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COLLECTIVE BARGAINING FOR COLLEGE SPORTS? *NCAA V. ALSTON* OPENS THE DOOR TO LABOR ISSUES

Harry Johnson, Crystal Carey, and Rick Marks

July 26, 2021

NCAA v. Alston: Potential Impact on the Unionization of College Sports

Morgan Lewis

Presenters

Harry Johnson

Crystal Carey

Rick Marks

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NCAA v. Alston Case: Supreme Court Strikes Down NCAA Rules Restricting Benefits to Student-Athletes

Supreme Court Backs Payments to Student-Athletes in N.C.A.A. Case

The association argued that the payments were a threat to amateurism and that barring them did not violate the antitrust laws.

JURISPRUDENCE

The NCAA Is Running an Illegal Cartel

And the Supreme Court knows it.

BY MARK JOSEPH STERN

JUNE 21, 2021 • 3:33 PM

NCAA v Alston: A Brave New World for College Sports

25 JUN 2021 | SAMUEL ESTREICHER AND ZACHARY FASMAN

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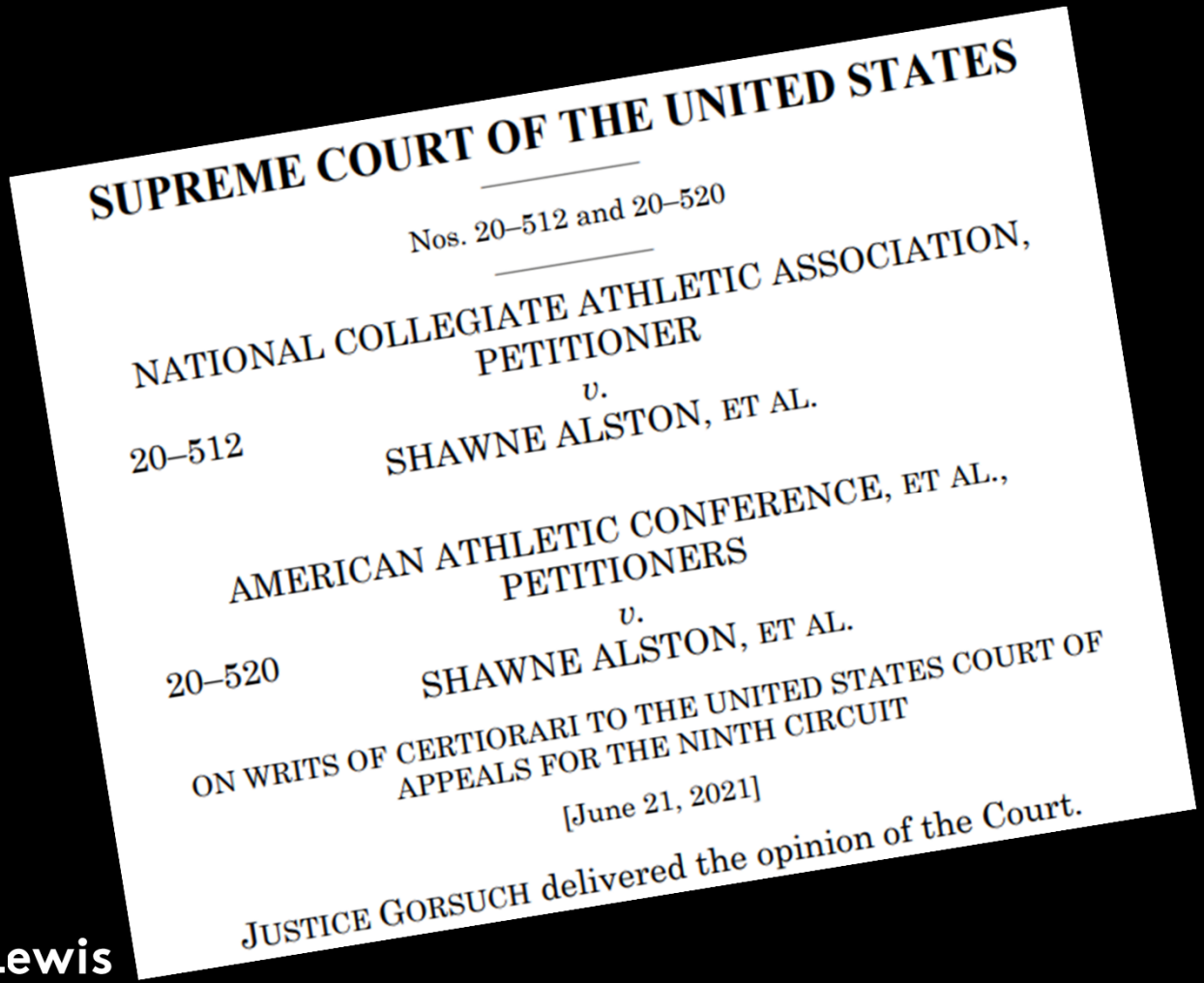


SUPREME COURT OF THE UNITED STATES

Nos. 20–512 and 20–520

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
PETITIONER
v.
20–512 SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
PETITIONERS
v.
20–520 SHAWNE ALSTON, ET AL.

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

[June 21, 2021]

JUSTICE GORSUCH delivered the opinion of the Court.

NCAA v. Alston: Why Does This Matter?

1985: Division I football and basketball raised approximately $922 million and $41 million, respectively.

2016: NCAA Division I schools raised more than $13.5 billion.

Currently approximately 180,000 Division I student-athletes

How will the NCAA modify its models (e.g., NIL) to avoid future litigation?

9-0 Decision Affirming Violation

Kavanaugh Concurrence

- Kavanaugh: "The NCAA is not above the law." Opened door to pending arguments that the NCAA is violating antitrust law in other respects.
- Suggested collective bargaining as one possible solution.

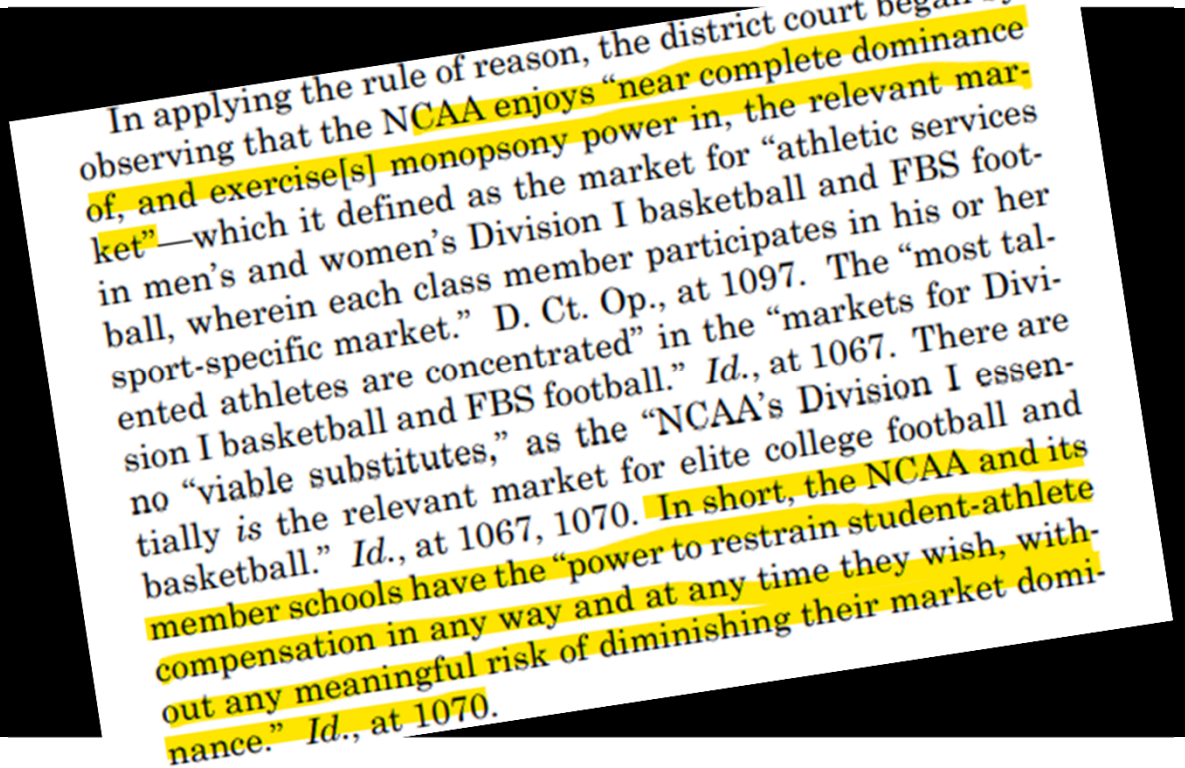
NCAA v. Alston – The Basics

- End of a long litigation process re: federal district court injunction invalidating NCAA rules limiting the "educational benefits" schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships
- Supreme Court affirmed the district court in a unanimous 9-0 decision, with one concurrence (Justice Kavanaugh)
- Supreme Court held that many questions were not before it and many facts were not disputed or contested
  - Did not address issues related to use of a student-athlete's name, image, or likeness (NIL)
  - Did not address NCAA rules limiting noneducational benefits or compensation

NCAA v. Alston: Origin/History of the Case

- Class action lawsuit alleging that the NCAA and certain of its conferences violated antitrust statutes by agreeing to restrict compensation that colleges and universities may offer the student-athletes who play for their teams.
- The district court refused to enjoin NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance.
  - But enjoined NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships.
- 9th Circuit affirmed.
- Before Supreme Court, NCAA appealed injunction versus enforcement of education-related benefits limits – including injunction not to reduce cap below cap for athletic awards.

NCAA v. Alston: District Court Reasoning



In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." D. Ct. Op., at 1097. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id.*, at 1067. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id.*, at 1067, 1070. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id.*, at 1070.

NCAA v. Alston: District Court Reasoning

- Student-athletes showed 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.
  - Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion.
- The district court evaluated the defense that NCAA rules promote amateurism.
  - This was the only defense at issue.
- The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education.
  - These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand."

NCAA v. Alston: District Court Reasoning

- The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships.
- These education-related benefits could not be "confused with a professional athlete's salary." If anything, they "emphasize that the recipients are students."
- Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports.

NCAA v. Alston: Issue Before the Supreme Court

- Supreme Court only reviewed the sole issue of the NCAA's challenge on the education-related benefits ruling:
  - "For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them."

NCAA v. Alston: Issues Conceded by the Parties

- The NCAA enjoys monopoly (monopsony) control in its labor market.
- The NCAA is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor.
- NCAA member schools compete fiercely for student-athletes but remain subject to NCAA–issued-and-enforced limits on what compensation they can offer.
  - i.e., that there is admitted horizontal price fixing in a market where the defendants exercise monopoly control.
- NCAA's restrictions in fact decrease the compensation that student-athletes receive compared to what a competitive market would yield.
- Decreases in compensation also depress participation by student-athletes in the relevant market.

NCAA v. Alston: Majority Decision

- Problems with the issue of compensation from the beginning, leading to labor issues:
  - 1939: Freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money
  - 1948: "Sanity Code"

NCAA v. Alston: Majority Decision

- The rules regarding student-athlete compensation have evolved ever since and are fairly complicated now.
  - In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry."
  - In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance."
  - The NCAA created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement."
- In 2018, the NCAA made more than $100 million available combined through the Student Activities Fund and Academic Enhancement Fund.
- The NCAA has also allowed other payments "incidental to athletics participation."

NCAA v. Alston: Majority Decision

- In a 9-0 opinion, the Supreme Court rejected overturning the injunction on a "quick look analysis," instead applying the rule-of-reason standard.
- Standard:
  - Plaintiff bears the initial burden to prove that the challenged restraint has a substantial anticompetitive effect.
  - If satisfied, the defendant must then demonstrate a procompetitive rationale for the restraint.
  - If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."

NCAA v. Alston: Rule of Reason Standard as Applied to *Alston*

- The NCAA's challenge failed on Step 2 because, as the district court found, the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand."
- Importantly, the district court only enjoined—and the Supreme Court affirmed—restrictions on education-related compensation.
- The Supreme Court clearly highlighted the injunction's limitations.

NCAA v. Alston: Kavanaugh Concurrence

"JUSTICE KAVANAUGH'S CONCURRING OPINION WILL POTENTIALLY SHAPE FUTURE DISCUSSIONS RELATED NOT ONLY TO THE NCAA MARKET BEHAVIOR BUT ALSO THE BROADER DEBATE RELATED TO ANTITRUST AND LABOR MARKETS."

NCAA v. Alston: Kavanaugh Concurrence

- The NCAA cannot price-fix labor by defining its product in a manner that incorporates the price-fixing.
- Openly questions whether the NCAA's limitations on noneducation-related benefits could survive scrutiny under antitrust laws.
- "[NCAA] traditions 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. . . . The NCAA is not above the law."

NCAA v. Alston: Kavanaugh Concurrence

- Explicitly suggests that collective bargaining could be a solution:
  - "And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes? Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues."

NCAA v. Alston: Kavanaugh Concurrence

- Why is this concurrence significant?
  - Still many issues in play → NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance.
  - Other pending antitrust litigation against the NCAA.
    - *House et al. v. National Collegiate Athletic Association et al.*, 4:20-cv-03919 (N.D. Cal.)
  - Strong attack on any Step 2 justification under the "rule of reason" standard.
  - No majority/plurality/individual rebuttal to the concurrence.

Nonstatutory Antitrust Exemption of CBAs

- Sherman Antitrust Act:
  - "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1.

- Collective bargaining involving multiple employers cannot work without this exemption.

- "As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition restricting agreements potentially necessary to make the process work or its results mutually acceptable."
  - *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996)

Creation of Labor Antitrust Exemption

- Basis for the exemption:
  - Federal labor laws establish a national policy favoring "free and private collective bargaining" and Congress enacted these statutes "to prevent judicial use of antitrust law to resolve labor disputes — a kind of dispute normally inappropriate for antitrust law resolution." *Brown*, 518 U.S. at 236.
- What does this mean in practice?
  - Antitrust prohibitions generally do not apply to conduct that (i) is directly related to collective bargaining; (ii) involves a mandatory subject of bargaining; and (iii) only concerns the parties to a collective bargaining relationship.

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EVOLUTION OF NIL

NCAA NIL RETREAT

NCAA waiver to effectively allow name, image and likeness rights for athletes near completion

The waiver would go into effect before numerous states enact new laws beginning July 1

The NIL Waiver – Overview and Purpose

- This waiver is intended to cover athletes nationwide and last until either federal legislation is passed or a more permanent NIL rule can be created by the NCAA.
- It sets minimal regulations for the new world of college sports, one in which athletes will be able to make money from endorsements, sponsorships, and social media, among other avenues.
- The goal of the interim policy is to give athletes in states without NIL laws on the books the ability to take advantage of sponsorship opportunities without violating NCAA rules.
- Notably, the NCAA remains steadfast that the waiver "leaves in place the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school."

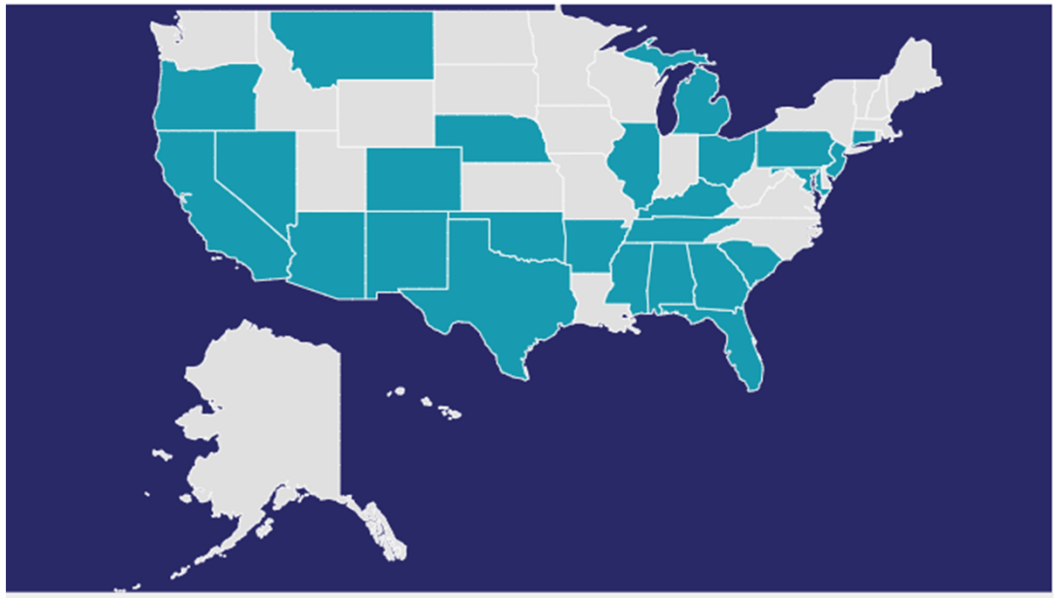
The Details

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities are responsible for determining whether those activities are consistent with state law.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.
- Individuals can use a professional services provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their schools.
- Athletes can enter into NIL agreements with boosters.
- High school students can engage in these activities without impact to eligibility.

Individual States with NIL Laws

- If states determine their own rules — does this provide an advantage?

The map below tracks states where governors have signed NIL bills into law.



Individual States with NIL Laws

Effective July 1 (or earlier)

- Oklahoma
- Nebraska
- Pennsylvania
- Alabama
- Florida
- Georgia
- Mississippi
- New Mexico
- Texas
- Kentucky
- Ohio
- Oregon
- Illinois
- Colorado

Effective post–July 1

- Arizona (July 23)
- Missouri (August 28)
- Connecticut (September 1)
- Arkansas (1/1/22)
- Tennessee (1/1/22)
- Nevada (1/1/22)
- South Carolina (7/1/22)
- Michigan (12/31/22)
- California (there's currently a proposal to move up the date to no later than 1/1/22)
- Montana (6/1/23)
- Maryland (7/1/23)
- New Jersey (2025)

Sample State NIL Laws

- Florida
  - "Student-athletes may earn compensation for their name, image, and likeness. Such compensation must be within fair market value."
  - "Compensation may not be provided in exchange for athletic performance or attendance at the University of Florida."
  - "Student-athletes will not be permitted to enter into NIL agreements with gambling/sports wagering vendors or any vendors associated with athletic performance enhancing drugs."
- Georgia
  - "A student athlete at a postsecondary educational institution may earn compensation for the use of his or her name, image, or likeness. Such compensation must be commensurate with the market value of the authorized use of the student athlete's name, image, or likeness. Such compensation may not be provided in exchange, in whole or in part, for a current or prospective student athlete to attend, participate, or perform at a particular postsecondary educational institution."
  - Permits pooling of NIL compensation.

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NLRB TREATMENT OF STUDENTS AND IMPACT OF *ALSTON* ON THE NLRA

Northwestern University, 362 NLRB 1350 (2015)

Northwestern University *and* College Athletes Players Association (CAPA), Petitioner. Case 13–RC–121359

August 17, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

After carefully considering the arguments of the parties and interested amici, we find that it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3). As explained below, we address this case in the absence of explicit congressional direction regarding whether the Board should exercise jurisdiction. We conclude that asserting jurisdiction in this case would not serve to promote stability in labor relations. Our decision today is limited to the grant-in-aid scholarship football players covered by the petition in this particular case; whether we might assert jurisdiction in another case involving grant-in-aid scholarship football players (or other types of scholarship athletes) is a question we need not and do not address at this time.

Northwestern: Background

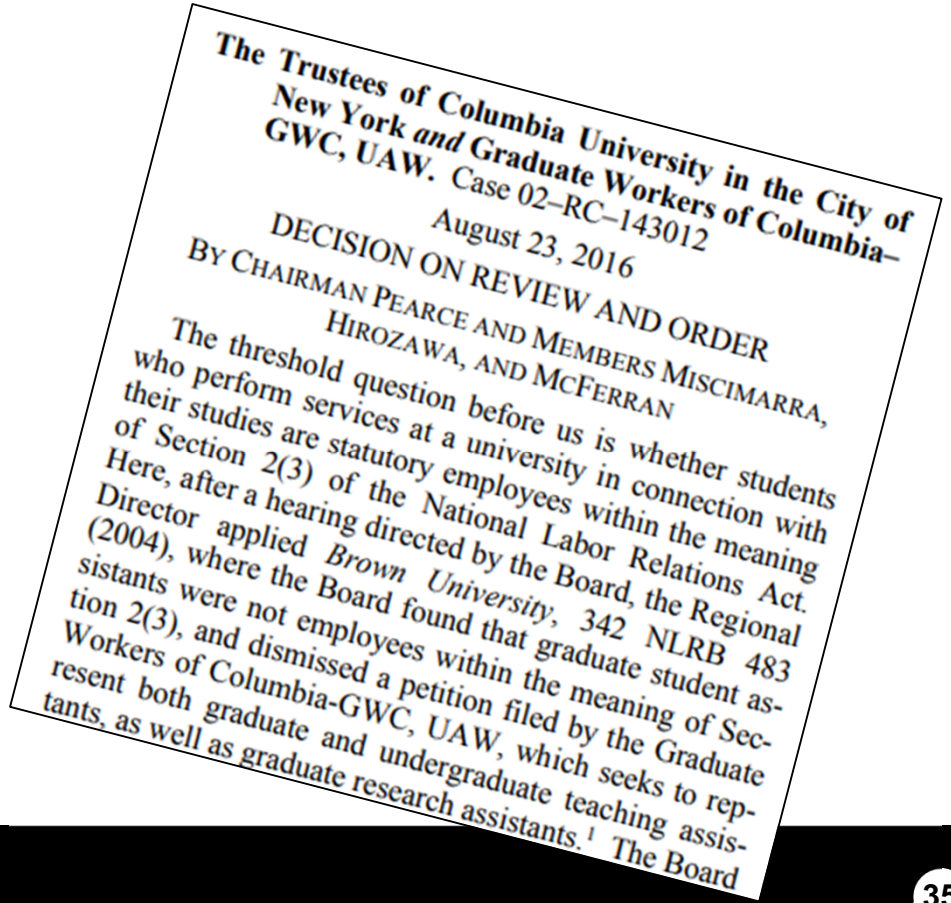
- In 2014, football players at Northwestern University filed a petition with the NLRB in Region 13.
- Peter Ohr (then Regional Director in Region 13 – Chicago, current Deputy General Counsel) held that Northwestern University football players were employees within the meaning of the National Labor Relations Act (NLRA or the Act).
- An election was held on April 25, 2014 – the votes were impounded.
- In his decision and direction of election Regional Director Ohr noted: "Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. Players are also required to sign a release permitting the Employer and the Big Ten Conference to utilize their name, likeness and image for any purpose."

Northwestern: Holding

- Reasons why the Board declined jurisdiction:
  - Would not promote labor stability due to the nature and structure of college athletics.
    - Labor and jurisdictional impacts of public and private institutions.
  - Uniqueness of the student-athlete.
  - Assumption that states will not allow bargaining at public institutions (i.e., no negotiation possible in large part of market).

Columbia University, 364 NLRB No. 90 (2016)

- Overruled *Brown University*
- Applied common-law principles in analyzing employee status
- Student assistants are employees under the Act



The Trustees of Columbia University in the City of New York *and* Graduate Workers of Columbia–GWC, UAW. Case 02–RC–143012

August 23, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants.[1] The Board

Northwestern – Revisited and Reversed?

- *Northwestern* was an exercise of discretion.
- Ohr is now Deputy General Counsel (GC).
- Impending flip to a Democrat-controlled Board
  - With Dave Prouty, a former sports union GC, nominated for a seat.
- *Columbia University* demonstrates that the Board is already willing to find undergraduate students are statutory employees.
- "Uniqueness of student-athlete" destroyed by Supreme Court: *Alston* now makes clear that the Court approves of some freedom for compensation negotiations and maybe collective bargaining.
- Prior assumption of inconsistent or partial regulation is now gone: NCAA is also allowing NIL negotiation, and many individual states allowing at least NIL negotiation; *Alston* further allows negotiation of "educational benefits."

WEBINARS

***NCAA v. Alston*: Potential Impact on the Unionization of College Sports**

July 26, 2021 | 9:30-10:30 am PT

What Future Student-Athlete Organizing and Bargaining Could Look Like

July 29, 2021 | 9:30-10:30 am PT

ROUNDTABLE

Best Practices: How to Think Proactively About Labor Issues Facing Your Sports Program

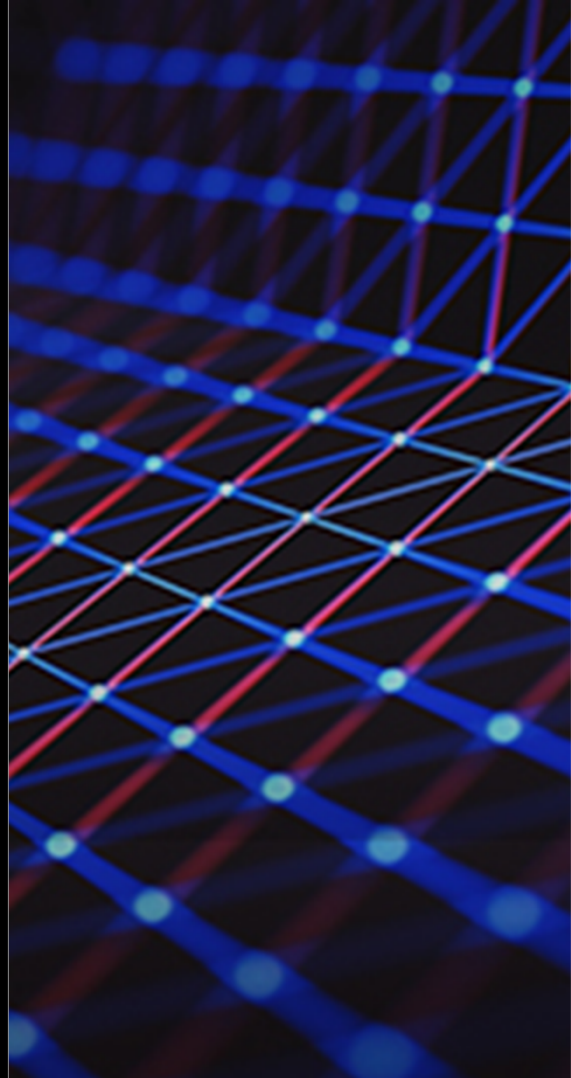
August 10, 2021 | 9:30-11:00 am PT

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



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Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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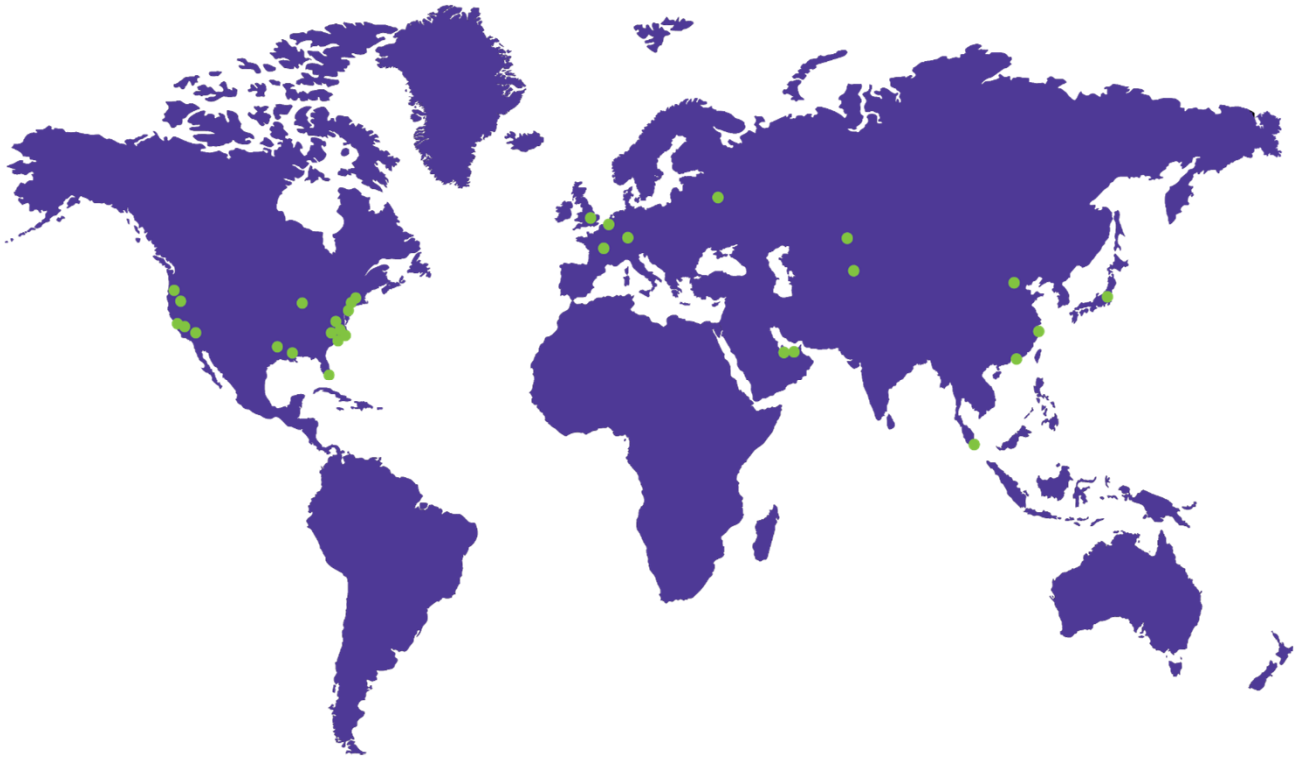
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



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THANK YOU