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## Comments

STUDENT-ATHLETES' PUSH FOR COMPENSATION:  
ANALYZING THE IMPACT OF *ALSTON V. NATIONAL  
COLLEGIATE ATHLETIC ASSOCIATION*  
(*ALSTON II*), 958 F.3D 1239  
(9TH CIR. 2020).

### I. TIPPING OFF: INTRODUCTION

Antitrust law is an important area of law and is most associated with companies involved in consumer product markets.<sup>1</sup> Despite a focus on consumer product markets, antitrust issues regularly dip into more nuanced areas such as the sports world.<sup>2</sup> These issues make more than just a cameo in the sports world, as professional sports have experienced their share of antitrust suits.<sup>3</sup> Additionally, college sports have been the subject of several antitrust lawsuits; in particular, the competitiveness of the National Collegiate Athletic Association (NCAA) rules and regulations have been challenged frequently.<sup>4</sup> Support for student-athlete compensation has been a

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1. See *Antitrust Laws*, U.S. CHAMBER OF COM., <https://www.uschamber.com/antitrust-laws> [<https://perma.cc/ZRK4-LUSY>] (last visited Oct. 19, 2021) (explaining function of antitrust laws is to provide for “a free and open market economy” as well as “healthy competition” that allows for “lower prices, higher quality products and services, more choices, and greater innovation”); see also James Chen, *Understanding Antitrust Laws*, INVESTOPEDIA (May 29, 2021), <https://www.investopedia.com/ask/answers/09/antitrust-law.asp> [<https://perma.cc/36UB-H93P>] (describing goal of antitrust laws to ensure fair competition by quashing activities like “bid rigging, price fixing, and monopolies”).

2. See *Antitrust Labor Law Issues in Sports*, USLEGAL, <https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/> [<https://perma.cc/G4DS-3SEU>] (last visited Oct. 19, 2021) (discussing cases *Flood v. Kuhn*, in which Major League Baseball (“MLB”) player Curtis C. Flood sued MLB for antitrust violations, *Wood v. National Basketball Association*, in which National Basketball Association (“NBA”)’s salary cap, draft, restricted free agency were challenged).

3. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (holding baseball has longstanding exemption from antitrust laws that must be upheld in accordance with *stare decisis*); see also, e.g., *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 963 (2d Cir. 1987) (affirming dismissal of Sherman Act challenges made against salary cap, player draft, free agency rules of NBA); *Am. Football League v. Nat’l Football League*, 323 F.2d 124, 134 (4th Cir. 1963) (holding plaintiff, American Football League (“AFL”), failed to demonstrate monopolization by defendant NFL).

4. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) [hereinafter *Board of Regents*] (holding NCAA restrictions on member schools televising college football games were anticompetitive behavior); see also, e.g., *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1079 (9th Cir. 2015) (“NCAA regulations are subject to antitrust scrutiny and must be

recent topic of controversy and conversation, receiving support from many different proponents interested in securing compensation for student-athletes for the use of their names, images, and likenesses (collectively “NIL”).<sup>5</sup> Despite growing support, however, the NCAA has been the greatest opposition to this compensation; the Association has insisted that its rules are the best for the sake of amateur sports and has presented obstacles to prevent student-athlete compensation by threatening athletes with legal challenges.<sup>6</sup>

Student-athletes are seeking compensation from the NCAA, a billion-dollar business that is profiting from their labor and skills.<sup>7</sup> Laws and rules allowing student-athletes to profit off of their NIL and be compensated for their performance on university teams would allow some athletes to finally make money without having to play at a professional level.<sup>8</sup> Because a very small minority of student-athletes end up in professional leagues, collegiate compensa-

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tested in the crucible of the Rule of Reason.”); *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 347 (7th Cir. 2012) (holding court dismissal of claim was proper given plaintiffs failed to properly identify labor market for student-athletes); *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 432–34 (6th Cir. 2008) (holding NCAA rules for recruitment of student athletes did not fall under Sherman Act’s restraint of trade provision); *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 185 (3d Cir. 1998) (holding Sherman Act did not apply to NCAA’s eligibility rules).

5. See Andrew Yang, *NCAA Should Pay Athletes*, YANG 2020 <https://2020.yang2020.com/policies/ncaa-pay-athletes/> [<https://perma.cc/789W-VJCY>] (last visited Oct. 19, 2021) (discussing how NCAA sports entertainment should result in athletes’ appropriate compensation given revenues athletes generate for schools); see also Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to Let Athletes Be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM), <https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/> [<https://perma.cc/WQ53-RHWS>] (noting California’s passage of pay to play bill, which has created “ripple effect” in other states introducing pay to play bills, leading to greater push against NCAA amateurism rules).

6. See NCAA Board of Governors, *NCAA Responds to California Senate Bill 206: Measure Would Upend Level Playing Field for All Student-Athletes*, NAT’L COLLEGIATE ATHLETIC ASS’N (Sept. 11, 2019), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206> [<https://perma.cc/Y9CM-BSTS>] (arguing NIL compensation for student-athletes would erase distinction between college versus professional athletics, leaving California schools with unfair recruiting advantages by allowing compensation); see also Andrew Smalley, *Pay for Play for College Athletes?*, NCSL BLOG (Sept. 30, 2019), <https://www.ncsl.org/blog/2019/09/30/pay-for-play-for-college-athletes.aspx> [<https://perma.cc/RHW6-52UC>] (discussing NCAA’s long-standing interest in preserving amateur nature of college athletics by preventing payment of student-athletes).

7. See Smalley, *supra* note 66 (“College athletes earn billions of dollars annually for their schools, television networks, apparel companies and the National Collegiate Athletic Association.”).

8. See Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html> [<https://perma.cc/L4QG-Q6JE>] (discussing

tion may reconcile for the countless—and often excessive—hours that student-athletes spend doing work for their sports each week compared to the time they spend doing academic work.<sup>9</sup>

However, the NCAA has perceived amateur sports as threatened by the emergence of laws allowing for student-athlete compensation.<sup>10</sup> In the past, the NCAA was given express instruction from the United States Supreme Court that it has “ample latitude” to structure rules as necessary in order to maintain the “revered tradition of amateurism in college sports.”<sup>11</sup> Accordingly, the NCAA has also argued in court about the need to preserve differences between amateur and professional sports—and the need for restrictive bylaws to do so.<sup>12</sup> Underlying NCAA arguments against player compensation, the NCAA has shown concern that allowing for student-athlete compensation would diminish demand for college athletics because it is the amateurism that the NCAA claims is driving demand.<sup>13</sup>

While these issues have been litigated before, they were again litigated in front of the Ninth Circuit in an antitrust suit waged against the NCAA in *Alston v. National Collegiate Athletic Association (Alston II)*,<sup>14</sup> which focused on issues similar to previous antitrust

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quote from former college athlete Hayley Hodson who stated “college is the only time [many athletes] have to profit off their hard-earned athletic successes”).

9. See Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend On Practice*, BUS. INSIDER (Jan. 27, 2015, 11:44 AM), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> [<https://perma.cc/SHB8-R79S>] (presenting data showing average time spent on athletic activities every week is over thirty hours); see also Jasmine Harris, *It's Naïve to Think College Athletes Have Time for School*, THE CONVERSATION (Oct. 9, 2018, 6:55 AM), <https://theconversation.com/its-naive-to-think-college-athletes-have-time-for-school-100942> [<https://perma.cc/CZ4U-K9KH>] (indicating college athletes spend triple amount of time on athletics per week compared to academics).

10. See NCAA Board of Governors, *supra* note 6 (arguing NIL compensation for student-athletes will blur line between collegiate versus professional athletics).

11. See Board of Regents, 468 U.S. 85, 120 (1984) (stating NCAA must be given ability to structure, control, enforce its own rules to preserve amateurism at collegiate level).

12. See Edward H. Grimmer, Comment, *NCAA Amateurism and Athletics: A Perfect Marriage or a Dysfunctional Relationship? - An Antitrust Approach to Student-Athlete Compensation*, 30 TOURO L. REV. 823, 831 (2014) (acknowledging NCAA arguments in past litigation favor restrictive regulations).

13. See Andy Schwarz, *The Fallacy Of Fragile Demand for “Amateurism”*, ATHLETIC DIR. U., <https://athleticdirector.uconn.edu/articles/the-fallacy-of-fragile-demand-for-amateurism/> [<https://perma.cc/3ZG9-9GLB>] (last visited Oct. 21, 2021) (discussing NCAA’s conception college sports’ amateur status drives consumer demand).

14. *Alston v. Nat’l Collegiate Athletic Ass’n*, 958 F.3d 1239 (9th Cir. 2020) [hereinafter *Alston II*].

litigation in both the Supreme Court and circuit courts.<sup>15</sup> The most pervasive issue of the litigation was whether the NCAA's rules that restrict education-related benefits are anti-competitive behavior.<sup>16</sup> Notably, the Ninth Circuit jurisdiction includes California, which at the time of the litigation had recently passed a "pay for play" law that would allow NIL compensation for student-athletes participating in NCAA athletics.<sup>17</sup> It is unclear how—or even if—this new legislation influenced the court's decision in *Alston II* or its later affirmation at the Supreme Court; at the very least the Ninth Circuit decision, collectively with the California play for pay law, demonstrates a level of consistency among this geographic area in its recent movement toward student-athlete compensation at the collegiate level.<sup>18</sup> As other states have followed California's lead and pursued NIL laws for student-athletes, the Ninth Circuit was likewise poised to become a guide for antitrust litigation regarding issues of student-athlete pay.<sup>19</sup> In *Alston II*, the Ninth Circuit affirmed a lower court injunction of NCAA rules restricting education-related benefits, as the Ninth Circuit agreed that the rules were in violation of the Sherman Antitrust Act (Sherman Act)—the NCAA rules were deemed unlawful restraints on trade.<sup>20</sup>

Nevertheless, many open questions remained as *Alston II* awaited a hearing in the Supreme Court, which foreshadowed a decision with nationwide implications for amateurism, student-athlete pay, and collegiate athletics in general.<sup>21</sup> On June 21, 2021, the

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15. For further discussion of other examples of antitrust litigation against the NCAA, see *supra* note 4 and accompanying text.

16. See *Alston II*, 958 F.3d at 1243 (noting case centered on order enjoining NCAA rule that restricted education-related benefits for student-athletes).

17. See CAL. EDUC. CODE § 67456 (a)(1) (West 2021) (discussing law's purpose to prohibit institutions of higher education from disallowing compensation of college athletes for name, image, or likeness); see also Blinder, *supra* note 8 (noting California's bill allows players to "strike endorsement deals and hire agents" while acknowledging California Governor who signed bill into law, Gavin Newsom's, comments about NCAA's no pay policy as "farce").

18. For further discussion of California's pay for play legislation, see *supra* note 17 and accompanying text. For further discussion of *Alston II*, see *infra* notes 32–57, 168–282 and accompanying text. For further discussion of *O'Bannon*, see *infra* notes 149–161 and accompanying text.

19. See Norlander, *supra* note 5 (noting pressure California's passage of pay to play bill has placed on other states).

20. See *Alston II*, 958 F.3d at 1265–66 (holding district court's conclusion about anticompetitive nature of NCAA's limits on education-related benefits was correct as NCAA limits "do not 'play by the Sherman Act's rules'" (quoting *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015))).

21. See Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute Compensation for Student-Athletes*, WASH. POST (Dec. 16, 2020, 11:08 AM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-ncaa/2020/12/16/](https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/)

Supreme Court released its opinion in *NCAA v. Alston (Alston III)*<sup>22</sup> and affirmed the Ninth Circuit's decision in a unanimous opinion authored by Justice Gorsuch.<sup>23</sup>

This Note focuses on *Alston II* as decided by the Ninth Circuit.<sup>24</sup> It discusses the facts of the case, the background of the law applied, the reasoning and analysis of the court, and the impact the decision will have.<sup>25</sup> Section Two of this Note describes the facts of the case, paying special attention to the focuses of the district court and the Ninth Circuit throughout litigation up until the Ninth Circuit's affirmation of the lower district court.<sup>26</sup> Section Three, the background section, discusses antitrust law being applied in *Alston II*.<sup>27</sup> Specifically, this Section addresses federal statutes surrounding antitrust law, traditional antitrust case law, NCAA-related antitrust case law, a circuit court split (now resolved by the Supreme Court opinion), and newly enacted or proposed pay for play laws at the state level.<sup>28</sup> Next, Section Four describes the Ninth Circuit's reasoning in *Alston II* and discusses the court's reasoning behind its decision.<sup>29</sup> This Note then proceeds to Section Five, which focuses on critical analysis and analyzes the court's logic and conclusions.<sup>30</sup>

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90f20dbc-3fa9-11eb-8db8-395dedaaa036\_story.html [https://perma.cc/S5FZ-UWFH] (recognizing Supreme Court accepted petition from NCAA to hear *Alston* when Supreme Court has not heard college athletics antitrust issues since *Board of Regents* in 1984, which indicates shifting landscape for college sports with regards to new NIL laws for student-athletes, in addition to general push against traditional NCAA amateurism rules).

22. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) [hereinafter *Alston III*].

23. See *National Collegiate Athletic Association v. Alston*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/national-collegiate-athletic-association-v-alston/ [https://perma.cc/BD88-YJY2] (last visited Oct. 19, 2021) (listing case details like date of argument, date of opinion, vote total, opinion author).

24. For further discussion of the Ninth Circuit's decision in *Alston II*, see *infra* notes 44–54 and accompanying text.

25. For further discussion of *Alston II*, see *infra* notes 44–54 and accompanying text.

26. For further discussion of facts of *Alston II*, see *infra* notes 32–57 and accompanying text.

27. For further discussion of background information on antitrust law, see *infra* notes 62–167 and accompanying text.

28. For further discussion of antitrust statutes, see *infra* notes 62–68, 75–86 and accompanying text. For further discussion of general antitrust case law, see *infra* notes 87–102 and accompanying text. For further discussion of NCAA-related antitrust case law, see *infra* notes 103–161 and accompanying text. For further discussion of emerging pay for play laws, see *infra* notes 162–167 and accompanying text.

29. For further discussion of a narrative analysis of *Alston II*, see *infra* notes 168–255 and accompanying text.

30. For further discussion of a critical analysis of *Alston II*, see *infra* notes 257–282 and accompanying text.

Finally, this Note concludes with Section Six, an impact section in which it considers consequences of the *Alston II* decision by the Ninth Circuit for the field of law and for collegiate sports as well as the consequences of its affirmation in *Alston III*.<sup>31</sup>

## II. SETTING THE PACE OF PLAY: LOOKING AT ALSTON'S FACTS

*Alston II*, prior to being argued in front of the Ninth Circuit, was brought as *Alston v. National Collegiate Athletic Association (Alston I)*<sup>32</sup> before the Northern District of California in March of 2019.<sup>33</sup> The Plaintiffs in *Alston I* (who became respondents in *Alston II*) were both current and former student-athletes challenging current NCAA rules that put limits on compensation receivable by student-athletes and alleging that those limits violate federal antitrust law.<sup>34</sup> Meanwhile, the Defendants—the NCAA and several of its conferences—contended that its limits were actually procompetitive given their effects of preserving amateurism in college sports and strengthening academic communities by including student-athletes.<sup>35</sup>

In evaluating the claims, the district court stated a brief factual history of the NCAA as a league, mentioning that while the associa-

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31. For further discussion of *Alston II*'s impact, see *infra* notes 283–323 and accompanying text.

32. See *Alston v. Nat'l Collegiate Athletic Ass'n*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019) [hereinafter *Alston I*] (ruling in favor of student-athlete Plaintiffs against NCAA while issuing injunction against NCAA amateurism rule).

33. See *generally id.* (noting district court case was heard in Northern District of California).

34. See *id.* at 1061–62 (discussing Plaintiffs' backgrounds, contention that NCAA student-athlete compensatory restrictions result in anticompetitive behavior).

35. See *id.* at 1061–62 & 1062 n.1 (noting Defendants include NCAA plus eleven of its conferences taking part in college football or basketball, including Pac-12, Big 12, SEC). The court did resolve some issues at summary judgment and ultimately presided over the remaining issues in a bench trial. See *id.* at 1062 (discussing court's summary judgment ruling plus subsequent trial). The Defendants also made both issue and claim preclusion arguments to try to stave off the litigation, stating that the challenge by Plaintiffs was precluded due to the issues being materially the same and already being settled. See *id.* at 1092–93 ("As a threshold matter, Defendants argue that Plaintiffs have not shown that this case is not precluded by the Ninth Circuit's ruling in *O'Bannon II*."). The district court stated that there were material factual differences that defeated the preclusion arguments and required consideration under the rule of reason. See *id.* at 1095–96 ("The material factual differences discussed above defeat Defendants' preclusion arguments and warrant examining the conduct challenged in this case under the Rule of Reason . . . . In sum, because Plaintiffs raise new antitrust challenges to conduct affecting a different class, in a different time period, relating to rules and forms of compensation that are not the same as those challenged in *O'Bannon*, the claims in this case are not precluded by *O'Bannon II*.").

tion was originally founded in 1905 for the purpose of regulating college football, it has evolved to “govern many aspects of athletic competitions among NCAA member schools” and it currently has some eleven hundred member schools.<sup>36</sup> The court then mentioned that the NCAA rules are enacted by a Board of Directors and noted that there has been an evolution of NCAA rules regulating benefits and compensation that student-athletes may receive.<sup>37</sup> While student-athletes were originally prohibited from receiving even scholarships, new rules in 1956 were implemented to allow “grants-in-aid,” or athletic scholarships, for student-athletes.<sup>38</sup> The court also recognized that the NCAA generates roughly one billion dollars each year in total revenues.<sup>39</sup>

The district court moved to analyze the challenged NCAA regulations under the rule of reason analysis, which exists for “agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>40</sup> The court noted that Plaintiffs were only focusing on rules regulating compensation and benefits that student-athletes may receive as NCAA athletes.<sup>41</sup> After doing a thorough analysis of the alleged anticompetitive rules, the district court entered judgment for the Plaintiffs, stating that “[r]estricting

36. *See id.* at 1062–63 (noting association’s evolution from single issue to broad governance overseeing three Divisions, including eleven hundred schools).

37. *See id.* at 1063 (discussing process, history of NCAA rule enactment).

38. *See id.* (noting 1906 bylaws of NCAA’s former body Intercollegiate Athletic Association (“IAA”) prohibited receipt of any compensation in exchange for participation in college sports, including scholarships, but new rules in 1956 gave schools permission to award “grants-in-aid” to student-athletes). While the 1956 rules did allow student-athletes to receive scholarships, the rules did limit the size of grant-in-aid that schools could offer, thus stopping any financial aid beyond normal education expenses. *See id.* (explaining origins, limitations of NCAA grant-in-aid awards for student-athletes). However, in 1976, the definition of grant-in-aid was amended to limit “educational expenses to include only ‘tuition and fees, room and board and required course-related books.’” *See id.* (summarizing NCAA grant-in-aid definition following rule amendment in 1976).

39. *See id.* (“The NCAA generates approximately one billion dollars in revenues each year. Its revenues have increased consistently over the years.”). The district court also briefly noted most of NCAA’s revenues come from March Madness, a Division I men’s basketball tournament held annually. *See id.* (indicating great value of March Madness for NCAA).

40. *See id.* at 1092, 1096 (noting district court analyzed alleged anticompetitive behavior under rule of reason analysis). On summary judgment, the court opposed using the per se rule to analyze the challenge and held that the rule of reason analysis must be implemented. *See id.* at 1092 (explaining why rule of reason is appropriate). For further discussion of the rule of reason analysis, see *infra* notes 90–95 and accompanying text.

41. *See id.* at 1063 (indicating Plaintiffs focused on narrow set of NCAA rules, specifically looking at NCAA regulation of student-athlete compensation, student-athlete benefit accrual).



non-cash education-related benefits and academic awards that can be provided on top of a grant-in-aid has not been proven to be necessary to preserving consumer demand” for collegiate sports and thus does not outweigh the anticompetitive effects of such rules.<sup>42</sup> The district court held that “NCAA limits on other education-related benefits that can be provided on top of a grant-in-aid are invalidated” and issued an injunction accordingly.<sup>43</sup>

Following the judgment in favor of the Plaintiffs at the district court level, the NCAA appealed the decision to the Ninth Circuit in May of 2020.<sup>44</sup> In evaluating the lower court’s decision, the Ninth Circuit stressed the fact that NCAA bylaws currently have an “Amateurism Rule” that prohibits student-athletes from using their athletic talents “for pay in any form in their sport”; this bylaw is an eligibility requirement and any student-athlete in violation loses eligibility to participate in NCAA sports.<sup>45</sup> However, the lower court noted that student-athletes regularly receive compensation and benefits beyond cost-of-attendance (“COA”), including payments for “incidental expenses while they are travelling for certain events” and payment of “travel expenses for certain family members to attend certain events.”<sup>46</sup> And yet, the Ninth Circuit observed that receipt of these various payments and benefits does not exclude

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42. *See id.* at 1110 (ruling in favor of Plaintiff class because rules were deemed to restrain trade, in addition to disparity between financial benefit bestowed to Defendants versus menial benefits received by student-athletes for exposition of their own talent).

43. *See id.* at 1109–10 (discussing district court’s determination education-related benefits provided on top of grant-in-aid cannot be limited by NCAA). The court recognized individual conferences or schools can still limit compensation or benefits, “including the education-related benefits that the NCAA will not be permitted to cap.” *See id.* at 1109 (explaining ruling still allows limits below NCAA organization level).

44. *See Alston II*, 958 F.3d 1239, 1243 (9th Cir. 2020) (noting NCAA appealed injunction as well as ruling from *Alston I*).

45. *See id.* at 1244 (discussing eligibility implications of “Amateurism Rule” for student-athletes). While the district court in *Alston I* did make references to the amateurism rule referenced by the Ninth Circuit, no discussion of the eligibility rule was as explicit as the Ninth Circuit’s mention, since the district court ultimately limited mention of the rule to parenthetical notes. *See Alston I*, 375 F. Supp. 3d at 1071 (discussing amateurism rule, NCAA amateurism bylaws).

46. *See Alston I*, 375 F. Supp. 3d at 1072–74 (noting student-athletes may receive monies beyond COA through Student Assistance Fund (“SAF”), Academic Enhancement Fund (“AEF”). The Ninth Circuit did again address these additional benefits in its opinion and even offered a slightly more in-depth look at the benefits available for student-athletes. *See Alston II*, 958 F.3d at 1244-45 (summarizing many benefits already offered to student-athletes).

student-athletes from intercollegiate competition nor impact their amateur status.<sup>47</sup>

The Ninth Circuit accepted the lower court's use of the rule of reason in analyzing the anticompetitive behavior in question.<sup>48</sup> In doing so, the analysis that followed was focused on evaluating the district court's discretion and conclusions as opposed to rejecting them and offering alternatives.<sup>49</sup> After reviewing the district court's analysis, the Ninth Circuit ultimately affirmed the decision in favor of the Plaintiff class.<sup>50</sup> The court held that the NCAA's restrictions on education-related benefits violated antitrust law—specifically the Sherman Act—due to their anti-competitive nature, which was determined to be unjustifiable.<sup>51</sup> However, the court made a key distinction regarding the extent of its holding: “limits on cash compensation unrelated to education do *not* . . . constitute anticompetitive conduct and, thus, may not be enjoined.”<sup>52</sup>

While this is a narrow holding (a fact that is favorable to the NCAA), commentators notice that it may serve a substantial blow to the NCAA's traditional amateurism model.<sup>53</sup> In particular, the NCAA fears that the *Alston II* decision “blurs the line between student-athletes and professionals” and “encourages never-ending litigation following every rule change.”<sup>54</sup> Citing a fear that college sports will be governed by the courts under the reasoning of *Alston*

47. See *Alston II*, 958 F.3d at 1245 (discussing ability to receive benefits in addition to COA without consequence of forfeiting eligibility to play in intercollegiate athletics).

48. See *id.* at 1244 (concluding rule of reason was properly applied by district court).

49. See generally *id.* (evaluating rule of reason analysis of district court).

50. See *id.* at 1265–66 (noting appeals court affirmed district court's “liability determination and injunction in all respects”).

51. See *id.* at 1265 (quoting *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015) (“[W]e hold that the district court properly concluded that NCAA limits on education-related benefits do not ‘play by the Sherman Act’s rules.’”). For further discussion of the Sherman Act, see *infra* notes 75–78 and accompanying text.

52. See *Alston I*, 375 F. Supp. 3d at 1264 (noting limiting compensation unrelated to education does not violate Sherman Act according to record of case at hand).

53. See Cassandra Ramsey, *NCAA Suffers Blow In Alston v. NCAA Scholarship Cost of Attendance Case*, L. OFF. OF KASSANDRA RAMSEY, P.L.L.C. (June 8, 2020), <https://www.kassandraramseylegal.com/blog/ncaa-suffers-blow-in-alston-v-ncaa-scholarship-cost-of-attendance-case> [<https://perma.cc/KNG4-FYM7>] (discussing how outcome of *Alston II* was not entirely detrimental for NCAA given its narrow holding, but NCAA's amateurism model is threatened by *Alston II*'s decision).

54. See Donald M. Remy, *NCAA Statement Regarding Supreme Court Petition for Alston Case*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 15, 2020), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case> [<https://perma.cc/74YK-JUCS>] (detailing NCAA

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*II*, the NCAA petitioned for the Supreme Court to grant certiorari and review the case.<sup>55</sup> The Supreme Court granted the NCAA's petition for writ of certiorari in December of 2020.<sup>56</sup> Then the Supreme Court released its decision in *Alston III* near the end of June 2021.<sup>57</sup>

In *Alston III*, the Supreme Court affirmed the Ninth Circuit's *Alston II* opinion, thereby rejecting the NCAA's petition.<sup>58</sup> The Court unanimously sided with the Plaintiff class, cementing the Ninth Circuit's interpretation as the proper analysis of antitrust law with regards to the NCAA.<sup>59</sup> The opinion also upheld the district court's injunction, affirming the district court's determination that education-related benefits provided on top of grant-in-aid cannot be limited by the NCAA.<sup>60</sup> Equally important, the Supreme Court confirmed that the NCAA and its rules are not exempt from antitrust review under the Sherman Act.<sup>61</sup>

### III. A GAME OF ANALYTICS: TAKING A LOOK AT ANTITRUST LAW BACKGROUND

United States antitrust law began in 1890 with Congress's passage of the Sherman Act.<sup>62</sup> Subsequently, Congress amended the

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fears about fallout of *Alston II*, plus concern about *Alston II*'s implications for amateurism in college sports).

55. *See id.* (noting NCAA asked Supreme Court to review *Alston II*).

56. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 1231 (2020) (No. 20-512) [hereinafter *Alston Petition*] ("Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. The case is consolidated, and a total of one hour is allotted for oral argument.").

57. *See generally* *Alston III*, 141 S. Ct. 2141, 2141 (2021) (evaluating Ninth Circuit's *Alston II* decision).

58. *See id.* at 2166 (affirming Ninth Circuit's decision in *Alston II*).

59. *See generally id.* (noting Justice Gorsuch delivered unanimous opinion of Supreme Court).

60. *See id.* at 2164-66 (recognizing district court "honored . . . principles" of avoiding role as central planner for businesses or micromanagement of businesses while recognizing "the district court acted within the law's bounds.").

61. *See id.* at 2156-58 ("Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review."). The court further emphasized that "*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions." *See id.* at 2158 (declining to adopt procompetitive presumption for NCAA rules).

62. *See The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/UL26-5Z6V>] (last visited Oct. 19, 2021) (discussing conception of antitrust laws in United States).

Sherman Act with the Clayton Antitrust Act (“Clayton Act”)—limiting, for example, creation of monopolies by mergers—and the Federal Trade Commission Act (“FTCA”) to create the Federal Trade Commission (“FTC”).<sup>63</sup> In a general sense, antitrust laws monitor business practices to promote competition and prohibit restraints on trade.<sup>64</sup> Since the implementation and introduction of these antitrust laws, the primary objective of preserving and protecting competition has remained the same.<sup>65</sup>

Part of the nature of antitrust law is that courts ultimately have to decide which business practices are illegal under antitrust law based on individual facts of every case.<sup>66</sup> The courts have also played an important role in clarifying the process of antitrust litigation and the extent of current laws.<sup>67</sup> For example, the Supreme Court has long held that Congress’s intent with the Sherman Act was to prevent only unreasonable restraints of trade, meaning that not all restraints of trade are prohibited.<sup>68</sup>

Courts have left a mark on antitrust law in sports as well; in particular college athletics and the NCAA have become an important topic of antitrust litigation.<sup>69</sup> *National Collegiate Athletic Association v. Board of Regents of Univ. of Oklahoma (Board of Regents)*<sup>70</sup> is a leading example of the Supreme Court’s impact on the NCAA through antitrust litigation and is an important case that courts consider in their assessments of antitrust allegations.<sup>71</sup> More re-

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63. *See id.* (noting Congress passed other antitrust laws in 1914 while discussing some details of Clayton Act).

64. *See id.* (discussing purpose of antitrust law to promote fair competition).

65. *See id.* (“[A]ntitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”).

66. *See id.* (“The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age.”).

67. *See id.* (noting clarifications made by Supreme Court regarding antitrust law). For further discussion of Supreme Court jurisprudence of antitrust law, see *infra* notes 68, 87–102 and accompanying text.

68. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (quoting *Ariz. v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342–343 (1931)) (“Although the Sherman Act, by its terms, prohibits every agreement ‘in restraint of trade,’ this Court has long recognized that Congress intended to outlaw only unreasonable restraints.”).

69. For further discussion of antitrust litigation involving college athletics, see *supra* note 4 and accompanying text.

70. *Board of Regents*, 468 U.S. 85 (1984).

71. *See id.* at 120 (holding NCAA rules restricting output were inconsistent with Sherman Act but noting NCAA must be offered “ample latitude” to maintain amateurism in college sports).

cently, the NCAA has been the subject of antitrust lawsuits claiming that NCAA rules—for example rules limiting student-athlete compensation or scholarships—have anticompetitive effects that are against the Sherman Act.<sup>72</sup> In addition to the antitrust litigation, some new state laws have been proposed and enacted to allow NIL compensation for student-athletes.<sup>73</sup> These laws are relevant in projecting the aggregate effect that these antitrust suits and NIL laws will have on college sports.<sup>74</sup>

#### A. Checking the Rulebook: A Review of Federal Law

##### 1. *The Original Rules: The Sherman Act*

The Sherman Act was the first antitrust law to be passed by Congress in July of 1890 and was codified as 15 U.S.C. §§ 1–38.<sup>75</sup> This Act declares illegal conspiracies, trusts, or other actions that result in a “restraint of trade or commerce among the several States, or with foreign nations.”<sup>76</sup> Notably, violations of the Sherman Act may be penalized civilly or criminally.<sup>77</sup> While Section One of the Sherman Act is the main focus of antitrust case law discussed in this Note, Section 2 of the Sherman Act expressly prohibits both monopolization and attempts to monopolize trade or commerce; doing so is a felony.<sup>78</sup> While the Sherman Act is expansive and written with a broad reach, in practice it has been limited to restrict only unreasonable restraints on trade.<sup>79</sup>

72. For further discussion of other NCAA antitrust lawsuits, see *supra* note 4; see also *infra* notes 103–161 and accompanying text.

73. See, e.g., CAL. EDUC. CODE § 67456 (a)(1) (West 2021) (stating law’s purpose to prohibit institutions of higher education from disallowing NIL compensation of college athletes); see also, e.g., N.J. Stat. Ann. §§ 18A:3B-86 - 18A:3B-89 (West 2020) (stating universities, colleges may not limit student-athletes from earning NIL compensation).

74. For further discussion of the impact of NIL laws and the outcome of *Alston II*, see *infra* notes 317–323 and accompanying text.

75. See 15 U.S.C.A. § 1 (West 2021) (noting Sherman Act was first passed July 2, 1890); see also *The Antitrust Laws*, *supra* note 62 (acknowledging Sherman Act was first antitrust law passed by Congress).

76. See 15 U.S.C.A. § 1 (West 2021) (discussing illegality of anticompetitive behavior restraining competition or trade).

77. See *The Antitrust Laws*, *supra* note 62 (discussing penalties for violating Sherman Act, which may be severe—noting criminal penalties may be as much as \$100 million for corporations or sometimes “twice the amount the conspirators gained from the illegal acts”).

78. See 15 U.S.C.A. § 2 (West 2021) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”).

79. For further discussion of the Sherman Act restricting only unreasonable restraints on trade, see *infra* notes 87–89 and accompanying text.

## 2. *The Rules Get Some Changes: The Clayton Act*

The Clayton Act, which is an amendment to the Sherman Act, is codified as Sections Twelve through Twenty-Seven of the Sherman Act and was passed by Congress in 1914 to strengthen antitrust laws and prohibit unethical corporate behavior more explicitly.<sup>80</sup> For example, the Clayton Act prohibits anticompetitive mergers and defines both price fixing and monopolies.<sup>81</sup> The Clayton Act itself was amended by the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>82</sup> The Clayton Act also gives a private right of action to persons injured in business or property by violation of Section 1 of the Sherman Act.<sup>83</sup>

## 3. *Additional Oversight: The Federal Trade Commission Act (FTCA)*

The FTCA was passed alongside the Clayton Act in 1914 to create the Federal Trade Commission (FTC) and oversee trade and commerce practices.<sup>84</sup> When the Sherman Act is violated, the FTCA is also violated according to the Supreme Court.<sup>85</sup> Nevertheless, the FTC does not work to enforce the Sherman Act but rather

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80. See Troy Segal, *Clayton Antitrust Act*, INVESTOPEDIA (Nov. 22, 2020), <https://www.investopedia.com/terms/c/clayton-antitrust-act.asp> [<https://perma.cc/9HXX-LUJJ>] (discussing purpose of Clayton Act); see also *Clayton Act*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes/clayton-act> [<https://perma.cc/WV9Y-9GY8>] (last visited Oct. 19, 2021) (noting Clayton Act is codified under 15 U.S.C. §§ 12–27).

81. See Segal, *supra* note 80 (noting Clayton Act “prohibits anticompetitive mergers [and] predatory and discriminatory pricing” in attempt to regulate antitrust law).

82. See *id.* (noting amendments to Clayton Act since passage). The Robinson-Patman Act strengthened laws against price discrimination while the Celler-Kefauver Act halted company acquisition of another firm’s stock or assets when the acquisition reduces competition. See *id.* (explaining antitrust amendments’ purposes). Finally, the Hart-Scott-Rodino Antitrust Improvements Act created a declaration requirement, thereby requiring “that companies planning big mergers or acquisitions make their intentions known to the government before taking any such action.” See *id.* (summarizing more recent antitrust amendment).

83. See 15 U.S.C.A. § 15(a) (West 2021) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States.”).

84. See *The Antitrust Laws*, *supra* note 62 (noting FTC Act was passed in 1914); see also *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021) (quoting 15 U.S.C. § 43 (1914)), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/BP8H-5JQF>] (discussing FTC’s authority to “prosecute any inquiry necessary to its duties in any part of the United States” to fulfill duty to prohibit unfair competition).

85. See *The Antitrust Laws*, *supra* note 62 (“The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act.”).

“bring[s] cases under the FTC[A] against the same kinds of activities that violate the Sherman Act.”<sup>86</sup>

### B. Referees Interpret the Rules: Listing Antitrust Case Law

When considering antitrust issues, the Supreme Court places a focus on Section One of the Sherman Act, often beginning its discussion of antitrust law there.<sup>87</sup> The Court has stated that although the Sherman Act could be interpreted to proscribe all restraints of trade, the proper interpretation is that it “outlaws only unreasonable restraints.”<sup>88</sup> Interpreting this line of the Sherman Act to prohibit only unreasonable restraints has thus become standard for all antitrust cases.<sup>89</sup>

There are two standards for testing whether specific restraints of trade violate Section One of the Sherman Act: the rule of reason and the *per se* rule.<sup>90</sup> The rule of reason is considered the common standard for testing antitrust violations and it requires “the factfinder [to] weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited.”<sup>91</sup> Part of the rule of reason analysis is taking different factors into account such as: information about the business; “the restraint [of trade]’s

86. *See id.* (noting FTC enforces Sherman Act through enforcing FTCA). The FTC actively conducts investigations into unfair practices in the marketplace to protect consumers and promote competition. *See What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/AA7Q-UGMC>] (last visited Oct. 21, 2021) (discussing mission, goals of FTC). In addition, the FTC will actively initiate suits against violating companies and challenge anticompetitive mergers that may threaten consumers. *See id.* (“The FTC will challenge anticompetitive mergers and business practices that could harm consumers by resulting in higher prices, lower quality, fewer choices, or reduced rates of innovation. We monitor business practices, review potential mergers, and challenge them when appropriate to ensure that the market works according to consumer preferences, not illegal practices.”).

87. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (beginning discussion of antitrust law with Section 1 of Sherman Act); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (beginning discussion of antitrust law with Section 1 of Sherman Act); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (beginning Court’s opinion with discussion of Section 1 of Sherman Act).

88. *See Leegin*, 551 U.S. at 885 (quoting *State Oil Co.*, 522 U.S. at 10) (“[T]he Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’”); *see also Texaco Inc.*, 547 U.S. at 5 (“This Court has not taken a literal approach to this language . . .”).

89. *See, e.g.*, *Board of Regents*, 468 U.S. 85, 98 (1984) (noting only unreasonable restraints of trade are prohibited); *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 184 (3d Cir. 1998) (noting Section One of Sherman Act precludes only unreasonable restraints on trade).

90. *See Leegin*, 551 U.S. at 885–86 (discussing different standards for analyzing potential antitrust violations).

91. *See id.* at 885 (approving rule of reason as “accepted standard” for testing antitrust violations while discussing basic requirement of rule of reason).

history, nature, and effect"; and "[w]hether the businesses involved have market power."<sup>92</sup> Under the rule of reason analysis, antitrust plaintiffs bear the burden of demonstrating that the restraints in question are "unreasonable and anticompetitive before it will be found unlawful."<sup>93</sup> Likewise, if a court concludes that a defendant is practicing anticompetitive behavior through unreasonable restraints under the rule of reason, that defendant then has a "heavy burden" of providing a defense that demonstrates a competitive justification for the anticompetitive restraint.<sup>94</sup> Parties that fail to meet that heavy burden and do not properly justify their anticompetitive behavior fail the rule of reason analysis and are considered to be in violation of U.S. antitrust law.<sup>95</sup>

The *per se* rule is the narrowly-applied alternative to the rule of reason.<sup>96</sup> The Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>97</sup> offered a succinct discussion of the *per se* rule and how it is differentiated from the rule of reason.<sup>98</sup> The *Leegin* Court explained the *per se* rule's use for restraints that have the tendency to "restrict competition and decrease output."<sup>99</sup> Implementation of the *per se* rule should be limited only to those restraints that truly "lack . . . any redeeming virtue."<sup>100</sup> The Court opined that any adoption of the *per se* rule should be based on a confident conclusion by courts that an analysis of a certain restraint would never pass

92. *See id.* at 885–86 (discussing factors of rule of reason analysis).

93. *See Texaco Inc.*, 547 U.S. at 5 ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.").

94. *See Board of Regents*, 468 U.S. at 113 (noting anticompetitive behavior found to be unreasonable under rule of reason may only be sustained if accused party can demonstrate some procompetitive justification for anticompetitive behavior).

95. *See id.* at 117–20 ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

96. *See Leegin*, 551 U.S. at 886 (articulating limited situations in which *per se* rule is applied instead of rule of reason).

97. *See id.* at 887, 907 (holding vertical price restraints should be judged under rule of reason). Vertical price restraints involve "agreement between a manufacturer and its distributor to set minimum resale prices." *See id.* at 887 (explaining vertical price restraints). Horizontal restraints include situations where competitors have agreements to fix prices or divide markets, and fall under the *per se* rule. *See id.* at 886 (observing recognized examples of horizontal agreements).

98. *See id.* at 886–87 (discussing *per se* rule's narrow utility).

99. *See id.* at 886 (quoting *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988)) ("Resort to *per se* rules is confined to restraints, like those mentioned, 'that would always or almost always tend to restrict competition and decrease output.'").

100. *See id.* (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Prtg. Co.*, 472 U.S. 284, 289 (1985)) (explaining what qualifies for *per se* analysis).



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the scrutiny of the rule of reason.<sup>101</sup> Moreover, the *per se* rule should not be adopted “where the economic impact of certain practices is not immediately obvious,” or at least reluctantly so applied.<sup>102</sup>

### C. Madness Outside of March: NCAA Antitrust Case Law

#### 1. *How Referees Are Trained: Reviewing Board of Regents*

*Board of Regents* has long been considered “the seminal case on the interaction between the NCAA and the Sherman Act.”<sup>103</sup> In *Board of Regents*, an NCAA television plan limiting the total number of televised college football games was challenged as anticompetitive under the Sherman Act.<sup>104</sup> The Court recognized the anticompetitive effects of the NCAA’s arrangement with member schools that gave members no real choice with television controls.<sup>105</sup> Ultimately, the Court applied a rule of reason analysis and ruled against the NCAA, stating that rules restricting output and limiting member schools played a role in restricting college athletics rather than enhancing the program.<sup>106</sup>

Despite its narrow holding, *Board of Regents* has had a lasting impact on how the NCAA must be analyzed under the Sherman Act.<sup>107</sup> Part of this impact was the Court’s dicta on the role the NCAA plays in preserving amateur sports.<sup>108</sup> The Court noted that

101. *See id.* at 886–887 (citations omitted) (noting predictability of outcome under rule of reason is benchmark for when *per se* rule may be applied).

102. *See id.* at 887 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)) (“It should come as no surprise, then, that ‘we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.’”).

103. *See Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 339 (7th Cir. 2012) (noting importance of *Board of Regents* for antitrust case law involving NCAA).

104. *See Board of Regents*, 468 U.S. 85, 90–95 (1984) (explaining NCAA television plan in controversy, including issues arising from NCAA members who were also members of College Football Association that negotiated television broadcast contracts separate from deal existing with NCAA to increase revenues).

105. *See id.* at 104–107 (noting NCAA’s television plan restricts competition by restraining price, restraining output, taking freedom to compete from individual competitors).

106. *See id.* at 120 (“Today we hold only that the record supports the District Court’s conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”).

107. For further discussion of the *Board of Regents* holding, see *supra* note 106 and accompanying text.

108. *See* Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O’Banion: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 346 (2016) (noting Supreme Court’s “ample latitude” com-

the “[NCAA] needs ample latitude to play that role” and “that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”<sup>109</sup> This explanation of the NCAA’s important role in maintaining the amateurism of college sports and the declaration from the Court about the NCAA’s overall consistency with the Sherman Act create a difficult task for courts in analyzing potential antitrust violations of the NCAA.<sup>110</sup> Effectively, the Supreme Court told courts to defer to NCAA rules as much as possible.<sup>111</sup> Yet *Board of Regents* simultaneously identified an instance where deference to the NCAA no longer applied.<sup>112</sup> Ultimately, courts attempting to reconcile the holding (though limited) and dicta of *Board of Regents* have created a difference of opinion in circuit courts.<sup>113</sup>

## 2. *Splitting Free Throws and Ending Up With a Circuit Split*

It has been over thirty years since the last time the Supreme Court heard a case on amateurism in college sports.<sup>114</sup> Since, scholars have been anticipating review of another case given growing social concerns for student-athlete compensation.<sup>115</sup> The words of Justice Stevens in *Board of Regents* continue to echo through courts faced with antitrust claims involving the NCAA.<sup>116</sup> Largely due to Stevens’ “ample latitude” dicta, the failure of antitrust claims

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ment in *Board of Regents* was dicta directed at “[s]tudent-athlete regulation . . . not even before the Court”).

109. See *Board of Regents*, 468 U.S. at 120 (explaining importance of NCAA in regulating student-athletes).

110. See Baker III & Brison, *supra* note 108, at 346 (discussing some subsequent district courts’, appellate courts’ reliance on *Board of Regents*’ dicta to shield NCAA from all antitrust law review).

111. See *id.* at 351 (explaining *Board of Regents*’ deference to NCAA with “ample latitude” statement).

112. See *Board of Regents*, 468 U.S. at 120 (holding NCAA’s curtailing of output with television plan was violation of Sherman Act).

113. For further discussion of the circuit split on NCAA antitrust issues, see *infra* notes 114–161 and accompanying text.

114. See *Board of Regents*, 468 U.S. at 120 (noting *Board of Regents* was decided in 1984).

115. See Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 882 (2016) (noting gap in time since NCAA amateurism was last considered by Supreme Court while discussing reasons for Court to hear another amateurism case).

116. See Grimmett, *supra* note 12, at 842 (noting impact of *Board of Regents* dicta on subsequent NCAA antitrust suits).

against the NCAA since *Board of Regents* has been common.<sup>117</sup> Nevertheless, a circuit split arose regarding the weight of deference for antitrust claims against the NCAA, where a claim lived or died depending on the circuit in which it was heard.<sup>118</sup> Some circuits had effectively granted antitrust exemptions to some NCAA rules because of how they identified commercial markets.<sup>119</sup> Meanwhile, other circuits also interpreted *Board of Regents* language as giving the NCAA another strong exemption from antitrust claims based on their great deference to NCAA rules.<sup>120</sup>

a. Blowing the Whistle: The Seventh, Sixth, and Third Circuits Give The NCAA Some Wiggle Room—But Differ On How Much

The Seventh, Sixth, and Third Circuits each decided antitrust cases that favor the NCAA and even prevented some antitrust litigation against the NCAA in their circuits altogether.<sup>121</sup> The Seventh Circuit's decision created a procompetitive presumption for some NCAA regulations, effectively assuring that they withstand anticompetitive challenges.<sup>122</sup> Meanwhile, the Sixth and Third Circuits determined that the NCAA rules challenged in their cases were not commercial in nature, thus they could not be analyzed under antitrust law.<sup>123</sup>

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117. See *id.* (noting lack of success of many antitrust claims against NCAA since *Board of Regents*).

118. For further discussion of circuit courts that have ruled in favor of the NCAA, see *infra* notes 124–148 and accompanying text. For further discussion of circuit court ruling against the NCAA, see *infra* notes 149–161 and accompanying text.

119. See, e.g., *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 433 (6th Cir. 2008) (“In order to state a claim under the Sherman Act there must be a commercial activity implicated . . . NCAA’s rules on recruiting student athletes . . . are all explicitly non-commercial. In fact, those rules are *anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools.”).

120. See, e.g., *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 342–43 (7th Cir. 2012) (stating *Board of Regents* created “procompetitive presumption for certain NCAA regulations” that “help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education”).

121. For further discussion of the Seventh Circuit's *Agnew*, see *infra* notes 124–131 and accompanying text. For further discussion of the Sixth Circuit's *Bassett*, see *infra* notes 132–138 and accompanying text. For further discussion of the Third Circuit's *Smith*, see *infra* notes 139–148 and accompanying text.

122. See *Agnew*, 683 F.3d at 342–43 (discussing procompetitive presumption given to certain NCAA regulations).

123. See *Bassett*, 528 F.3d at 429–30 (noting challenged NCAA rules were not commercial in nature); see also *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185–86 (3d Cir. 1998) (stating NCAA eligibility rules are non-commercial).

i. *Official Timeout: Recapping the Seventh Circuit's Reasoning in Agnew v. National Collegiate Athletic Association*<sup>124</sup>

In *Agnew v. National Collegiate Athletic Association*,<sup>125</sup> student-athlete plaintiffs alleged that NCAA regulations violated the Sherman Act by both capping the number of scholarships given per team and prohibiting multi-year scholarships.<sup>126</sup> The Seventh Circuit affirmed a lower court's dismissal of the plaintiffs' claims.<sup>127</sup> This court made its affirmation reasoning that the plaintiffs failed to identify a cognizable commercial market impacted by the NCAA rules at issue.<sup>128</sup> Nevertheless, the *Agnew* court stated that the student-athlete scholarship market can be considered a labor market given that colleges engage in competition to attract student-athletes to their campuses by offering benefits instead of cash.<sup>129</sup> While *Agnew* ultimately left questions as to how to identify a labor market in antitrust cases, it also interpreted *Board of Regents* to provide a heavy procompetitive presumption to NCAA regulations so long as they are "of the type that have been blessed by the Supreme Court."<sup>130</sup> Though not a declaration of unconditional support for NCAA rules and regulations, the *Agnew* court's interpretation of the term "ample latitude" from *Board of Regents* created a daunting standard of

124. See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (6th Cir. 2008).

125. See *id.*

126. See *id.* at 332 (noting plaintiffs' claim against NCAA). The plaintiffs in *Agnew* had both suffered injuries that ended their football careers. See *id.* (explaining facts of case). Because they could no longer play football, their one-year athletic scholarships "were not renewed." See *id.* (acknowledging source of plaintiffs' claim).

127. See *id.* at 347 (rejecting lower court's reasoning but affirming district court's dismissal of claims).

128. See *id.* at 345 (stating dismissal by district court was justified because plaintiffs did not identify commercial market in their complaint). The Seventh Circuit differed from the lower court, however, in that it recognized the plaintiffs "could" have identified an appropriate market but "did not" do so in their complaint. See *id.* (acknowledging plaintiffs' ability to identify market).

129. See *id.* at 346–47 ("We find this argument [of no identifiable labor market for student-athletes] unconvincing for two reasons. First, the only reason that colleges do not engage in price competition for student-athletes is that other NCAA bylaws prevent them from doing so. The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does not remove that industry from the purview of the Sherman Act altogether . . . Second, colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash.").

130. See *id.* at 341–43 (citing *Board of Regents*, 468 U.S. 85, 120 (1984)) (extending "ample latitude" to automatically grant procompetitive presumption for NCAA regulations that are "clearly meant to help maintain the revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education").

deference for some NCAA rules that would be difficult for future plaintiffs to overcome.<sup>131</sup>

ii. *Calling to the Replay Center: The Sixth Circuit Clamps Down on Defining Commercial Activity*

In *Bassett v. National Collegiate Athletic Association*,<sup>132</sup> the plaintiff alleged a violation of the Sherman Act against the NCAA for conspiring with member conferences to prevent the plaintiff from holding a coaching position at another NCAA member school.<sup>133</sup> The Sixth Circuit held that the claim was not commercial in nature so the antitrust claim was properly dismissed.<sup>134</sup> More specifically, the actions of the NCAA in question were deemed not commercial in nature so the claim could not go forward.<sup>135</sup> Possibly the most important statement on commercial nature from *Bassett* was its commentary on eligibility rules and rules regarding recruitment of student-athletes.<sup>136</sup> The Sixth Circuit went as far as to say that eligibility rules and rules on recruiting student-athletes are not just “explicitly non-commercial” but are even “anti-commercial.”<sup>137</sup> Adoption of this interpretation would shield any NCAA rules regarding eligibility or student-athlete recruitment from antitrust

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131. *See id.* (noting NCAA regulations may be presumed procompetitive under *Board of Regents*). Despite its great deference to the Supreme Court’s dicta from *Board of Regents*, the *Agnew* court went on to determine that the bylaws in question did not meet the procompetitive presumption afforded by *Board of Regents*. *See id.* at 344–45 (acknowledging procompetitive presumption does not apply to bylaws at issue). However, the Seventh Circuit did not make a determination on whether the bylaws were themselves anticompetitive because that issue was not reached by the district court. *See id.* at 345 (declining to rule on anticompetitiveness of bylaws).

132. *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426 (6th Cir. 2008).

133. *See id.* at 429–30 (describing claim filed against NCAA).

134. *See id.* at 429 (“The Appellant’s appeal is not well taken. We find the district court correctly determined Appellant’s antitrust claim was not commercial in nature and failed to allege an antitrust injury.”).

135. *See id.* at 432–33 (noting focus of whether action is commercial is “on the enforcement action itself and not NCAA as a commercial entity” while concluding plaintiff’s complaint was “wholly devoid of any allegation on the commercial nature of NCAA’s enforcement of the rules” that plaintiff violated).

136. For further discussion of *Bassett*’s commentary on commercial nature, see *infra* note 137 and accompanying text.

137. *See Bassett*, 528 F.3d at 433 (stating NCAA rules regarding eligibility or student-athlete recruitment are “anti-commercial” in nature). The *Bassett* court reasoned that like eligibility rules, rules controlling recruitment that govern fraud and inducement are tailored to discourage commercial advantage among schools. *See id.* (explaining purpose of NCAA eligibility rules).

claims because an antitrust claim cannot commence without the alleged violation being commercial in nature.<sup>138</sup>

iii. *Sticking with the Original Call: The Third Circuit's Smith v. National Collegiate Athletic Association*<sup>139</sup> *Precedes and Persuades Bassett*

In *Smith v. National Collegiate Athletic Association*,<sup>140</sup> the plaintiff had participated in Division I athletics during her undergraduate education but was precluded from competing in NCAA athletics during her post-baccalaureate education due to an NCAA bylaw prohibiting participation “in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree.”<sup>141</sup> The *Smith* plaintiff alleged that the bylaw violated the Sherman Act as an unreasonable restraint of trade.<sup>142</sup> The Third Circuit affirmed the lower court's dismissal of the Sherman Act claim, stating that the bylaw “clearly survives a rule of reason analysis.”<sup>143</sup>

However, the Third Circuit did its rule of reason analysis after already ruling in favor of the NCAA so that analysis is more of a courtesy made by the court than it is the principal rule of the case.<sup>144</sup> Thus, *Smith's* determination regarding the commercial nature of eligibility rules is the main takeaway of the case.<sup>145</sup> *Smith* states that “the [NCAA's] eligibility rules are not related to the NCAA's commercial or business activities” as they do not seek to give the NCAA any commercial advantage—rather, they try to ensure fair collegiate athletic competition.<sup>146</sup> Because “restraints in business and commercial transactions” are the focus of the Sherman Act, this ruling by the Third Circuit effectively eliminated

138. *See id.* at 432 (“[I]n order for the Sherman Act to apply, the enforcement action ‘must be commercial in nature.’”).

139. *See Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998).

140. *See id.* at 186 (finding Sherman Act does not apply to NCAA eligibility requirements).

141. *See id.* at 183 (giving background on facts of case, bylaw at issue).

142. *See id.* at 184 (stating plaintiff's claim).

143. *See id.* at 187-190 (stating bylaw passes rule of reason while affirming district court on Sherman Act issue).

144. *See id.* at 185-87 (holding “Sherman Act does not apply to the NCAA's promulgation of eligibility requirements” but noting even if Sherman Act applied, NCAA's eligibility requirements would pass rule of reason analysis).

145. For further discussion of *Smith's* commercial analysis, see *infra* notes 146-148 and accompanying text.

146. *See Smith*, 139 F.3d at 185-86 (holding eligibility rules are non-commercial, so not under Sherman Act).

claims focusing on NCAA eligibility rules.<sup>147</sup> This reasoning was later adopted by the Sixth Circuit in *Bassett*.<sup>148</sup>

b. Making A Big Three-Pointer: The Ninth Circuit Pushes Back on the NCAA in *O'Bannon v. National Collegiate Athletic Association*<sup>149</sup>

The Ninth Circuit in *O'Bannon* provided an analysis less favorable to the NCAA.<sup>150</sup> In *O'Bannon*, a former college basketball player saw his likeness used in a videogame but was not compensated and he did not consent to the use of his likeness.<sup>151</sup> A claim was then filed against the NCAA, alleging that its amateurism rules prohibiting student-athletes from receiving NIL compensation were in violation of the Sherman Act.<sup>152</sup>

In its opinion, the *O'Bannon* court created a circuit split with the Seventh Circuit and with the Sixth and Third Circuits.<sup>153</sup> Regarding interpretation of the *Board of Regents* language, the Ninth Circuit determined that the Supreme Court's dicta was "informative" but ultimately the circuit court refused to offer a presumption of validity to NCAA rules.<sup>154</sup> Instead, *O'Bannon* interpreted *Board of Regents* as merely holding that "no NCAA rule should be invalidated without a Rule of Reason analysis"; the Ninth Circuit did not agree

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147. See *id.* ("Based upon the Supreme Court's recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in business and commercial transactions . . . and therefore has only limited applicability to organizations which have principally noncommercial objectives . . . we find that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements.").

148. For further discussion of *Bassett* and its commercial nature analysis, see *supra* notes 133–138 and accompanying text.

149. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

150. For further discussion of the *O'Bannon* opinion, see *infra* notes 151–161 and accompanying text.

151. See *O'Bannon*, 802 F.3d at 1055 (explaining origin of suit while referencing videogame portraying NCAA athlete without his consent).

152. See *id.* (noting plaintiff sued, claiming NCAA amateurism rules preventing student-athlete NIL compensation were illegal restraint of trade under Sherman Act).

153. For further discussion of *O'Bannon* opposing other circuits, see *infra* notes 154–161 and accompanying text. For further discussion of the Seventh Circuit's *Agnew*, see *supra* notes 124–131 and accompanying text. For further discussion of the Sixth Circuit's *Bassett*, see *supra* notes 132–138 and accompanying text. For further discussion of the Third Circuit's *Smith*, see *supra* notes 139–148 and accompanying text.

154. See *O'Bannon*, 802 F.3d at 1064 ("In sum, we accept *Board of Regents*' guidance as informative with respect to the procompetitive purposes served by the NCAA's amateurism rules, but we will go no further than that. The amateurism rules' validity must be proved, not presumed.").

with the sentiment that *Board of Regents* established NCAA amateurism rules “as categorically consistent with the Sherman Act.”<sup>155</sup> The Ninth Circuit thus contrasted the strong presumption of validity given to NCAA rules by the Seventh Circuit in *Agnew*.<sup>156</sup>

*O'Bannon* also addressed the commercial activity requirement of the Sherman Act by again combating the NCAA's claim that their rules were not subject to the Sherman Act.<sup>157</sup> In analyzing this argument, the Ninth Circuit was not persuaded by the analysis of the Sixth Circuit or Third Circuit in *Bassett* and *Smith*, respectively.<sup>158</sup> The Ninth Circuit reasoned that even where NCAA rules are “‘*anti-commercial* and designed to promote and ensure competitiveness,’ [those rules] surely *affect* commerce just as much as rules promoting commercialism.”<sup>159</sup> Because the NCAA compensation rules regulate an exchange—“labor for in-kind compensation—[that] is a quintessentially commercial transaction,” the rules themselves can be considered commercial in nature despite their “anti-commercial” intent.<sup>160</sup> In coming to this conclusion on commercialism, the Ninth Circuit called *Bassett's* reasoning “simply wrong” while distinguishing from *Smith* based on the fact that the post-baccalaureate bylaw at issue in *Smith* was “not related to the NCAA's commercial or business activities,” unlike compensation rules.<sup>161</sup>

155. *See id.* at 1063 (stating NCAA amateurism rules do not automatically dodge label of anticompetitive, so requirement exists to analyze NCAA rules under rule of reason).

156. *See id.* at 1064 (“Only . . . the Seventh Circuit's decision in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012) . . . comes close to agreeing with the NCAA's interpretation of *Board of Regents*, and we find it unpersuasive . . . Like the amateurism language in *Board of Regents*, *Agnew's* ‘procompetitive presumption’ was dicta that was ultimately unnecessary to the court's resolution of that case. But we would not adopt the *Agnew* presumption even if it were not dicta. *Agnew's* analysis rested on the dubious proposition that in *Board of Regents*, the Supreme Court ‘blessed’ NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny . . . We doubt that was the Court's intent, and we will not give such an aggressive construction to its words.”). For further discussion of *Agnew's* “procompetitive presumption,” see *supra* notes 130–131 and accompanying text.

157. *See O'Bannon*, 802 F.3d at 1064–65 (noting NCAA's argument that its compensation rules do not fall under Sherman Act because they are not commercial in nature but stating NCAA's argument about commercial nature “is not credible”).

158. *See id.* at 1066 (“Neither *Smith* nor *Bassett* convinces us that the NCAA's compensation rules are noncommercial.”).

159. *See id.* (citation omitted) (explaining how even “*anti-commercial*” rules can affect commercialism).

160. *See id.* (stating NCAA's compensation rules may be analyzed under Sherman Act).

161. *See id.* (noting disagreement with *Bassett* while also distinguishing *Smith*). While *O'Bannon* did distinguish *Smith* based on the differences of rules at issue, *Smith's* reasoning still did not persuade the *O'Bannon* court to label the NCAA's



## D. Possible Rules Changes: State Pay for Play Laws Emerge

This Note does not focus on NIL or pay for play laws being enacted to aid in student-athlete compensation, as they are merely an example of government intervention that relates to NCAA rules; the government intervention itself is not antitrust-related.<sup>162</sup> Nevertheless, rules capping student-athlete compensation are at issue in *Alston II* so a brief discussion of emerging pay for play laws is warranted.<sup>163</sup> California's Governor, Gavin Newsom, signed the Fair Pay to Play Act in September of 2019 to allow NIL compensation for college student-athletes.<sup>164</sup> The law will eventually take effect in 2023 and has put immense pressure on the NCAA to adjust its policy given the large draw of California universities' sports programs.<sup>165</sup> Outside of the pressure placed on the NCAA, other states are feeling the pressure of California's new law and several states are proposing their own legislation.<sup>166</sup> States including New Jersey, Colorado, and Florida have Pay to Play legislation set to go into effect, thereby creating opportunities for student-athletes to be paid without losing scholarship eligibility.<sup>167</sup>

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compensation rules as noncommercial. *See id.* (explaining intent behind NCAA rules does not negate effect on commerce).

162. For further discussion of pay for play laws, see *infra* notes 163–166 and accompanying text.

163. *See Alston II*, 958 F.3d 1239, 1248 (9th Cir. 2020) (noting NCAA limits on student-athlete compensation).

164. *See CAL. EDUC. CODE* § 67456 (a)(1) (West 2021) (discussing bill's purpose in prohibiting institutions of higher education from disallowing NIL compensation of college athletes, including intent of legislature to adopt policies avoiding exploitation of student-athletes); *see also* Blinder, *supra* note 8 (noting California bill allows players to “strike endorsement deals and hire agents”). For further discussion of California Governor Newsom's comments about the no pay policy, see *supra* note 17 and accompanying text.

165. *See* Blinder, *supra* note 8 (noting law should take effect in 2023 while discussing Governor Newsom's threat to NCAA regarding NCAA losing membership of California schools).

166. *See* Norlander, *supra* note 5 (noting California's passage of Pay to Play Act has created “ripple effect” leading to greater push against NCAA amateurism, supported with list of various pay to play bills set to be introduced in various states); *see also* Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa> [<https://perma.cc/L2Z3-N4VW>] (“Dozens of state legislatures are close to adopting laws governing athlete compensation within their borders.”).

167. *See* Gregg E. Clifton, *New Jersey Grants Name, Image, Likeness Rights to Collegiate Student-Athletes*, NAT'L L. REV. (Sep. 15, 2020), <https://www.natlawreview.com/article/new-jersey-grants-name-image-likeness-rights-to-collegiate-student-athletes> [<https://perma.cc/7BZ4-724E>] (noting these laws have been passed only on limited scale thus far).

#### IV. STICK TO THE GAMEPLAN: CHECKING OUT THE NARRATIVE ANALYSIS

##### A. The Starters Come Out Strong: The Majority Affirms the District Court

After reciting the facts of the case and conclusions of the district court, the *Alston II* court then analyzed the conclusions of the district court, beginning by evaluating whether stare decisis or res judicata applied.<sup>168</sup> Following that analysis, the court examined the antitrust findings of the district court and then the injunction issued by the district court.<sup>169</sup> The court ultimately affirmed the district court's injunction and agreed with the finding that "NCAA limits on education-related benefits 'do not play by the Sherman Act's rules.'"<sup>170</sup>

##### 1. *Should The Game Be Happening?: The Ninth Circuit Handles Stare Decisis and Res Judicata Arguments*

The Ninth Circuit began its analysis by determining whether the *Alston II* litigation was foreclosed by stare decisis or precluded by res judicata.<sup>171</sup> Stare decisis is a Latin phrase that means "to stand by things decided" and this doctrine binds courts to precedent for issues already decided.<sup>172</sup> Res judicata is a Latin phrase meaning "a matter judged" and refers to the legal principle that a claim cannot be relitigated after having been judged on the merits.<sup>173</sup>

In determining whether stare decisis would stop the *Alston II* litigation, the Ninth Circuit focused on whether the factual differences between the current case and *O'Bannon* were "material to the application of the rule or allow the precedent to be distinguished

168. See *Alston II*, 958 F.3d at 1252–53 (discussing concepts of stare decisis, res judicata before considering whether stare decisis or res judicata applied to case at hand).

169. See *id.* at 1256–65 (analyzing district court's findings, conclusions of law).

170. See *id.* at 1265–66 ("For the foregoing reasons, we hold that the district court properly concluded that NCAA limits on education-related benefits do not 'play by the Sherman Act's rules.' Accordingly, we affirm its liability determination and injunction in all respects.")

171. See *id.* at 1252–53 (questioning whether res judicata or stare decisis apply given Ninth Circuit's prior decision in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*).

172. See *Stare Decisis*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) [<https://perma.cc/27FZ-ETDA>] (last visited Oct. 21, 2021) (explaining stare decisis doctrine).

173. See *Res judicata*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/res\\_judicata](https://www.law.cornell.edu/wex/res_judicata) [<https://perma.cc/6LRS-Q3J2>] (last visited Oct. 21, 2021) (explaining res judicata doctrine).

on a principled basis.”<sup>174</sup> The court considered the NCAA’s argument to foreclose the litigation and rejected the NCAA’s argument, reasoning that a rule of reason analysis relies on “case-by-case adjudication” and is “fact-dependent.”<sup>175</sup> The court noted that the previous *O’Bannon* litigation cited by the NCAA was factually different, as *O’Bannon* narrowly addressed NCAA restrictions on NIL compensation while *Alston II* broadly considered “NCAA rules that limit the compensation [student-athletes] may receive in exchange for athletic services.”<sup>176</sup>

The *Alston II* court rejected the argument that the NCAA avoided antitrust liability by relaxing its compensation limits in the wake of *O’Bannon*; even though the limits were relaxed, the existence of limits on student-athlete compensation was still anticompetitive.<sup>177</sup> The Ninth Circuit accepted Plaintiffs’ argument that the NCAA’s own statement on relaxed compensation limits since *O’Bannon* demonstrated factual differences between *O’Bannon* and *Alston II* given the difference in rules.<sup>178</sup> Specifically, this change in rules by the NCAA usurped “the factual assumption that drove the result in *O’Bannon*” because although offering student-athletes compensation unrelated to education was in great contrast to NCAA rules of the time, the NCAA rules during the *Alston II* litigation are no longer a “quantum leap” from what the NCAA allows.<sup>179</sup>

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174. See *Alston II*, 958 F.3d at 1253 (noting basic standard for foreclosing litigation based on stare decisis).

175. See *id.* at 1253–54 (noting antitrust litigation has great reliance on facts of case; stating NCAA’s argument to foreclose litigation “ignores the inherently fact-dependent nature of a Rule of Reason analysis”).

176. See *id.* at 1254 (“The district court meaningfully and properly distinguished *O’Bannon II* from the current litigation as a narrow challenge to restrictions on NIL compensation . . . . By contrast, this action more broadly targets the ‘interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services.’”).

177. See *id.* (“The district court rightly concluded that this argument misses the mark: ‘It is the fact that the prices of student-athlete compensation are fixed, as opposed to the amount at which these prices are fixed, that renders the agreements at issue anticompetitive.’” (quoting *Alston I*, 375 F. Supp. 3d 1058, 1095 (N.D. Cal. 2019))).

178. See *id.* (“[T]he NCAA’s concession that it has relaxed its compensation limits since *O’Bannon* only underscores that the instant litigation is materially factually different from *O’Bannon*.”).

179. See *id.* at 1254–55 (noting while offering non-education-related compensation to student-athletes was greatly different from NCAA rules in *O’Bannon*, difference between such compensation versus NCAA rules during *Alston II* was much smaller). Thus, the NCAA rules during *O’Bannon* seem so far away from ever leading to non-education-related cash payments for student-athletes. See *id.* at 1255 (“[T]he changes to compensation limits since *O’Bannon* ‘alter the factual assumption that drove the result in *O’Bannon*: they show that non-education-related cash payments in excess of the [COA] are no longer a ‘quantum leap’ from current

The court then demonstrated more factual differences between *Alston II* and *O'Bannon* by listing certain types of student-athlete compensation that began after *O'Bannon*.<sup>180</sup> Because of these factual differences, the Ninth Circuit agreed with the district court that the instant litigation was not foreclosed by stare decisis.<sup>181</sup>

The Ninth Circuit did a quick analysis of the NCAA's res judicata claim and ultimately rejected it.<sup>182</sup> First, the court reasoned that the NCAA did not bear its burden for proving the required elements to preclude a claim under res judicata.<sup>183</sup> Next, the court stated that “[c]laim preclusion does not apply to claims that were not in existence and could not have been sued upon . . . when the allegedly preclusive action was initiated”; because the current claim arose following *O'Bannon*, it could not be barred.<sup>184</sup>

## 2. *Back to The Rulebook: Reviewing the District Court's Sherman Act Conclusions and Judgment*

The Ninth Circuit agreed with the district court's decision to apply the rule of reason in its antitrust analysis.<sup>185</sup> As commentators have noted, this application of the rule of reason relied on an interpretation of *Board of Regents* that did not grant special antitrust protections to the NCAA—a conclusion that *O'Bannon* originally posited.<sup>186</sup> A three-step framework for the rule of reason analysis was laid out:

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NCAA practice.”). However, now in *Alston II*, that relaxation of rules making allowing non-education-related compensation for student-athletes seem possible. *See id.* (explaining how rule changes allow for current litigation). This makes the *Alston II* litigation materially factually different from *O'Bannon*. *See id.* at 1254–55 (confirming rule changes since *O'Bannon* create factual differences from *O'Bannon*).

180. *See id.* at 1255 (footnote omitted) (“For example, the court found that, after the *O'Bannon* record closed, student-athletes have received, inter alia, athletic participation awards in the form of Visa gift cards, SAF disbursements in the thousands of dollars to pay for loss-of-value insurance, and personal expenses unrelated to education.”).

181. *See id.* (acknowledging some student-athlete compensation practices arising after *O'Bannon* but declining to adopt NCAA's interpretation of *O'Bannon* as foreclosing *Alston II* litigation).

182. *See id.* at 1255–56 (recounting Ninth Circuit res judicata discussion while stating instant case was not barred under res judicata).

183. *See id.* at 1255 (declaring NCAA did not carry its burden for applying res judicata).

184. *See id.* at 1255–56 (stating student-athletes' antitrust claim was not barred because it had “[arisen] from events that occurred after the *O'Bannon* record closed”).

185. *See id.* at 1256 (noting proper rule for antitrust analysis is rule of reason).

186. *See Baker III & Brison, supra* note 108, at 352 (“By subjecting the NCAA's amateurism regulations to the rule of reason analysis, the Ninth Circuit deviated

(1) Student-Athletes “bear[ ] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market”; (2) if they carry that burden, the NCAA “must come forward with evidence of the restraint’s procompetitive effects”; and (3) Student-Athletes “must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.”<sup>187</sup>

In clarifying the standard for striking down NCAA rules, the Ninth Circuit stated that courts cannot “strike down largely beneficial market restraints” and should only act when a restraint goes far beyond what is necessary to achieve procompetitive effects.<sup>188</sup> In stating this, the Ninth Circuit again reiterated its *O’Bannon* analysis of replacing only restraints that are “*patently and inexplicably* stricter than necessary.”<sup>189</sup>

a. Out of Bounds, Plaintiffs’ Ball: Analyzing Plaintiffs’ Burden to Show Anticompetitive Effects of Restraint

The Ninth Circuit determined that the Plaintiffs carried their initial burden under step one of the rule of reason analysis by showing that the NCAA rule at issue had anticompetitive effects.<sup>190</sup> As part of that determination, the court stated that the NCAA’s disputed rules “have significant anticompetitive effects in the relevant

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from the line of district and circuit cases that interpreted Justice Stevens’s [*Board of Regents*] dicta in ways that fortified the NCAA’s amateurism restrictions as noncommercial and, therefore, outside of § 1 [of the Sherman Act’s] jurisdiction.”).

187. See *Alston II*, 958 F.3d at 1256 (stating how to analyze under rule of reason).

188. See *id.* (“Throughout this analysis, we remain mindful that, although the NCAA is not above the antitrust laws, . . . courts are not ‘free to micromanage organizational rules or to strike down largely beneficial market restraints’ . . . . Accordingly, a court must invalidate a restraint and replace it with a [less restrictive alternative] only if the restraint is ‘*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives.’”).

189. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1075 (9th Cir. 2015) (“Thus, in holding that setting the grant-in-aid cap at student-athletes’ full cost of attendance is a substantially less restrictive alternative under the Rule of Reason, we are not declaring that courts are free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity. Rather, our affirmance of this aspect of the district court’s decision should be taken to establish only that where, as here, a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative.”).

190. See *Alston II*, 958 F.3d at 1256 (stating student-athletes passed first step of rule of reason). For further discussion of the steps of a rule of reason analysis, see *supra* note 187 and accompanying text.

market” for Plaintiffs’ student-athlete labor.<sup>191</sup> Closing up this stage of analysis, the court noted that the NCAA did not even dispute the findings regarding the anticompetitive effects of the relevant NCAA rules.<sup>192</sup> The Supreme Court later reiterated this point in its opinion, quoting the district court’s opinion.<sup>193</sup>

b. Challenge On the Call: Analyzing NCAA’s Procompetitive Justification for Anticompetitive Restraints

The circuit court then considered the procompetitive effects of the disputed NCAA rule, noting the NCAA’s heavy burden to demonstrate those procompetitive effects as well as the NCAA’s disagreement with the district court’s analysis on this step.<sup>194</sup> The NCAA’s procompetitive justification was that the challenged rules preserved amateurism and the difference between college and professional sports, thereby preserving consumer demand for amateurism and college sports.<sup>195</sup> Ultimately, the court not only accepted the district court’s findings but also followed the district court’s

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191. See *Alston II*, 958 F.3d at 1256 (noting rules had anticompetitive effects for Plaintiffs). The court also provides a quote from the district court opinion in *Alston I* to provide more clarity on the reasoning for why the compensation rules are anticompetitive:

“[B]ecause elite student-athletes lack any viable alternatives to [D1], they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [D1] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.”

*Id.* at 1256–57. For further discussion of the NCAA rules at issue in *Alston II*, see *supra* notes 34, 41 and accompanying text.

192. See *Alston II*, 958 F.3d at 1256–57 (“These findings ‘have substantial support in the record’ and the NCAA does not dispute them.” (citations omitted)).

193. See *Alston III*, 141 S. Ct. 2141, 2161-62 (2021) (“As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes’ labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA ‘did not meaningfully dispute’ this conclusion.” (citation omitted)).

194. See *Alston II*, 958 F.3d at 1257 (“[T]he NCAA bears a ‘heavy burden’ of ‘competitively justify[ing]’ its undisputed ‘deviation from the operations of a free market.’”) (quoting *Board of Regents*, 468 U.S. 85, 113 (1984)). For further discussion of steps of rule of reason analysis, see *supra* note 187 and accompanying text.

195. See *Alston II*, 958 F.3d at 1257 (“On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve ‘amateurism,’ which, in turn, ‘widen[s] consumer choice’ by maintaining a distinction between college and professional sports.”). In a concurring opinion issued by the Supreme Court, Justice Kavanaugh called the NCAA’s argument “circular and unpersuasive.” See *Alston III*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (indicating discontent for NCAA’s justification for its rules).

lead in splitting the analysis between limits restricting unlimited cash payments versus limits restricting education-related benefits.<sup>196</sup>

The Ninth Circuit briefly acknowledged that maintaining a distinction between college and professional sports is important to consumer demand and noted that “improving [consumer] choice is procompetitive.”<sup>197</sup> However, the Ninth Circuit accepted the district court’s finding that rules restricting non-cash education-related benefits are not procompetitive because they have no demand-preserving effect.<sup>198</sup> The court accepted this finding under the reasoning that the values of these types of benefits “[are] inherently limited to [their] actual value[s], and could not be confused with a professional athlete’s salary.”<sup>199</sup> The court gave a graduate school scholarship as an example of the limited value of education-related benefits.<sup>200</sup>

The circuit court similarly accepted the district court’s reliance on demand analyses, survey evidence, and NCAA testimony, all of which indicated that restrictions on non-cash education-related benefits have no procompetitive effect.<sup>201</sup> The court went on to

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196. *See Alston II*, 958 F.3d at 1260 (observing different finding for procompetitive nature of unlimited cash payment restrictions compared to finding for education-related benefits). The court ultimately held limits preventing unlimited cash payments preserve demand while restrictions on education-related benefits do not preserve demand. *See id.* (differentiating education-related benefits from non-education-related benefits).

197. *See id.* at 1257 (acknowledging importance of distinction between college versus professional sports for consumer demand, consumer preference).

198. *See id.* at 1257–58 (concluding restrictions on non-cash education-related benefits do not have procompetitive justification). The Supreme Court likewise agreed with the district court’s findings that “less restrictive restraints on education-related benefits” could still result in procompetitive effects for the NCAA. *See Alston III*, 141 S. Ct. at 2162 (agreeing with district court analysis on education-related benefits).

199. *See Alston II*, 958 F.3d at 1257 (explaining value limitations of non-cash education-related benefits).

200. *See id.* (explaining limited nature of value of education-related benefits, focusing on inherent difference between professional salaries, educational benefits).

201. *See id.* at 1257–58 (discussing evidence from district court testimony, analyses, surveys demonstrated lack of demand-preservation provided by disputed non-education-related restrictions). The mentioned demand analyses noted that relaxation of NCAA restrictions on education-related benefits since *O’Bannon* has not diminished consumer demand for NCAA events and activities. *See id.* at 1258 (explaining rule relaxations’ impact on demand for NCAA). The Plaintiffs also provided survey evidence that if NCAA rules allowed for some education-related benefits, NCAA demand would not be negatively impacted. *See id.* (“Student-Athletes’ survey evidence reflects that individually implementing seven types of education-related benefits—limited or forbidden under the challenged rules—would not diminish the survey respondents’ viewership or attendance.”). Finally, the Ninth Circuit mentioned NCAA testimony that demand studies were not consulted when making rules about compensation. *See id.* (“NCAA witnesses confirmed that

reject the NCAA's contention that NCAA amateurism rules prohibiting payment beyond the COA "[expand] consumer choice."<sup>202</sup> It did so reasoning that while *Board of Regents* and the Ninth Circuit's *O'Bannon* "define amateurism to exclude payment for athletic performance," the *Board of Regents* definition was dicta and the *O'Bannon* definition accepted the NCAA's understanding of amateurism based on the record of that case.<sup>203</sup> Furthermore, the record in *Alston II* called for a narrower understanding of "amateurism that still gives rise to procompetitive effects," stating that limits on unlimited payments to student-athletes are what differentiate student-athletes from professional athletes.<sup>204</sup> When this definition of amateurism was considered in *O'Bannon*, one commentator foresaw the potential for the NCAA to incorporate rules valuing both compensation and amateurism without diminishing one of those values.<sup>205</sup> Partially supporting that analysis, the Ninth Circuit in *Alston II* thus rejected the NCAA's proposed amateurism standard—which relied on not allowing any payment above COA—based on evidence that the recent "increase in permissible forms of above-COA compensation" did not diminish college sports demand.<sup>206</sup> In doing so, the court determined that NCAA restrictions

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the NCAA set limits on education-related benefits without consulting any demand studies.").

202. *See id.* (stating NCAA's argument "lacks support in both precedent and the record").

203. *See id.* (presenting *Board of Regents*'s, *O'Bannon*'s definitions of amateurism).

204. *See id.* (discussing difference between college versus professional sports).

205. *See Sheetz, supra* note 115, at 880-81 ("Following *O'Bannon*, [t]here are significant tensions still at play between the values of education and amateurism and the goals of compensating college athletes. However, by upholding both values in its decisions, perhaps the court left room for the NCAA to adopt a model that incorporates both compensation and amateurism.").

206. *See Alston II*, 958 F.3d at 1258-59 (recounting reasoning in rejecting NCAA's standard for amateurism rules, including its compensation rules). The Ninth Circuit also elaborated on why it rejected the NCAA's amateurism definition and survey evidence that the organization provided. *See id.* at 1259 ("The survey results reflect, at most, a consumer *preference* for 'amateurism,' but do not capture the effects (if any) that the tested compensation scenarios would have on consumer *behavior*."). The court agreed with the district court's description of the NCAA survey—which asked fans why they watched college sports and had 31.7% of responses select preference for the fact that college players are "amateurs and/or are not paid"—as "hopelessly ambiguous." *See id.* (recognizing amateurism term is without fixed definition). The court concluded that respondents selecting that answer "may have very well equated amateurism with student status, irrespective of whether those students receive compensation for athletics." *See id.* (speculating survey answer choices were not clear). Given this ambiguity, the NCAA's survey results did not have the value that the NCAA purported; they certainly did not have enough value to support the "expansive conception of amateurism." *See id.*



on certain education-related compensation had no procompetitive justification.<sup>207</sup>

The Ninth Circuit’s analysis of the procompetitive effects of NCAA restrictions on non-education-related unlimited cash payments was brief.<sup>208</sup> This portion of the opinion called back again to *O’Bannon*: even though suspicions lingered over the NCAA’s amateurism rules, some rules were not too restrictive.<sup>209</sup> Accordingly, the *Alston II* court accepted the district court’s understanding that limits on non-education related compensation like unlimited cash payments and above-COA payments did have procompetitive purposes.<sup>210</sup> The Supreme Court’s opinion acknowledged this conclusion on non-education-related benefits as a “wrinkle” in the case, but not one that offended the analytical process undertaken by the district court and Ninth Circuit.<sup>211</sup> This finding clearly and concisely demonstrated that the NCAA still has an interest in restricting non-education-related cash payments and benefits and that courts must recognize that interest.<sup>212</sup>

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(“Given this lack of clarity, the district court reasonably concluded that the NCAA’s survey results were of limited evidentiary value.”).

207. *See id.* at 1259–60 (noting restraints on certain education-related benefits do not preserve demand).

208. *See id.* at 1257–60 (discussing procompetitive purpose of challenged rules relating to unlimited cash compensation).

209. *See* Sheetz, *supra* note 115, at 879 (discussing *O’Bannon*’s conclusions that some NCAA rules still have procompetitive purposes).

210. *See Alston II*, 958 F.3d at 1257, 1260 (noting compensation limits preventing unlimited cash payments preserve demand, thus serving procompetitive purpose). The court also listed examples of challenged rules with procompetitive purpose. *See id.* at 1257 (“The district court concluded, however, that only *some* of the challenged rules serve that procompetitive purpose: limits on above-COA payments unrelated to education, the COA cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives.”).

211. *See Alston III*, 141 S. Ct. 2141, 2162 (2021) (“Even acknowledging this wrinkle, we see nothing about the district court’s analysis that offends the legal principles the NCAA invokes.”). When referring to “legal principles the NCAA invokes,” the Court was referencing the NCAA’s argument that “antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes.” *See id.* at 2161-62 (“Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA’s restraints ‘patently and inexplicably stricter than is necessary’ to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act.”).

212. *See Alston II*, 958 F.3d at 1260 (holding NCAA compensation limits relating to prevention of unlimited cash payments preserve demand for NCAA products).

c. Ruling Upheld: Ninth Circuit's Analysis of Student-Athletes' Less Restrictive Alternative

Continuing with the analysis, the *Alston II* court considered the less restrictive alternative stage of the rule of reason—at this stage, an acceptable less restrictive alternative demonstrates “that any legitimate objectives can be achieved in a substantially less restrictive manner.”<sup>213</sup> The less restrictive alternative considered by the court “would prohibit the NCAA from (i) capping certain education-related benefits and (ii) limiting academic or graduation awards or incentives below the maximum amount that an individual athlete may receive in athletic participation awards, while (iii) permitting individual conferences to set limits on education-related benefits.”<sup>214</sup> In considering the less restrictive alternative, the circuit court evaluated whether the alternative would be “virtually as effective in serving the procompetitive purposes of the NCAA’s current rules” and whether the alternative would greatly affect cost to the NCAA.<sup>215</sup>

Here, the Ninth Circuit considered the district court’s contemplation of the effectiveness of the less restrictive alternative in preserving the demand for college sports.<sup>216</sup> The court again accepted the district court’s conclusion that the less restrictive alternative would preserve demand just at the same level as the challenged rules.<sup>217</sup> The Ninth Circuit reasoned that the benefits are so connected to education that they are not comparable to professional salaries, especially given that the value of the benefits is limited to the actual costs of the benefits provided—meanwhile, a professional salary would not be limited in the same way.<sup>218</sup> The Supreme Court later supported this conclusion, also stating that there was no

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213. *See id.* at 1256, 1260 (discussing rule of reason third step, noting burden on Plaintiffs to demonstrate viability of proposed less restrictive alternatives including how to identify acceptable less restrictive alternative). For further discussion of the steps of a rule of reason analysis, see *supra* note 187 and accompanying text.

214. *See Alston II*, 958 F.3d at 1260 (discussing less restrictive alternative identified by district court).

215. *See id.* (acknowledging necessary discussion of effectiveness of less restrictive alternative including effects on cost).

216. *See id.* (noting discussion of preservation of consumer demand for college athletics).

217. *See id.* (ruling uncapping education-related benefits would still preserve consumer demand).

218. *See id.* at 1261 (stating difference between less restrictive alternative compared to professional compensation).

evidence that such benefits for student-athletes would hurt demand for the product.<sup>219</sup>

The Ninth Circuit further reasoned that allowing competition related to education-related benefits would “reinforce consumers’ perception of student-athletes as students” given that they are receiving a benefit that only students can receive.<sup>220</sup> The court also explicitly rejected the NCAA’s argument that these uncapped benefits would not be distinguishable from professional salaries.<sup>221</sup> It reasoned that the NCAA was reading the district court’s injunction too expansively and the context of the injunction demonstrates that it does not permit any unlimited cash payments but instead is reserved for “non-cash education-related benefits” for “*legitimate* education-related costs.”<sup>222</sup> Thus, when properly interpreting the injunction and accounting for available evidence, demand is not negatively impacted by the proposed less restrictive alternative.<sup>223</sup>

When analyzing less restrictive alternatives, a court may issue an injunction if it finds that a less restrictive alternative exists.<sup>224</sup> In addressing the issue of cost increases caused by the less restrictive alternative, the *Alston II* court quickly determined that the less re-

219. *See Alston III*, 141 S. Ct. 2141, 2165 (2021) (discussing difference between professional salary versus current NCAA benefits while noting athletic awards would not adversely impact demand for NCAA competition).

220. *See Alston II*, 958 F.3d at 1261 (discussing importance of perceiving student-athletes as students for demand).

221. *See id.* (stating lack of evidence for NCAA’s claim that less restrictive alternative would lead to student-athletes’ payment being indistinguishable from professionals’ payments).

222. *See id.* (quoting *Alston I*, 375 F. Supp. 3d 1058, 1105 (N.D. Cal. 2019)) (rejecting NCAA argument about threat of student-athlete compensation similar to professional salaries).

223. *See id.* at 1260 (concluding uncapped education-related benefits would not be detrimental to consumer demand). The Ninth Circuit also rejected the NCAA’s challenge to evidence underlying the less restrictive alternative, stating that the NCAA failed in explaining why cumulative evidence was insufficient to support the less restrictive alternative. *See id.* at 1262 (“The NCAA fails to explain why the cumulative evidence, which included demand analyses regarding the growth of NCAA revenue alongside the expansion of SAF and AEF payments for education-related expenses, was insufficient.”). Finally, the Court considered the NCAA’s contention that the district court improperly engaged in “judicial price setting by tying the cap on academic and graduation awards and incentives to the cap on aggregate athletic participation awards.” *See id.* (discussing NCAA arguments about judicial price setting). The Court rejected that argument, noting that the actual responsibility of setting the value of academic awards remains vested with the NCAA. *See id.* (“But the district court did not *fix* the value of these academic awards: The task of setting their value to protect demand, by adjusting the aggregate value of athletic participation awards, remains in the NCAA’s court.”).

224. *See Sheetz, supra* note 115, at 877 (describing process of issuing injunction, which *O’Bannon* proceedings demonstrated).

strictive alternative would not significantly increase costs.<sup>225</sup> The court agreed with the district court that uncapping education-related benefits would ultimately save the NCAA money and resources by eliminating the need to enforce the caps.<sup>226</sup> The court also stated that there is no reason to believe regulation of academic awards and education-related benefits would lead to those cost increases.<sup>227</sup> Relying on this reasoning, the circuit court stated that the district court's findings were "certainly not clearly erroneous."<sup>228</sup>

The Ninth Circuit court did not place a large focus on the district court's rejection of Plaintiffs' proposed less restrictive alternative (to uncap all non-education-related cash payments for student-athletes) during its less restrictive alternative discussion but returned to the district court's conclusion during the injunction analysis.<sup>229</sup> Appeals courts do not always accept the less restrictive alternatives of lower courts, as was the case in *O'Bannon*.<sup>230</sup> Nevertheless, the circuit court accepted the district court's rejection of the proposed less restrictive alternative specifically for the non-education-related benefits, reasoning that such payments could negatively impact perception of college sports as unique from professional sports.<sup>231</sup> The circuit court thus declared the limits on non-education-related cash compensation as "*not . . . anticompetitive conduct*" and declined to enjoin them.<sup>232</sup> Beyond this case, the NCAA is ready to allow some non-education-related NIL compensation for student-athletes given pressure from state legislation.<sup>233</sup>

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225. See *Alston II*, 958 F.3d at 1262 ("The district court did not clearly err in finding that this [least restrictive alternative] will not result in significantly increased costs.").

226. See *Alston II*, 958 F.3d at 1262 (noting less restrictive alternative would not lead to much greater costs).

227. See *id.* at 1263 (stating NCAA's ability to regulate benefits would not necessarily result in greater costs).

228. See *id.* ("The court's findings at step three are supported by the record, and certainly not clearly erroneous.").

229. See *id.* at 1264 (discussing proposed less restrictive alternative to eliminate unlimited cash payment limits).

230. See Sheetz, *supra* note 115, at 879 (observing *O'Bannon* court struck down district court's remedy, finding it "erroneous").

231. See *Alston II*, 958 F.3d at 1264 (noting demand is preserved by limits on non-education-related payments).

232. See *id.* ("Contrary to Student-Athletes' understanding, this analysis reflects the judgment that limits on cash compensation unrelated to education do *not*, on this record, constitute anticompetitive conduct and, thus, may not be enjoined.").

233. See Dennis Dodd, *NCAA Rushing a Name, Image, Likeness Rule as its Power Over College Athletics is Quickly Diminishing*, CBS SPORTS (May 10, 2021), <https://www.cbssports.com/college-football/news/ncaa-rushing-a-name-image-likeness->

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These state laws will take some power away from the NCAA in placing meaningful limits on this type of compensation for student-athletes.<sup>234</sup>

3. *A Slam Dunk: Affirming The Alston I Injunction Amidst NCAA and Plaintiff Opposition*

Moving to the injunction, the circuit court considered the NCAA's contention that the injunction went too far as well as the student-athletes' contention that the injunction did not go far enough.<sup>235</sup> The court ultimately ruled that the district court's carefully crafted injunction did well to provide remedy for Plaintiffs while preserving demand for Defendants.<sup>236</sup> Therefore, they affirmed the injunction as is.<sup>237</sup> The Supreme Court later took the same stance, preserving the district court's original injunction.<sup>238</sup> The injunction was therefore properly structured to only enjoin NCAA restrictions on education-related benefits available to student-athletes.<sup>239</sup>

On appeal to the Ninth Circuit, the NCAA alleged that the injunction issued against it was too vague and interfered with the "association's role as the 'superintend[ent]' of college sports."<sup>240</sup> The

rule-as-its-power-over-college-athletics-is-quickly-diminishing/ [https://perma.cc/S86G-H96Z] (noting NCAA president's recommendation to approve NIL legislation for college athletes before July 1, when related state legislation would otherwise take action).

234. *See id.* (explaining how implementation of NIL rules has been taken out of NCAA's hands, meaning future NCAA attempts to limit student-athlete NIL compensation "could bring more legal action").

235. *See Alston II*, 958 F.3d at 1263 ("The final question remaining is whether the district court's injunction goes too far or not far enough in enjoining the NCAA's unlawful conduct.").

236. *See id.* ("[T]he district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.").

237. *See id.* ("Thus, we neither vacate nor broaden the injunction, but affirm.").

238. *See Alston III*, 141 S. Ct. 2141, 2166 (2021) (holding district court's injunction was "within the law's bounds" in part because district court did not "[f]a]ll prey to [the] temptation" to meddle in business affairs beyond normal judicial review).

239. *See id.* at 2153 ("Enjoining the NCAA's restrictions on these forms of [education-related] compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports.").

240. *See Alston II*, 958 F.3d at 1263 (recounting NCAA's challenge to injunction). In alleging the injunction was too vague, the NCAA believed the injunction was in violation of Rule 65(d) of the Federal Rules of Civil Procedure. *See id.* ("In the NCAA's view, the injunction is impermissibly vague, in violation of Federal Rule of Civil Procedure 65(d) ("Rule 65(d)"), and usurps the association's role as the "superintend[ent]" of college sports.").

*Alston II* court rejected the NCAA's challenge, declaring that the injunction did not meet the necessary standard for being struck down—that is, it was not “so vague that [it has] no reasonably specific meaning.”<sup>241</sup> The court reasoned that the injunction was reasonably specific given that it used exact language and particular examples of enjoined behavior.<sup>242</sup>

The circuit court then addressed the issue of whether the injunction takes control of the association's own rules out of the hands of the NCAA.<sup>243</sup> Here, the court concluded that the injunction did not result in “judicial usurpation” and did not give courts control over NCAA rules.<sup>244</sup> The court reasoned that the injunction did not give power to courts but rather left control with the NCAA for defining what constitutes “related to education” and merely subjected that definition to subsequent approval by courts.<sup>245</sup> Justice Gorsuch's Supreme Court opinion would eventually agree with this assessment, applauding the district court's judgment for “stand[ing] on firm ground” behind “an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.”<sup>246</sup>

While the *Alston II* court concluded the injunction was not too broad and did not go too far, it also had to consider Plaintiffs' cross-appeal that the injunction did not go far enough and “should have enjoined *all* NCAA compensation limits.”<sup>247</sup> The court rejected this

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241. *See id.* (stating injunction could not be struck down as vague).

242. *See id.* (advocating context of injunction while recognizing examples listed with injunction provide reasonable specificity). The NCAA was not confused by the injunction enjoining NCAA limits on “compensation and benefits related to education.” *See id.* (explaining NCAA's position on injunction). However, the association did claim that the “injunction's reference to other tangible items not included in the [COA] but nonetheless related to the pursuit of academic studies” was too vague under Rule 65(d). *See id.* (stating NCAA's opinion regarding injunction's specifics). The court rejected this argument, stating that reading the injunction in context with the list of examples of education-related equipment demonstrated the language of the injunction was “reasonably specific.” *See id.* (“When read in context, following a list of specific types of education-related equipment, this language is reasonably specific.”).

243. *See id.* (discussing NCAA's challenge of injunction for seizing control over NCAA by courts).

244. *See id.* at 1263–64 (holding injunction did not usurp NCAA's control over its own rules).

245. *See id.* (explaining NCAA has power to define what is related to education but court gets final approval on definition).

246. *See Alston III*, 141 S. Ct. 2141, 2166 (2021) (stating district court's judgment was not judicial usurpation).

247. *See Alston II*, 958 F.3d at 1263 (acknowledging cross-appeal by Plaintiffs for stronger injunction).

argument by the student-athlete Plaintiffs, reasoning that the NCAA carried its burden of demonstrating procompetitive justification for rules prohibiting unlimited payments unrelated to education and the proposed less restrictive alternative to enjoin all compensation limits would not preserve those procompetitive effects.<sup>248</sup> At the Supreme Court level, the Plaintiffs did not renew their challenges to NCAA restrictions not enjoined by the original injunction, “confin[ing] [the Supreme Court’s review] to those restrictions now enjoined.”<sup>249</sup> The *Alston II* court also rejected the Plaintiffs’ arguments that the NCAA had endorsed NIL benefits of non-education-related cash payments through changes to rules following *O’Bannon*; the NCAA had merely altered its rules to comply with *O’Bannon*.<sup>250</sup>

#### B. Garbage Time for The Bench Unit: Reviewing the Concurrence

A concurring opinion was issued in *Alston II* by Ninth Circuit Judge Milan Smith, who joined the majority panel in full but wished to express concern over expansion of the rule of reason that seems to be occurring in antitrust law (and actually harming student-athletes’ protections under antitrust law).<sup>251</sup> In particular, Judge Smith noted that the treatment of student-athletes going largely uncompensated for their labor and talent is not the result of free market competition but rather “the result of a cartel of buyers acting in concert to artificially depress the price” student-athletes might otherwise receive.<sup>252</sup> Judge Smith also criticized the tendency of courts to expand consideration of procompetitive effects beyond the limits of the market at issue.<sup>253</sup> Here, the consideration of procompeti-

248. *See id.* at 1264 (“As previously stated, the district court concluded, at step two, that the NCAA satisfied its burden of showing that ‘[r]ules that prevent unlimited payments’—‘unrelated to education’ and ‘akin to salaries seen in professional sports leagues’—serve the procompetitive end of distinguishing college from professional sports.”).

249. *See Alston III*, 141 S. Ct. at 2154 (“For their part, the student-athletes do not renew their across-the-board challenge to the NCAA’s compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court’s judgment upholding them.”).

250. *See Alston II*, 958 F.3d at 1265 (stating Plaintiffs’ argument NCAA has endorsed non-education-related cash payments is premature).

251. *See id.* at 1266 (Smith, J., concurring) (explaining concerns over state of antitrust law).

252. *See id.* at 1267 (Smith, J., concurring) (explaining student-athletes’ treatment in their market is result of behavior meant to be prohibited by antitrust law).

253. *See id.* at 1269 (Smith, J., concurring) (“Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified from the outset. If the purpose of the Rule of Reason is to determine whether

tive effects was not limited to the student-athlete services market but instead also considered the effects on demand outside of the market.<sup>254</sup> Ultimately, Judge Smith warned that this “cross-market Rule of Reason analysis frustrates the very purpose of the antitrust laws” and stated that there is no justification pronounced for the shift to cross-market analysis.<sup>255</sup>

#### V. GOING TO THE BOOTH: REPLAYING THE DECISION AND OFFERING CRITICAL ANALYSIS

This Section analyzes and critiques the logic, reasoning, and conclusion of the circuit court in *Alston II*.<sup>256</sup> The Ninth Circuit never actually addressed the circuit split that existed during the litigation, as it accepted and relied upon the ruling and findings from *O'Bannon*.<sup>257</sup> This absence of discussion of the circuit split and issues regarding commercial nature and procompetitive presumptions was consistent with the *O'Bannon* opinion and followed the custom of stare decisis.<sup>258</sup> The issues of whether the market was commercial or whether NCAA rules should be presumed to be procompetitive were already settled by the Ninth Circuit, so they did not need to be addressed in this instant case.<sup>259</sup> Thus, the Ninth Circuit properly declined to analyze those issues again by not addressing them anywhere in the opinion.<sup>260</sup>

The critique begins by considering the court's determinations regarding res judicata and stare decisis.<sup>261</sup> The conclusion by the court in this part of the analysis was straightforward and easily un-

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a restraint is net procompetitive or net anticompetitive, accepting procompetitive effects in a collateral market disrupts that balancing.”).

254. See *id.* at 1269–70 (Smith, J., concurring) (arguing rule of reason analysis went beyond labor market identified by student-athlete Plaintiffs).

255. See *id.* at 1270–71 (Smith, J., concurring) (suggesting rule of reason analysis going beyond labor market seems to go against purpose of antitrust laws, especially considering cross-market analysis was detrimental to student-athlete Plaintiffs in this case).

256. For further discussion of a critical analysis of *Alston II*, see *infra* notes 257–282 and accompanying text.

257. See *Alston II*, 958 F.3d at 1244 (declaring *O'Bannon* as standard to follow).

258. For further discussion of the circuit split and analysis of the split, see *supra* notes 115–161 and accompanying text.

259. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1064–65 (9th Cir. 2015) (advocating rules must be proved to be valid, not presumed valid). For further discussion of *O'Bannon*, see *supra* notes 149–161 and accompanying text.

260. See generally *Alston II*, 958 F.3d 1239 (accepting *O'Bannon's* ruling on these matters).

261. For further discussion of the Ninth Circuit's analysis of stare decisis and res judicata, see *supra* notes 171–184 and accompanying text.



derstood, as the court noted that *stare decisis* could not foreclose the litigation because of material factual differences between the instant litigation and the previously decided *O'Bannon*.<sup>262</sup> However, the court reasoned that the situation was factually different in a material way because the NCAA had relaxed its compensation limits in the wake of *O'Bannon*; now that the compensation limits were more relaxed during *Alston II* than what they were during *O'Bannon*, the facts of *Alston II* were sufficiently different from *O'Bannon* to support new litigation.<sup>263</sup> This reasoning, however, implies that the NCAA's response to the *O'Bannon* ruling made it susceptible to subsequent litigation on similar issues.<sup>264</sup> Nevertheless, the reasoning is logically sound and consistent with the Ninth Circuit's prior *O'Bannon* decision and the Supreme Court's statement in *Leegin Creative Products* regarding the fact specific nature of antitrust cases.<sup>265</sup> The recent relaxation of the rules means they are different from the *O'Bannon* litigation.<sup>266</sup> The circuit court's reluctance to apply *res judicata* and the effect of allowing the claim was likewise logically sound given the court's reasoning; it does not make any sense to preclude a claim arising from events that occurred after *O'Bannon* closed.<sup>267</sup>

Moving to the court's rule of reason analysis, the first step of the rule of reason analysis was logical and straightforward, considering that the NCAA did not dispute that the rules at issue had "significant anticompetitive effects" in the market for student-athlete skills.<sup>268</sup> No dispute meant the end of the analysis for step one.<sup>269</sup>

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262. *See Alston II*, 958 F.3d at 1254–55 (indicating NCAA conceded instant litigation was factually different from *O'Bannon* litigation previously decided).

263. *See id.* ("Additionally, the NCAA's concession that it has relaxed its compensation limits since *O'Bannon* only underscores that the instant litigation is materially factually different from *O'Bannon*.").

264. *See id.* (stating relaxation of NCAA compensation rules differentiated instant case from *O'Bannon*).

265. *See id.* at 1253 (citing *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007)) (explaining need for fact-sensitive nature of antitrust litigation).

266. *See id.* at 1253–55 (stating relaxed rules are "materially factually different" from previously unchanged rules).

267. *See id.* at 1255–56 (explaining claim preclusion cannot apply when claims at issue were not in existence when prior action was settled).

268. *See id.* at 1256–57 (discussing anticompetitive effects of NCAA rules, specifically recognizing lack of challenge by NCAA to this finding). This finding by the circuit court did not analyze the anticompetitive nature of the NCAA rules but rather accepted the district court's findings on the matter. *See id.* (accepting district court findings, relying on record from district court). For further discussion of rule of reason analysis steps, see *supra* note 187 and accompanying text.

269. *See Alston II*, 958 F.3d at 1256–57 (concluding first step is settled because of lack of dispute). Because the NCAA did not dispute the district court's finding

However, the second step of the rule of reason analysis was more analytical for the Ninth Circuit and likewise more open to critique.<sup>270</sup> The court had accepted all of the district court's findings on demand analyses, survey evidence, and NCAA testimony—and it was correct to do so as it needed to rely on the record from the district court.<sup>271</sup> Ultimately, the circuit court's methods for analysis and conclusions on this issue were consistent with its prior decision in *O'Bannon* and consistent with the record of the instant case.<sup>272</sup>

While this step of the rule of reason analysis was consistent with the prior decision of *O'Bannon*, the concurrence included in *Alston II* raised valid criticisms of the analysis.<sup>273</sup> The main point of contention—that the step two analysis of procompetitive effects went beyond the defined market—argues effectively that the current rule of reason analysis is flawed.<sup>274</sup> This demonstrates inconsistency in the way that the *Alston II* court carried out the rule of reason analysis given that the first step of the analysis was confined to the defined market but the second step examined the procompetitive effects beyond the market.<sup>275</sup> The concurring judge also noted that this exception for the second step of the analysis disadvantages plaintiffs like the student-athletes and likewise “frustrates the very purpose of the antitrust laws.”<sup>276</sup> Because antitrust law is meant to “[outlaw] only unreasonable restraints” on trade as they arise, this version of the rule of reason analysis does seem to frustrate the law's intent because it gives more leeway to unreasonable restraints—such as NCAA rules.<sup>277</sup> Given this apparent conflict be-

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at this stage, there was no longer a dispute over this issue; it makes sense for the circuit court not to spend time doing more analysis. *See id.* (“These findings ‘have substantial support in the record’ . . . and the NCAA does not dispute them.”).

270. For further discussion of the Ninth Circuit's rule of reason second step analysis, see *infra* notes 271–278 and accompanying text.

271. *See Alston II*, 958 F.3d at 1257–58 (determining acceptance of district court's findings based on record).

272. *See id.* (stating importance of record in making decision).

273. For further discussion of Judge Smith's concurrence, see *supra* notes 251–255 and accompanying text.

274. *See Alston II*, 958 F.3d at 1268, 1270–71 (Smith, J., concurring) (discussing rule of reason analysis while arguing step two of analysis typically goes beyond defined market).

275. *See id.* at 1256, 1257–59 (majority opinion) (stating anticompetitive effects identified must be in relevant market but noting procompetitive effects relate to demand for NCAA's amateur sports product).

276. *See id.* at 1266–67, 1271 (Smith, J., concurring) (stating cross-market rule of reason analysis done in second step goes against purpose of antitrust law).

277. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (explaining Supreme Court's ruling Section 1 of Sherman Act bars only unreasonable restraints).

tween the steps of the analysis and whether this analysis upholds antitrust law's intent, the reasoning by the *Alston II* majority at that stage in the analysis, though sound, is not as powerful as other parts of the opinion.<sup>278</sup>

In addressing the injunction, the Ninth Circuit held that the injunction did not go too far because it did not take any power away from the NCAA to define what constituted something “related to education”—though the court then had to approve the NCAA’s definition.<sup>279</sup> This injunctive relief presents a straightforward issue that the NCAA reasonably challenged: the court has the final say over the definition so the court seemingly has control over the definition.<sup>280</sup> While this appears problematic at first glance, this portion of the injunctive relief is still consistent with the rest of the court’s opinion because it recognizes the duty of courts to preside over trade restraints and prevent unreasonable restraints.<sup>281</sup> Moreover, given that the action was brought by Plaintiffs whom were harmed by the conduct of the NCAA, it is necessary to carry out the injunctive relief granted for the Plaintiffs to the fullest extent possible; if the court did not monitor the NCAA’s adjustments following the ordered injunction, there would be no guarantee that the restrictive behavior would be corrected.<sup>282</sup>

#### VI. WHAT ARE THE VEGAS ODDS ON FUTURE LITIGATION AND HOW CAN I BET ON THAT?: ASSESSING *ALSTON II*'S (AND THEREFORE *ALSTON III*'S) IMPACT

The Ninth Circuit’s *Alston II* decision will immediately impact U.S. antitrust law, as the Supreme Court granted certiorari on the case and issued an opinion in June 2021.<sup>283</sup> Following a unanimous decision by the Supreme Court affirming the Ninth Circuit decision, the Court resolved the circuit split previously mentioned in

278. For further discussion of a rule of reason criticism, see *supra* notes 268–278 and accompanying text.

279. See *Alston II*, 958 F.3d at 1263–64 (noting court left power over NCAA definitions with NCAA but definition is subject to court approval).

280. See *id.* (noting court’s power to approve (or disapprove) of NCAA’s definition of what relates to education).

281. See *id.* (stating vesting of control in NCAA subject to court approval is not “judicial usurpation by a long shot”).

282. For further discussion of the injunction issued, see *supra* notes 235–250 and accompanying text.

283. See *Alston Petition*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 1231 (2020) (No. 20-512) (“Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. The case is consolidated, and a total of one hour is allotted for oral argument.”). See *generally* *Alston III*, 141 S. Ct. 2141 (2021).

this Note in *Alston III*.<sup>284</sup> Indeed, the Court settled whether the NCAA is commercial and under the restraints of the Sherman Act, indicating that the NCAA is in fact commercial in nature.<sup>285</sup> The Supreme Court's decision likewise clarified the *Board of Regents* dicta about the "ample latitude" the NCAA needs for rule-making, indicating that the NCAA shall not receive any procompetitive presumption for its compensation rules.<sup>286</sup> Nor shall courts "reject *all* challenges to the NCAA's compensation restrictions" according to the Supreme Court opinion.<sup>287</sup>

The Supreme Court's decision on the case is surely impactful, but it is what is written in the Ninth Circuit's decision in *Alston II* and the district court's decision in *Alston I* that gives important takeaways for antitrust law.<sup>288</sup> First, the Ninth Circuit's two holdings in the case must be considered.<sup>289</sup> The narrowest holding in the case was the ruling on the injunction; by affirming the district court's injunction, the Ninth Circuit applied the injunction only to the challenged rules in the case and refused to enjoin additional NCAA rules.<sup>290</sup> Despite its short reach, this holding in *Alston II* greatly impacts the NCAA as it mandates a change in rules and disallows caps on education-related benefits for student-athletes at NCAA member universities.<sup>291</sup> Commentators likewise believe that the amateurism model of the association is threatened by this deci-

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284. See generally *Alston III*, 141 S. Ct. at 2166 (affirming both district court's holding in *Alston I*, Ninth Circuit's affirmation in *Alston II*). For further discussion of the circuit split, see *supra* notes 115–161 and accompanying text.

285. See *Alston III*, 141 S. Ct. at 2158–60 (rejecting NCAA's argument that its member schools are not commercial enterprises).

286. See *id.* at 2158 (noting *Board of Regents* court was merely "assuming the reasonableness of the NCAA's restrictions" rather than declaring them procompetitive). For further discussion of *Board of Regents* and NCAA-related antitrust litigation, see *supra* notes 103–161 and accompanying text.

287. See *Alston III*, 141 S. Ct. at 2158 ("*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions.").

288. For further discussion of *Alston II*'s impact, see *infra* notes 289–323 and accompanying text.

289. For further discussion of *Alston II*'s holdings, see *supra* notes 168–282, 290–300 and accompanying text.

290. See *Alston II*, 958 F.3d 1239, 1263–64 (9th Cir. 2020) (acknowledging appeal by Plaintiffs for stronger injunction but rejecting Plaintiffs' request). For further discussion of the court's injunction, see *supra* notes 235–250 and accompanying text.

291. See *Alston I*, 375 F. Supp. 3d 1058, 1109–10 (N.D. Cal. 2019) (noting district court's decision that education-related benefits for student-athletes beyond COA cannot be limited).

sion.<sup>292</sup> The Supreme Court’s affirmation of the injunction creates greater tension regarding the NCAA’s amateurism model.<sup>293</sup>

The second *Alston II* holding is implicit and refers to the Ninth Circuit’s faithfulness to its prior *O’Bannon* decision.<sup>294</sup> The implicit holding has two layers: rules must be proved to be valid, not presumed as such, and rules regulating an exchange that is a “quintessentially commercial” can be considered commercial in nature despite their “anti-commercial” intent.<sup>295</sup> By accepting the *O’Bannon* decision’s findings on both of these points, the *Alston II* court further cemented the Ninth Circuit’s interpretation of *Board of Regents* and how NCAA rules should be treated under antitrust law.<sup>296</sup> This holding was broad in that it can apply to all NCAA rules challenged before a court; the procompetitive nature of rules must be proven and the commercial nature of rules can be recognized despite facially anticompetitive purposes.<sup>297</sup> The Supreme Court’s affirmation of the Ninth Circuit opinion further confirmed this holding.<sup>298</sup> *Alston III* made clear that the procompetitive presumption previously recognized by some circuits was not declared by the *Board of Regents* Court—NCAA rules, particularly compensation rules, are not immune from antitrust litigation.<sup>299</sup> *Alston III* serves as a clarification for *Board of Regents* and alludes to future NCAA antitrust litigation given its affirmation of *Alston II*’s broad holding.<sup>300</sup>

Even if the Supreme Court had never reviewed this case, *Alston II* would still be impactful.<sup>301</sup> The holdings of the court—in partic-

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292. See Ramsey, *supra* note 53 (noting *Alston II*’s threat to NCAA’s amateurism model).

293. See *Alston III*, 141 S. Ct. 2141, 2166 (2021) (holding district court’s injunction was “within the law’s bounds”).

294. For further discussion of *Alston II*’s continuation of *O’Bannon*, see *supra* notes 257–260 and accompanying text.

295. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1064–66 (9th Cir. 2015) (noting stance against procompetitive presumption; discussing presence of commercial nature despite anti-commercial intent).

296. For further discussion of *O’Bannon*, see *supra* notes 149–161 and accompanying text.

297. See *Alston II*, 958 F.3d 1239, 1244, 1265–66 (9th Cir. 2020) (noting faithfulness to *O’Bannon* in current analysis). For further discussion of *O’Bannon* holdings, see *supra* notes 154–155, 159–160 and accompanying text.

298. See *Alston III*, 141 S. Ct. at 2166 (affirming judgment of Ninth Circuit).

299. See *id.* at 2163 (noting *Board of Regents* dicta about NCAA rulemaking did not cement NCAA compensation restrictions as procompetitive).

300. For further discussion of *Alston III*’s clarification of *Board of Regents*, see *supra* notes 294–299 and accompanying text.

301. For further discussion of *Alston II*’s impact without Supreme Court review, see *infra* notes 302–314 and accompanying text.

ular the previously mentioned implicit holding—would create a more apparent circuit split.<sup>302</sup> Nothing regarding the circuit split was resolved in *Alston II*; instead, the Ninth Circuit stood its ground and maintained its understanding of *Board of Regents* by relying heavily on the reasoning and analysis presented in *O'Bannon*.<sup>303</sup> Given the allegiance to *O'Bannon* by the *Alston II* court, the Ninth Circuit already seemed set on this stance and subsequent litigation of related issues in that jurisdiction would be doubly bound to the *O'Bannon* analysis.<sup>304</sup> Still, given the unwillingness to preclude the instant litigation given the difference in facts from *O'Bannon*, the Ninth Circuit's *Alston II* opinion makes clear that each distinct set of facts will warrant its own analysis.<sup>305</sup>

*Alston II*'s impact on other jurisdictions was speculative pending the Supreme Court review, inferring some takeaways when considering the makeup of the rest of the circuit split.<sup>306</sup> Before *Alston III*, *Alston II* served more as a confirmation of *O'Bannon* than a new *Board of Regents* interpretation so the current balance of opinions among the circuits was not changed.<sup>307</sup> The Seventh Circuit still had a procompetitive presumption for NCAA rules focused on amateurism, courtesy of the *Agnew* decision.<sup>308</sup> Similarly, the Sixth Circuit and Third Circuit both maintained their respective stances that antitrust litigation regarding NCAA eligibility rules could not go forward because those rules are not commercial in nature.<sup>309</sup> *Alston*

302. For further discussion of the court's implicit holding, see *supra* notes 294–297 and accompanying text. For further discussion of the circuit split, see *supra* notes 115–161 and accompanying text.

303. See generally *Alston II*, 958 F.3d 1239 (9th Cir. 2020) (citing *O'Bannon* repeatedly for guidance in antitrust analysis); see also *id.* at 1266 (Smith, J., concurring) (noting binding effect of *O'Bannon* decision on Ninth Circuit in *Alston II*). For further discussion of *Board of Regents*, see *supra* notes 103–113 and accompanying text.

304. See *Alston II*, 958 F.3d at 1244 (discussing need for antitrust analysis to be faithful to *O'Bannon*).

305. See *id.* at 1253–1255 (explaining factual differences between *O'Bannon* versus *Alston II* while highlighting importance of “case-by-case adjudication” when factual differences exist). For further discussion of *Alston II*'s stare decisis and res judicata analyses, see *supra* notes 171–184 and accompanying text.

306. For further discussion of *Alston II*'s impact on other jurisdictions, see *infra* notes 307–314 and accompanying text.

307. For further discussion of circuit split, see *supra* notes 115–161 and accompanying text.

308. See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 341–43 (7th Cir. 2012) (establishing procompetitive presumption for NCAA regulations meant to preserve amateurism). For further discussion of Seventh Circuit's *Agnew*, see *supra* notes 124–131 and accompanying text.

309. See *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 433 (6th Cir. 2008) (stating NCAA student-athlete eligibility rules are not commercial); see also *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185–86 (3d Cir. 1998) (hold-

*II* did not even comment on these rival decisions because the Ninth Circuit was basing its analysis off of the trail that *O'Bannon* had blazed.<sup>310</sup> The Ninth Circuit reaffirmed its rebuke of the other circuits but declined to disagree any further with those circuit courts.<sup>311</sup> The effect of this silence was unclear but realistically could have impacted other jurisdictions in two distinct ways: (1) other circuits would have continued thinking nothing has changed since *O'Bannon* given that *Alston II* does not elaborate on the analysis, or (2) other circuits would have viewed *Alston II* as strengthening *O'Bannon's* analysis.<sup>312</sup> The first possibility was addressed earlier by this Note in the discussion of *O'Bannon's* binding effect on *Alston II*.<sup>313</sup> The second possibility was previously hinged on a balancing act between the different circuit courts involved in the circuit split; *Alston II* gave the *O'Bannon* analysis another leg to stand on when considering the views of competing circuits.<sup>314</sup> Now, the Supreme Court opinion in *Alston III* eliminates the circuit split regarding the NCAA's purported procompetitive presumption and non-commercial nature.<sup>315</sup> To that extent, *Alston III* establishes how to properly review antitrust litigation pertaining to the NCAA—a fact that will be important in future suits.<sup>316</sup>

*Alston II* and *Alston III* may also have an impact that goes beyond time in court when considering the emergence of pay for play

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ing eligibility rules do not fall under Sherman Act because they are not commercial). For further discussion of *Bassett*, see *supra* notes 132–138 and accompanying text. For further discussion of *Smith*, see *supra* notes 139–148 and accompanying text.

310. For further discussion of *Alston II's* close following of *O'Bannon*, see *supra* notes 257–260 and accompanying text.

311. See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1066 (9th Cir. 2015) (indicating *O'Bannon* court was not convinced by *Smith* or *Bassett* decisions—*O'Bannon's* court stated *Bassett's* reasoning was “simply wrong”).

312. For further discussion of two possible impacts of *Alston II's* silence on the former circuit split, see *infra* notes 313–314 and accompanying text.

313. For further discussion of *Alston II* being bound by *O'Bannon*, see *supra* notes 257–260, 297, 303–304 and accompanying text.

314. For further discussion of the Seventh Circuit's reasoning, see *supra* notes 124–131 and accompanying text. For further discussion of the Sixth and Third Circuits' reasoning, see *supra* notes 132–148 and accompanying text. For further discussion of the Ninth Circuit's reasoning, see *supra* notes 149–161, 168–250 and accompanying text.

315. See *Alston III*, 141 S. Ct. 2141, 2158–59 (2021) (asserting NCAA did not earn procompetitive presumption for its compensation restrictions, declining to agree with NCAA's position that NCAA is not commercial).

316. See *id.* at 2166 (Kavanaugh, J., concurring) (stating Supreme Court's *Alston III* majority decision “marks an important and overdue course correction” to prevent NCAA from avoiding future antitrust scrutiny).

laws in some states.<sup>317</sup> While the Ninth Circuit's decision in *Alston II* and Supreme Court's decision in *Alston III* do not offer significant ground to student-athletes in the push for NIL compensation or non-education related compensation, they do push the issue and attack the NCAA's amateurism model.<sup>318</sup> Given the Ninth Circuit's view on eligibility rules being subject to antitrust review and its somewhat blunt rejection of the NCAA's appeal, other student-athlete plaintiffs may be inclined to strike the iron while it is hot in more antitrust litigation against the NCAA.<sup>319</sup> Likewise, the Supreme Court's affirmation of *Alston II* and the further success of the student-athlete Plaintiffs may encourage future antitrust suits against the NCAA.<sup>320</sup> Beyond the scope of the courtroom, states may also see the judiciary's stance as a jumping-off point for additional pay for play legislation.<sup>321</sup> Recently, the association has made concessions on some rules; for example, the NCAA announced that it would let players receive NIL compensation back in October of 2019.<sup>322</sup> *Alston II* and subsequent litigation may provide additional pressure to the NCAA that could result in even more changes to current amateurism rules.<sup>323</sup>

Justice Kavanaugh's concurrence in *Alston III* demonstrates the potential for future litigation, even highlighting an expectation that judicial treatment of the NCAA will be corrected in favor of proper

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317. For further discussion of pay for play laws, see *supra* notes 162–167 and accompanying text.

318. See Ramsey, *supra* note 53 (discussing *Alston II*'s impact on NCAA's amateurism model, including fact that *Alston II* does not take away NCAA's ability to restrict non-education related benefits).

319. See, e.g., Steve Berkowitz, *New Name, Images, Likeness Lawsuit Against NCAA Could Put Hundreds of Millions of Dollars at Stake*, USA TODAY (June 15, 2020), <https://www.usatoday.com/story/sports/college/2020/06/15/ncaa-lawsuit-over-athletes-images-likeness-puts-big-money-stake/3189283001/> [<https://perma.cc/LKF8-CRKF>] (discussing suit filed in June 2020 to place additional pressure on current NCAA rules surrounding student-athlete compensation, particularly regarding NIL compensation).

320. See *Alston III*, 141 S. Ct. at 2165–66 (majority opinion) (mentioning importance of NCAA amateurism debate but also limitation on judiciary to only review issues brought in litigation while affirming Ninth Circuit's *Alston II* judgment).

321. See Norlander, *supra* note 5 (discussing prospective NIL legislation in states).

322. See Jabari Young, *The NCAA Will Allow Athletes to Profit From Their Name, Image and Likeness in a Major Shift for the Organization*, CNBC (Oct. 29, 2019), <https://www.cnbc.com/2019/10/29/ncaa-allows-athletes-to-be-compensated-for-names-images.html> [<https://perma.cc/W8N9-PEQJ>] (discussing unanimous vote by NCAA's governing board to allow student-athletes to be compensated for NIL).

323. See Berkowitz, *supra* note 319 (noting increase in tension surrounding student-athletes about NIL profitability); see also Ramsey, *supra* note 53 (noting *Alston II*'s impact on NCAA amateurism model).



antitrust scrutiny.<sup>324</sup> Specifically, Kavanaugh’s concurrence noted that “the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”<sup>325</sup> Moreover, Justice Kavanaugh criticized the “circular theory” the NCAA used to justify its amateurism rules, namely that not paying student-athletes is a “defining characteristic of college sports.”<sup>326</sup> Kavanaugh accurately states that “[t]he NCAA is not above the law,” a quote that will resonate with many future plaintiffs.<sup>327</sup> While Kavanaugh’s concurrence has no binding legal impact, his words and analysis could drive other suits.<sup>328</sup>

In addition to the likelihood of future litigation on the issues of amateurism and NCAA rules relating to student-athletes, questions loom over what the federal government will do in response.<sup>329</sup> With state pay for play laws on the horizon, it stands to reason that a federal law could be next.<sup>330</sup> Given the country-wide nature of NCAA activities, Congress may decide to oversee this area directly by using its power to regulate interstate commerce.<sup>331</sup> Many Con-

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324. See *Alston III*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring) (“[W]ith surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court’s decision marks an important and overdue course correction, and I join the Court’s excellent opinion in full.”).

325. See *id.* (Kavanaugh, J., concurring) (suggesting future consideration of other NCAA compensation rules may be inevitable).

326. See *id.* at 2168 (Kavanaugh, J., concurring) (criticizing NCAA’s justification for not paying student-athletes).

327. See *id.* at 2169 (Kavanaugh, J., concurring) (explaining how NCAA is not exempt from antitrust law).

328. For further discussion of Justice Kavanaugh’s concurring opinion and its impact, see *supra* notes 324–327 and accompanying text.

329. For further discussion of the federal government’s possible action, see *infra* notes 330–335 and accompanying text.

330. See Rudy Hill & Jonathan D. Wohlwend, *College Athletes Now Allowed to Earn Money from Use of Their Name, Image, and Likeness*, NAT’L L. REV. (July 1, 2021), <https://www.natlawreview.com/article/college-athletes-now-allowed-to-earn-money-use-their-name-image-and-likeness> [<https://perma.cc/N35K-NYFB>] (discussing possibility of federal NIL legislation including reviewing previously introduced federal NIL bills that did not get passed).

331. See U.S. CONST. art. I, § 8, cl. 1, 3 (“The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states.”); see also David Cruikshank, Comment, *The Fair Pay to Play Act: Likely Unconstitutional, Yet Necessary to Protect Athletes*, 81 OHIO ST. L.J. ONLINE 253, 264–65 (2020) (suggesting California’s Fair Pay to Play Act would fail against possible dormant commerce clause challenge because it impermissibly burdens interstate commerce); *Commerce Clause*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause) [<https://perma.cc/XD46-XJWH>] (last visited Oct. 21, 2021) (“The Commerce Clause has historically been viewed as both a grant of congressional authority and as a restriction on the regulatory authority of the States.”). In concluding that state laws like California’s are likely unconstitutional, Cruikshank proposes that federal action is necessary to protect student athletes “from the exploitative prac-

gressmembers have voiced support for a federal NIL bill and payment of student-athletes.<sup>332</sup> Moreover, *Alston III* demonstrated some level of judicial animosity for current and past NCAA rules circumventing the law.<sup>333</sup> Even the NCAA has adopted an interim NIL rule, but is seeking federal legislation in order to eliminate the dysfunction that it believes different state laws will cause; notably, this new rule adoption occurred about a week after *Alston III* was decided.<sup>334</sup> With all of this preexisting and burgeoning support for student-athletes, the *Alston* decision could very well be the beginning of a revolution against the NCAA as we know it.<sup>335</sup>

## VII. NO OVERTIME TONIGHT: CONCLUSION

Even before Supreme Court review, the Ninth Circuit opinion stood as another victory for NCAA student-athletes and their opportunities for compensation.<sup>336</sup> Limitless education-related compensation is not exactly what most student-athletes have been lobbying for, but it is a starting point.<sup>337</sup> As states continue to pass NIL compensation laws that favor student-athletes, it seems NCAA compensation and eligibility rules will inevitably become friendlier to

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tices of the NCAA.” See Cruikshank at 265 (footnote omitted) (“Federal action is required to ensure athletes continue to be protected from the exploitative practices of the NCAA, as state protections like California’s Fair Pay to Play Act are likely unconstitutional. Currently, the best way to protect athletes would be federal legislation allowing them to enter into sponsorships and similar arrangements with third parties, enabling them to profit from the use of their NILs.”).

332. See Hill & Wohlwend, *supra* note 330 (noting Senator Mitch McConnell’s past statements about necessity of federal NIL bill); see also Sally Jenkins, *The College Sports Debate Comes to Capitol Hill, Athletes Not Invited*, WASH. POST (June 8, 2021), <https://www.washingtonpost.com/sports/2021/06/08/congress-ncaa-nil-senate-commerce-hearing/> [<https://perma.cc/783Q-DNRK>] (discussing past efforts at federal legislation proposed by Senators Roger Wicker, Jerry Moran, Chris Murphy).

333. See *Alston III*, 141 S. Ct. 2141, 2166, 2169 (2021) (Kavanaugh, J., concurring) (declaring how *Alston III* decision was “overdue course correction” while criticizing NCAA’s justification for maintaining strict amateurism rules).

334. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT’L COLLEGIATE ATHLETIC ASS’N (June 30, 2021), <https://www.ncaa.com/news/ncaa/article/2021-06-30/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/M4J3-E4LJ>] (noting NCAA adopted policy only as “interim solution” while “work[ing] with Congress to adopt federal legislation to support student-athletes.”); see also *Alston III*, 141 S. Ct. at 2141 (noting case was decided June 21, 2021).

335. For further discussion of already existing support for student-athletes, see *supra* notes 5, 162–167, 329–332 and accompanying text.

336. See Ramsey, *supra* note 53 (discussing *Alston II*’s result prohibiting NCAA from limiting education-related benefits for student-athletes).

337. See *id.* (noting *Alston II* still allows NCAA limitations on non-education related benefits for student-athletes).

student-athletes as well—even though the NCAA has not responded to the pressure as strongly as some state legislators expected.<sup>338</sup> Following *Alston III*, the circuit split no longer lingers.<sup>339</sup> Through the *Alston II* decision, the Ninth Circuit had made clear its stance that NCAA rules are subject to review under the Sherman Act.<sup>340</sup> Moreover, the Supreme Court’s unanimous agreement with the Ninth Circuit is dispositive; ultimately the *O’Bannon* framework—later used in *Alston I* and *Alston II*—received the blessing of the Supreme Court for future antitrust litigation.<sup>341</sup>

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338. See Dellenger, *supra* note 166 (“The NIL blitzkrieg is thundering through the halls of state capitol buildings across the country.”). New Jersey State Senator Joseph Lagana spoke about New Jersey NIL law’s intent in “get[ting] the NCAA to act” while noting NCAA has not responded quite as expected by legislator. See *id.* (discussing push to move up NIL law’s effective date as response to NCAA’s failure to act adequately). For further discussion of state pay for play laws, see *supra* notes 163–167 and accompanying text.

339. See generally *Alston III*, 141 S. Ct. at 2157–59 (majority opinion) (confirming Ninth Circuit’s understanding of *Board of Regents* classification of NCAA’s position as commercial in nature). For further discussion of the circuit split, see *supra* notes 115–161 and accompanying text.

340. See generally *Alston II*, 958 F.3d 1239 (9th Cir. 2020) (accepting *O’Bannon* decision’s conclusions on commercial nature of NCAA eligibility rules including unwillingness to grant procompetitive presumption to NCAA amateurism rules). For further discussion of *Alston II*’s holding that NCAA rules are subject to review under the Sherman Act, see *supra* notes 257–260, 294–300 and accompanying text.

341. See generally *Alston III*, 141 S. Ct. at 2166 (affirming Ninth Circuit’s *Alston II* decision). For further discussion of affirmation of *O’Bannon*, see *supra* notes 257–260, 294–300 and accompanying text. For further discussion of the *O’Bannon* decision, see *supra* notes 149–161 and accompanying text.

\* J.D. Candidate Class of 2022, Villanova University Charles Widger School of Law; This Note is dedicated to my late father, Greg, who sparked my interest in the law and in sports. Telling him that this Note was selected for publication was a very special moment for me. Thank you also to my mother, siblings, and other loved ones, who have shown me immeasurable love and support. Finally, thank you to my mentors for their encouragement and guidance.