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PERSPECTIVE

Supreme Court needs to rethink NCAA 'amateurism'

By Maurice M. Suh, Daniel L. Weiss and Zathrina Z. Perez

As the college football bowl season concludes and all eyes look toward March Madness, the debate concerning how student-athletes should be compensated for their close to 80 hours a week of training, practicing, performing and studying continues in living rooms, bars, and sports talk radio, and even in many state legislatures. On Dec. 16, the U.S. Supreme Court joined the fray by granting review in *In re NCAA Grant-In-Aid Cap Antitrust Litigation* (*Alston*). In *Alston*, the Supreme Court will consider the 9th U.S. Circuit Court of Appeals finding that the National Collegiate Athletic Association's rules restricting its member conferences and schools from offering players compensation beyond athletic scholarships at cost of attendance unlawfully restrain trade by preventing conferences and schools from competing with each other for the student-athlete's athletic services (and thereby violate Section 1 of the Sherman Act).

More than 36 years ago, the Supreme Court issued *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), which helped shape college sports as we know them today. In *Board of Regents*, the court held that the NCAA's then-existing rules regarding the sale of television rights violated antitrust laws. Although the NCAA's regulation of student-athletes was not before the court, Justice John Paul Stevens in his majority decision commented that college sports have "a revered tradition of amateurism" and that amateurism is necessary for college sports to compete with professional sports in terms of popularity. He observed that the NCAA should have "ample latitude" in preserving amateurism in college sports and that this latitude included the NCAA's rules that "athletes must not be paid, must be required to attend class, and the like."

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For decades, the NCAA evaded any meaningful antitrust review of its compensation rules by claiming that those rules protect "amateurism," which the NCAA argued Justice Stevens in *Board of Regents* already found to be procompetitive. This was true until the *O'Bannon v. NCAA* case, which challenged the NCAA's rules prohibiting student-athletes from receiving any compensation for the use of their names, images and likeness. After being subjected to a rule-of-reason analysis on a well-developed record following a trial, the NCAA regulations were found to violate the antitrust laws. As a result, the NCAA was enjoined from preventing its member conferences and institutions from offering scholarships that were capped at the cost of attendance, which is the maximum the NCAA allowed at that time.

In *Alston*, the plaintiffs challenged the NCAA's timeworn model of promoting college sports through which the NCAA generates massive revenue hauls (exceeding $1 billion for the NCAA and more than $18 billion for NCAA-related athletic departments) while enacting strict and draconian restrictions on student-athletes receiving compensation. As it has done for decades, the NCAA relied on *Board of Regents* to argue that the challenged rules are procompetitive because the popularity of college sports depends on maintaining amateurism. But the NCAA never defined amateurism. While the NCAA did make clear that amateurism is not "pay for play," even then the NCAA argued that "pay" constituted anything that was not permitted by its then-existing rules.

The 9th Circuit accepted the fundamental premise that college sports are different from professional sports due to certain features associated with "amateurism." It, however, did not accept that this meant that the NCAA's rules are not subject to a rule-of-reason analysis based on a full record. The 9th Circuit also rejected the NCAA's argument that amateurism requires student-athletes not be paid and noted all the ways that the NCAA's own rules are already riddled with exceptions allowing different types of payments to student-athletes, none of which have decreased consumer demand for college sports.

The 9th Circuit adopted the district court's view that consumer demand for college sports could be maintained by drawing the line at student-athletes receiving "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." The 9th Circuit therefore affirmed the district court's split order, which prohibited the NCAA from restricting its conferences and schools from offering noncash education-related benefits to student-athletes but kept in place other compensation restrictions that had the

potential to balloon into professional-like salaries, including payments untethered to education.

While the 9th Circuit provided plaintiffs with partial, though significant, relief, it denied plaintiffs the systemic changes to the NCAA compensation restrictions that they were seeking.

Yet the plaintiffs did not file a writ of certiorari; only the NCAA sought the court's review. In its writ, the NCAA objects to applying a rule-of-reason analysis on a full record to what it claims to be its "amateurism rules." The NCAA instead seeks a broad legal pronouncement that its rules are valid as a matter of law if, on their face, they are "clearly meant to help maintain ... amateurism in college sports" — and that amateurism means whatever the NCAA says it means. Under the NCAA's position, any challenge to its amateurism rules should be dismissed at the motion to dismiss stage if it could make such a showing. In other words, the NCAA is seeking for the Court to provide it special treatment under the antitrust laws.

It is difficult to predict how the Supreme Court may rule or why it granted review in *Alston* instead of *O'Bannon* a few years earlier when both the NCAA and the plaintiffs sought the court's review — other than noting that the composition of the court has materially changed since 2016 with the addition of Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. While it is concerning that the court may reverse what was achieved in *Alston*, it is time for the court to clarify the application of federal antitrust law to the NCAA. For too long has the NCAA cited statements made by Justice Stevens in *Board of Regents* as "precedent" for insulating the NCAA's amateurism rules from federal antitrust oversight. Although the 9th Circuit noted in prior decisions that Justice Stevens' statements were mere dicta, it appears to have shaped its ruling in *Alston* within the construct of amateurism that was created by those comments.

In reviewing *Alston*, the Supreme Court should make clear that Justice Stevens' statements in *Board of Regents* are not precedent. The court also should find that, while they may have had persuasive value in the past, the underpinnings for Justice Stevens' statements no longer exist. *Board of Regents* was issued in 1984. Since then, the commercialization of college sports has exploded, with the NCAA and its conferences entering into highly lucrative broadcasting and media rights deals, at the expense of student-athletes. At the same time, the financial burden on student-athletes has increased, as tuition, textbooks, housing, cost of living, and other expenses have skyrocketed. The demands and expectations on student-athletes have likewise greatly increased as the popularity of college sports has grown: The institutions, the coaches and the viewing public now expect that student-athletes will act and perform in a professional-like manner.

The NCAA has long used its amateurism theory to defend its exploitive model against lawsuits and regulation, which has allowed the NCAA to obtain massive revenue while depressing what the student-athletes may receive in exchange for them providing the NCAA with their athletic services. True amateurism in college sports, however, is an artifact of a bygone era that the NCAA abandoned long ago. The NCAA's and its member conferences and institutions' view of amateurism now is so tortured and self-serving that it is not a usable construct through which a court should evaluate whether the NCAA's compensation restrictions violate the antitrust laws. The court's evaluation in *Alston* of the NCAA's opposition to student-athletes receiving noncash education-related benefits purportedly in the name of "amateurism" — whatever that may mean — provides the court with the ideal avenue to revisit (and clarify) *Board of Regents* and untether antitrust review of the NCAA's rules from the amorphous concept for amateurism. The court should leave discussions of amateurism to those still waxing nostalgic about the days of Knute Rockne and Red Grange. ■

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