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Alston v. NCAA: A Reckoning for the Big Business of College Sports

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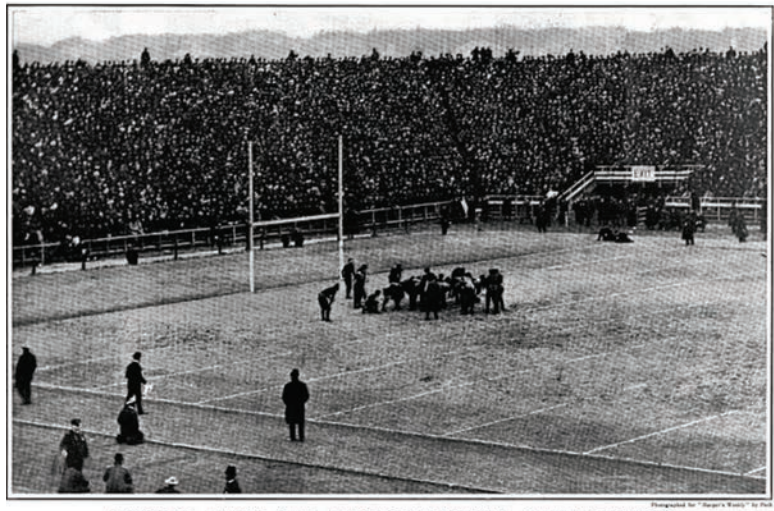
The NCAA & Amateurism (1906 – 1948)

- By the late 1880s, college football had become hugely popular. But it was also very dangerous. Minimal protective equipment and violent plays led to 18 player deaths in 1905. This threatened to undermine public support for the sport.
- In 1906, at the urging of President Theodore Roosevelt, schools combined forces to create the Intercollegiate Athletic Association of the United States (IAA) to establish uniform safety and competition rules for college football.
- The IAA—which became the NCAA in 1910—also established a rigid definition of "amateurism," which prohibited recruiting athletes or awarding scholarships based on athletic ability.
- However, adherence to this definition of "amateurism" by member conferences and schools was purely aspirational. In practice, each conference adopted its own rules about the amount of compensation that could be paid to student-athletes.



HARVARD WINS THE INTERCOLLEGIATE CHAMPIONSHIP

The NCAA & Amateurism (1948 – 1984)

- In 1948, the NCAA adopted the "Sanity Code," which formally incorporated the strict definition of amateurism and gave the NCAA the power to enforce this definition against member schools. But after widespread violations of these rules went unpunished, the NCAA dropped the Sanity Code in 1951.
- Despite these rampant violations of the amateurism rules, college sports remained extremely popular and commercially successful.
- In 1957, the NCAA gave up the battle to entirely ban compensation to student-athletes and instead adopted rules to limit the amount of compensation. The new rules allowed schools to provide financial aid to student-athletes for educational expenses up to a set amount (i.e., COA).
- Significantly, the 1957 rule changes gave the NCAA the authority to enforce the amateurism rules, not only against member schools, but also as an eligibility requirement for student-athletes themselves.
- The NCAA's power over college sports—and its definition of "amateurism"—have evolved ever since.

The New York Times.

SUNDAY, JANUARY 11, 1948.

COLLEGES ADOPT THE 'SANITY CODE' TO GOVERN SPORTS

N. C. A. A. Bans Scholarships in Which Athletic Ability Is the Major Factor

FINANCIAL AID OUTLAWED

Violators of Rules Can Be Suspended or Expelled— Tournament Dates Set

With a minimum of opposition and surprisingly little discussion, the National Collegiate Athletic Association yesterday closed its forty-second annual convention by adopting the "principles for the conduct of intercollegiate athletics" that are popularly referred to as the "sanity code."

NCAA v. Board of Regents of the Univ. of Oklahoma (1984)

- NCAA agreed to deals with ABC and CBS to air college football games. The Universities of Oklahoma and Georgia negotiated a separate contract with NBC allowing for more televised games and greater revenues, but the NCAA announced it would discipline any school that went along with that plan.
- The Supreme Court noted that such horizontal price fixing and output limitation are normally analyzed under a *per se* approach.
- However, this case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all," as what the NCAA markets is "competition itself."
- The Court therefore applied the Rule of Reason to determine whether the restraint of trade was unreasonable. Since the NCAA television plan served to raise prices and reduce output, the NCAA faced a heavy burden to justify this deviation from the operations of a free market.

"The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or 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. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role."

NCAA v. Board of Regents of the Univ. of Oklahoma (1984)

- The Court rejected the NCAA's argument that it did not have market power, holding that college football broadcasts constituted a separate market and that other types of programming were not substitutable. Furthermore, even if this were not the case, a lack of proof of market power does not justify naked restrictions on price or output.
- The Court then rejected the NCAA's claimed procompetitive justifications: that its plan constituted a cooperative joint venture, that the plan was necessary to protect live attendance, and that it was necessary to preserve competitive balance.
- The Court ruled 7-2 that the NCAA's rule violated the Sherman Act.

"[T]he NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable.... In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed."

NCAA v. Board of Regents of the Univ. of Oklahoma (1984)

- But in ruling against the NCAA, the Court also noted, in dicta, its role in preserving the product of "college football."
- Due to the conflict between this dicta and the finding of antitrust liability, circuit courts in the years following *Board of Regents* debated the question of whether the NCAA was subject to normal antitrust rules for joint ventures or should receive some type of special treatment.

"The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.... That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."

McCormack v. NCAA (5th Circuit, 1988)

- After the NCAA found that Southern Methodist University's football program had exceeded restrictions on compensation for players, a group challenged the action, arguing that the NCAA had violated the antitrust laws by promulgating and enforcing rules restricting benefits that may be awarded college athletes.
- Citing *Board of Regents*, the Fifth Circuit held that the challenged restrictions were reasonable under a Rule of Reason analysis, noting that even the *Board of Regents* dissenters had observed that "each of these regulations represents a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'"

"None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."

Banks v. NCAA (7th Circuit, 1992)

- College football player sued the NCAA, alleging that rules preventing athletes from playing college athletics after entering the draft or hiring an agent violated the Sherman Act.
- Seventh Circuit affirmed lower court's dismissal, finding Banks had failed to allege an anticompetitive impact on a discernable market.

"[T]he NCAA cannot be heard to argue that the REC Rule fosters the amateurism that serves as the hallmark of NCAA competition. While courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics, see *Banks*, courts have only legitimized rules designed to ensure the amateur status of student athletes, not coaches."

Law v. NCAA (10th Circuit, 1998)

- College basketball coaches with "restricted-earnings status" brought class action under the Sherman Act challenging an NCAA rule that placed a limit on coaches' annual compensation.
- The Tenth Circuit, applying Rule of Reason analysis, held that the compensation limit constituted an unlawful restraint of trade.
- The court rejected the NCAA's claimed procompetitive justifications of retention of entry-level positions, cost reduction, and maintaining competitiveness.

"The *Banks* majority, in dicta, opined that the market for scholarship athletes cannot be considered a labor market, since schools do not engage in price competition for players, nor does supply and demand determine the worth of student-athletes' labor. We find this argument 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.... Second, colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash."

Agnew v. NCAA (7th Circuit, 2012)

- College athletes filed action under Sherman and Clayton Acts alleging that rules limiting the number of scholarships given per team and prohibiting multi-year scholarships had an anticompetitive effect on the market for college athletes.
- "[T]he first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive."
- Seventh Circuit affirmed district court's dismissal of action, finding that Plaintiffs had failed to properly identify the commercial market, but in so doing disagreed with *Banks* and held such a market could exist.

O'Bannon v. NCAA (9th Circuit, 2015)

- Group of NCAA Division I college athletes brought an antitrust class action against the NCAA to challenge the Association's rules preventing athletes from being paid for the use of their names, images, and likenesses in video games, live game telecasts, and other footage.

"[T]he Court finds that the NCAA's restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products. Rather, the evidence presented at trial suggests that consumers are interested in college sports for other reasons."

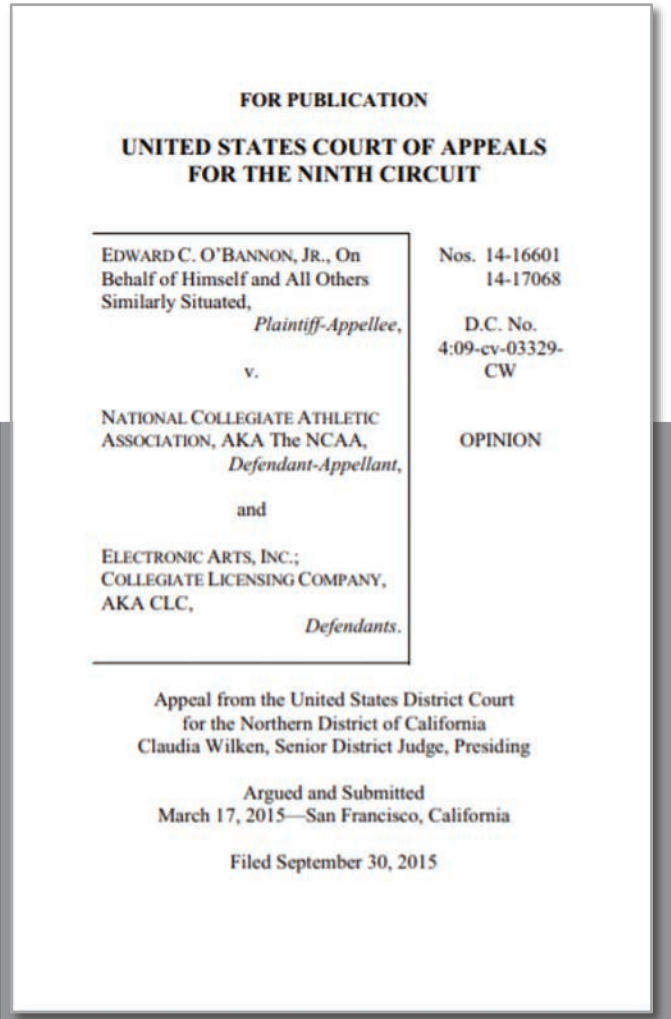
O'Bannon v. NCAA (9th Circuit, 2015)

- Applying Rule of Reason analysis, Judge Wilken of the Northern District of California held that the challenged rules violated Section 1 of the Sherman Act and that Plaintiffs had met their burden of showing that the NCAA had acted anticompetitively in fixing the price of the college athletes' name and likeness rights.
- Wilken rejected the NCAA's amateurism, competitive balance, and integration defenses, and also rejected the argument that the rules are procompetitive because they allow for increased output.
- Wilken held that two of Plaintiffs' less restrictive alternatives—allowing schools to award full cost of attendance scholarships and allowing schools to place up to $5,000 in a blind trust for athletes' IP rights—would allow the NCAA to achieve the purposes of its rules in a less restrictive manner.

O'Bannon v. NCAA (9th Circuit, 2015)

- The Ninth Circuit affirmed the District Court's finding that allowing schools to award scholarship grants up to cost of attendance would be a less restrictive alternative to the existing rules, but vacated the judgment and injunction insofar as it required the NCAA to allow member schools to pay college athletes up to $5,000 for IP rights in a trust account.

"The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its 'particular brand of football' to minor league status. In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA 'ample latitude' to superintend college athletics, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint."



FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD C. O'BANNON, JR., On Behalf of Himself and All Others Similarly Situated,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AKA The NCAA,
Defendant-Appellant,

and

ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY, AKA CLC,
Defendants.

Nos. 14-16601
14-17068

D.C. No.
4:09-cv-03329-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, Senior District Judge, Presiding

Argued and Submitted
March 17, 2015—San Francisco, California

Filed September 30, 2015

"[M]ost NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics. Deppe has not persuaded us that the year-in-residence requirement is the rare exception to this general principle."

Deppe v. NCAA (7th Circuit, 2018)

- College athlete brought antitrust class action against NCAA challenging "year in residence" rule that required athletes who transfer to another Division I college to wait one full academic year before playing for their new school.
- Court cited *Agnew* for the proposition that "[m]ost—if not all—eligibility rules…fall within the presumption of pro-competitiveness" established in *Board of Regents*.
- Seventh Circuit affirmed district court's dismissal of action, finding the bylaw to be presumptively procompetitive.

Alston v. NCAA (N.D. Cal., 2018)*

- Plaintiffs, three classes of Division I men's basketball, women's basketball, and FBS football players, filed suit against the NCAA and its major conferences in 2014.
- Plaintiffs alleged that Defendants conspired to fix prices for the payments and benefits the college athletes could receive as compensation for playing services, in violation of Section 1 of the Sherman Act.
- Defendants argued two claimed procompetitive justifications for this behavior (integration of athletes into campus life and maintaining consumer demand) outweigh any anticompetitive effects under a Rule of Reason test.
- Plaintiffs disputed that any procompetitive justifications existed and asserted less restrictive alternatives, including:
  1. Allowing individual conferences, rather than the NCAA, to compete in the establishment of any compensation or benefit rules.
  2. Enjoining all NCAA national rules that prohibit or limit payments or benefits not tethered to educational expenses, or that are incidental to athletic participation.

*Jeffrey Kessler, David G. Feher, David L. Greenspan, and Jeanifer Parsigian served as co-class counsel in the *Alston* litigation.

Alston Economic Background: The Vast Change in College Sports Economics in the 35 Years Since *Board of Regents*

Today, FBS Football and D-I basketball generate billions of dollars of revenues, and the "Power Conferences" and their schools dominate these markets.

- ESPN paid **$5.64 billion** over 12 years to televise the College Football Playoff ("CFP") and spends no less than an additional **$215 million annually** to televise other major bowl games. During the 2017 season alone, Power Conference schools received more than **$1 billion** for their regular-season football games.
- The most recent Power Conference media-rights agreements, driven by demand for football and basketball, pay out a total of at least **$16 billion**.
- CBS and Turner Sports paid **$11 billion** to broadcast the NCAA Men's Basketball Tournament for fourteen years, and then agreed to pay **$8.8 billion** more to extend the deal by eight years.

* Wall Street Journal, Nov. 21, 2012; Sports Illustrated, Nov. 14, 2012; ESPN.com, Mar. 19, 2013; USA Today, Apr. 22, 2010; NCAA.com, Apr. 12, 2016.

“Amateur” Sports or Big Businesses?

Top NCAA Sponsors

Brand	2013	2014	Change
Capital One*	$18,900,979	$27,972,404	48%
AT&T*	$16,189,681	$23,034,375	42%
Buick	$6,122,669	$8,247,985	35%
Coca-Cola*	$6,327,618	$5,607,434	-11%
Enterprise	$3,532,441	$6,075,980	72%
Infiniti	$2,567,617	$4,160,330	62%
LG	$1,697,177	$3,859,786	127%
Allstate	$1,542,255	$3,531,171	129%
Reese's	$1,005,361	$3,394,081	238%
Northwestern Mutual	$1,348,547	$3,257,573	142%
UPS	$1,368,641	$3,097,924	126%
Lowe's	$1,550,584	$2,523,164	63%
Powerade*	$37,515	$4,278,343	11,304%

* NCAA corporate champion, the organization's highest level of partnership. Powerade is a Coca-Cola brand. The remaining brands listed are NCAA corporate partners.
Source: Kantar Media

2019 NCAA Men's Basketball Championship Top 5 Ad Categories

Rank	Category	# of Different Advertisers	Ad Spend* (millions)
1	Auto Manufacturers	8	$151
2	Telecom	4	$110
3 (tie)	Financial Services	12	$105
4 (tie)	Insurance	9	$105
5	Restaurants	11	$83

Figures reflect national TV only and include all pre-game, game and post-game programming

Source: Kantar KANTAR

NCAA Men's Basketball Championship: National TV Ad Spending*

	2015	2016	2017	2018	2019
Ad Spend (million)	$848	$888	$917	$943	$910
Total # of Advertisers	92	92	93	97	102
# of Returning Advertisers From Prior Year	63	70	63	63	67

Includes Pre-Game, Game & Post-Game Programming

Source: Kantar KANTAR

“Amateur” Sports or Big Businesses?

Mercury News **Jan 29, 2021**	“The Pac-12’s official [FY20] payouts should show an average campus distribution of about 33.7 million [which] would represent a 4.65 percent year-over-year increase from the FY19 average payments of 32.2 million.”
Richmond Times-Dispatch **May 21, 2021**	“… ACC revenue increased 9.1% to a league-record $496.7 million in 2019-2020…”
Cleveland.com **Feb. 25, 2021**	“The Big Ten is now a nearly $2 billion business, fueled largely by TV revenue from league and national network contracts, ticket sales at some of the largest stadiums in college football, donations and royalties.”
USA Today **Feb. 4, 2021**	“[The SEC] had 729 million in total revenue for [FY20] … as a result, the conference distributed roughly $45.5 million to each of its 14 member schools.”
USA Today **Jul. 21, 2021**	“The Big 12 reported revenue of $409.2 million for fiscal year 2020. Payouts ranged from $37 million to $40.5 million among its 10 members schools.”

“Amateur” Sports or Big Businesses? Conference Media Deals

$3.6 billion from ESPN through 2026-27

$2.25 billion from ESPN through 2023-24;

$3 billion from ESPN through 2033-2034;

$825 million from CBS through 2023-24;

SEC Network valued at **$4.7 billion**

$2.6 billion from ESPN and Fox through 2024-25

$3 billion from Fox and ESPN through 2023-24;

Pac-12 Network valued at **$300 million**

$2.8 billion from Big Ten Network through 2031-32;

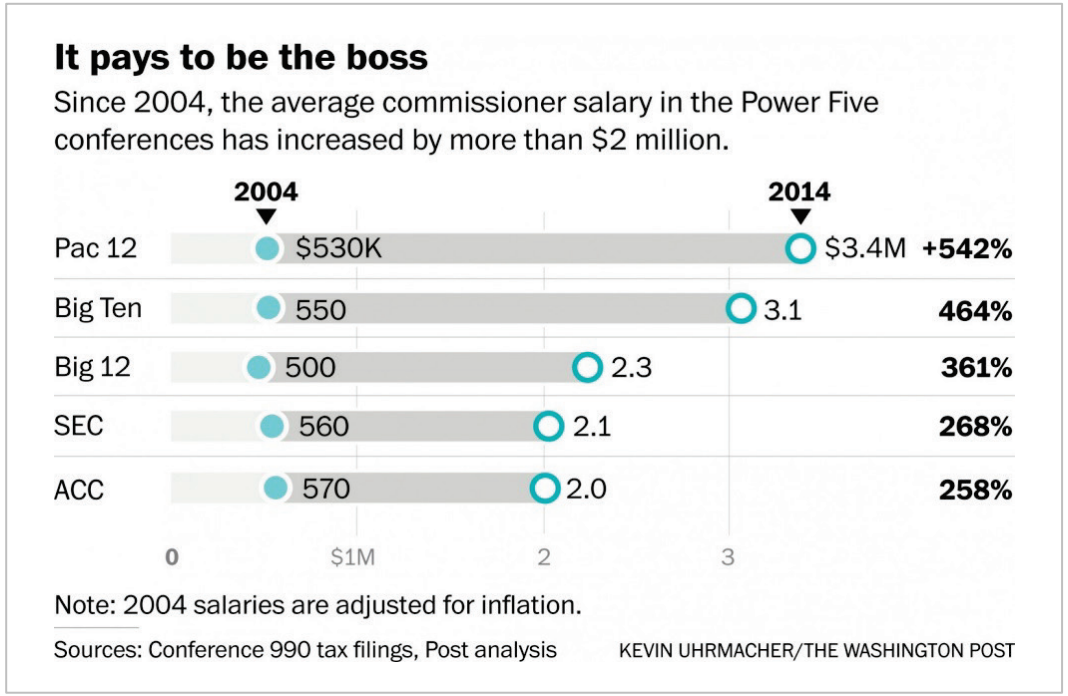
$2.6 billion from ESPN, Fox, and CBS through 2023-24;

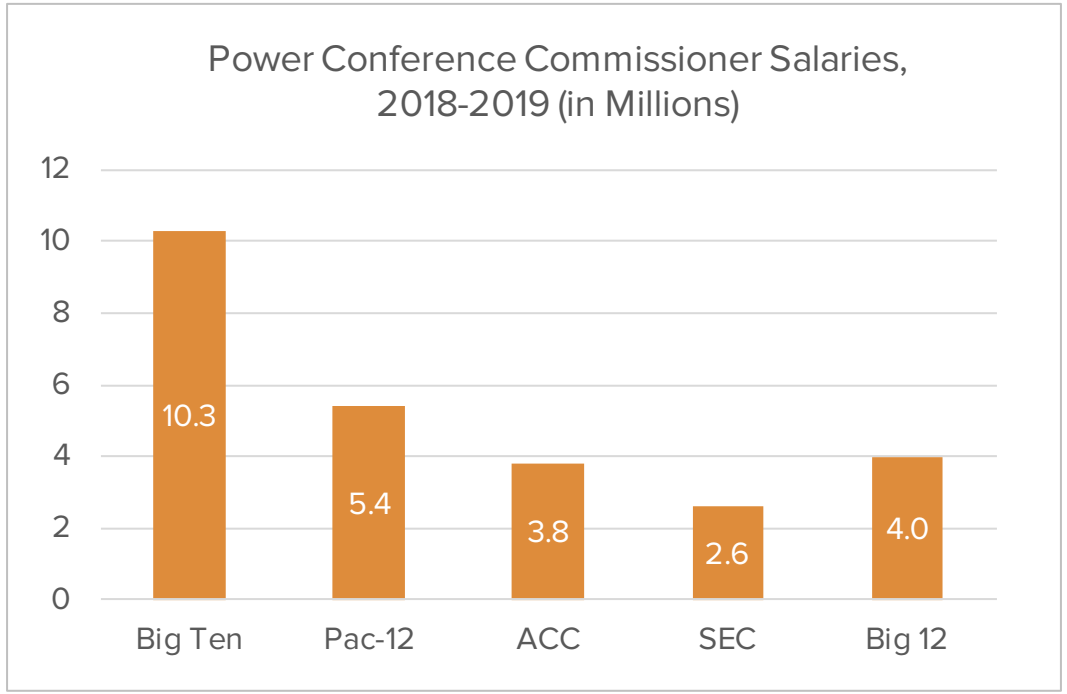
Big Ten Network valued at **$1.1 billion**

* ESPN, May 19, 2013; SportsBusiness Journal, June 20, 2016; AL.com, Aug. 26, 2015; AL.com, May 7, 2017; SI.com, Dec. 10, 2020

“Amateur” Sports or Big Businesses? Conference Commissioner Salaries

Power Conference commissioners now earn at least $2.5 million annually, and compensation has soared over the past decade.





* Austin American-Statesman, Jul. 12. 2020; USA Today, Jul. 10, 2020

“Amateur” Sports or Big Businesses? Highest-Paid State Employees are NCAA Coaches

The highest paid public employee in **40 states** is a DI coach; **11 coaches** earn over **$5 million** per year.

COACH, UNIVERSITY	SALARY
Nick Saban, University of Alabama	$10.6 million
Dabo Swinney, Clemson University	$9.3 million
John Calipari, University of Kentucky	$9.3 million
Jim Harbaugh, University of Michigan	$7.5 million
Jimbo Fisher, Texas A&M University	$7.5 million
Kirby Smart, University of Georgia	$6.9 million
Jeff Brohm, Purdue University	$6.6 million
Lincoln Riley, University of Oklahoma	$6.4 million
Dan Mullen, University of Florida	$6.1 million
James Franklin, Penn State University	$5.7 million
Scott Frost, University of Nebraska	$5.0 million

* Fanbuzz, Dec. 31, 2019; ESPN, Dec 2019; ESPN, Aug. 2, 2021

“Amateur” Sports or Big Businesses? Athletic Department Revenues

40 schools reported revenues of over **$100 million** in 2019.

UNIVERSITY	REVENUE
University of Texas	$224 million
Texas A&M	$213 million
Ohio State University	$210.5 million
University of Michigan	$198 million
University of Georgia	$174 million
Penn State University	$160.5 million
University of Alabama	$164.5 million
University of Oklahoma	$163 million
University of Florida	$159.7 million
Louisiana State University	$157.8 million
University of Wisconsin	$157.6 million
Florida State University	$152.8 million
Auburn University	$152.5 million
University of Iowa	$152 million
University of Kentucky	$150.4 million
University of Tennessee	$143.7 million
University of South Carolina	$140.7 million
Michigan State University	$140 million
University of Louisville	$140 million
University of Arkansas	$137.5 million

UNIVERSITY	REVENUE
University of Nebraska	$136.2 million
Clemson University	$134 million
University of Washington	$133.8 million
University of Minnesota	$130.5 million
University of Indiana	$127.8 million
University of Oregon	$127.5 million
Arizona State University	$121.7 million
University of Kansas	$121.5 million
University of Illinois	$118.6 million
Mississippi State University	$112.3 million
Purdue University	$111 million
University of Virginia	$110.2 million
University of Maryland	$108.8 million
University of Mississippi	$108.4 million
UCLA	$108.4 million
University of North Carolina	$107.8 million
University of Missouri	$106.6 million
University of Arizona	$105 million
Rutgers University	$103.2 million
West Virginia University	$102.7 million

* USA Today Athletic Revenue Database.

“Amateur” Sports or Big Businesses? Athletic Director Salaries

Athletic Directors routinely earn more than $1 million per year.

UNIVERSITY	AD SALARY
Vanderbilt University	$3,239,678
University of Tennessee	$1,800,000
University of Louisville	$1,411,915
University of Florida	$1,233,250
University of Wisconsin	$1,230,000
University of Nebraska	$1,123,000
University of Texas	$1,109,041
The Ohio State University	$1,099,030
University of Notre Dame	$1,026,942
University of Oklahoma	$1,000,000

* Business Insider, Jul. 26, 2021.

The Evidence on Athlete Integration: Revenues Soar, but Graduation Rates Lag

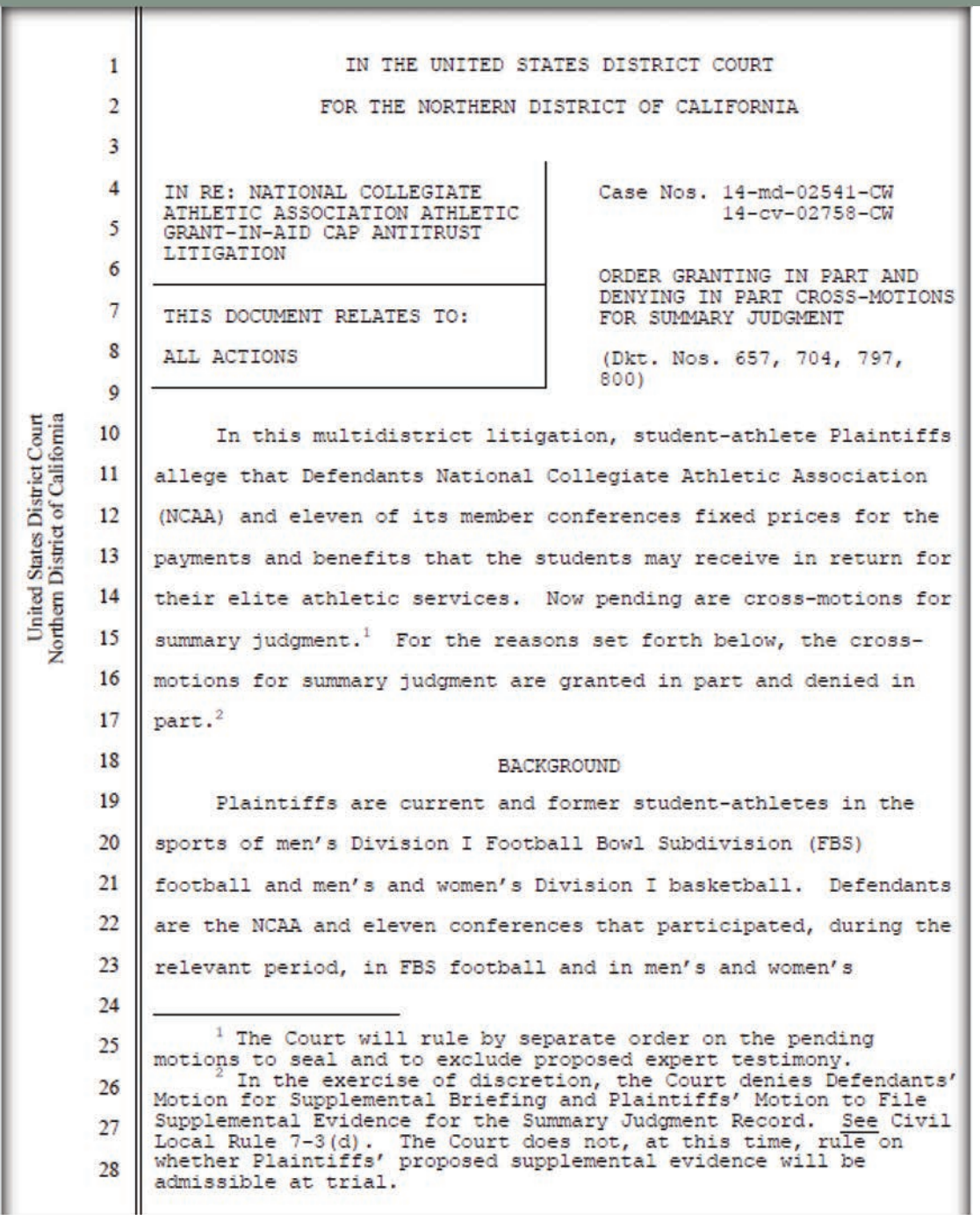
- The graduation rate for men's D-I basketball players lags behind that of other students and athletes. For example, the Department of Education Federal Graduation Rate for **all college athletes is 69%** and for **men's D-I basketball players is 50%**.
- **40%** of D-I basketball players leave their original schools by sophomore year, and players who transfer are less likely to complete their degrees.
- The graduation rate for black male D-1 basketball players **was 10% lower than for their white male counterparts**. For FBS football, the gap in graduation rates between black and white male players is **18%**, with black FBS football players holding only a **57% graduation rate**.
- At Power Conference schools, **55.2% of black athletes in football and basketball** graduated within six years, compared to **69.3% percent of all athletes and 76.3% of all undergraduate students**.

* NCAA, Nov. 2020; Commission on College Basketball, Apr. 2018; ESPN, Mar. 11, 2018.

The Evidence on Athlete Integration: Sports First, Studies Second?

- **50%** of FBS football players, **34%** of DI MBB players, and **51%** of DI WBB players say athletics participation **prevented them from taking classes** they wanted to take.
- **36%** of FBS football players, **29%** of DI MBB players, and **32%** of DI WBB players say athletics participation **prevented them from majoring in their desired majors**.
- Median hours spent per week on **athletic** activities in-season: **42** (FBS football), **34** (DI MBB), **35** (DI WBB).
- Median hours spent per week on **academic** activities in-season: **37** (FBS football), **34** (DI MBB), **37** (DI WBB).
- Average **classes missed** per week during the season: **1.3** (FBS football), **2.2** (DI MBB), **2.5** (DI WBB).
- **76%** of FBS football players, **71%** of DI MBB players, and **59%** of DI WBB players report spending as much or more time on athletic activities in the **offseason** than in-season.

* 2015 GOALS Study of the Student-Athlete Experience.



IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	Case Nos. 14-md-02541-CW 14-cv-02758-CW
THIS DOCUMENT RELATES TO: ALL ACTIONS	ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT (Dkt. Nos. 657, 704, 797, 800)

In this multidistrict litigation, student-athlete Plaintiffs allege that Defendants National Collegiate Athletic Association (NCAA) and eleven of its member conferences fixed prices for the payments and benefits that the students may receive in return for their elite athletic services. Now pending are cross-motions for summary judgment.[1] For the reasons set forth below, the cross-motions for summary judgment are granted in part and denied in part.[2]

BACKGROUND

Plaintiffs are current and former student-athletes in the sports of men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball. Defendants are the NCAA and eleven conferences that participated, during the relevant period, in FBS football and in men's and women's

[1] The Court will rule by separate order on the pending motions to seal and to exclude proposed expert testimony.

[2] In the exercise of discretion, the Court denies Defendants' Motion for Supplemental Briefing and Plaintiffs' Motion to File Supplemental Evidence for the Summary Judgment Record. See Civil Local Rule 7-3(d). The Court does not, at this time, rule on whether Plaintiffs' proposed supplemental evidence will be admissible at trial.

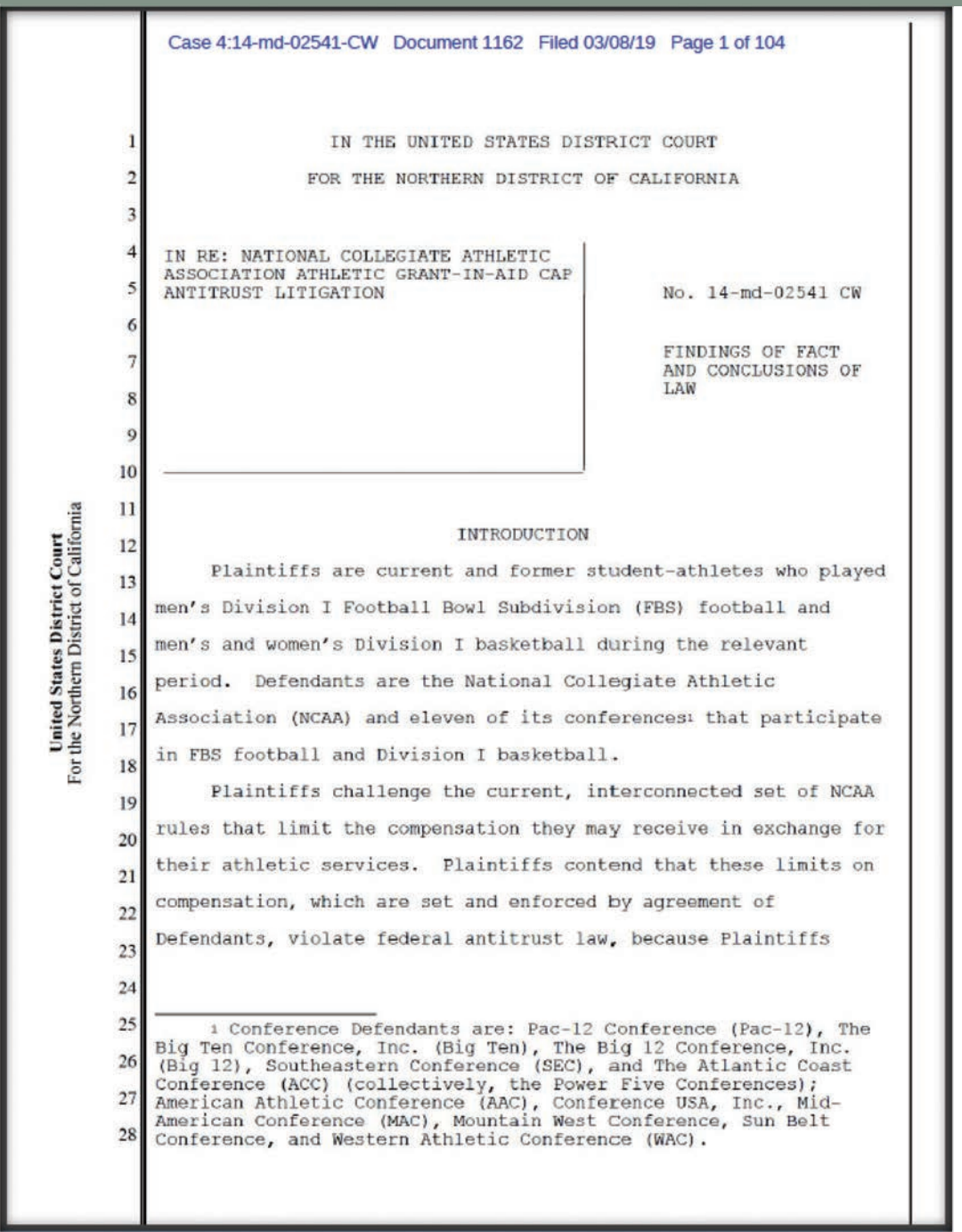
United States District Court
Northern District of California

Alston: Summary Judgment Rulings

- On March 28, 2018, Judge Wilken, applying the Rule of Reason, ruled as follows:
  - Wilken concluded that the challenged NCAA restraints produce significant anticompetitive effects in the established relevant market and thus granted Plaintiffs' motion for summary judgment on this issue.
  - Wilken denied the parties' cross-motions for summary judgment on the question of whether the challenged NCAA rules served Defendants' alleged procompetitive purposes, finding this issue required a trial.
  - Wilken denied Defendants' motion for summary judgment on less restrictive alternatives, finding Plaintiffs challenged different rules and proposed different alternatives than those in *O'Bannon*. This issue also required a trial.

Alston: The NCAA Trial of the Century

- In September 2018, a bench trial on the two claimed NCAA procompetitive justifications, less restrictive alternatives, and Rule of Reason balancing test was held before Judge Wilken in the Northern District of California.
- Among those who testified during the ten-day trial included college athletes, conference administrators, and NCAA executives.
- The Plaintiffs sought a permanent injunction to stop the NCAA from enforcing any of its compensation restraints and to leave any such rulemaking to competition among the conferences.



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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

No. 14-md-02541 CW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

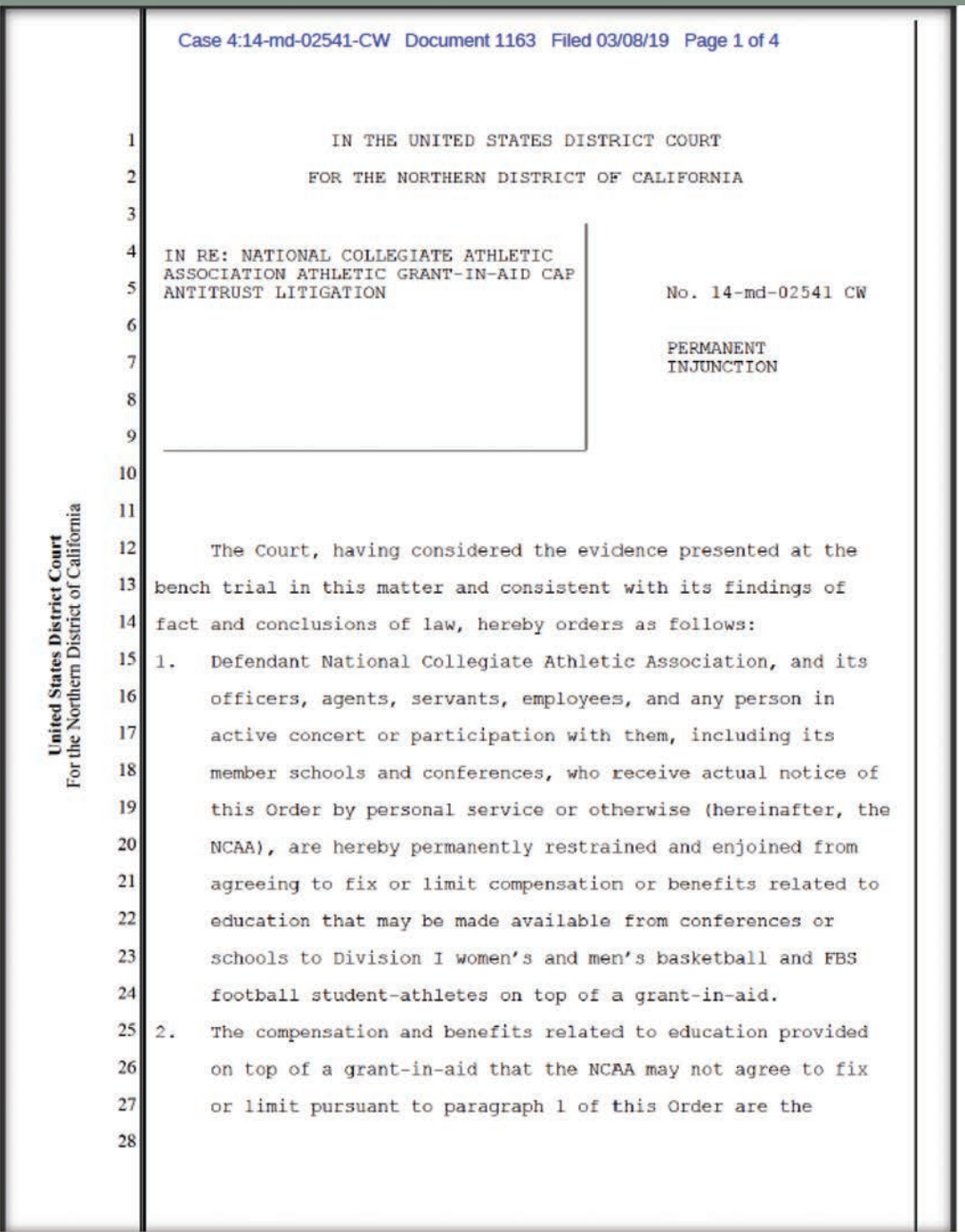
Plaintiffs are current and former student-athletes who played men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball during the relevant period. Defendants are the National Collegiate Athletic Association (NCAA) and eleven of its conferences[1] that participate in FBS football and Division I basketball.

Plaintiffs challenge the current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services. Plaintiffs contend that these limits on compensation, which are set and enforced by agreement of Defendants, violate federal antitrust law, because Plaintiffs

[1] Conference Defendants are: Pac-12 Conference (Pac-12), The Big Ten Conference, Inc. (Big Ten), The Big 12 Conference, Inc. (Big 12), Southeastern Conference (SEC), and The Atlantic Coast Conference (ACC) (collectively, the Power Five Conferences); American Athletic Conference (AAC), Conference USA, Inc., Mid-American Conference (MAC), Mountain West Conference, Sun Belt Conference, and Western Athletic Conference (WAC).

Alston: The NCAA Trial of the Century

- On March 8, 2019, Judge Wilken ruled in favor of Plaintiffs, finding that "the challenged rules, in their current form, unreasonably restrain trade in violation of Section 1 of the Sherman Act," as they "constitute horizontal price-fixing agreements enacted and enforced with monopsony power."
- "The court finds and concludes that Defendants agreed to and did restrain trade in the relevant market, affecting interstate commerce, and that the challenged limits on student-athlete compensation produce significant anti-competitive effects."
- Wilken held that the NCAA "failed to show that the challenged rules have an effect on promoting integration of student-athletes and their academic communities" and "the only procompetitive effect that Defendants established, namely preventing unlimited cash payments, unrelated to education, similar to those observed in professional sports, can be achieved through less restrictive means."



Case 4:14-md-02541-CW Document 1163 Filed 03/08/19 Page 1 of 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

No. 14-md-02541 CW

PERMANENT INJUNCTION

The Court, having considered the evidence presented at the bench trial in this matter and consistent with its findings of fact and conclusions of law, hereby orders as follows:

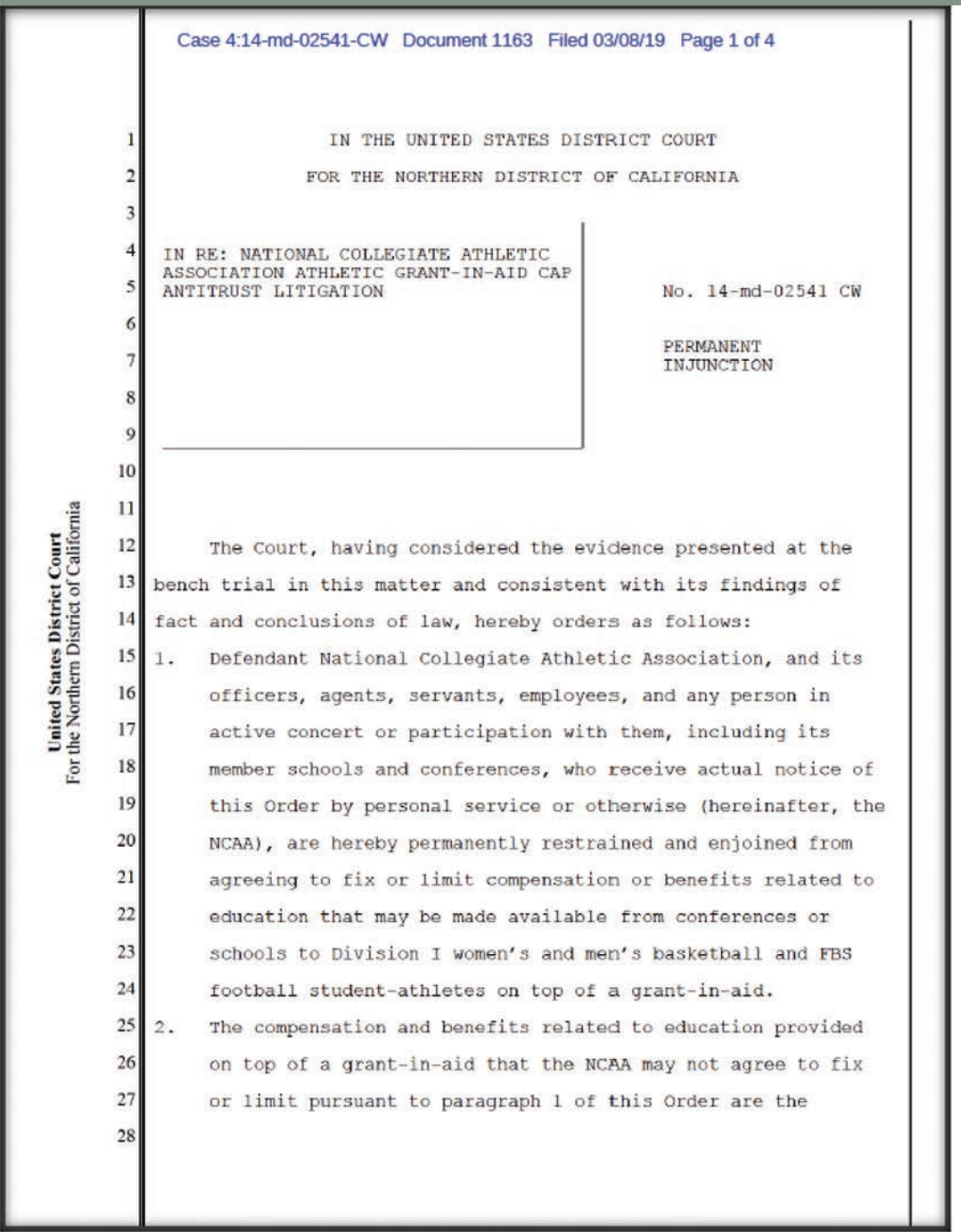
1. Defendant National Collegiate Athletic Association, and its officers, agents, servants, employees, and any person in active concert or participation with them, including its member schools and conferences, who receive actual notice of this Order by personal service or otherwise (hereinafter, the NCAA), are hereby permanently restrained and enjoined from agreeing to fix or limit compensation or benefits related to education that may be made available from conferences or schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid.

2. The compensation and benefits related to education provided on top of a grant-in-aid that the NCAA may not agree to fix or limit pursuant to paragraph 1 of this Order are the

United States District Court
For the Northern District of California

Alston: The NCAA Trial of the Century

- Wilken did not go as far as Plaintiffs had asked on the remedy, holding that "the NCAA may continue to limit the grant-in-aid at not less than the cost of attendance, and to limit compensation and benefits that are unrelated to education provided on top of a grant-in-aid."
- However, Wilken issued a permanent injunction preventing the NCAA from "agreeing to fix or limit compensation or benefits related to education that may be made available from conferences or schools to Division I women's and men's basketball and FBS football student-athletes on top of a grant-in-aid."



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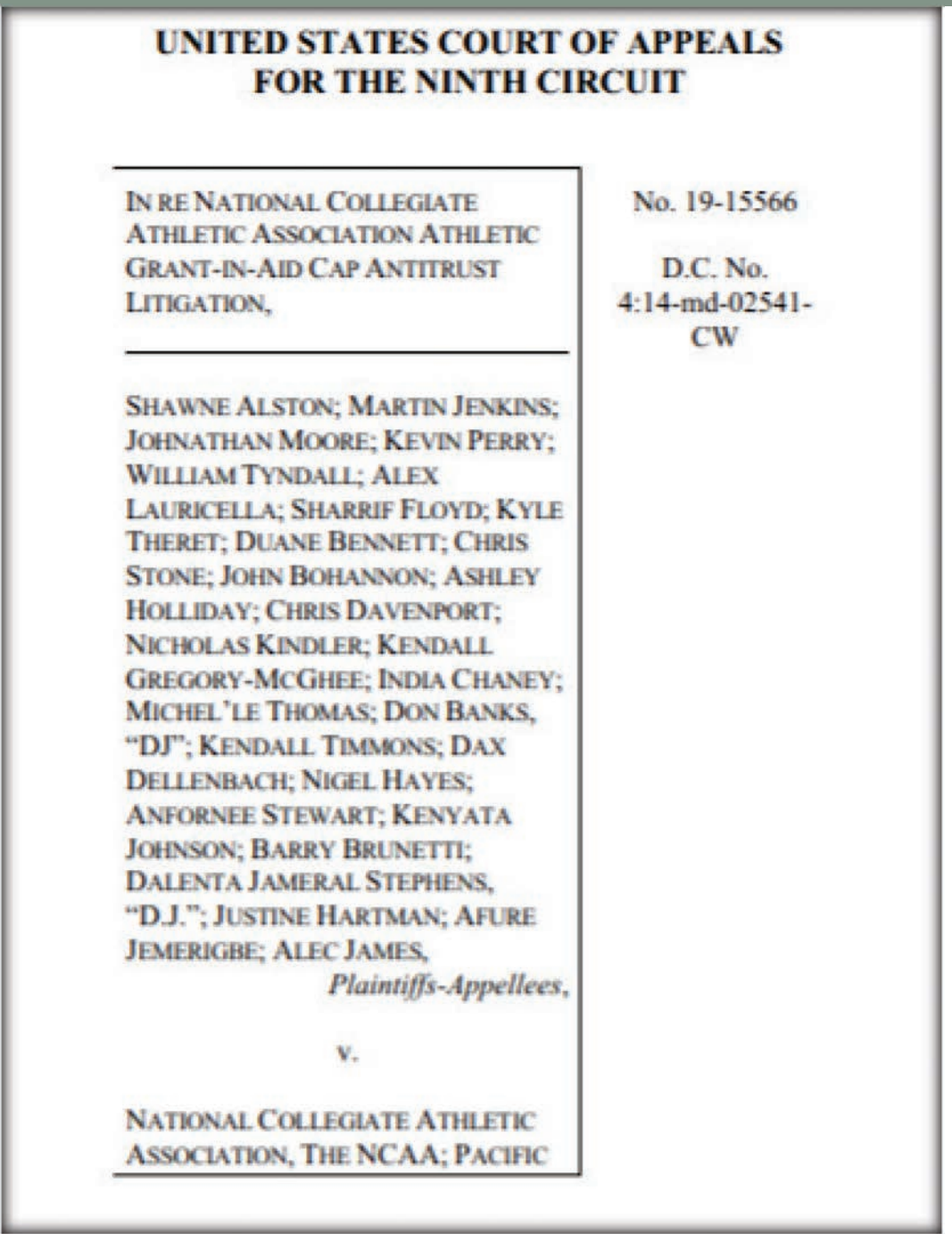
Alston: The NCAA Trial of the Century

- Under the injunction, the NCAA is no longer able to prevent schools from providing cash incentives to athletes for making academic progress or getting degrees in amounts that will total many thousands of dollars per year.
- In addition to having to permit these substantial cash incentives for educational progress, the NCAA is no longer able to limit at all the value or number of post-graduate scholarships that can be given to the athletes, the costs of computers or other education-related items, paid post-eligibility internships, the costs of study abroad, the costs of vocational school, tutoring costs, or any other benefits that are similarly related to education.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION,

No. 19-15566

D.C. No. 4:14-md-02541-CW

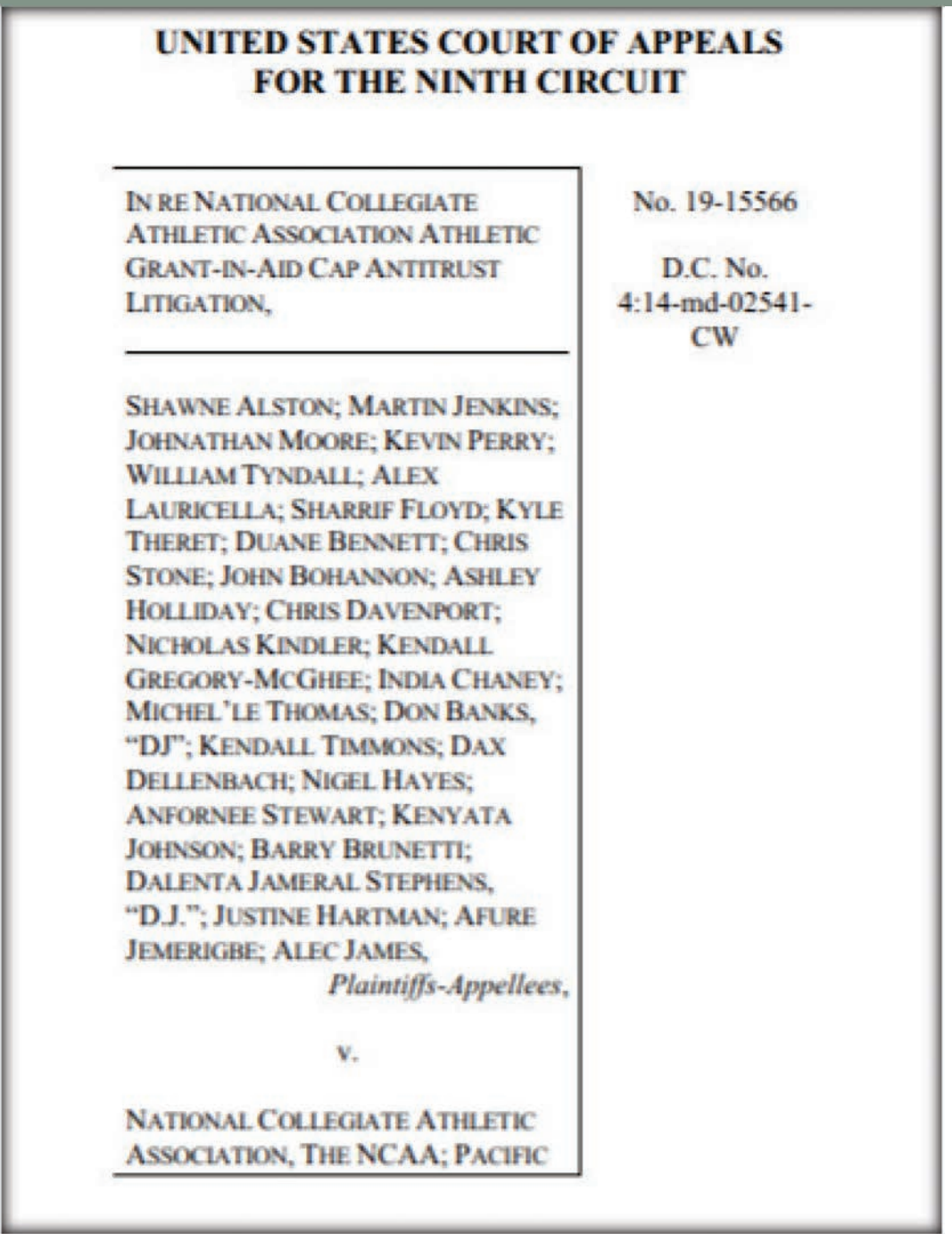
SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY; WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET; DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY; CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE; INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART; KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS, "D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES,
Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC

Alston: Ninth Circuit Decision

- The NCAA appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, and oral argument was held in San Francisco on March 9, 2020.
- On May 18, 2020, the three-judge panel unanimously affirmed the decision in favor of Plaintiffs, with Chief Judge Sidney R. Thomas writing the majority opinion.
- The panel concluded that the District Court appropriately applied the Rule of Reason in determining that the enjoined rules constituted unlawful restraints of trade, that the factual findings supported the injunction, and that the District Court's decision properly followed *O'Bannon*.



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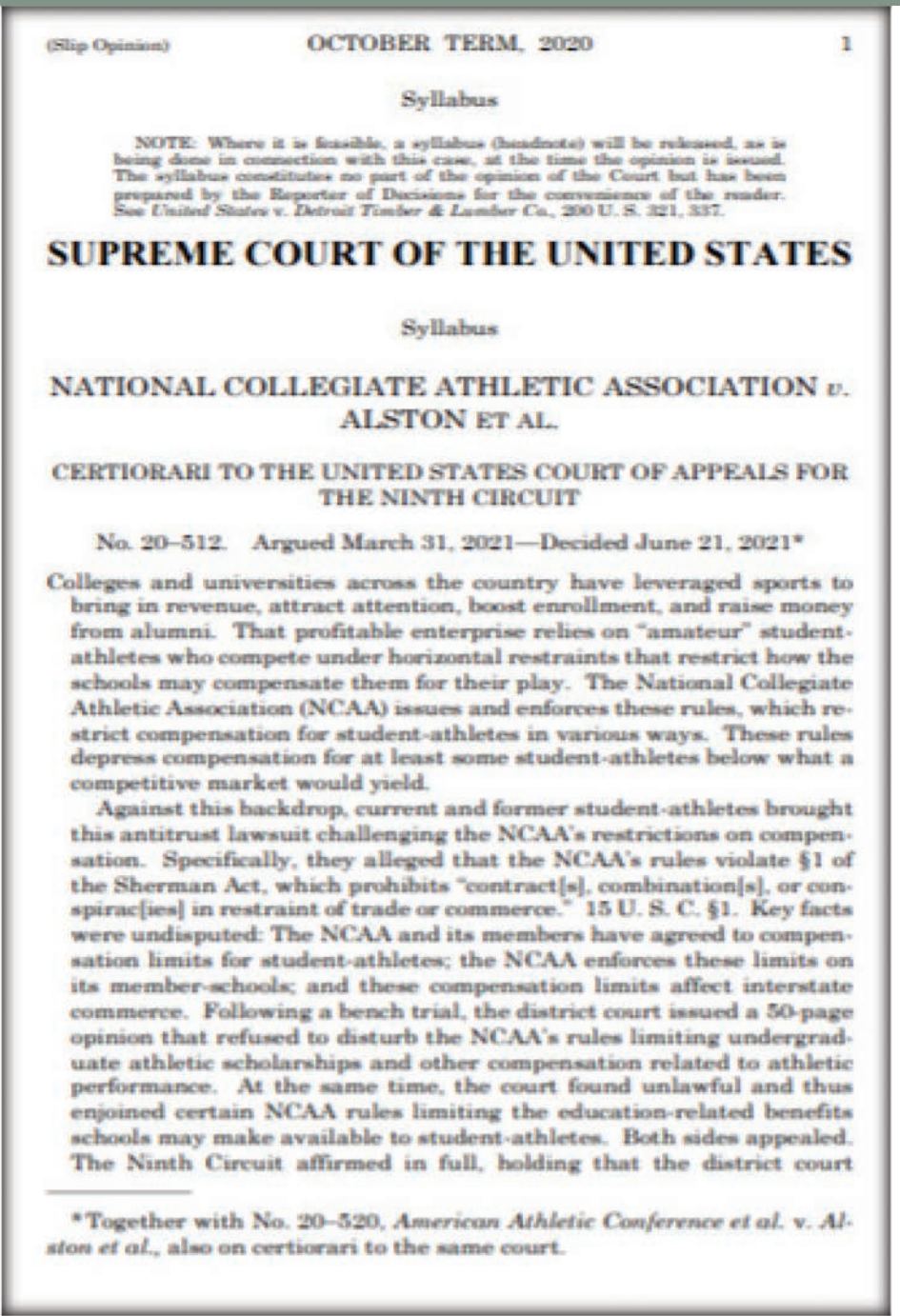
Alston: Ninth Circuit Decision

- The Ninth Circuit denied Plaintiffs' cross-appeal seeking to broaden the injunction and strike down the non-education-related NCAA compensation rules. The Court concluded that the District Court had "struck the right balance in crafting a remedy that both prevented anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports."
- Judge Milan Smith filed a concurring opinion in which he wrote that "[t]he treatment of Student-Athletes is not the result of free market competition. To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this type of distortion."

Alston: Supreme Court Decision

- The NCAA appealed to the United States Supreme Court, which granted certiorari. It was the Court's first time hearing an antitrust case involving the NCAA since *Board of Regents* 36 years prior.
- The Court heard oral argument on March 31, 2021 and issued its decision on June 21, ruling unanimously, 9-0, in favor of the student-athletes.
- Justice Neil Gorsuch wrote the majority opinion for the Court, with Justice Brett Kavanaugh writing a concurrence.



(Slip Opinion) OCTOBER TERM, 2020 1

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* ALSTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–512. Argued March 31, 2021—Decided June 21, 2021*

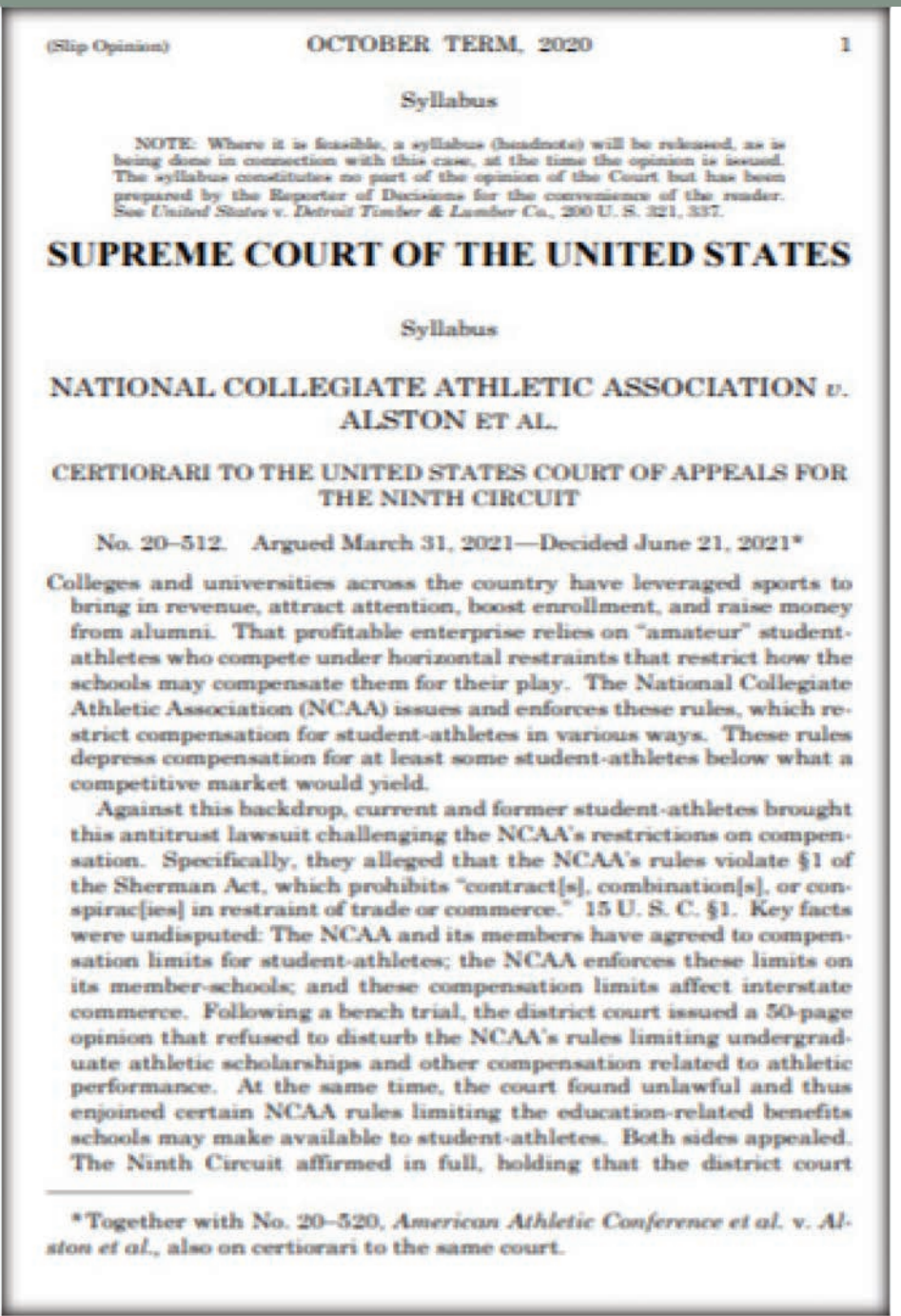
Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on "amateur" student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. §1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court

*Together with No. 20–520, *American Athletic Conference et al.* v. *Alston et al.*, also on certiorari to the same court.

Alston: Supreme Court Decision

- The majority agreed with the student-athletes that the NCAA's restrictions should be analyzed under the Rule of Reason, rejecting the NCAA's request for what the Court described as "immunity from the normal operation of the antitrust laws." Following that standard, the Court held that "the district court acted within the law's bounds" in holding that the restraints on education-related compensation violated the Sherman Act and in issuing the injunction lifting those restraints.
- The Court emphasized that college sports had changed significantly since *Board of Regents*, morphing into a "massive business" in which coaches and administrators get paid millions, "profit[ing] in a different way than the student-athletes whose activities they oversee."



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Alston: Supreme Court Decision

- The Court held that due to "the sensitivity of antitrust analysis to market realities—and how much has changed in this market," the language in *Board of Regents* about the importance of maintaining "amateurism" could no longer be considered more than an "aside."
- The Court thus concluded that "to the extent [the NCAA] means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree."

Alston: Kavanaugh Concurrence

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

The NCAA is not above the law."

NCAA Blanket Waiver for Education-Related Benefits

- On August 11, the NCAA quietly extended the Alston relief, which applied only to FBS football and Division I basketball players, to **all Division I student-athletes.**

NCAA Division I Committee for Legislative Relief Blanket Waiver Benefits Related to Education and Academic or Graduation Awards And Incentives, *Approved August 11, 2021*

The NCAA Division I Committee for Legislative Relief approved a blanket waiver request to permit a conference or an institution to provide the educational benefits specified in the Alston/Grant-in-Aid litigation injunction to student-athletes, in sports other than basketball and bowl subdivision football, and to specify that the NCAA, a conference or an institution may provide student-athletes, in sports other than basketball and bowl subdivision football, academic or graduation awards or incentives that have a value up to the maximum value of awards an individual student-athlete could receive in an academic year in participation, championship and special achievement awards (combined) listed in Figures 16-1, 16-2, and 16-3.

Specifically, this waiver extends the legislation adopted for basketball and bowl subdivision football per NCAA Division I Proposal No. 2020-3 to all other sports. The waiver applies through the 2021-22 academic year or until permanent legislation is adopted.

https://www.ncaa.org/compliance/waivers/division-i-legislative-council-subcommittee-legislative-relief-blanket-waivers

Name, Image & Likeness Developments: Timeline

September 2019

California passes NIL legislation, but the law does not go into effect **until 2023**. The NCAA calls the law an "existential threat" to college sports.

October 2019

The NCAA's Board of Governors agrees to modernize its NIL rules.

April 2020

The NCAA's working group suggests revised NIL rules.

May 2020

Ninth Circuit affirms district court's *Alston* decision.

June 2020

Florida passes its own NIL law with an effective date of July 1, 2021.

September 2020

First federal NIL legislation introduced.

November 2020

NCAA Division I Council formally submits proposed NIL rule changes with plans to put them to a vote in January 2021.

December 2020

Supreme Court agrees to hear NCAA's *Alston* appeal.

January 2021

NCAA Division I Council indefinitely delays its vote on NIL rules.

June 21, 2021

Supreme Court unanimously affirms Ninth Circuit's Alston decision.

June 30, 2021

NCAA Board of Directors adopts temporary rule change allowing NIL activity.

July 1, 2021

First state NIL laws, and the NCAA's new rules, go into effect.

Name, Image & Likeness Developments: State Laws

- **28 States** have **enacted** NIL legislation or executive orders:
  - **20 States** have NIL legislation or orders **currently in effect**;
  - **4 States** have NIL legislation that will take effect **in 2022**;
  - **3 States** have NIL legislation that will take effect **in 2023**;
  - **1 State** has NIL legislation that will take effect **in 2025**;
- All of the enacted state legislation permits student-athletes to receive compensation for the use of their NIL and to hire licensed agents, attorneys, and/or other representatives to help them negotiate NIL agreements.
- Many state laws also require student-athletes to disclose NIL activities to their schools, either before or after entering into a contract.
- **12 States** have **pending** NIL legislation

Name, Image & Likeness Developments: Federal Laws

- There have been **8 NIL bills** introduced in Congress:
  - **6 bills** have been introduced in the **Senate**; **2 bills** have been introduced in the **House**.
  - **None** of the bills have made it out of committee.
- Unlike state NIL laws, which have largely followed (with minor differences) the language of California's "Fair Pay to Play Act," federal NIL proposals have varied dramatically:
  - Some proposals, such as the "College Athletes Bill of Rights," introduced by a group led by Sen. Cory Booker (D-NJ), would make major changes to the NCAA model, including taking college sports regulation out of the hands of the NCAA and placing it under control of the federal government and implement a 50-50 revenue share between schools and athletes.
  - The "Student Athlete Level Playing Field Act," introduced by Sen. Roger Wicker (R-MS), would allow the NCAA to make NIL rules and grant those rules deference under the antitrust laws so long as they do not "unduly restrict" athletes' ability to earn NIL compensation.
  - The "College Athlete Right to Organize Act," introduced by Sen. Chris Murphy (D-CT), would amend the National Labor Relations Act to allow student-athletes the right to unionize and collectively bargain.
- Any enacted federal legislation on NIL rights would preempt state NIL laws.

"This is not about tweaking the model we have now. This is about **wholesale transformation** so we can set a sustainable course for college sports for decades to come."

NCAA President
Mark Emmert

Name, Image & Likeness Developments: NCAA Rules

- Effective July 1, 2021, the NCAA has abandoned its NIL rules. The new NCAA policy allows student-athletes to "engage in NIL activities that are consistent with the law of the state where the school is located" and allows individual schools and conferences to impose their own NIL rules.
- On July 30, 2021, the NCAA Board of Governors announced that it would be convening a "Constitutional Convention" in November.
- Redrafting of the NCAA constitution will be led by a 28-person Constitution Committee, which includes both conference and school administrators as well as 3 student-athletes.
- Following November's Convention, final proposals will be provided to the NCAA Board of Governors by December 15 and voted on in January 2022 by the full NCAA membership at the National Convention in Indianapolis.

House v. NCAA (N.D. Cal.)*

- Plaintiffs filed a putative class action against the NCAA in 2020 and filed an amended complaint in August 2021, alleging that the NCAA's NIL rules constitute an unreasonable restraint of trade under Section 1 of the Sherman Act and unjust enrichment.
- Plaintiffs seek monetary damages and injunctive relief.

"Every person has a property interest in his or her public personality and should have the sole right to benefit from and restrict its commercial use."

"The NCAA . . . purports to protect college athletes from commercial exploitation, yet it has conspired to create an anticompetitive market where student-athletes have been unable to benefit from the same opportunities that are available to their fellow classmates and powerless to realize the commercial value of their own NILs. These young men and women—often from socio-economically disadvantaged backgrounds—are deprived of the economic and other benefits that the market would pay to use their NIL in an open and unrestrained market."

*Jeffrey Kessler, David G. Feher, David L. Greenspan, and Jeanifer Parsigian are co-counsel for plaintiffs and the proposed classes in the *House* litigation.

The New World of NIL Rights

JEFFREY L. KESSLER

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Co-Executive Chairman of Winston & Strawn, Jeffrey is one of the world's leading antitrust, sports law, and trial lawyers. He has been lead counsel in some of the most complex antitrust, sports law, and intellectual property law cases in the country, including major jury trials, and has represented a number of U.S. and international companies in criminal and civil investigations in the antitrust, sports law, trade, and FCPA areas.

Jeffrey successfully defended Matsushita and JVC against claims of a worldwide conspiracy in the landmark U.S. Supreme Court case *Zenith v. Matsushita* and is regarded as a leading commentator on international antitrust law. He has also been the lead counsel in numerous IP cases involving frontier issues of IP law and lead counsel in numerous government criminal and civil investigations.

Jeffrey is also one of the most prominent lawyers in the country regularly engaged in high-profile sports litigation. He has litigated some of the most famous sports-antitrust cases in history, including *McNeil v. the NFL*, the landmark antitrust jury trial which led to the establishment of free agency in the National Football League (NFL), and *Brady v. NFL*, which led to the end of the 2011 NFL lockout. Some of Jeffrey's clients in the sports law area have included the NFL Players Association (NFLPA), the National Basketball Players Association, the Arena Football League (AFL) Players Association, the National Hockey League Players Association, the Major League Baseball Players Association, the National Invitation Tournament (NIT), Wasserman Media Group, SCP Worldwide, MVP Sports, the Women's National Soccer Team, the NFL Coaches Association, Players, Inc., the Women's Tennis Benefit Association, Excel Sports, Endeavor, Super Slam Ltd., Activision Blizzard, and Adidas.

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David has been recognized in *Chambers USA* – America's Leading Lawyers for Business as "one of the country's leading sports attorneys." He also was recognized in *The Legal 500 U.S.* for his work in Sports Law and International Litigation, selected by his peers for inclusion in *The Best Lawyers in America*© in the field of Sports Law, selected in the first 100 *Lawdragon's* "New Stars" in 2006, and honored in 2010–2019 by *New York Super Lawyers*.

David is the co-chair of Winston & Strawn's Sports Law Practice. He also has extensive experience in complex litigations, negotiations, and arbitrations involving contract, intellectual property, antitrust, and international issues.

He has been outside counsel for the NFL Players Association (NFLPA) and the NBA Players Association (NBPA) for many years. He is one of the prime negotiators of the collective bargaining agreements and antitrust settlements in the NFL (1993, 1996, 1998, 2002, 2006, and 2011) and the NBA (1995, 1999, 2005, 2011, and 2017).

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An accomplished antitrust, sports, and complex-commercial litigator, David counsels clients on wide-ranging matters and represents them both at trial and on appeal.

In connection with antitrust matters, David Greenspan has acted as plaintiffs and defense counsel in cases involving monopolization, predatory pricing, price-fixing, group boycotts, and other restraints of trade. Representative cases include the defense of alleged cartel activities in multidistrict class actions and the defense of unlawful monopolization claims under various federal and state antitrust laws. He has also defended companies in criminal and administrative proceedings brought by the U.S. Department of Justice (DOJ) and international competition authorities. On the plaintiff's side, David has prosecuted group boycotts and other restraints of trade in the sports and entertainment industries, among others. David regularly counsels clients on antitrust matters, including implementing antitrust compliance policies and conducting company-wide trainings.

With respect to sports-related litigation in particular, David has litigated cases involving antitrust law, labor law, licensing, agent regulation, active and retired player rights, and collegiate athlete rights. He has represented all four major Players Associations, myriad professional athletes and agents, and teams and owners in disputes with their respective Leagues. Much of David's sports work is for the NFL Players Association and NFL players. He has appeared in dozens of matters, including those involving players such as Tom Brady, Colin Kaepernick, Ray Rice, Adrian Peterson, Ezekiel Elliott, Eric Reid, Terrell Owens and Michael Vick.

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An accomplished antitrust, sports, intellectual property, and commercial litigator, Jeanifer concentrates her practice on civil antitrust and unfair competition litigation with particular expertise in mixed issues of antitrust and intellectual property law, and class actions.

Jeanifer regularly represents plaintiffs and defendants in complex commercial disputes at the trial and appellate levels. She has represented clients in high-profile matters such as the Women's National Soccer Team's gender discrimination litigation, and the landmark antitrust trial against the NCAA on behalf of classes of D-I college athletes. Jeanifer was selected to the 2021 *Chambers* "Ones to Watch" list and named a *Super Lawyers* "Rising Star."

She has been recognized for obtaining critical wins for her clients whether at trial or by obtaining complete dismissals. Recently, she successfully defended PetIQ in a private merger challenge, where she argued an appeal to the Ninth Circuit and successfully secured a dismissal of the complaint. Jeanifer also has a major role in Winston's renowned sports practice, successfully trying antitrust claims to a landmark win for college athletes against the NCAA, and in a high stakes, high-profile gender discrimination lawsuit on behalf of the Women's National Soccer Team in their pursuit of equal pay.