The *Alston* Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis

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Introduction

Fall Saturdays and college football. The March Madness basketball tournament. The NCAA plays an important role in many Americans' lives. But for decades, the association has justified its restrictions on compensation to student-athletes on the basis of "amateurism." Those attempts just ran into the brick wall of *NCAA v. Alston*.[1]

This Article is adapted from a brief we filed on behalf of 65 professors in the *Alston* case.[2] Because the arguments made by the NCAA and the athletic conferences (together, "NCAA") have been employed so frequently and are so misguided, we address them here. After addressing them, we describe the Supreme Court's rejection of the NCAA's arguments.

Central to the *Alston* case is the NCAA's pursuit of "amateurism."[3] For decades, the NCAA has relied on this concept, which involves some version of student-athletes not being paid or being paid limited amounts of money.[4] In the *Alston* case, the NCAA restricted not only payments unrelated to education but also those related to education—covering, for example, tutoring, scientific equipment, and computers.[5]

Part I of this Article shows how the NCAA's attempt to obtain immunity is not consistent with fundamental underpinnings of antitrust law. Part II focuses on the Supreme Court's 1984 decision in *NCAA v. Board*

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1 141 S. Ct. 2141 (2021).

2 *See* Brief of Amici Curiae 65 Professors of Law, Business, Economics, and Sports Management in Support of Respondents, NCAA v. Alston, 141 S. Ct. 2141 (Nos. 20-512, 20-520).

3 *See* Petition for a Writ of Certiorari at 7, 16, NCAA v. Alston, 141 S. Ct. 2141 (Nos. 20-512, 20-520).

4 *Id.* at 7.

5 Alston v. NCAA, 958 F.3d 1239, 1251 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

of Regents of the University of Oklahoma,[6] in which the Court discussed amateurism in dicta in the course of holding that the NCAA's restrictions on television contracts violated antitrust law.[7] Part III focuses on the Rule of Reason, the form of antitrust analysis used by most courts today, to show how the NCAA's restrictions were anticompetitive.

I. The NCAA's Arguments Undermined Competition and Conflicted with Antitrust Law

In the *Alston* case, the NCAA relied on "amateurism" to create a new rule that sharply conflicted with established antitrust policy.[8] It did so in five ways. First, the rule provided an immunity or scope limitation of a kind the Supreme Court has long opposed. Second, it empowered the NCAA, alone among antitrust defendants, to choose values of its own liking—not long-recognized antitrust values of price, quality, or output—and use them to excuse conduct that would otherwise be illegal. Third, as a corollary, it granted the NCAA a unique authority to preserve a product in a particular form, even one at odds with consumer preference expressed through free markets. Fourth, it allowed the NCAA to gain a special, favorable antitrust treatment available to none of the thousands of other desirable and important economic integrations throughout the economy. And fifth, the rule gained no special status from the NCAA's assertion that it is a "joint venture."[9]

A. *The NCAA's Rule Limited Antitrust Scope in a Way Deeply Disfavored by the Supreme Court*

Though the NCAA characterized it in various ways in its briefing, it sought what was effectively a new judicial immunity. The NCAA mostly argued that such immunity would not be unusual,[10] and briefly quibbled

6 468 U.S. 85 (1984).

7 *See id.* at 119–20.

8 *See Alston*, 958 F.3d at 1249, 1253–54.

9 *See* Petition for a Writ of Certiorari, *supra* note 3, at 17–18, 32.

10 The NCAA implied different and inconsistent justifications for its rule, and sometimes it seemed to acknowledge that it would be special. At times, it emphasized the NCAA's uniqueness—it dwelled on its special history and claimed that college sports are noncommercial, educational, and social. Brief for Petitioner at 6, 31–33, *Alston*, 141 S. Ct. 2141 (2021) (No. 20-512) [hereinafter NCAA Br.]; Brief for Petitioner at 4–5, *Alston*, 141 S. Ct. 2141 (2021) (No. 20-520) [hereinafter Conf. Br.]. But other times, the NCAA claimed that its rule already applies in all business sectors. *E.g.*, Conf. Br. at 26 (arguing that "*Board of Regents* did not state a special rule for the NCAA; it applied broad and generally

that it is not semantically an "immunity," because plaintiffs would still have the satisfaction of filing complaints before the courts summarily dismiss them all.[11] But the NCAA claimed that "amateurism rules are procompetitive as a matter of law"[12] and that dismissal is required "on the pleadings" as to any rule the NCAA calls "amateurism,"[13] a categorization that is "not open to judicial second-guessing."[14] It imagined a rule that renders some changing and uncertain class of conduct categorically beyond antitrust oversight.

If there is consensus in antitrust about any single issue, however, it is that exemptions, immunities, and other scope limitations are rarely justified. "Language more comprehensive" than the antitrust statutes "is difficult to conceive."[15] That language captures Congress's aim "to strike as broadly as it could."[16] More than a century of the Supreme Court's precedent has established that "[r]epeals of [antitrust] by implication . . . are strongly disfavored"[17] because "antitrust . . . [is] a fundamental national economic policy."[18] Even where Congress makes exemptions, the Supreme Court reads them narrowly.[19]

Other antitrust institutions share these fundamental tenets. Every official study panel set up over many decades, by Republican and Democratic Presidents and by Congress, has called for the repeal or restriction of antitrust scope limits.[20] And the enforcement agencies,

applicable standards of antitrust law"). These inconsistencies make no difference in considering the NCAA's arguments.

11 *See* NCAA Br., *supra* note 10, at 30–31.

12 *Id.* at 18.

13 *Id.* at 25 (quoting Deppe v. NCAA, F.3d 498, 501–04 (7th Cir. 2018)).

14 *See* Conf. Br., *supra* note 10, at 13; *see also* NCAA Br., *supra* note 10, at 43 (explaining that courts are "required" to recognize that "the NCAA's conception of amateurism is procompetitive").

15 United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

16 Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975).

17 Carnation Co. v. Pac. Westbound Conf., 383 U.S. 213, 217–18 (1966) (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 350–51 (1963)).

18 *Id.*

19 *E.g.*, Union Lab. Life Ins. v. Pireno, 458 U.S. 119, 126 (1982) (citation omitted).

20 DEBORAH A. GARZA, JONATHAN R. YAROWSKY, BOBBY R. BURCHFIELD, W. STEPHEN CANNON, DENNIS W. CARLTON, MAKAN DELRAHIM, JONATHAN M. JACOBSON, DONALD G. KEMPF, JR., SANFORD M. LITVACK, JOHN H. SHENEFIELD, DEBRA A. VALENTINE & JOHN L. WARDEN, ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 335–37, 356, 428 (2007); NAT'L COMM'N FOR THE REV. OF ANTITRUST L. & PROCS., REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 183, 185, 190 (1979); *see generally* REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted in* 115 CONG. REC. 15,933–35, 15,937 (1969); REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 115 CONG. REC. 13,890, 13,897 (1969). For a discussion of past congressional discussions on exemptions in antitrust law, see *Report of the Attorney General's National Committee to Study the*

under control of either party, have agreed,[21] as has the leading professional antitrust organization.[22]

B. *Private Entities Do Not Get to Choose Their Own Non-Competition Antitrust Values*

The NCAA's rule also allowed it to preserve values it considered important and use them to justify trade restraints that would be illegal if used by any other entity. Its "amateurism" concept did not have determinate content,[23] and it often did not explain which values encompass "amateurism" or if there are any limits on those values.[24] But the NCAA clearly believed that it could promote objectives based on morality, nostalgia, or other social policy concerns, and even explicitly admitted so—claiming that it enjoys antitrust deference because it "serv[es] a societally important non-commercial objective."[25] In fact, the NCAA sought to save those values *from competition itself.* Its major stated concern was that, without horizontal restraints, competition among schools for athletic talent would jeopardize values it prefers but markets do not.[26]

Antitrust Laws: Hearing Before the S. Select Comm. on Small Bus., 84th Cong., 1st Sess. 270, 272 (1955); and REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 260, 270 (1955).

[21] *E.g.*, Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., Assistant Attorney General Makan Delrahim Delivers Remarks at Antitrust Division's First Competition and Deregulation Roundtable: Examining Exemptions and Immunities from the Antitrust Laws (Mar. 14, 2018), https://perma.cc/5EDV-BUS7; Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div, Antitrust Immunities, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference: Public and Private: Are the Boundaries in Transition? (June 24, 2010), https://perma.cc/D7ND-32GZ.

[22] *See* ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 291–315 (2007).

[23] All the courts in *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part*, *rev'd in part*, 802 F.3d 1049 (9th Cir. 2015), and in *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021), so found, despite the NCAA's opportunity to explain the concept in two full trials and two appeals. The district court in *O'Bannon* found the definition "malleable," lacking any "single definition," and frequently "revised[,] . . . sometimes in significant and contradictory ways." *O'Bannon*, 7 F. Supp. 3d at 1000. The district court in *Alston* also found it lacking a "coherent definition," "circular," and without any consistency except that "the NCAA has decided to forbid [something]." *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070, 1074, 1099.

[24] *See* NCAA Br., *supra* note 10, at 1–3.

[25] *Id.* at 3.

[26] *Id.* at 20–21, 28.

Antitrust law entirely precludes these arguments. Congress has already chosen the values that are relevant to antitrust cases, and they are few, narrowly delineated, and well-known. If conduct subject to antitrust law impedes quality-adjusted price competition, then the only evidence that can mitigate its illegality is an improvement in price, quality, or output—as measured by an increase in consumer demand.[27] It is no defense that a restraint serves some other social value or protects society from ruinous competition.[28] *Board of Regents* itself rejected such an argument. In that case, the NCAA could not limit broadcast games to protect live attendance on the "assumption that the product itself is insufficiently attractive to consumers" because that argument would be "inconsistent with the basic policy of the Sherman Act."[29]

Longstanding precedent of the Supreme Court thus makes clear that "amateurism" is not a relevant legal category, and it has no independent significance in an antitrust case. "Amateurism" matters only to the extent that it improves price, quality, or output.

As Ninth Circuit Chief Judge Sidney Thomas explained in his concurrence in *O'Bannon v. NCAA*,[30] "amateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism."[31] And the district court in *Alston* appropriately explained that the restraints "cannot be deemed procompetitive simply because they promote or are consistent with amateurism," but instead "must have some procompetitive effect on the relevant market."[32]

In *Alston*, the Supreme Court made clear that "[t]o 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."[33] The reason is that the Court "has regularly refused materially identical requests from

27 *See, e.g.*, *In re* McWane, Inc., 2014 WL 556261, at *30 (F.T.C. 2014).

28 *E.g.*, FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 421–22 (1990); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 463 (1986); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 690–91 n.16, 692 (1978); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940).

29 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984); *see id.* at 101 n.23 ("[G]ood motives will not validate an otherwise anticompetitive practice.").

30 802 F.3d 1049 (9th Cir. 2015).

31 *Id.* at 1082 (Thomas, C.J., concurring in part and dissenting in part).

32 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1098 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

33 *Alston*, 141 S. Ct. at 2159.

litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition."[34]

C. *Markets, Not Committees of Competitors, Decide Which Products Succeed*

As a corollary, the NCAA raised no legally relevant defense when it implied that particular products have a moral or intrinsic right to exist in their makers' preferred form.[35] On the one hand, firms are free to sell whatever they like and design their products as they think best, and in appropriate cases they may design them collectively. But their products must then succeed or fail on the merits by appealing to consumers in terms of price or quality. No producer or association could argue that it needs a trade restraint to preserve its product because consumers in unrestrained markets would have chosen something else.

For example, a given university might try to compete for athletic talent by increasing compensation. A rule prohibiting that competition might be justified if the evidence showed that the quality of the product, as measured by consumer demand, would be harmed by loss of team parity or consumer perception that such players are no longer "students" or the like.[36] In fact, the district court in *Alston* took that kind of evidence into account.[37] But it is no defense to argue, as the NCAA did in various ways, that competition for talent should be suppressed because member schools prefer their product to remain an "amateur" product, or that the product's "amateur" nature might not survive if competition for talent gives some schools better or more popular teams.[38] Markets decide which products survive and, accordingly, how they will be designed.

This same principle would apply to the "definition" of any product, in sports or elsewhere. Imagine that a group of manufacturers collectively agrees not to purchase foreign-made inputs, or that food distributors agree to discontinue products with high-fructose corn syrup. If the manufacturers take action to enforce those decisions and are shown to have harmed quality-adjusted price competition, they could not defend themselves by arguing that foreign inputs are "un-American" or that high-

34 *Id.*

35 *See generally* NCAA Br., *supra* note 10.

36 *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1082–83.

37 *Id.*

38 NCAA Br., *supra* note 10, at 22, 43.

sugar foods are unhealthy. They could only argue that *consumers* value products with domestic inputs or healthier ingredients, as proven by evidence that they would buy them at higher prices or in larger quantities. Non-antitrust values might be important and widely shared, but they are not legally relevant until Congress adopts them by statute.

D. *No Other Economic Integration Is Treated as the NCAA Claimed It Should Be Treated*

The NCAA's proposed rule would have given it more favorable treatment than the thousands of other economic integrations that face full Rule-of-Reason scrutiny.[39] For example, the NCAA relied on the famous *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[40] decision, but did not explain why the restraint there was subject to the full Rule of Reason.[41] The defendant in *Broadcast Music* made a stronger case for special protection because the product—a group license for musical compositions—literally could not exist without the challenged agreement.[42] The NCAA, by contrast, frequently changes its rules and tolerates inter-conference variation, and so proves by its own conduct that no particular restraints are required for the product to exist.

The NCAA likewise deserves no better treatment than professional sports leagues, which are much more economically integrated. The NCAA coordinates hundreds of disparate institutions fielding thousands of teams in a variety of sports, most of which will never face one another on the field, and it permits extensive rules variations among the sub-national conferences and organizations. Professional leagues are more closely integrated, typically consisting of a small number of similar units that are subject to one set of rules and frequently interact. And yet the Supreme Court has held professional leagues subject to ordinary Sherman Act section 1 treatment, even for conduct where their interests align and collaboration could generate benefits.[43]

Nor are amateur sports more important or special than the work of the economy's thousands of technological standard-setting organizations,

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[39] *See id.* at 19. The Rule of Reason involves a court's consideration of a restraint's anticompetitive and procompetitive effects. *See* Conf. Br., supra note 10, at 28–29. For in-depth analysis on Rule-of-Reason scrutiny in the modern era, see Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265 [hereinafter Carrier, *Bridging the Disconnect*].

[40] 441 U.S. 1 (1979).

[41] *See id.* at 24.

[42] *See id.* at 20–22.

[43] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010).

to whom the full Rule of Reason is normally applied.[44] Even though these entities' sole reason for being is to define products, the Supreme Court is comfortable finding their conduct illegal without special rules or deference.[45] And while such organizations now enjoy some special protections in section 1 cases, it is only because Congress provided them by statute.[46] Likewise, the NCAA could not comfortably explain why amateur sports are more special or important than the large variety of important integrations that face full Rule-of-Reason analysis under the ancillary restraints rule.[47]

E. *Calling the NCAA a "Joint Venture" Adds Nothing to its Argument*

The NCAA did not strengthen its argument by asserting that it is a "joint venture" or that it cooperates in ways required for a product to exist.[48] While courts have often been "bemused by the label 'joint venture,'"[49] the Supreme Court has frequently told them not to be. Recently, for example, the Court unanimously found a professional sports league to be subject to ordinary Rule-of-Reason treatment because "[t]he mere fact that [firms] operate jointly in some sense does not mean that they are immune."[50] After all, "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products."[51] Accordingly, "[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and

44 *See* Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMORY L.J. 583, 627–30 (1998).

45 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509–11 (1988); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 577–78 (1982).

46 *See* National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815, 1815–19 (codified as amended at 15 U.S.C. §§ 4301–05).

47 *E.g.*, Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1151 (9th Cir. 2003); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 970 (10th Cir. 1994); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986); Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985); *see also* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338–39 (2d Cir. 2008) (Sotomayor, J., concurring); FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 8, 30 (2000).

48 *See* NCAA Br., *supra* note 10, at 17, 24.

49 Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 HARV. L. REV. 1007, 1045–46 (1969).

50 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 199 (2010).

51 *Id.* at 199 n.7.

label," as "[p]erhaps every agreement and combination in restraint of trade could be so labeled."[52]

The Supreme Court appropriately held that "the NCAA's status as a particular type of venture" does not "categorically exempt its restraints from ordinary rule of reason review."[53] Even if "some degree of coordination between competitors within sports leagues can be procompetitive[,] . . . . this insight does not always apply."[54] In particular, the fact that "*some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are."[55]

The Court explained that the NCAA's "rules fixing wages for student-athletes fall on the far side of this line."[56] The reason is that "Division I basketball and [Football Bowl Subdivision] football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined."[57] "Instead," the Court continued, "the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means," with such a "dispute present[ing] complex questions."[58]

II. *Board of Regents* Created No Special Rule Favoring the NCAA

Not only was the substance of the NCAA's position contrary to the ordinary antitrust policy that applies in other sectors, but the NCAA gained no support from *Board of Regents*. That decision, which ruled *against* the NCAA, discussed amateurism only in dicta, and that discussion should be understood in its historical setting.[59] Misleading excerpts from the Court's ruling in *Board of Regents*—or from lower court decisions—did not fill the gaps in the NCAA's argument.

52 *Id.* at 197 (quoting Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (internal quotation marks omitted)).

53 NCAA v. Alston, 141 S. Ct. 2141, 2157 (2021).

54 *Id.*

55 *Id.*

56 *Id.* at 2157.

57 *Id.*

58 *Id.*

59 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–04 (1984) (holding NCAA's horizontal restraint on its member schools, through its television deal, anticompetitive under abbreviated Rule-of-Reason analysis).

A. *Dicta and Context Reject the NCAA's Radical Reinterpretation of* Board of Regents

1. Dicta

In its briefs, the NCAA claimed that *Board of Regents* "*required*" courts to recognize that its "conception of amateurism is procompetitive."[60] The NCAA frequently reiterated *Board of Regents'* dicta that amateur players "must not be paid,"[61] even while acknowledging that it pays its players "modest" amounts.[62] And it said in various ways that this was the Court's "holding."[63]

As *Board of Regents* itself explained, however, the Supreme Court held "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."[64] That statement mentions neither amateurism nor evidentiary standards to be used in cases not before the Court. The brief discussion of amateurism resolved no disputed matters of law and was not subject to factual findings in the trial record.[65] Remarkably, in the *Board of Regents* case itself, the NCAA did not even argue that "amateurism" justified its restraints, and its counsel admitted during oral argument that "it might be able to get more viewers . . . if it had semi-professional clubs rather than amateur clubs."[66]

2. Context

The context of *Board of Regents* cast further doubt on the NCAA's interpretation. Foreclosing judicial inquiry into uncertain facts would be quite at odds with the antitrust jurisprudence of the 1970s and 1980s. At

60 NCAA Br., *supra* note 10, at 43 (emphasis added).

61 *See id.* at 2, 3, 6, 11, 14, 16, 17, 22, 27, 34, 35, 38, 45, 46; Conf. Br., *supra* note 10, at 1, 5, 9, 16, 23, 31.

62 NCAA Br., *supra* note 10, at 7, 27, 29, 37, 46 n.4.

63 *See* Conf. Br., *supra* note 10, at 23 (claiming that *Board of Regents* so "held"); *see also* NCAA Br., *supra* note 10, at 28–29 (contending that *Board of Regents* dicta "has full stare decisis effect"); Conf. Br., *supra* note 10, at 23–26.

64 *Bd. of Regents*, 468 U.S. at 120.

65 *See id.* at 100–01 (clarifying that the Court's "decision [was] not based . . . on [its] respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics").

66 Oral Argument at 29:48, *Bd. of Regents,* 468 U.S. 85 (1984) (No. 83-271), https://perma.cc/AA7M-NTYT.

that time, the Supreme Court was in the midst of a long season of repealing per se antitrust rules, stressing the need for empirical caution.[67]

In fact, the questions at issue in *Board of Regents* were poorly suited for conclusory, categorical treatment. For years, sports economists had been bitterly divided over empirical claims that trade restraints improve team parity or consumer appeal.[68] Since then, the empirical literature has grown against those claims.[69] It would be uncanny for a Court devoted to greater caution and empirical fullness to rule a priori on empirical matters that were sharply contested then and that have grown more doubtful since.

B. *The NCAA's Discussion of* Board of Regents *Was Misleading*

In its briefing, the NCAA exaggerated and misinterpreted *Board of Regents*. First, it misstated what the Supreme Court in *Board of Regents* held as to the television broadcast restraints that were actually at issue, claiming it was "subject to detailed rule-of-reason analysis."[70] Not only did the Court not subject those restraints to the full Rule of Reason, but its holding—that the NCAA enjoyed little deference at all—is a leading application of the *pro-plaintiff* quick-look Rule of Reason.[71] We know it was a quick-look case because the Court explicitly held that the television contract could be found illegal without any proof of market power.[72]

This misreading seems important to the NCAA's position. The NCAA implied that if it enjoys full Rule-of-Reason treatment for even the grossest horizontal price and output restraints, then perhaps rules like the scholarship restraints in *Alston* enjoy more deferential treatment.[73] But on

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67 *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–59 (1977).

68 *Compare* Brief of Economists as Amici Curiae in Support of Petitioner at 13, 37, 39, 40, 46, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010) (No. 08-661), *with* Brief of Economists as Amici Curiae in Support of Respondents at 9, 10, 21, 29, 31, *Am. Needle, Inc.*, 560 U.S. 183 (2010) (No. 08-661).

69 *See, e.g.*, Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 698 (2018) (empirical study found "no change in consumption of [D1 Football Bowl Subdivision] Power Five football games following the first significant increase in student-athlete compensation in more than forty-two years"). *See generally* RODNEY FORT & JASON WINFREE, 15 SPORTS MYTHS AND WHY THEY'RE WRONG 7–40, 80–94 (2013).

70 NCAA Br., *supra* note 10, at 8, 23.

71 *See Bd. of Regents*, 468 U.S. at 109–10, 109 n.39, 113.

72 *Id.* at 109–10, 113; *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999) (describing the Court's application of quick look in *Board of Regents* as what the Court "held").

73 *See* NCAA Br., *supra* note 10, at 8, 13, 17, 20.

the contrary, the NCAA's restraints in *Board of Regents* were held nearly per se illegal because they were so obviously harmful.[74]

Similarly, the NCAA concealed an important distinction that the Court was at pains to explain and that the *Board of Regents* dicta was about. The NCAA quoted from *Board of Regents* that "the NCAA and its member institutions market . . . . competition itself" and that "this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed."[75] But it then made a misleading edit, quoting the Supreme Court that "[a] myriad of [such] rules [. . .] all must be agreed upon."[76] The Court actually wrote that the "myriad" includes "rules *affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed*."[77] Those restraints—rules of on-field play on which schools must agree—are far different than the price restrictions at issue in *Alston*.[78]

C. Alston's *Burial of* Board of Regents

In *Alston*, the Supreme Court struck the death knell to the NCAA's decades-long quest to discern an amateurism-based antitrust defense in *Board of Regents*. The Court rejected "the NCAA's reading" of the case that "expressly approved its limits on student-athlete compensation," with "this approval foreclos[ing] any meaningful review of those limits [by the Court]."[79] The Court noted that "*Board of Regents* explained that the league's television rules amounted to 'horizontal price fixing and output limitations' of the sort that are 'ordinarily condemned' as 'illegal *per se*.'"[80] The Court in *Board of Regents* had "declined to declare the NCAA's restraints *per se* unlawful only because they arose in 'an industry' in which some 'horizontal restraints on competition are essential if the product is to be available at all.'"[81]

The *Alston* Court explained that its analysis "is fully consistent with all of this," and that "if any daylight exists" between *Alston*'s application of

74 *See Bd. of Regents*, 468 U.S. at 113; *see also id.* at 126 (White, J., dissenting).

75 NCAA Br., *supra* note 10, at 22.

76 *Id.*

77 *Bd. of Regents*, 468 U.S. at 101 (emphasis added).

78 *See, e.g.*, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196–97 (2010) (stating that "contracts with . . . playing personnel" are an issue on which NFL teams "compete with one another").

79 NCAA v. Alston, 141 S. Ct. 2141, 2157 (2021).

80 *Id.* (quoting *Bd of Regents*, 468 U.S. at 100).

81 *Id.* (quoting *Bd. of Regents*, 468 U.S. at 101).

Board of Regents and the *Board of Regents* opinion itself, "it is only in the NCAA's favor."[82] For "[w]hile *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation."[83] And "[i]f a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here."[84]

The Court also rejected the NCAA's claim that *Board of Regents* "foreclose[d] any rule of reason review" because of its "comment[] on student-athlete compensation restrictions."[85] Any "stray comments"[86] relating to amateurism "do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions."[87] In fact, "[s]tudent-athlete compensation rules were not even at issue in *Board of Regents*."[88] And that Court "made clear it was only assuming the reasonableness of the NCAA's restrictions," which meant that it "simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore."[89]

D. *The Lower Court "Consensus" Explicitly Rejected the NCAA's Position*

The "consensus" of courts that the NCAA claimed read *Board of Regents* differently was, at most, just one case.[90] The NCAA's other cited cases were inapposite, and one of the key decisions on which it relied tells us that they are not on point. In fact—remarkably—that decision drew exactly the same distinction between procompetitive and anticompetitive restraints that the lower courts did in *Alston*.

Namely, *Agnew v. NCAA*,[91] a case the NCAA won only because the plaintiff pled no relevant market at all, distinguished between NCAA rules

82 *Id.*

83 *Id.*

84 *Id.*

85 *Alston*, 141 S. Ct. at 2157–58.

86 *Id.* at 2158.

87 *Id.*

88 *Id.*

89 *Id.*

90 NCAA Br., *supra* note 10, at 8.

91 683 F.3d 328 (7th Cir. 2012).

governing "financial aid" and a category it described as "eligibility rules."[92] The court borrowed from *Board of Regents* to make that distinction,[93] and to illustrate "eligibility," it offered the example of "rules requiring class attendance."[94] "[F]inancial aid rules," on the other hand, including the scholarship limits in that case, deserved no "procompetitive presumption."[95] The court thought any such claim would be "far too great a leap to make without evidentiary proof at the full Rule of Reason stage."[96] In other words, the *Agnew* court thought "eligibility" rules are those that require players actually to be students, and it explicitly distinguished those rules from education-related compensation. That is the same distinction drawn by the lower courts in *Alston.*

Deppe v. NCAA,[97] another case cited by the NCAA, merely confirmed the state of the law in the U.S. Court of Appeals for the Seventh Circuit, relying mainly on *Agnew* to hold that a residency requirement—involving no price or output restraint, and merely ensuring a person is a student at the school where they want to play—is an "eligibility" rule that enjoys favorable treatment.[98] Thus, the Seventh Circuit all but explicitly held that NCAA limits on education-related payments must face full Rule-of-Reason review.[99] The law of the Seventh and Ninth Circuits is the same.[100]

The NCAA cited two other inapt cases. *Smith v. NCAA*[101] involved a non-monetary eligibility rule very similar to that in *Deppe*.[102] Likewise, in upholding tire specifications chosen to make car races more exciting—the equivalent of specifications for football players' shoes or helmets—*Race Tires America, Inc. v. Hoosier Racing Tire Corp*.[103] involved no horizontal restraints at all, much less horizontal price restraints.[104]

92 *Id.* at 344–45.

93 *Id.* at 339 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984)).

94 *Id.* at 343.

95 *Id.* at 344–45.

96 *Id.* at 344.

97 893 F.3d 498 (7th Cir. 2018).

98 *Id.* at 502.

99 *See id.* at 502–04.

100 *Compare id.*, *with* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

101 139 F.3d 180 (3d Cir. 1998).

102 *See id.* at 183.

103 614 F.3d 57 (3d Cir. 2010).

104 *See id.* at 75, 78, 83–84.

That leaves only *McCormack v. NCAA*,[105] which dismissed a challenge to the NCAA's financial benefits restrictions.[106] But even that case did not find categorical immunity of the kind the NCAA claimed, as it considered whether the plaintiff adequately alleged that the restraints would "stifle competition."[107] To whatever extent *McCormack* found a special rule in *Board of Regents* for price and output restraints, it is wrong, and it is alone.[108] It conflicted with both the Seventh and Ninth Circuits, and is incorrect for the reasons explained above.

III. The Lower Courts in *Alston* Found a Hornbook Violation of Antitrust Law

The district court in *Alston*—affirmed by the Ninth Circuit—applied hornbook antitrust law. Rule-of-Reason analysis typically follows a four-step burden shifting approach: (1) the plaintiff must show that the alleged restraint has a significant anticompetitive effect ("Step One"); (2) after the plaintiff establishes such an effect, the burden shifts to the defendant to demonstrate a procompetitive justification ("Step Two"); (3) once the defendant has proven a justification, the burden shifts back to the plaintiff to show that the restraint's objectives can be achieved through less restrictive means ("Step Three"); and (4) the court then balances the restraint's anticompetitive and procompetitive effects ("Step Four").[109]

The lower courts' version of the Rule of Reason in *Alston* was deferential to the NCAA, and the courts worked to help the NCAA make its case by filling in weaknesses in its evidence. The courts found "severe" injury at Step One of the analysis, a finding that remained undisputed, offset only modestly by procompetitive benefits that the lower courts found within the NCAA's non-antitrust justifications.[110] Given a finding of substantial net injury, the conclusion that the limited benefits could have been obtained without so much competitive damage naturally followed.[111]

The NCAA responded in its briefing with abstract logical critiques of the district court's handling of Steps Two and Three of its Rule-of-Reason

105 845 F.2d 1338 (5th Cir. 1988).

106 *Id.* at 1340.

107 *Id.* at 1345.

108 *See id.* at 1344–45.

109 *See, e.g.,* Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST, Spring 2019, at 50–51 [hereinafter Carrier, *Four-Step*].

110 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1098 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

111 *See id.* at 1102.

analysis.[112] Its arguments were incorrect, especially given the very high bar the courts required plaintiffs to meet at Step Three.[113] In any event, the NCAA found no support in the caselaw, and even if it was correct, there would have followed a balancing step—Step Four—at which the NCAA likely would have lost.

A. *Plaintiffs Demonstrated "Severe" Anticompetitive Effects at Step One*

The plaintiffs in *Alston* demonstrated a particularly strong case under the Rule of Reason. Of the 897 Rule-of-Reason cases decided in the modern era, courts have disposed of nearly all at the initial step on the grounds that the plaintiff failed to demonstrate a significant anticompetitive effect.[114] The *Alston* case was very different. The plaintiffs demonstrated "severe" anticompetitive effects in the form of an "exercise [of] monopsony power" that "essentially eliminate[d] price competition . . . ."[115] Because "elite student-athletes lack any viable alternatives to Division 1," they must "accept . . . whatever compensation is offered to them" regardless of "whether any such compensation is an accurate reflection of the competitive value of their athletic services."[116]

These severe harms to the players are not hypothetical. As Judge Milan Smith noted in his Ninth Circuit concurrence in *Alston*, "Student-Athletes work an average of 35–40 hours per week on athletic duties during their months-long athletic seasons," are "often forced to miss class, to neglect their studies, and to forego courses," and are "often prevented from obtaining internships or part-time paying jobs," while "the NCAA and Division 1 universities make *billions* of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of Student-Athletes."[117]

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112 *See* NCAA Br., *supra* note 10, at 35–45.

113 *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1104.

114 Since 1977, courts decided 90% (809 of 897) on this ground, with the figure rising to 97% (391 of 402) after 1999. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (reviewing cases between 1999 and 2009) [hereinafter Carrier, *Rule of Reason*]; Carrier, *Bridging the Disconnect*, *supra* note 39, at 1268–69 (reviewing cases from Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977), through 1999). The authors reviewed every Rule-of-Reason case between 2009 and February 2021 for this Article.

115 *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1097–98.

116 *Id.* at 1070; *see also id.* at 1068 (noting the harm from "artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services").

117 Alston v. NCAA, 958 F.3d 1239, 1266 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021) (Smith, J., concurring); *see also* Tony Paul, *UM's Fab Five Players Want to Break Down Barriers*, DETROIT NEWS (Oct.

The Supreme Court, citing our brief, agreed that the plaintiffs' satisfaction of the initial step "was no slight burden."[118] This lawsuit "was different" than "nearly all rule of reason cases in the last 45 years," in which "the plaintiff failed to show a substantial anticompetitive effect."[119] The Court explained that "based on a voluminous record, the district court held that the student-athletes had shown [that] 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."[120] "[E]ven more notably," the NCAA "'did not meaningfully dispute' this conclusion."[121]

B. *The Courts Gave the NCAA the Benefit of the Doubt on Its Purported Procompetitive Justifications*

After the plaintiffs' demonstration at Step One, the burden shifted to the NCAA to demonstrate a procompetitive justification for its restrictions. The NCAA, however, offered little related to any *antitrust* justification, instead relying on its own definition of "amateurism."[122] The NCAA complained that the lower courts in *Alston* didn't understand or didn't apply that definition properly—even though the district court applied the same definition as the NCAA's own expert.[123] But it doesn't matter. When called to provide legally relevant evidence, the NCAA "offered no cogent explanation for why limits or prohibitions on these education-related benefits are necessary to preserve consumer demand,"[124] and its expert "did not even attempt to examine whether a relationship exists between [athlete] compensation and consumer demand."[125] In affirming those findings, the Ninth Circuit noted that "the NCAA set limits on education-related benefits without consulting any demand studies."[126]

8, 2016, 9:19 PM), https://perma.cc/L42H-EPKG (explaining that at the same time Michigan signed a deal with Nike in the early 1990s worth $170 million, members of the "Fab Five" basketball team had to pool their money so they could afford Taco Bell).

118 *Alston*, 141 S. Ct. at 2160–61.

119 *Id.*

120 *Id.* at 2161.

121 *Id.* (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1097).

122 *See* NCAA Br., *supra* note 10, at 36–37.

123 Alston v. NCAA, 958 F.3d 1239, 1260 n.16 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

124 *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1102.

125 *Id.* at 1100.

126 *Alston*, 958 F.3d at 1258.

By contrast, the district court relied on legally relevant evidence. It considered "demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect, and, therefore, lack a procompetitive justification."[127] It reviewed the NCAA's evidence carefully, searching for legally relevant benefits and finding that "some of the challenged rules serve [the NCAA's] procompetitive purpose: limits on above-[cost-of-attendance] payments unrelated to education, the [cost-of-attendance] cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives."[128] The court found no benefit in "restricting 'non-cash education-related benefits,'" however, because those "benefits, like a scholarship for post-eligibility graduate school tuition, [are] inherently limited to [their] actual value, and could not be confused with a professional athlete's salary."[129] The Ninth Circuit affirmed this distinction, holding that the district court "fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits."[130]

The Supreme Court appropriately found that the lower court considered amateurism, rejecting the NCAA's contention that the district court "'impermissibly redefined' its 'product' by rejecting its views about what amateurism requires and replacing them with its preferred conception."[131] The Court warned that a party cannot "relabel a restraint as a product feature and declare it 'immune'" from antitrust scrutiny.[132]

The Court then explained that "[t]he NCAA's argument not only misapprehends the inquiry" but also "would require [the Court] to overturn the district court's factual findings."[133] And "[w]hile the NCAA ask[ed] [the Court] to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition."[134] The Court found that "[n]one" of the district court's analysis "is product

127 *Id.* at 1257–58.

128 *Id.* at 1257 (emphasis omitted) (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1101–02).

129 *Id.* (internal quotation marks omitted).

130 *Id.* at 1260.

131 NCAA v. Alston, 141 S. Ct. 2141, 2162–63 (2021) (quoting NCAA Br., *supra* note 10, at 35).

132 *Id.* at 2163.

133 *Id.*

134 *Id.*

redesign" but instead "is a straightforward application of the rule of reason."[135]

C. *The NCAA's Attacks on Steps Two and Three Were Incorrect and Would Have Made No Difference to the Outcome*

Responding to facts found so badly against it, the NCAA offered an extremely convoluted and implausible line of argument purporting to show logical failures in the district court's treatment of Steps Two and Three. The NCAA argued in various ways that the lower courts improperly weighed the evidence, and in doing so, confused the application of the second and third steps in the Rule of Reason.[136]

1. Considering Harms and Benefits "As a Whole" at Step Two

The NCAA contended that its evidence of procompetitive benefits would have been better received if the district court had "review[ed] at step 2 whether [the] rules as a whole produced the procompetitive benefits of offering a distinctive product," implying that it was unfair to have considered the harms of "the NCAA rules as a whole."[137] It argued that requiring it to show that each rule individually was procompetitive had the effect of converting a "less" restrictive alternative test into a "least" restrictive one.[138] Apparently as a variation on the same argument, the NCAA claimed that the plaintiffs effectively bore the burden at Step Three.[139] The NCAA then contended that the district court would have avoided these problems by following a "reasonable necessity" test instead of one based on less restrictive alternatives.[140]

The NCAA's argument found no support in the caselaw and misapprehended the burden-shifting Rule of Reason. The argument is irrelevant at Step Two, where courts do not inquire into the size or nature of the benefits shown or compare them to the harm. At Step Two, courts merely ask whether defendants have produced some indication of benefits

135 *Id.*

136 *See, e.g.*, *id.* at 1257–63.

137 NCAA Br., *supra* note 10, at 39; *see also* Conf. Br., *supra* note 10, at 35.

138 NCAA Br., *supra* note 10, at 39–42; Conf. Br., *supra* note 10, at 37 ("[T]he effect of the lower courts' approach was to impose upon them the insuperable burden of having to prove a negative: *the absence* of a less restrictive alternative.").

139 Conf. Br., *supra* note 10, at 39.

140 NCAA Br., *supra* note 10, at 41 (quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 227 (D.C. Cir. 1986)); Conf. Br., *supra* note 10, at 41 (quoting *Rothery Storage*, 792 F.2d at 227).

to competition.[141] If so, the burden shifts back to the plaintiff.[142] Likewise, the purpose of Step Three is not to compare the benefits to demonstrated harm, but only to ask whether those benefits could be obtained with much less harm.[143]

The NCAA argued that Step Three subjected it to a "least" restrictive alternative analysis because the courts in the case didn't group its justifications together.[144] But the courts could not and should not have lumped the NCAA's claims into one justification. Whether or not the courts considered the harms separately or as a whole makes no difference because they found that each restraint has "severe" anticompetitive effects.[145] Each of them "artificially compress[es] and cap[s] student-athlete compensation."[146] And each prevents the compensation from "accurate[ly] reflect[ing] . . . the competitive value of . . . athletic services."[147]

In contrast, some of the NCAA's justifications were supported by no evidence of consumer benefit at all, as it failed to show a connection between particular restraints and consumer demand. The NCAA seemed to argue that the courts were required to credit those alleged benefits as part of a package because the harms were considered together.[148] But if some proffered justifications are legally irrelevant, then courts should not be compelled to accept them.[149]

Nor could the NCAA find support in the caselaw for its argument. Having reviewed all 897 Rule-of-Reason cases in the modern era, we were unable to locate a single case in which a court examined the defendant's array of justifications in a bundle similar to what the NCAA sought.

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141 *See* Alston v. NCAA, 958 F.3d 1239, 1267, 1270 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021) ("It was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market.").

142 *See, e.g.*, *id.* at 1270–71.

143 *Id.* at 1268.

144 NCAA Br., *supra* note 10, at 40–41.

145 *In re* NCAA Athletic Grant-in-Aid Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

146 *Id.* at 1068.

147 *Id.* at 1070.

148 *See* NCAA Br., *supra* note 10, at 39–41.

149 The NCAA also misread the leading treatise on this point. The discussion there of "the content of the restraint," which includes "the sum total of everything that the parties have 'agreed' about," refers not to multiple rules but to the "enlarge[ment] or interpret[ation of] those documents by [the defendant's] conduct." 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 1504d, at 421 (4th ed. 2017) (emphasis omitted).

2. The Importance of Step Three

The Supreme Court in *Alston* "agree[d] with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes."[150] But while the Court "agree[d] with the NCAA's legal premise," it could not "say the same for [the NCAA's] factual one."[151] The "trouble for the NCAA . . . is not the level of generality," but "the fact that the district court found unpersuasive much of its proffered evidence," in particular that "the court found the NCAA failed 'to establish that the challenged compensation rules . . . have any direct connection to consumer demand.'"[152]

Having found severe anticompetitive harm at Step One and (as reformulated in terms of consumer demand) some benefit at Step Two, the district court moved to Step Three. This step of the analysis is important: If a less restrictive alternative would attain the defendant's objectives nearly—or completely—as effectively while harming competition significantly less, then we can achieve the defendant's objectives with less competitive harm.[153] Moreover, where a plaintiff demonstrates that the benefits did not require such significant competitive harms, courts can avoid the challenge of balancing harms and benefits—the focus of Step Four.[154] Step Three also avoids the "extreme" position of "tolerating every restraint whenever the defendant states a plausible connection with a legitimate objective and claims that the alternatives are unsatisfactory."[155]

3. The Courts Applied the Highest Bar for Less Restrictive Alternatives at Step Three

The lower courts' approach at Step Three was not only appropriate, but also highly favorable to the NCAA. *First*, the courts, relying on *O'Bannon*, applied the most demanding version of the analysis that courts have applied in the past four decades. The courts credited alternatives only when the restraint was "patently and inexplicably stricter than . . .

150 *Alston*, 141 S. Ct. at 2162 (2021).

151 *Id.*

152 *Id.* (quoting *In re* NCAA Athletic Grant-in-Aid Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021)).

153 For an in-depth discussion of "less restrictive alternatives," see 7 AREEDA & HOVENKAMP, *supra* note 149, § 1502, at 398–99.

154 *See id.* § 1507d, at 450.

155 *See id.* § 1505b, at 435–36.

necessary" and the alternative did not impose "significantly increased cost."[156] This is an extremely high bar that requires a plaintiff to show that a restraint is clearly and without explanation more restrictive than needed.[157] Such an analysis would credit an alternative *only* when the restraint is obviously disconnected from the defendant's justifications. Because it is so difficult to satisfy, the analysis avoids judicial "tinker[ing]" to find marginally less restrictive alternatives, and in fact closely resembles the "reasonable necessity" standard that the NCAA preferred.[158] A restraint that is clearly and inexplicably disconnected from the objective is not reasonably necessary to attain it.[159]

Second, the lower courts connected the alternative with the defendant's objectives. A concern at Step Three is that courts might focus only on the existence of less restrictive alternatives, not on whether the alternative attains the defendant's objectives.[160] That did not happen in *Alston*. Again, the courts worked to shape the NCAA's focus on amateurism into a justification cognizable under the antitrust laws. This significant effort to rework the NCAA's justifications made it much more likely that the courts would—as they in fact did—consider whether the proffered alternatives would attain the goal of consumer demand, ensuring that the court directly considered the link between alternatives and objectives.

The *Alston* Court recognized the high bar set by the lower courts' analyses of less restrictive alternatives. In particular, "the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand."[161] Instead, "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."[162] Such a "demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions."[163]

156 *Alston*, 958 F.3d at 1260 (emphasis omitted) (quoting O'Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015)).

157 *See* NCAA Br., *supra* note 10, at 42.

158 *See id.* at 41; Conf. Br., *supra* note 10, at 47, 49.

159 *See* Carrier, *Bridging the Disconnect*, *supra* note 39, at 1341–46.

160 7 AREEDA & HOVENKAMP, *supra* note 149, ¶ 1505b, at 435–36.

161 NCAA v. Alston, 141 S. Ct. 2141, 2162 (2021).

162 *Id.* (quoting *In re* NCAA Athletic Grant-in-Aid Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021)).

163 *Id.*

4. Courts' Applications of Less Restrictive Alternatives at Step Three

The district court accepted an alternative that would:

> (1) allow the NCAA to continue to limit grants-in-aid at not less than the cost of attendance; (2) allow the NCAA to continue to limit compensation and benefits unrelated to education; [and] (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future.[164]

This result is appropriate. It gives the NCAA the benefit of the doubt when there is any chance that the restrictions could possibly affect consumer demand. And it precisely matches the procompetitive justifications the lower courts accepted.

On the other hand, the district court "reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do."[165] It is difficult to see how restrictions on *education*-related benefits like computers, science equipment, musical instruments, and tutoring make it more likely that consumers would watch college sports. In fact, if the NCAA actually sought to foster consumer demand, then "market competition in connection with education-related benefits" would itself "reinforce consumers' perception of student-athletes as students."[166] Restrictions like these do not make student-athletes appear less like professionals or enhance consumer demand and are more likely explained as a cartel's cost-saving measure, which courts do not accept.[167]

The Supreme Court in *Alston* thus was correct when it found that "[t]he [district] court enjoined only restraints on education-related benefits" and "did so . . . only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules."[168] And "[e]ven with respect to education-related benefits, the district court extended the NCAA considerable leeway[,] . . . provid[ing] that [it] could develop its own definition of benefits that relate to

164 *In re NCAA Athletic Grant-in-Aid Antitrust Litig.*, 375 F. Supp. 3d at 1087.

165 *See Alston*, 958 F.3d. at 1260.

166 *Id.* at 1261.

167 7 AREEDA & HOVENKAMP, *supra* note 149, ∫ 1508, at 461.

168 NCAA v. Alston, 141 S. Ct. 2141, 2164 (2021).

education and seek modification of the court's injunction to reflect that definition."[169]

D. *Even in the Absence of a Less Restrictive Alternative, Plaintiffs Would Have Won at Step Four*

In any event, none of the NCAA's attacks on the second- and third-step analyses were ultimately relevant because even if the plaintiffs had not shown a less restrictive alternative, the *Alston* courts would have moved to Step Four—balancing the anticompetitive and procompetitive justifications. And given the "severe" anticompetitive effects and the NCAA's failure to consider the effects of its restraints on consumer demand, the NCAA likely would have lost.[170]

All the sources relied on for the Supreme Court's recent formulation of the Rule-of-Reason test in *Ohio v. American Express Co.*[171] required this balancing step,[172] and the dissent in that case plainly contemplated one.[173] The leading treatise also contemplates balancing because, even if it is sometimes difficult or problematic, some opportunity for balancing is essential.[174] Other than conduct deemed per se illegal, antitrust doctrine requires courts to consider anticompetitive and procompetitive effects, and it is hard to see how a court can make this assessment without, at some point, having the chance to directly compare the two. In the context of *Alston*, a balancing analysis likely would have led to the NCAA coming up short.

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169 *Id.*

170 *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

171 138 S. Ct. 2274, 2284 (2018).

172 *See* Carrier, *Four-Step,* note 109, at 53 (analyzing *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993)); *see also* 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 12.02[1] (2d ed. 2017); and most notably 7 AREEDA & HOVENKAMP, *supra* note 149, at §§ 1502, at 399 (explaining that if a plaintiff cannot show a less restrictive alternative, "the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable").

173 *Am. Express*, 138 S. Ct. at 2291 (Breyer, J., dissenting) (stating that the plaintiff could win at the third stage "by showing that the legitimate objective does not outweigh the harm that competition will suffer, i.e., that the agreement 'on balance' remains unreasonable" (quoting 7 AREEDA & HOVENKAMP, *supra* note 149, § 1507a, at 442)).

174 7 AREEDA & HOVENKAMP, *supra* note 149, at §§ 1502, 1507a; *see also, e.g., In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1109 ("If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown."); Carrier, *Four-Step*, *supra* note 109, at 53–54.

We believe that, in repeating the "three-step, burden-shifting framework" it articulated in *American Express*,[175] the Court missed an opportunity to acknowledge the long-standing fourth step of the Rule-of-Reason framework, which calls for a balancing of a restraint's anticompetitive and procompetitive effects.[176] A plaintiff should not lose a Rule-of-Reason case if, at Step Three, it does not demonstrate a less restrictive alternative. That just allows us to have our cake and eat it too in permitting the defendant to achieve all or nearly all of its objectives while harming competition significantly less. Recognizing a balancing step would have been consistent with (1) the analytical underpinnings of antitrust law; (2) courts' application of the Rule of Reason for the past 45 years; and (3) the policies underlying the Rule of Reason, which require consideration of anticompetitive and procompetitive effects.[177]

Conclusion

The NCAA did not deserve an antitrust immunity enjoyed by no other entity in American law. The courts' hostility to limits on the scope of antitrust and social-value defenses made clear that the NCAA could not decide that values other than price, quality, and output justify trade restraints.

The NCAA's arguments in *Alston* also did not gain support from *Board of Regents*. Although the NCAA cited the case 145 times in its briefing, the Supreme Court's ruling in *Board of Regents* did not rely on amateurism. Rather, the discussion of amateurism was limited to dicta in a setting in which the Court was actively replacing rigid rules with more nuanced economic analysis.[178]

Finally, the application of hornbook Rule-of-Reason analysis favored the student-athlete plaintiffs. First, the plaintiffs showed "severe" anticompetitive effects.[179] Second, the NCAA's purported procompetitive justifications largely rested on its definition of "amateurism" with no showing of any benefit to price, quality, or output.[180] And the NCAA succeeded at all at this step only because the courts worked to help it,

175 *Alston*, 141 S. Ct. at 2160.

176 Carrier, *Four-Step, supra* note 109, at 53.

177 *Id.* at 53–54.

178 *See* Conf. Br., *supra* note 10, at 8. *See generally* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

179 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020), *aff'd*, 141 S. Ct. 2141 (2021).

180 *Alston*, 958 F.3d at 1257, 1268.

looking for evidence within its presentation on "amateurism" that could be understood in legally cognizable terms of consumer demand.

The NCAA's claims that the lower courts should have considered its justifications as a whole rather than as individual justifications, and that the failure to do so led to a "least restrictive alternative" requirement, did not bear support in the caselaw.[181] In fact, the "less restrictive alternative" formulation used was the most demanding standard employed in the caselaw.[182] And even if the plaintiffs had not shown a competitively preferred alternative, the case would have proceeded to Step Four—balancing—and under the lopsided evidence of net competitive injury, the plaintiffs most likely would have won.

In short, the NCAA was not entitled to the radical restructuring of antitrust law it sought. The Supreme Court agreed, finding that the district court's "judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility."[183]

In *Alston*, the NCAA sought the knockout punch of antitrust immunity. To put it mildly, it was not successful. Student-athletes will be the beneficiaries.

181 *See* NCAA Br., *supra* note 10, at 39–41.

182 *See id.*; Conf. Br., *supra* note 10, at 37; *see also supra* Part III.C.

183 *Alston*, 141 S. Ct. at 2166.