TO: Professor Stephanie L. Wilka, J.D.

FROM: Maya Moise

RE: Antitrust Challenge to College Athlete NIL Litigation Settlement Agreement

DATE: December 6th, 2024

QUESTION PRESENTED

Does the proposed *House v. NCAA*[1] settlement, which introduces a 22% revenue-sharing cap, constitute price-fixing in violation of Section 1 of the Sherman Act?

SHORT ANSWER

Yes, the proposed *House v. NCAA*[2] settlement likely violates Section 1 of the Sherman Act through price-fixing. The 22% cap on revenue sharing—which limits the portion of broadcast revenues that can be shared with athletes— functions as a mechanism that limits athlete compensation and fixes the price athletes can earn in the collegiate athletics market. These provisions, which restrain market competition, are likely to be deemed anticompetitive under the Rule of Reason analysis. Courts are likely to find that the NCAA's justifications, such as preserving the separation of student-athletes from professional athletes and maintaining competitive balance, are insufficient given the availability of less restrictive alternatives that attain these objectives without compromising competition.

FACTS

In 2020, two collegiate athletes filed *House v. NCAA*[3], alleging that the NCAA's NIL restrictions violated Section 1 of the Sherman Act by fixing prices[4] and engaging in a group boycott[5]. They argued that the NCAA and its conferences exploited athletes by capping their compensation and denying them a share of TV broadcast revenue. This litigation, which took place before the Supreme Court's ruling in *NCAA v. Alston*,[6] addressed similar concerns about NCAA compensation limits[7]. Just a month after *House v. NCAA*, two additional antitrust

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[1] Complaint, *House v. NCAA*, No. 4:20-CV-03919 (N.D. Cal. June 15, 2020).
[2] *Id.*
[3] *Id.* at ¶ 72-73.
[4] *Id.* at ¶ 268.
[5] *Id.* at ¶ 279.
[6] 141 S. Ct. 2141 (2021).
[7] *Id.* at 2151-52, 2166.

cases—*Hubbard v. NCAA*[8], and *Carter v. NCAA*[9]—were filed, with plaintiffs similarly arguing that the NCAA's restrictions on performance-related benefits violated Section 1 of the Sherman Act, constituting an unlawful restraint of trade. The plaintiffs contended that these limitations on athletes' compensation for their athletic performance were anti-competitive, as they unfairly prevented athletes from receiving financial rewards tied to their success in collegiate sports.[10]

During that same time period, *Alston*[11] reached the Supreme Court where it was ruled that the NCAA's restrictions on education-related benefits for student-athletes violated antitrust law under Section 1 of the Sherman Act.[12] The decision allowed schools to provide athletes with benefits like scholarships for graduate school, laptops, and tutoring, rejecting the NCAA's defense that such limits were necessary to preserve amateurism in college sports.[13] Justice Kavanaugh's concurring opinion questioned the legality of the NCAA's justification for limiting athlete pay, stating that "the NCAA is not above the law."[14] His opinion suggested that other NCAA rules, including those capping athlete compensation, should face future legal challenges.[15] Kavanaugh's words amplified pressure on the NCAA to reform its policies, which resulted in the NCAA adopting an interim NIL policy that allows college athletes the "opportunity to benefit from their NIL."[16]

In 2023, *House*, *Carter*, and *Hubbard* were consolidated into *In re College Athlete NIL Litigation* [17] under Rule 42(a) of the Federal Rules of Civil Procedure, as they all argued that NCAA bylaws restricting athletes from monetizing their NIL or receiving compensation for participation violated Section 1 of the Sherman Act by fixing prices and preventing fair compensation for athletes' labor.[18]

On May 23, 2024, the parties in *In re College Athlete NIL Litigation* agreed to settle which led to a settlement agreement to resolve the claims. The settlement introduced a 10-year revenue-sharing model that allows NCAA member institutions to share up to 22% of annual

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[8] Complaint, *Hubbard v. NCAA*, No. 4:23-CV-01593, at ¶ 106 (N.D. Cal. Apr. 4, 2023).
[9] Complaint, *Carter v. NCAA*, No. 3:23-CV-06325 at ¶ 193 (N.D. Cal. Dec. 7, 2023).
[10] Complaint, House v. NCAA, No. 4:20-CV-03919 at t ¶ 87 (N.D. Cal. June 15, 2020).
[11] 141 S. Ct. 2141 (2021).
[12] *Id.* at 80-81.
[13] *In re NCAA, 375 F. Supp. 3d* at 1087-88.
[14] *Alston*, 141 S. Ct. 2141, 2166–67 (2021) (Kavanaugh, J., concurring).
[15] *Id.* at 2166.
[16] Interim Name, Image, and Likeness Policy Guidance Regarding Third Party Involvement, NCAA (June 2021).
[17] No. 4:20-cv-03919 (N.D. Cal. 2023).
[18] Complaint, Carter v. NCAA, No. 3:23-CV-06325, at ¶ 13 (N.D. Cal. Dec. 7, 2023).

Power Five conference revenue with athletes, which could amount to $21 million annually by 2025–2026.[19] The 22% revenue-sharing model is defined in the settlement agreement as the "Pool," which explicitly states that "Each Member Institution will be permitted, but not required, to distribute, each Academic Year, additional payments and/or benefits to student-athletes over and above annual existing scholarships and all other benefits currently permitted by NCAA rules as of the date of the filing of the motion for final approval up to a certain amount." [20]

Year	Amount
Year 1	22% of Average Shared Revenue based on the most recent Membership Financial Reporting System Reports available
Year 2	Year 1 amount x 1.04
Year 3	Year 2 amount x 1.04
Year 4	22% of Average Shared Revenue based on the most recent Membership Financial Reporting System Reports available
Year 5	Year 4 amount x 1.04
Year 6	Year 5 amount x 1.04
Year 7	22% of Average Shared Revenue based on the most recent Membership Financial Reporting System Reports available
Year 8	Year 7 amount x 1.04
Year 9	Year 8 amount x 1.04
Year 10	22% of Average Shared Revenue based on the most recent Membership Financial Reporting System Reports available

The 22% revenue-sharing model includes a detailed 10-year plan for yearly adjustments as shown above.[21] The money comes directly from the Power Five conferences' media deals, not from individual schools' budgets.[22] While not finalized, under the proposed revenue sharing model, NCAA I schools will be allowed to distribute revenue to their athletes up to 22% of the average Power 5 School annual athletic revenue, subject to a tentative revenue sharing cap of

[19] *In re College Athlete NIL Litigation*, No. 4:20-cv-03919-CW, Doc. 535-2, at 61 (N.D. Cal. Sept. 26, 2024) (Amended Stipulation and Settlement Agreement).
[20] *Id.* at 60.
[21] *Id.* at 61.
[22] *Id.* at 60.

$20.5 million per school for the 2025-26 year.[23] This annual cap is estimated to grow to around $30 million over the next ten years.Schools that choose to participate will receive a portion of this conference revenue to distribute to their athletes, with discretion over how payments are allocated, but total payouts across all schools cannot exceed the 22% cap.[24]

The proposed settlement allows student-athletes, starting in the fall of 2025, to opt into the settlement agreement where they can receive a portion of the revenues generated by their universities and be subject to NIL review.[25] The settlement just received preliminary approval by Judge Claudia Wilken in the United States District Court for the Northern District of California under the jurisdiction of the Ninth Circuit Court of Appeals.[26]

DISCUSSION

Section 1 of the Sherman Act prohibits "every contract, combination... or conspiracy, in restraint of trade or commerce among the several States."[27]

Settlement agreements, even if court-approved, are still subject to antitrust scrutiny if they result in anticompetitive effects. In *United States v. Singer Manufacturing Co.*[28], the Supreme Court ruled that settlement agreements designed to monopolize a market violated the Sherman Act. Similarly, in *FTC v. Actavis, Inc.*[29], the Court held that settlements suppressing competition, such as pay-for-delay agreements, are not immune from antitrust review. Given this framework, the *House v. NCAA* settlement can be reviewed to assess whether its 22% revenue-sharing cap constitutes an unreasonable restraint of trade.

In *Catalano, Inc. v. Target Sales, Inc.*[30], the Supreme Court defined price-fixing as “an agreement to fix maximum prices, like an agreement to fix minimum or uniform prices,” which is illegal per se under the Sherman Act. Price-fixing, in this context, inherently limits market forces and does not require proof of actual harm to competition. However, in cases involving the NCAA, the Court has recognized that not all horizontal restraints should be treated as per se

[23] *Id.*
[24] *Id.*
[25] *Id.* at 68.
[26] NCAA Proposed Settlement Receives Preliminary Approval, Ropes & Gray LLP (Nov. 2024).
[27] Sherman Antitrust Act, 15 U.S.C. § 1.
[28] 374 U.S. 174 at 192 (1963).
[29] 570 U.S. 136 at 21 (2013).
[30] 446 U.S. 643, 647 at 650 (1980).

violations.[31] In *NCAA v. Board of Regents of the University of Oklahoma*[32], the Supreme Court concluded that the NCAA requires certain horizontal agreements to preserve the amateur nature of collegiate athletics, making it inappropriate to apply a per se rule to the NCAA. As a result, a Rule of Reason analysis is more appropriate.

Under the Rule of Reason, courts conduct a more comprehensive analysis to determine whether the restriction in question promotes or suppresses competition. In *Continental T.V., Inc. v. GTE Sylvania Inc.*[33], the Court explained that some restraints may enhance competition by improving efficiencies in the marketplace. Within this framework, the NCAA's regulations can sometimes promote competition among member institutions. As a result, a thorough review of the justifications for the 22% revenue-sharing cap is essential to determine whether it encourages or hinders competition.

To begin the Rule of Reason analysis, the plaintiffs must first demonstrate that the 22% revenue-sharing model creates significant anticompetitive effects. As highlighted in *NCAA v. Alston*[34], the NCAA exercises monopsony power, which allows it to control compensation levels for student-athletes without sacrificing its dominant market position. Similarly, in *O'Bannon v. NCAA*[35], the court found that the NCAA's restrictions on compensation had demonstrable anticompetitive effects by artificially suppressing student-athlete earnings. By showing that the 22% cap suppresses athlete compensation, the plaintiffs may successfully satisfy the first prong of the Rule of Reason.

Next, the burden shifts to the NCAA to justify the revenue-sharing cap by demonstrating its procompetitive benefits. While joint ventures like the NCAA may have procompetitive effects by increasing efficiency, they must still withstand antitrust scrutiny. *Alston*[36] recognized that the NCAA operates as a joint venture coordinating among competitors, yet emphasized that any restraints must still promote, rather than hinder, competition. As noted in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[37], joint ventures can only be justified if they enhance competition or improve market output. In *NCAA v. Board of Regents of the Univ. of Okla.*,[38] the

[31] Alston, 141 S. Ct. 2141, at 2154 (2021).
[32] 468 U.S. 85, at 101-02 (1984).
[33] 433 U.S. 36, at 51-57 (1977).
[34] 141 S. Ct. 2141, at 2157 (2021).
[35] 802 F.3d 1049, at 1070 (9th Cir. 2015).
[36] Alston, 141 S. Ct. 2141, at 2155 (2021).
[37] 441 U.S. 1, at 20 (1979).
[38] 468 U.S. 85, at 101 (1984).

Court acknowledged that many NCAA rules are designed to increase public interest in intercollegiate sports, which can serve to enhance competition. Thus, the NCAA would need to prove that the 22% cap positively impacts competition by boosting public engagement with college athletics.

If the NCAA successfully proves its procompetitive justifications, the burden returns to the plaintiffs to show that "substantially less restrictive alternative rules would achieve the same pro-competitive effect."[39] While businesses are not required to adopt the least restrictive measures to accomplish their goals[40], any imposed restraints must not be unduly excessive. If the plaintiffs can demonstrate that the 22% revenue-sharing cap is more restrictive than necessary, the court is likely to find the model in violation of Section 1 of the Sherman Act under the Rule of Reason analysis.

The following outlines how the Rule of Reason analysis is likely to proceed.

I. The plaintiffs likely meet their burden of establishing anti-competitive behavior.

A. The 22% revenue-sharing cap functions as a form of price-fixing, directly limiting the compensation that athletes can receive, which constitutes an anti-competitive restraint on trade under antitrust law.

Price-fixing, as established in *Catalano, Inc. v. Target Sales, Inc.*[41], refers to agreements that set maximum, minimum, or uniform prices, which are per se illegal under the Sherman Act because they artificially suppress market forces. While most price-fixing agreements are treated as per se violations, the Supreme Court in *NCAA v. Board of Regents*[42], determined that the NCAA's unique structure requires the application of the Rule of Reason. Under this analysis, the 22% cap still represents a restraint on trade, as it limits what athletes can earn and suppresses competition in the market for their services.

The plaintiffs will argue that this revenue-sharing model closely mirrors salary caps found in professional sports, which have historically reduced compensation and stifled

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[39] *Alston*, S. Ct. 2141, at 2158 (2021).
[40] *United States v. American Express Co.*, 838 F.3d 179, at 202 (2d Cir. 2016).
[41] 446 U.S. 643, at 647 (1980).
[42] 468 U.S. 85, at 101-02 (1984).

competition. In *Mackey v. NFL*,[43] the court struck down the NFL's Rozelle Rule, finding that it artificially restrained player mobility and compensation, making it harder for players to secure competitive salaries. Similarly, the 22% revenue-sharing cap places an artificial ceiling on what universities can offer athletes, stifling competition and limiting what athletes can earn for their contributions. Without the cap, universities would have more freedom to compete for top talent, driving up compensation and ensuring athletes receive fair market value.

Furthermore, in *Wood v. National Basketball Ass'n*[44], the court found that salary caps in the NBA reduced players' earning potential by capping what teams could spend. The 22% cap functions in much the same way, limiting the amount of revenue that schools can allocate to their athletes. By setting an arbitrary limit on the share of revenue athletes can receive, the NCAA's model artificially restrains competition in the market, preventing athletes from fully capitalizing on their market value in the same way salary caps limit players in professional sports.

The NCAA will likely argue that the revenue-sharing cap does not constitute price-fixing because athletes are free to earn unlimited NIL income outside of their compensation for athletic participation.[45] However, this argument overlooks the essential issue: the cap directly limits what schools can offer athletes from the revenue their participation generates. Unlike professional athletes, who negotiate salary caps through collective bargaining agreements (CBAs), college athletes lack unions or CBAs, leaving them without a say in the imposition of this cap.[46] In *Brown v. Pro Football, Inc.*,[47] the Supreme Court upheld salary caps in professional sports because they were the product of a collective bargaining process. However, college athletes do not have unions or CBAs, and the cap is not the result of any collective bargaining process. This lack of representation further weakens the NCAA's comparison to professional sports salary caps. The absence of a negotiated agreement exacerbates the harm caused by the cap, as athletes are forced to accept reduced compensation without any bargaining power.

Ultimately, the plaintiffs are likely to establish that the 22% revenue-sharing model functions as a form of price-fixing, reducing both athlete compensation and competition between

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[43] 543 F.2d 606, at 230 (8th Cir. 1976).
[44] 809 F.2d 954, at 958 (2d Cir. 1987).
[45] Gabe Feldman, Ep. 74 Steve Berman, *SportsWise: A Podcast About Sports and the Law*, The Latest on the House Settlement with Co-Counsel for the Plaintiffs, (Sept. 27, 2024).
[46] *Brown v. Pro Football, Inc.*, 518 U.S. 231, at 250 (1996).
[47] *Id.*

schools. The cap imposes an artificial limit on what athletes can earn, suppressing the free market for their services. The court is likely to find that the 22% cap creates anti-competitive harm and violates Section 1 of the Sherman Act under the Rule of Reason.

II. The defendants likely fail to prove sufficient procompetitive justification for the 22% revenue-sharing cap.

A. The NCAA's procompetitive argument for the preservation of academic integrity and amateurism likely fails to justify the 22% revenue-sharing cap.

The NCAA may argue that the 22% revenue-sharing cap is essential to maintaining the academic mission of college sports and protecting the amateur nature of student-athletes.[48] By capping the compensation that athletes can receive from media and broadcast revenue, the NCAA might assert that athletes remain students first and not professionals. This argument follows the *NCAA v. Board of Regents of the University of Oklahoma*[49] where the Court stated that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is consistent with the goals of the Sherman Act."

However, the plaintiffs would likely argue that this claim fails under the precedent set in *Alston*.[50] The Court in *Alston*[51] criticized the NCAA for overusing the concept of amateurism as a blanket justification for all compensation limits. The plaintiffs can contend that the 22% revenue-sharing cap is not necessary to maintain academic integrity, especially when NCAA Bylaws already require student-athletes to maintain good academic standing and make progress toward a degree.[52] These regulations already safeguard the academic mission without limiting athlete compensation.

The Court will likely shut them down because college sports have been commercialized for years, with schools and conferences profiting from massive broadcast deals. Limiting athletes' compensation in this context seems contradictory to the NCAA's claims about

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[48] Gabe Feldman, Ep. 74 Steve Berman, *SportsWise: A Podcast About Sports and the Law*, The Latest on the House Settlement with Co-Counsel for the Plaintiffs, (Sept. 27, 2024).
[49] 468 U.S. 85, at 120 (1984).
[50] 141 S. Ct. 2141, at 2158 (2021).
[51] *Id.*
[52] NCAA Bylaw §14.01.2.

protecting amateurism. The plaintiffs might emphasize that the 22% cap artificially suppresses the compensation athletes could earn in a free market, thereby diminishing their earning potential without necessarily preserving the NCAA's mission. As *Alston*[53] made clear, the NCAA must provide specific evidence linking compensation limits to legitimate procompetitive benefits—something that may be lacking here.

Given the Court's ruling in *Alston*[54], which directly undermined the NCAA's use of amateurism as a broad justification for compensation limits, the Court would likely find that the 22% cap does not meaningfully promote academic integrity or amateurism, especially in an increasingly commercialized landscape.

B. The NCAA's procompetitive argument for the preservation of amateurism likely fails to justify the 22% revenue-sharing cap.

In Alston[55], the Supreme Court cast doubt on the NCAA's use of amateurism and competitive balance as justifications for compensation restrictions, emphasizing that "amateurism cannot stand as an immutable defense" and that compensation restrictions must be tied to demonstrable procompetitive benefits. Plaintiffs could argue that the cap imposes an arbitrary restriction on athlete compensation without enhancing amateurism in a meaningful way. They may point to how larger schools already dominate recruitment through superior facilities and resources, challenging the NCAA's claim that the cap preserves amateurism's appeal. Moreover, the lack of a collective bargaining framework, unlike professional leagues, undermines the legitimacy of such a restriction as a means of preserving the amateur ethos of college sports. In addition, exploring the distinction between a student-athlete and a non-professional athlete highlights a key weakness in the NCAA's reliance on amateurism as a justification for the 22% revenue-sharing cap. While the NCAA asserts that student-athletes are fundamentally different from professional athletes, this distinction has eroded over time, particularly as the revenue generated by college sports has grown exponentially.

The NCAA traditionally frames student-athletes as individuals primarily focused on

[53] 141 S. Ct. 2141, at 2158 (2021).
[54] *Id.*
[55] *Id.* at 2148.

education, participating in athletics as a complement to their academic pursuits. This portrayal supports the concept of amateurism, where compensation restrictions are justified by the premise that college athletes should not receive pay like professionals because their primary role is that of a student. However, the plaintiffs may argue that athletic commitments often supersede academic identity. The time demands of collegiate athletics often exceed those of professional athletes, with rigorous training schedules, games, and travel obligations. This reality challenges the notion that student-athletes are primarily students, as their athletic commitments often dominate their college experience. Next, the plaintiffs could address the economic realities. The massive revenue generated by college athletics, particularly in sports like football and basketball, underscores the professional nature of student-athletes' contributions. Unlike other students, whose extracurricular activities are unpaid because they do not generate revenue, student-athletes are at the core of a billion-dollar industry. This economic context undermines the NCAA's amateurism argument and raises questions about equity. The NCAA's argument for amateurism also hinges on distinguishing college athletes from professional athletes. The organization claims that college sports are uniquely valuable because athletes are not professionals, preserving a sense of purity and educational focus.

However, in Alston[56], the Supreme Court cast doubt on this rationale, emphasizing that "amateurism is not an immutable defense." Justice Gorsuch noted that the NCAA cannot rely solely on the concept of amateurism to justify compensation restrictions without tying them to demonstrable procompetitive benefits. The Court recognized that the NCAA's definition of amateurism has evolved, and its use as a blanket defense lacks empirical support. In addition, market dynamics blur the line between a college athlete and a professional. College athletes engage in activities that are professional in all but name. They train, perform, and generate revenue in a competitive environment that mirrors professional leagues. The distinction between a college athlete and a professional is therefore arbitrary and insufficient to justify broad compensation restrictions. The distinction between a student-athlete and a non-professional athlete is central to the NCAA's amateurism argument, but it falters under scrutiny. The Supreme Court's decision in *Alston*[57] signals a shift away from accepting amateurism as an immutable

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[56] *Id.*
[57] *Id.*

justification, requiring the NCAA to substantiate its claims with tangible procompetitive benefits. Without evidence that the 22% revenue-sharing cap preserves amateurism in a meaningful way, this argument is unlikely to withstand antitrust scrutiny.

C. The NCAA's procompetitive argument for competitive balance likely fails to justify the 22% revenue-sharing cap.

The NCAA's argument that the 22% revenue-sharing cap promotes competitive balance is unlikely to withstand scrutiny. The NCAA may argue that the cap prevents wealthier schools from monopolizing talent through higher payments, thereby fostering parity. They might cite *Board of Regents*[58], where the Supreme Court emphasized the importance of competitive balance in college sports, and *Alston*[59], where the Court acknowledged amateurism as a distinguishing feature of college athletics. Without the cap, they might claim, wealthier programs could dominate recruitment and competition.

However, plaintiffs will likely counter that financial disparities already exist and undermine competitive balance. Wealthier schools benefit from superior facilities, larger donor networks, and bigger budgets, which allow them to dominate regardless of compensation limits. In *O'Bannon v. NCAA*[60], the Ninth Circuit found no evidence that compensation restrictions promote parity. Similarly, in Alston, the Court expressed skepticism about using amateurism to justify restrictive practices, highlighting the need for closer scrutiny.

Plaintiffs might also argue that the cap harms smaller programs by imposing a ceiling on athlete compensation without addressing resource disparities. Larger programs will continue to dominate with advantages unrelated to compensation, leaving smaller schools at a disadvantage. Furthermore, comparisons to professional salary caps are flawed. In pro leagues like the NFL and NBA, caps are part of collectively bargained agreements (*Brown v. Pro Football*[61]), balancing the interests of players and owners. College athletes, however, lack unions or collective bargaining agreements, leaving them with no input into the NCAA's compensation limits.

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[58] 68 U.S. 85, at 102(1984).
[59] 141 S. Ct. 2141, at 2158 (2021).
[60] 802 F.3d 1049, at 1074 (9th Cir. 2015).
[61] 518 U.S. 231, at 250 (1996).

The cap is unlikely to meet the narrow tailoring required for competitive measures. In *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*[62], the court emphasized that restrictions must directly enhance competition. Here, the cap exacerbates existing inequalities without promoting balance. In *Law v. NCAA*[63], the Tenth Circuit rejected cost-cutting as a justification for anticompetitive practices. Similarly, in *Alston*[64] the Court held that vague appeals to amateurism fail without concrete evidence of procompetitive effects.

Ultimately, the 22% cap suppresses athlete compensation while doing little to address deeper disparities, creating anti-competitive effects that outweigh any benefits. Under the Rule of Reason analysis, it likely constitutes an unreasonable restraint on trade and violates Section 1 of the Sherman Act.

D. The NCAA's procompetitive argument for cost control and resource allocation likely fails to justify the 22% revenue-sharing cap.

The NCAA may argue that the 22% revenue-sharing cap is necessary to control costs and ensure that schools do not overspend on athlete compensation, which could destabilize college athletics. By limiting the amount schools can allocate to athletes, the NCAA could claim that the cap helps prevent a financial arms race, where wealthier schools with larger budgets would spend disproportionate amounts on athletes, leaving smaller schools unable to compete financially. In *NCAA v. Board of Regents*[65], the Court recognized that the NCAA's role includes maintaining the structure of college athletics, which includes promoting financial stability across programs.

However, this cost-control argument is likely to fall short. In *O'Bannon v. NCAA*[66], the court dismissed the NCAA's broad claims that compensation limits were necessary for cost control, noting that the massive revenues generated by college sports, particularly in the Power Five conferences, make it difficult to argue that paying athletes a fair share would result in financial instability. The plaintiffs are likely to argue that the 22% cap does not address existing spending disparities between schools. Wealthier institutions will continue to outspend smaller programs in areas like facilities, coaching, and recruitment, even with a cap on athlete

[62] 961 F.2d 667, at 672 (7th Cir. 1992).
[63] 134 F.3d 1010, at 1024 (10th Cir. 1998).
[64] 141 S. Ct. 2141, 2157 (2021).
[65] 468 U.S. 85, at 120 (1984).
[66] 802 F.3d 1049, at 1074 (9th Cir. 2015).

compensation.

Furthermore, plaintiffs can point out that the revenue-sharing cap does not limit other forms of spending, such as extravagant facilities and coaching salaries, which have skyrocketed in recent years. The 22% cap restricts only athlete compensation, which directly impacts the individuals who generate the revenue while allowing schools to continue spending excessively in other areas. This misallocation of resources undermines the NCAA's argument that the cap is essential for financial stability.

In *NCAA v. Alston*[67], the Supreme Court emphasized that the NCAA's justifications for compensation limits must be backed by specific evidence, not merely speculative concerns about cost control. The Court held that the NCAA must show how its restraints promote a pro-competitive effect, and general assertions about controlling costs are insufficient to meet that burden. The plaintiffs can argue that the NCAA has failed to provide concrete evidence showing how the 22% cap would prevent financial instability, especially in a market where schools already allocate significant resources to non-athlete expenditures.

Ultimately, the Court is likely to find that the NCAA's cost-control argument does not hold up under scrutiny. As in *Alston*[68] and *O'Bannon*[69], the plaintiffs are likely to demonstrate that the 22% revenue-sharing cap does not meaningfully promote financial stability and instead serves as an artificial limit on athlete compensation, which stifles competition and undermines the free market for athlete services. The NCAA's failure to provide specific evidence supporting its cost-control claims is likely to lead the Court to reject this procompetitive justification under the Rule of Reason analysis. While the NCAA did not meet muster for section 2, we will proceed to section 3.

While the analysis thus far suggests the Court is unlikely to validate the NCAA's justifications for the cap, if any of the NCAA's procompetitive arguments were to withstand scrutiny, the burden would shift back to the plaintiffs. They would then need to show that these goals could be achieved through less restrictive means than the 22% revenue-sharing cap. We will now proceed with the assumption that the Court has accepted at least one procompetitive

[67] 141 S. Ct. 2141 (2021).
[68] *Id.*
[69] 802 F.3d 1049 (9th Cir. 2015).

justification, requiring the plaintiffs to propose less restrictive alternatives under the third prong of the Rule of Reason analysis.

The plaintiffs are likely to succeed in demonstrating that the NCAA's procompetitive benefits could be achieved through less restrictive alternatives. To prevail, however, the plaintiffs must provide supporting data, as shown in *NCAA v. Alston*[70], where the Court emphasized that NCAA restrictions must be narrowly tailored to their stated procompetitive objectives. In Alston, the Court rejected broad restrictions, indicating that plaintiffs must show that less restrictive alternatives could meet these objectives without unduly limiting athlete compensation.

III. The plaintiffs will likely succeed in proving that the NCAA's pro-competitive objectives could be achieved through less restrictive alternatives than the 22% revenue-sharing cap.

The plaintiffs are likely to succeed in proving that the NCAA's procompetitive goals can be achieved through less restrictive alternatives than the 22% revenue-sharing cap. The alternatives proposed would allow athletes to receive fair market compensation without imposing arbitrary restrictions or unduly restraining trade.

In *Alston*[71], the Supreme Court held that the NCAA's restrictions on education-related benefits for student-athletes violated the Sherman Act. The court found that the NCAA could achieve its goals of maintaining amateurism and consumer interest in college athletics through less restrictive means, such as allowing schools to provide certain education-related benefits while maintaining other restraints. The plaintiffs raised examples of less restrictive means by which the NCAA could achieve its stated goals of maintaining amateurism and consumer interest in college athletics. The Supreme Court also independently analyzed the NCAA's justifications and found them unconvincing. The plaintiffs argued that the NCAA could maintain its procompetitive goals without imposing a blanket ban on education-related benefits by highlighting that schools could provide education-related benefits like laptops, science equipment, study abroad opportunities, and academic achievement awards, which align with the NCAA's stated goal of supporting the educational mission of college athletics. These benefits would not undermine amateurism but would allow student-athletes to receive fair value for their

[70] 141 S. Ct. 2141, at 2163 (2021).
[71] *Id.*

contributions while maintaining consumer interest in college sports. The plaintiffs proposed that the NCAA could craft more narrowly tailored restrictions that prohibit payments unrelated to education or athletic performance while allowing modest education-related compensation. This approach would strike a balance between preserving amateurism and reducing the anticompetitive effects of overly broad restrictions. Ultimately, the court emphasized that less restrictive alternatives must be substantially less restrictive while still achieving the same procompetitive objectives. The Supreme Court found that the NCAA's restrictions on education-related benefits were overly broad and unnecessarily restrictive.

In this prong, we will follow the same analysis of prong 3 by establishing an example of less-restrictive means that the NCAA could introduce which still achieve its procompetitive goals.

Free Market Approach

The plaintiffs could propose that a free market approach, where there is no cap at all on athlete compensation. This offers a less restrictive means of achieving the NCAA's procompetitive benefits. In this model, schools would be allowed to compensate athletes according to their financial capabilities and market demand, without the imposition of any revenue-sharing cap or ceiling. This approach would align with the natural forces of supply and demand, allowing athletes to negotiate compensation that reflects their market value. Such an approach would remove arbitrary restrictions like the 22% revenue-sharing cap and allow schools to compete for talent based on their resources and reputation, while still preserving the NCAA's goals of promoting amateurism and academic integrity.

This free-market approach draws support from *NCAA v. Board of Regents of the Univ. of Okla.* (1984)[72], where the Supreme Court struck down NCAA-imposed restrictions on the number of televised football games schools could broadcast and the revenue-sharing arrangements tied to those broadcasts. The Court held that the restrictions were anticompetitive because they artificially capped the market for televised college football games. The NCAA justified the restrictions as necessary to preserve competitive balance and amateurism. The Court concluded that a free market, where schools could negotiate their broadcast deals directly, would

[72] 468 U.S. 85, at 120 (1984).

better serve consumer interests without undermining competitive balance. This case supports the idea that allowing unrestricted market forces, rather than NCAA-imposed limits, can achieve procompetitive goals while fostering competition. Under a free-market approach, athletes' compensation would be determined by market forces, which are inherently less restrictive and more efficient than a fixed cap. The plaintiffs could argue that allowing schools to offer compensation based on their financial resources and the value of their athletes is a more natural and effective way of achieving competitive balance, as it incentivizes schools to invest in their athletic programs rather than simply adhering to a cap that limits athlete compensation.

Additionally, in *Law v. NCAA*[73], the 10th Circuit found the NCAA's cap on coaches' salaries for part-time coaches (the "Restricted Earnings Coach" rule) to be an antitrust violation under the Rule of Reason. The court invalidated the NCAA's Restricted Earnings Coach rule, which capped part-time coaches' salaries at $16,000 per year. The NCAA argued this cap was necessary for cost control and competitive balance. The court rejected the NCAA's justification that the salary cap preserved competitive balance and cost control, holding that the cap was an unnecessary and overly restrictive restraint on competition. The court rejected the NCAA's justifications, finding that less restrictive means, such as allowing schools to set their own budgets or imposing broader cost-containment policies, could achieve the same goals.The court rejected the NCAA's justifications, finding that less restrictive means, such as allowing schools to set their own budgets or imposing broader cost-containment policies, could achieve the same goals. The court emphasized that market forces could regulate coaching salaries effectively without the need for artificial caps, thereby fostering competition among schools to hire the best talent. The plaintiffs could apply this reasoning to the NCAA's 22% revenue-sharing cap, arguing that removing caps and allowing the free market to operate fosters competition while addressing goals like cost control through natural economic mechanisms. A free market, similar to the model used for regulating coaches salaries, would allow schools to negotiate with athletes freely, based on what they are able to offer, without distorting market forces through arbitrary caps.

In *Federal Trade Commission v. Superior Court Trial Lawyers Association*[74] (1990), the Supreme Court ruled that a group of lawyers engaging in collective action to fix prices for their

[73] 134 F.3d 1010, at 1024 (10th Cir. 1998).
[74] 493 U.S. 411, at 421-422 (1990).

services violated antitrust laws. The Court found that a free-market approach to pricing for legal services would be less restrictive and align better with consumer interests. The decision highlights how artificial caps or price-fixing arrangements are generally disfavored under antitrust law, with market mechanisms serving as a preferred alternative. Although not directly related to the NCAA, this case emphasizes that market forces are often viewed as the least restrictive means for achieving competitive outcomes. Therefore, a free market approach would be a successful proposal that the plaintiffs can bring before the courts as a way thast the NCAA could achieve their procompetitive benefits in a less restrictive way.

In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc*.[75], the court struck down the NHL's player-reserve system, which capped player salaries and restricted player mobility. The system effectively stifled competition for players. The court held that a free-market approach, where teams could compete for players without artificial restrictions, would better serve competitive balance and enhance league viability. The court decided that market-based compensation for players was deemed a less restrictive means to achieve competitive balance than rigid salary caps. The plaintiffs in House v. NCAA could leverage *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*[76] to argue that the 22% revenue-sharing cap is too restrictive and violates antitrust principles under Section 1 of the Sherman Act. The plaintiffs could argue that the cap restricts how much athletes can collectively earn, even though their contributions vary across schools, conferences, and sports. Just as the reserve system limited competition for NHL players, the revenue-sharing cap limits schools' ability to compensate athletes fairly and compete for talent. The NHL argued that the reserve system was necessary to maintain competitive balance among teams, but the court found that free-market competition for players would achieve the same objective more effectively. Similarly, the NCAA will claim that the 22% cap ensures fairness and balance among schools. However, plaintiffs could argue that allowing schools to determine their own compensation structures (market-based sharing) would better serve competitive balance and align compensation with athletes' contributions. In *Philadelphia World Hockey Club*[77], the court ruled that market-based compensation was a less restrictive and more effective way to achieve competitive balance.

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[75] 351 F. Supp. 462, at 482 (E.D. Pa. 1972).
[76] *Id.*
[77] *Id.*

Removing the 22% revenue-sharing cap would allow schools and conferences to determine how to distribute revenue, creating a natural balance based on market dynamics. Schools could compete to attract top talent by offering fair compensation tied to market conditions, rather than adhering to an arbitrary cap. The NCAA could achieve its procompetitive goals (e.g., academic integrity, amateurism) through a performance-based revenue-sharing system, which rewards athletes for their contributions without imposing a rigid cap. Rather than applying a blanket 22% cap, schools could allocate revenue based on academic achievement, team performance, or other measurable contributions, ensuring that the system supports amateurism and fairness without unduly restricting compensation. Just as the NHL could achieve competitive balance through market-based mechanisms, the NCAA can allow schools to negotiate their own revenue-sharing policies while still promoting fairness through other rules (e.g., roster limits, scholarship limits). Revenue-sharing caps are unnecessary if schools have the flexibility to align their compensation with their resources and priorities. In *Philadelphia World Hockey Club*[78], the court rejected the NHL's claim that the reserve system was necessary for financial stability. Similarly, plaintiffs can argue that the NCAA's cost-control justification for the cap is unfounded, as schools already control their own athletic budgets.

The NCAA would likely counter that a free market approach would undermine the competitive balance of college sports. In *NCAA v. Board of Regents*[79], the Supreme Court recognized that "competitive balance" is essential to distinguishing college athletics from professional sports. The NCAA might argue that, without any cap, wealthier schools would monopolize top athletes by offering higher compensation packages, exacerbating the existing financial disparities between elite programs and smaller schools. They could claim that a free-market approach would result in bidding wars, where only a select few programs could afford to recruit the best talent, further entrenching the dominance of large programs with extensive resources.

However, the plaintiffs could counter this argument by highlighting that the disparities

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[78] *Id.*
[79] 468 U.S. 85, at 82 (1984).

the NCAA fears already exist. In *O'Bannon v. NCAA*[80], the Ninth Circuit acknowledged that wealthier programs already hold substantial advantages in recruiting and performance due to their larger budgets, better facilities, and other resources, regardless of compensation limits. Removing the cap would not necessarily worsen these disparities, but rather allow smaller schools to compete more effectively by offering non-monetary benefits like better education, training, or post-graduation opportunities. The plaintiffs could also argue that the cap itself does little to prevent dominant programs from securing the best athletes, as schools with greater resources already have the upper hand in recruitment.

Moreover, in *NCAA v. Alston*[81], the Court emphasized that compensation rules must not be overly broad or arbitrary and should be narrowly tailored to achieve legitimate procompetitive benefits. A free-market approach, while allowing for flexibility in compensation, would still leave room for the NCAA to regulate amateurism and academic integrity without imposing an arbitrary cap. For example, the NCAA could still set academic standards or eligibility requirements without limiting athlete compensation. The Court in *Alston*[82] also noted that the NCAA could not use tradition alone as a justification for its compensation limits, further supporting the idea that a free-market approach could align more closely with antitrust principles than a rigid cap.

In sum, the plaintiffs are likely to argue that a free-market approach offers a less restrictive and more effective alternative to the 22% revenue-sharing cap. By allowing schools to pay athletes according to their financial capabilities and market demand, this model would remove the artificial ceiling on compensation while still enabling the NCAA to preserve its procompetitive goals. Courts have consistently rejected price-fixing as anti-competitive, and a free-market model would allow for natural competition to determine athlete compensation without the need for arbitrary restrictions. Under the reasoning in presented above, the Court would likely find that a free-market approach is a less restrictive means of achieving the NCAA's goals, making the 22% cap unnecessary under antitrust law.

[80] 802 F.3d 1049, at 1070 (9th Cir. 2015).
[81] 141 S. Ct. 2141, at 2157 (2021).
[82] *Id.*

D. CONCLUSION

The 22% revenue-sharing cap in the *House v. NCAA*[83] settlement constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act[84] by artificially limiting athlete compensation and suppressing market competition. The NCAA's attempt to implement this cap appears to be a strategic effort to sidestep congressional intervention and avoid collective bargaining or unionization while maintaining its control over athlete compensation. Given the financial disparities in college sports and the availability of less restrictive alternatives, the 22% revenue-sharing cap is likely to face successful antitrust challenges.

[83] Complaint, *House v. NCAA*, No. 4:20-CV-03919 (N.D. Cal. June 15, 2020).
[84] Sherman Antitrust Act, 15 U.S.C. § 1.