And so the Supreme Court has, for almost 100 years, recognized that agreements to fix wages are violations of the Sherman Act.[38] The reason for this is obvious. Allowing anti-competitive behavior in labor markets is disastrous, leading to "excess unemployment, a permanent gap between wages and worker productivity, poor working conditions, and domination of the workers by employers."[39]

Labor laws also exist almost universally to protect employees from abuse by their overseers. The Fair Labor Standards Act sets minimum wages, maximum hours, and child labor standards;[40] the Occupational Safety and Health Act mandates safe working conditions;[41] and the National Labor Relations Act "protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation."[42] These protections are considered so critical that FLSA rights cannot be waived, even voluntarily, by employees or negotiated away by labor unions,[43] and an employee can refuse to work in the face of dangerous OSHA violations.[44]

35 15 U.S.C. §§ 1, 2.
36 In *Alston*, the relevant market was one for "athletic services in men's and women's Division I basketball and FBS football," and the Court referred to it throughout the opinion as a labor market. 141 S. Ct. at 2151–52. Indeed, the NCAA did not contest in *Alston* that it "enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor." *Id.* at 2154; cf. *Brown v. Pro Football, Inc.,* 518 U.S. 231, 252 (1996) ("a marketwide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act.").
37 21 Cong. Rec. 2455, 2457 (1890) (emphasis added).
38 *Anderson v. Shipowners' Ass'n of Pac. Coast,* 272 U.S. 359, 363–65 (1926). Much like the NCAA, the Shipowners' Association was comprised of a group of employers, namely merchant vessel owners and operators, who agreed to abide by a set of rules governing the terms of employment, including hours and wages, for a specific group, namely seamen. *Id.* at 361–62. "These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows … that the combination is in violation of the [Sherman] Anti-Trust Act." *Id.* at 365.
39 Suresh Naidu, Eric A. Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 536, 550 (2018).
40 *Wages and the Fair Labor Standards Act*, U.S. Dep't of Labor; 29 U.S.C. § 203, *et seq.*
41 *About OSHA*, Occupational Safety & Health Admin.; 29 U.S.C. § 651, *et seq.*
42 *National Labor Relations Act*, Nat'l Labor Relations Board; 29 U.S.C. § 151, *et seq.*
43 *Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. 2010).
44 29 C.F.R. § 1977.12(2).

At the intersection of labor and antitrust, unions are exempt from the Sherman Act's prohibition of restraints in trade.[45] The exemption reflects a national labor policy grounded in "[t]he basic premise … that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be."[46] This means that employees can band together and collectively bargain for better wages and working conditions, with the express goal of "restoring equality of bargaining power between employers and employees."[47]

There is also a "judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions."[48] The non-statutory labor exemption protects agreed-upon restraints arrived at through the collective bargaining agreement, including multi-employer agreements with unions.[49] "[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."[50] This is what allows sports leagues like the NFL to collectively bargain, on behalf of all of their member teams, with their players' unions.

Nonetheless, it is important to remember that the statutory and non-statutory labor exemptions are narrow and that "'(i)mmunity from the antitrust laws is not lightly implied.' This canon of construction … reflects the [] indispensable role of antitrust policy in the maintenance of a free economy."[51] Our employers control the conditions of our livelihoods—our abilities to earn living wages, put food on our tables, and live and work in a safe and democratic world. Opportunities to abuse that power are vast and must be reined in by the law.

45 15 U.S.C. § 17; 29 U.S.C. §§ 52, 104.
46 *Brown*, 518 U.S. at 253 (Stevens, J. dissenting) (citing 29 U.S.C. § 151).
47 29 U.S.C. § 151.
48 *Brown*, 518 U.S. at 254 (Stevens, J. dissenting).
49 *Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.,* 381 U.S. 676, 691 (1965).
50 *Brown*, 518 U.S. at 237.
51 *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 348 (1963) (internal citations omitted). *See also United States v. Topco Assocs., Inc.,* 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. … Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.").

THE MYTH OF AMATEURISM

The NCAA claims its restraints on compensation exist to preserve a noble tradition of amateurism in college athletics and, by extension, consumer demand for their product.[52] But amateurism is an amorphous concept. The NCAA was, in seven years of litigation before the decision against it in *Alston*, unable to define it.[53] Nor did the NCAA bother to offer real expert testimony showing that amateurism was important to consumers in the first place,[54] probably because it isn't. In sharp contrast, the college athletes presented ample evidence that increasing athlete compensation had not reduced consumer demand in the past, nor would it affect consumer demand in the future.[55] And real-world evidence since *Alston* has proven those athletes right.[56] So when the Supreme Court considered the rules' legality, that logic was flatly and unanimously rejected.[57] As Justice Kavanaugh wrote:

> [T]raditions alone [could not] justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different.[58]

The NCAA's flimsy amateurism defense was compounded by the NCAA's stunning admissions "that it and its members have agreed to compensation limits on college athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits 'affect interstate commerce.'"[59] The NCAA acknowledged that it holds monopsony power over college athletes, "such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor."[60] Finally, it agreed that schools "compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer."[61] In other words, *Alston* "involve[d] admitted

52 *Alston*, 141 S. Ct. at 2152.
53 *Id.*
54 *Id.*
55 *Id.* at 2153.
56 College football viewership has risen 12% since the NCAA lifted its NIL ban. Stewart Mandel, *College football is booming, after all the hand-wringing, thanks to NIL and the transfer portal*, The Athletic (Oct. 13, 2023).
57 *Alston*, 141 S. Ct. at 2147.
58 *Id.* at 2169 (Kavanaugh, J. concurring).
59 *Id.* at 2151.
60 *Id.* at 2154.
61 *Id.*

horizontal price fixing in a market where the defendants exercise[d] monopoly control."[62] It is difficult to imagine another context where courts would give any thought to permitting such overtly illegal behavior.

In the wake of *Alston*, the remaining NCAA "amateurism" rules and other university policies are being challenged in legal proceedings across the country. In March, a group of athletes filed an antitrust suit against Ivy League schools challenging their agreed-upon policy of not offering any athletic scholarships.[63] In May, the National Labor Relations Board filed a complaint alleging that "USC, the Pac-12 conference, and the NCAA, as joint employers, deprive[d] their players of their statutory right to organize and to join together to improve their working and playing conditions."[64] In the Third Circuit Court of Appeals, college athletes are arguing that they are employees of the colleges whose teams they play on and should be paid in accordance with Fair Labor Standards Act.[65] And in the Northern District of California, a district court judge just certified three classes of athletes in a lawsuit challenging NCAA rules restricting NIL compensation, which cost athletes billions in lost revenue from television contracts and other endorsement opportunities.[66]

State legislatures have responded to *Alston* with legislation protecting the athletes' rights to compensation. In California, the legislature is considering legislation that would require universities with media revenue exceeding $10 million annually to contribute up to $25,000 per college athlete to a college degree completion fund and create a regulatory agency tasked with, among other things, setting safety standards and return-to-play protocols, providing educational programs related to sexual abuse, and making NIL deals more transparent.[67] The driving force is state universities' desire and need to compete for the best talent. Creating the best economy for college athletes will, at bottom, help with recruitment. The NCAA has, in response, taken the extraordinary step of instructing schools that, if a state law conflicts with an NCAA regulation, the school "must adhere to NCAA legislation (or policy) when it conflicts with permissive state law."[68] However, a number of these laws expressly preempt NCAA regulations, so it is unclear what the force of that proclamation will be.

62 *Id.*
63 *Choh v. Brown University*, No. 23-cv-00305 (D. Conn.).
64 Dan Murphy, *National Labor Relations Board files complaint for unfair labor practices vs. NCAA, Pac-12, USC*, ESPN (May 18, 2023). Motions to dismiss filed by the NCAA and other respondents were denied on November 7.
65 *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 22-1223 (3rd Cir.).
66 *In re: College Athlete NIL Litig.*, No. 20-cv-03919, Order Granting Mtn. for Certification of Damages Class (Dkt. 387) (Nov. 3, 2023).
67 *The College Athlete Protection Act*, Cal. Assemb. Bill No. 252 (2023).
68 NCAA, *NIL Update Memo* (June 27, 2023).

And despite all of this, the NCAA continues to rely on the myth of amateurism to justify its rules against athlete compensation. Current NCAA bylaws mandate that (1) "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport,"[69] and (2) "[a] professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the [NCAA]."[70] The NCAA doubles down on this tautology in its opposition to the Johnson lawsuit, arguing that universities do not pay college athletes because they are not employees and college athletes are not employees because the NCAA prohibits them from being paid.[71] This is the precise argument that Justice Kavanaugh called "circular and unpersuasive"—"that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid."[72]

WHAT AN ANTITRUST EXEMPTION LOOKS LIKE

Having lost at the Supreme Court for such an obviously illegal arrangement, the NCAA now wants a substantial exemption from the antitrust laws, largely so that it can continue to limit compensation for student-athletes. To foresee the consequences of this, we need look no further than Major League Baseball (MLB), the only professional sports league in the United States that enjoys such special treatment.

The Supreme Court found the Sherman Act inapplicable to professional baseball in 1922.[73] At the time, Justice Oliver Wendell Holmes wrote that "exhibitions of baseball" were "purely state affairs" and not commerce covered by the Sherman Act.[74] In *Alston*, the Supreme Court called the decision "'unrealistic' and 'inconsistent' and 'aberration[al].'"[75] It is also the subject of multiple government investigations and private lawsuits.[76] But it remains firmly in place and has allowed the MLB to engage in a panoply of anti-competitive behavior that harms players, coaches, staff, and communities across the country.

69 *Division I Manual,* supra note 14, at Bylaw 12.01.1.
70 *Id.* at Bylaw 12.02.11.
71 *Johnson*, Appellants' Opening Br. (Dkt. 17) (May 31, 2022).
72 *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J. dissenting).
73 *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).
74 *Id.* at 208.
75 141 S. Ct. at 2141 (citations and quotations omitted).
76 Mike Scarcella, *U.S. Justice Dept jumps into pro baseball antitrust fray on appeal*, Reuters (Jan. 31, 2023); Evan Drellich, *U.S. Senate requests information on MLB's antitrust exemption from commissioner Manfred*, The Athletic (July 18, 2022).

With this antitrust exemption, MLB has been allowed, among other things, to:

- Cap the salaries of minor league players at $15,000 a year and force them to attend spring training with no compensation;[77]
- Impose a uniform contract on scouts and no-poach agreements on teams that suppress scouts' salaries to as low as $15,000 a year;[78]
- Block attempts to relocate franchises from one geographic market to another, a practice declared anti-competitive and unlawful in the NFL in 1982;[79] and
- Restrict the number of minor league teams that can affiliate with a major league team and force 40 previously thriving teams to close their doors.[80]

It has also been reported that MLB is considering imposing cost-cutting measures on its teams by placing artificial caps on the number of scouts, trainers, and analytics experts they can hire.[81]

These practices are not tolerated anywhere else in professional sports. The Supreme Court has steadfastly held that the NFL, the NBA, hockey leagues, professional golf, boxing clubs, and, yes, the NCAA must adhere to the Sherman Act's prohibitions,[82] albeit subject to the more lenient rule of reason.[83] But while it recognizes "'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important,'"[84] that interest and the rule of reason have their limits. As the Supreme Court said in *Alston*, "That some restraints are necessary to create or maintain a league sport does not mean all 'aspects of elaborate interleague cooperation are.'"[85] Yet the NCAA cannot seem to adapt to this maxim.

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77 *Concepcion v. Off. of Comm'r of Baseball,* No. 22-cv-1017, 2023 WL 4110155, at *2, 10–11 (D.P.R. May 31, 2023), *report and recommendation adopted,* 2023 WL 4109788 (D.P.R. June 21, 2023).
78 *Wyckoff v. Off. of the Comm'r of Baseball*, 211 F. Supp. 3d 615, 625–27 (S.D.N.Y. 2016), *aff'd sub nom.*, 705 F. App'x 26 (2d Cir. 2017).
79 *Compare City of San Jose v. Off. of the Com'r of Baseball,* 776 F.3d 686, 690 (9th Cir. 2015) *and Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 726 F.2d 1381, 1401 (9th Cir. 1984).
80 *Nostalgic Partners, LLC v. Off. of Comm'r of Baseball,* No. 22-2859, 2023 WL 4072836, at *1 (2d Cir. June 20, 2023). MLB settled the case for an untold sum after the plaintiffs filed a petition with the Supreme Court asking it to overturn *Federal Baseball*, an outcome that seemed likely given the Court's recent criticism of the decision in *Alston*. Alex Lawson, *MLB Avoids High Court Antitrust Scrutiny With Settlement*, Law360 (Nov. 3, 2023).
81 Evan Drellich and Ken Rosenthal, *MLB intends to curb team spending on tech; staffing limits also discussed, officials say*, The Athletic (June 13, 2023). The NCAA already has rules like this. It is being sued in yet another antitrust class action for limiting the number of football coaches that schools can hire. The rule allows them to hire one additional volunteer coach, who the schools agreed would not be paid. *Smart v. Nat'l Collegiate Athletic Ass'n,* No. 22-cv-02125 (E.D. Cal.). In antitrust parlance, the NCAA and schools conspired to artificially fix the wages of volunteer coaches at $0.
82 *Radovich v. Nat'l Football League*, 352 U.S. 445, 446–48 (1957); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205, 91 S. Ct. 672, 673, 28 L. Ed. 2d 206 (1971); *Linseman v. World Hockey Ass'n,* 439 F. Supp. 1315, 1320 (D. Conn. 1977); *Blalock v. Ladies Pro. Golf Ass'n,* 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 241–42 (1955); *Alston*, 141 S. Ct. at 2159–60.
83 *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010).
84 *Id.* at 204.
85 141 S. Ct. at 2156.

THERE IS A BETTER PATH

It is hard to overstate the positive impact that *Alston* and subsequent NCAA rule changes have had on college athletes' lives. They no longer have to choose between earning a degree and earning money. Instead, they have the freedom to negotiate contracts that realize their market value and to support themselves and their families without losing their college scholarships and eligibility to participate in intercollegiate athletics. The days when the University of Michigan collected $19 million from jersey sales when its star basketball player couldn't afford a pizza are quickly fading.[86]

But this sea change in college athletics has garnered a lot of skepticism and hand wringing. There have been ten hearings in Congress on the topic of NIL since *Alston*. At one, NCAA President Charlie Baker made several strategically worded requests to Congress that would undo most of this progress: a national NIL standard that would preempt state laws, a declaration that college athletes are not employees, and immunity from antitrust laws.[87] There are also close to 15 different bills and discussion drafts floating around the Hill. They generally enshrine college athletes' rights to NIL compensation into the U.S. Code, but many deliver some of the most insidious items on the NCAA's legislative wish list that would strip college athletes of their freedom of contract and deprive them of private rights of action.[88] Far less restrictive options exist that would protect both the athletes and the schools they play for. That is why the *Alston* Court refused to grant the NCAA antitrust immunity in the first place.[89]

To start, the NCAA should allow universities to create NIL offices that can help athletes navigate the world of NIL deals, which includes contract negotiations and complex legal issues. Lawmakers and policy advocates should also look to organizations like the College Football Players Association and the National College Players Association, which have presented well-reasoned platforms that protect college athletes and competition, both on and off the field.[90] These include guaranteed medical care and other health and safety protections, safer practice conditions like those enjoyed by NFL players, a true off-season to rest, sharing of media revenue, and improved Title IX enforcement. And they cannot

86 Alyson Hagy, ***Webber's World***, The New York Times Magazine (Feb. 23, 2003).
87 Hearing on Name, Image, and Likeness, and the Future of College Sports, ***Written Testimony of Charlie Baker***, U.S. Sen. Judiciary Cmte. (Oct. 17, 2023).
88 *Id*. Senators Tuberville and Manchin have proposed limiting players' ability to transfer schools and negotiate contracts using agents. ***Protecting Athletes, Schools, and Sports Act of 2023***, 118th Cong. (2023). That is no better than the non-compete clauses that restrict employee movement and suppress wages.
89 *See Alston*, 141 S. C.t at 2162 ("[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.").
90 ***CFBPA Platform for Change***, College Football Players Association (Jan. 2023); ***About Us***, National College Players Association.

forget international students, who cannot accept NIL money from anyone under the terms of their student visas. Lastly, they should look seriously at the option of collective bargaining, which would diffuse some of the NCAA's power, give college athletes leverage to negotiate better working conditions and pay, and allow the NCAA to bargain for uniform rules on behalf of all schools without violating antitrust laws. Notre Dame's athletic director even offered the creative solution of crafting a law that would grant athletes "the right to negotiate with the conferences in which they compete over the terms and conditions of their athletic participation" without making them employees.[91]

At the end of the day, we should not be taking away college athletes' rights and immunizing the NCAA and its members from liability. Unfortunately, that seems to be the knee-jerk reaction to progress, prompted by a fear of losing beloved college sports traditions. So remember why we have antitrust and labor laws, remember that $16 billion is flowing largely to a few elites in the upper echelons of college athletics, and remember that this is all the result of grueling work by highly disciplined athletes who also happen to be working on a college degree.

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91 Hearing on Name, Image, and Likeness, and the Future of College Sports, *Testimony of Jack Swarbrick*, U.S. Sen. Judiciary Cmte. (Oct. 17, 2023).