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An Antitrust Analysis of the NCAA Transfer Policy

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AN ANTITRUST ANALYSIS OF THE NCAA TRANSFER POLICY

by: Michael A. Carrier* & Marc Edelman**

ABSTRACT

The National Collegiate Athletic Association (“NCAA”) is no stranger to antitrust law. As a trade association composed of nearly all U.S. colleges offering competitive sports, its rules are regularly challenged under antitrust law. In the past 40 years, the NCAA has faced challenges to rules limiting televised game broadcasts, curtailing assistant coaches’ pay, and restraining players’ compensation, among other issues. Restraints on college athlete transfers also could subject the Association to reasonable legal scrutiny.

Restrictions on the ability to transfer can harm athletes by preventing their immediate eligibility even though transferring could allow them to be closer to family, enroll in more academically rigorous schools, or escape abusive coaches. Transfer restraints have an especially restrictive effect on players hoping to one day play in the National Football League (“NFL”). For these individuals, the college football system is the primary opportunity to showcase talent before declaring for the League’s draft. The NCAA’s transfer rules keep many of these elite players on their teams’ benches. This hurts their ability to prepare for careers in the NFL. And it denies football fans the opportunity to watch them perform in college.

The NCAA’s rules that prevent football players from freely transferring between schools have changed over time. Why? Because of the changing preferences of members of the NCAA Division I Council (“NCAA Council”), a group of college athletic directors and administrators. In April 2021, the NCAA Council changed its rules to facilitate the movement of football players between schools, allowing athletes who had not previously switched schools to pursue transfer opportunities by entering a portal within a 60-day window. On October 4, 2023, the NCAA Council reduced the transfer window from 60 to 45 days.

In this Essay, we explore the antitrust consequences of this latest action by the NCAA Council, as well as the broader competitive effects of limits on college football player movement. We conclude that: (1) the NCAA’s transfer limits impose substantial anticompetitive effects; (2) the NCAA could offer (but would need to prove) a justification based on reduced fan interest from a lack of team stability; (3) less restrictive alternatives (including the 60-day transfer window) are available; and (4) the restraint’s anticompetitive effects are likely to outweigh its procompetitive effects.

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TABLE OF CONTENTS

I. INTRODUCTION	1000
II. HISTORY	1001
A. <i>Brief History of College Football</i>	1001
B. <i>Transfer Policy</i>	1003
C. <i>Deppe</i>	1006
III. ANTITRUST: GENERAL	1007
A. <i>No Immunity</i>	1008
B. <i>Board of Regents</i>	1009
IV. ANTITRUST: RULE OF REASON	1010
A. <i>Anticompetitive Effects</i>	1010
B. <i>Procompetitive Justifications</i>	1013
C. <i>Less Restrictive Alternatives</i>	1015
D. <i>Balancing</i>	1017
V. CONCLUSION	1018

I. INTRODUCTION

The National Collegiate Athletic Association (“NCAA”) is no stranger to antitrust law. As a trade association composed of nearly all U.S. colleges offering competitive sports, its rules are regularly challenged under antitrust law. In the past 40 years, the NCAA has faced challenges to rules limiting televised game broadcasts,¹ curtailing assistant coaches’ pay,² and restraining players’ compensation,³ among other issues. Restraints on college athlete transfers also could subject the Association to reasonable legal scrutiny.

Restrictions on the ability to transfer can harm athletes by preventing their immediate eligibility⁴ even though transferring could allow them to be closer to family, enroll in more academically rigorous schools, or escape abusive coaches.⁵ Transfer restraints have an especially restrictive effect on players hoping to one day play in the National Football League (“NFL”). For these individuals, the college football system is

1. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85 (1984).

2. Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010 (10th Cir. 1998); Mike Scarcella, *NCAA Fends off Unpaid Coaches’ Bid for Pay Data in Antitrust Case*, REUTERS (Nov. 10, 2023, 12:03 PM), <https://www.reuters.com/legal/litigation/ncaa-fends-off-unpaid-coaches-bid-pay-data-antitrust-case-2023-11-10/> [https://perma.cc/K7PD-PU6J].

3. Steve Berkowitz, *NCAA, Power Five Conferences Facing New Antitrust Lawsuit over Pay to Athletes*, USA TODAY (Apr. 4, 2023, 1:42 PM), <https://www.usatoday.com/story/sports/2023/04/04/ncaa-lawsuit-power-five-conferences/11598052002/> [https://perma.cc/V2FR-LB3Z].

4. See NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA GUIDE FOR FOUR-YEAR TRANSFERS 2023–24, at 17 (2023).

5. Cf. Jared K. Richards, Shelley L. Holden & Steven F. Pugh, *Factors That Influence Collegiate Student-Athletes to Transfer, Consider Transferring, or Not Transfer*, SPORT J., Oct. 6, 2016, at 1.

the primary opportunity to showcase talent before declaring for the League's draft. The NCAA's transfer rules keep many of these elite players on their teams' benches. This hurts their ability to prepare for careers in the NFL. And it denies football fans the opportunity to watch them perform in college.⁶

The NCAA's rules that prevent football players from freely transferring between schools have changed over time. Why? Because of the changing preferences of members of the NCAA Division I Council ("NCAA Council"), a group of college athletic directors and administrators. In April 2021, the NCAA Council changed its rules to facilitate the movement of football players between schools, allowing athletes who had not previously switched schools to pursue transfer opportunities by entering a portal within a 60-day window.⁷ On October 4, 2023, the NCAA Council reduced the transfer window from 60 to 45 days.⁸

In this Essay, we explore the antitrust consequences of this latest action by the NCAA Council, as well as the broader competitive effects of limits on college football player movement. We conclude that: (1) the NCAA's transfer limits impose substantial anticompetitive effects; (2) the NCAA could offer (but would need to prove) a justification based on reduced fan interest from a lack of team stability⁹; (3) less restrictive alternatives (including the 60-day transfer window) are available; and (4) the restraint's anticompetitive effects are likely to outweigh its procompetitive effects.

II. HISTORY

To understand the landscape of the NCAA Division I college football transfer rules, this Part offers a brief history of college football, player transfers, and antitrust litigation related to transfers.

A. *Brief History of College Football*

College football traces its roots back to November 6, 1869, when Rutgers College defeated the College of New Jersey (now Princeton University) by a score of 6 to 4.¹⁰ According to most available accounts,

6. *Cf. id.*

7. Michelle Brutlag Hosick, *DI Council Adopts New Transfer Legislation*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 15, 2021, 4:41 PM), <https://www.ncaa.org/news/2021/4/15/di-council-adopts-new-transfer-legislation.aspx> [<https://perma.cc/J6A3-THSJ>].

8. Meghan Durham Wright, *DI Council Approves Changes to Notification-of-Transfer Windows*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 4, 2023, 1:30 PM), <https://www.ncaa.org/news/2023/10/4/media-center-di-council-approves-changes-to-notification-of-transfer-windows.aspx> [<https://perma.cc/U9DA-P3PP>].

9. See *infra* Section IV.B and accompanying text.

10. See John T. Holden, Marc Edelman, Thomas A. Baker & Andrew G. Shuman, *Reimagining the Governance of College Sports After Alston*, 74 FLA. L. REV. 427, 430–31, 431 n.12 (2022).

students at these schools organized the game without any faculty or administrative oversight. There were few fans and no commercial elements.¹¹ Over the next ten to twenty years, faculty members and administrators began to take interest, recognizing that football could bring goodwill to their schools and an increased ability to recruit new students. These individuals began organizing schools into conferences and crafting rules to determine player eligibility.¹²

By the early 1900s, the first efforts were underway to form a national governing board to regulate college football.¹³ Initially, the plans for national oversight centered on creating “aspirational” guidelines rather than mandatory practices.¹⁴ The original NCAA constitution, for example, stated that schools would not be required to accept any specific rules.¹⁵ By the 1920s and 1930s, however, the Carnegie Foundation for the Advancement of Education began pushing to turn these guidelines into mandates.¹⁶ And by 1951, the NCAA had created a formal Committee on Infractions, hired a full-time employee to help enforce the Association’s rules,¹⁷ and began transforming the NCAA into a highly commercialized trade association.¹⁸

College athletic departments within the NCAA currently earn roughly \$19 billion in annual revenue, with most of this coming from its Division I football programs,¹⁹ which rely heavily on a labor supply consisting of college students who aspire to play in the NFL. A recent report showed that 49 Division I colleges bring in more than \$100 million per year from their athletic programs.²⁰ Five schools—Ohio State University,

11. See *The First Game: Nov. 6, 1869*, RUTGERS, <https://scarletknights.com/sports/2022/7/25/sports-m-footbl-archive-first-game-html.aspx> [<https://perma.cc/6FFR-X3C2>].

12. W. Burette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 225–26 (2006); see, e.g., RANDY ROBERTS, *THE ROCK, THE CURSE, AND THE HUB: A RANDOM HISTORY OF BOSTON SPORTS* 167–70 (2005).

13. Carter, *supra* note 12, at 215–17.

14. See *id.* at 227; see also *id.* at 215–20 (exploring the emergence of what the NCAA has become and noting a statement in the original constitution that eligibility rules would not be membership requirements).

15. See *id.* at 220 (“[T]he constituted authorities of each institution shall decide on methods of preventing the violation of the principles laid down [in the constitutional charter].”).

16. See Marc Edelman, Michael A. McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2023 U. ILL. L. REV. (forthcoming 2024) (manuscript at 5) (on file with authors).

17. *Id.* at 7.

18. *Id.* at 11 (“Byers created an organization that not only exerted a powerful disciplinary hand, but also grew the college sports business into a colossal, revenue generating enterprise.”).

19. Andrew Zimbalist, *Analysis: Who is Winning in the High-Revenue World of College Sports?*, PBS (Mar. 18, 2023, 7:14 PM), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports> [<https://perma.cc/8ZJZ-TSQR>].

20. See Steve Berkowitz et al., *NCAA Finances: Revenues and Expenses by School*, USA TODAY, <https://sports.usatoday.com/ncaa/finances> [<https://perma.cc/5KML-K33C>] (June 13, 2023, 7:51 PM); Dylan Callaghan-Croley, *Which Schools Had the Most Athletic*

the University of Texas, the University of Alabama, the University of Michigan, and the University of Georgia—have annual college football revenues exceeding \$200 million.²¹

B. *Transfer Policy*

Rules guiding athletes in their rights and responsibilities when transferring need to be understood in the context of the evolving social landscape of college sports since the 1800s. Initially, no rules prevented athlete transfers. At times, this resulted in frequent player movement. Fielding Yost, best known as the football coach who helped build the University of Michigan football team,²² was one of the most famous beneficiaries of the sport's early free market.²³ As a law student at West Virginia University, Yost transferred to Lafayette College in late October 1896 to help Lafayette beat archrival the University of Pennsylvania in an important game.²⁴ The week after Lafayette's victory, Yost was back at West Virginia University attending classes.²⁵ He graduated from West Virginia University in 1897.²⁶

While the NCAA was founded as a national body for college football, it did not immediately involve itself in transfers, and initially, “there was no uniform approach [on the national level] to curb transfers and school hopping.”²⁷ But member schools, fearing a repeat of Yost's behavior of switching conferences, agreed to a national rule. This rule provided that “[a] transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution.”²⁸ This became known as the “one-year rule.”

Revenue in 2022?, COLL. SPORTS WIRE (June 15, 2023, 3:21 PM), <https://collegesportswire.usatoday.com/lists/college-athletics-revenue-rankings-2022-fiscal-year-ohio-state-texas/> [<https://perma.cc/V2TE-A5HQ>].

21. See Berkowitz, *supra* note 20.

22. *Fielding Yost: The Man Who Created Michigan Football*, DETROIT NEWS (Nov. 27, 2019) [hereinafter *Fielding Yost*], <https://www.detroitnews.com/picture-gallery/news/local/michigan-history/2017/10/25/fielding-yost-the-man-who-created-michigan-football/107013758/> [<https://perma.cc/F9FA-QCHA>].

23. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 75 (2021).

24. *Id.*

25. *Id.*

26. See *Fielding Yost*, *supra* note 22.

27. Carter, *supra* note 12, at 236. In 1906, the predecessor association to what became the NCAA produced a constitution that included nonbinding player-eligibility guidelines that the founders encouraged colleges to adopt. *Id.* at 220. Included in these guidelines was language that “[n]o student who has been registered as a member of any other College or University shall participate in any intercollegiate game or contest until he shall have been a student of the institution which he represents at least one college year.” *Id.* at 223.

28. See *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 500 (7th Cir. 2018).

The one-year rule was controversial from the beginning, and it occasionally faced legal challenges.²⁹ In one, a college football player at the University of Maryland sued after he was forced to sit out a year after transferring to Cornell University “for academic reasons.”³⁰ In another, an elite college tennis player from Arizona State University sued when he was required to sit out a year after transferring to the University of Pennsylvania.³¹ In a third, a former college punter sued when, after his promised football scholarship was rescinded, he was not able to transfer to a school where he would have received a scholarship and could have immediately played.³²

Over time, the NCAA began to relax its application of the one-year rule. First, it implemented a process to allow athletes to petition for an exemption by showing “financial hardship, or an injury or illness to [themselves] or a member of their family.”³³ The next change allowed athletes who had already earned their undergraduate degrees to become immediately eligible to compete for new schools where they were pursuing master’s degrees.³⁴

On April 15, 2021,³⁵ the NCAA Division I Council implemented even bigger changes, allowing athletes one free transfer without needing to sit out a season as long as they satisfied three conditions.³⁶ First, the athletes had to meet all academic requirements for eligibility, including the progress-toward-degree requirements.³⁷ Second was a certification

29. See *Graham v. Nat’l Collegiate Athletic Ass’n*, 804 F.2d 953, 955 (6th Cir. 1986); see also *McHale v. Cornell Univ.*, 620 F. Supp. 67, 67–68 (N.D.N.Y. 1985).

30. *McHale*, 620 F. Supp. at 68.

31. *Weiss v. E. Coll. Athletic Conf.*, 563 F. Supp. 192, 192–93 (E.D. Pa. 1983).

32. *Deppe*, 893 F.3d at 499–500.

33. See Eamonn Brennan, *NCAA Approves Half of All Hardship Waivers*, ESPN (July 13, 2012, 3:45 PM), https://www.espn.com/blog/collegebasketballnation/post/_id/61087/ncaa-approves-half-of-all-hardship-waivers [<https://perma.cc/T5BL-KQUP>].

34. See *Division I Proposal 2010-52*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://web3.ncaa.org/lstdbi/search/proposalView?id=2660> [<https://perma.cc/ZV2P-75E9>] (explaining that the proposal to allow for immediate eligibility of graduate student transfers was first proposed for consideration on July 14, 2010, and ultimately adopted on June 27, 2011).

35. This policy was adopted shortly after a Supreme Court oral argument in a case challenging limits on education-related benefits in which the NCAA faced “uncharacteristically unified . . . skepticism” from both sides of the ideological aisle. Jason Hicks, *Supreme Court’s Skepticism of NCAA’s Arguments Could Lead to Win for Student-Athletes, Changes in Antitrust Law*, JD SUPRA (Apr. 2, 2021), <https://www.jdsupra.com/legalnews/supreme-court-s-skepticism-of-ncaa-s-6713158/> [<https://perma.cc/48SS-DA9F>].

36. Hosick, *supra* note 7.

37. *Id.*; see also *Staying on Track to Graduate*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2021/2/10/student-athletes-current-staying-track-graduate.aspx> [<https://perma.cc/5YSS-55Q4>] (explaining that in NCAA Division I sports, progress-toward-degree requirements entail three mandates that apply to college athletes: (1) completing 40% of required coursework for graduation by the end of the second year, 60% by the end of the third year, and 80% by the end of the fourth year; (2) no longer working toward an undergraduate degree after five years; and (3) earning

that no “tampering” took place in the transfer decision.³⁸ Third, the athletes had to enter their names in the transfer portal within a 60-day timeframe.³⁹

Under this transfer policy, football players at Division I Football Bowl Subdivision (“FBS”) schools⁴⁰ who had not previously transferred were granted two periods in which to place their name into the portal for free transfer the following academic year.⁴¹ The first period consisted of “[a] 45 consecutive-day period beginning the day after championship selections are made in the sport,”⁴² and the second, 15-day period lasted from May 1 to May 15.⁴³

Players quickly took advantage. As of the summer of 2023, “[a] total of 2,224 Division I football players entered the transfer portal [the previous] winter and 1,373 entered in the spring.”⁴⁴ For many players, the portal allowed them to switch from being backups at their old colleges to starters at their new ones.

Despite this success, on October 4, 2023, the NCAA Division I Council shifted the pendulum back in the other direction, voting to

at least six credit hours the previous term with a minimum GPA that meets the school’s standard for graduation).

38. Hosick, *supra* note 7; see also Alex Scarborough, *Tampering Has Arrived in College Football, and It Looks Like NBA Free Agency*, ESPN (May 24, 2021, 5:42 AM), https://www.espn.com/college-football/story/_id/31477534/tampering-arrived-college-football-looks-nba-free-agency [<https://perma.cc/MDK9-DFMX>] (describing “tampering” as coaches using third parties to contact players who have not entered the transfer portal and encouraging them to transfer to their school).

39. Shehan Jeyarajah & Barrett Sallee, *NCAA Board Approves Transfer Portal Windows, “Modernizes” Infractions Process*, CBS (Aug. 31, 2022, 5:32 PM), <https://www.cbssports.com/college-football/news/ncaa-board-approves-transfer-portal-windows-modernizes-infractions-process/> [<https://perma.cc/7CEF-EL7J>].

40. The FBS schools are the 130 colleges with sports programs eligible to participate in postseason football bowl games. See *Our Division I Members*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx> [<https://perma.cc/MHL8-6WBH>]. They include, for the most part, the college football teams that generate the most revenue, including 65 programs from the Atlantic Coast, Big Ten, Big 12, Pac-12, and Southeastern conferences and football independent Notre Dame. See Tony Adame, *Ranking Every Power Five Conference Program*, STADIUM TALK (May 18, 2023), <https://www.stadiumtalk.com/s/power-5-conferences-rankings-c0f6d968d5f44dde> [<https://perma.cc/4Y5E-MGGZ>].

41. See *Bylaw § 13.1.1.3.1 Notification of Transfer*, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 31, 2022), <https://web3.ncaa.org/lstdbi/bylaw?ruleId=101136&refDate=20220914> [<https://perma.cc/UQM3-QT75>].

42. *Id.* This period is subject to extension for college athletes who compete in the College Football Playoff Championship Game (a national championship game for the highest level of collegiate football, conducted by the College Football Playoff) and the FCS Championship Game (a postseason bracketed tournament conducted by the NCAA for programs that do not compete at the highest level) to ensure that the players who compete in either game are allowed 14 days after the game to notify their schools of their intent to transfer. See *id.*; see also *Our Division I Members*, *supra* note 40.

43. *Bylaw § 13.1.1.3.1 Notification of Transfer*, *supra* note 41.

44. See Tom VanHaaren, *NCAA Division I Council Proposes Cutting Transfer Portal Window in Half*, ESPN (June 28, 2023, 6:01 PM), https://www.espn.com/college-sports/story/_id/37930109/d-council-proposes-cutting-transfer-portal-window-half [<https://perma.cc/XS8F-26PZ>].

shorten the transfer window from 60 to 45 days.⁴⁵ This was not a total surprise. Many high-profile college football coaches had publicly complained about the portal.⁴⁶ They lamented players' ability to announce transfers over the course of 60 days, which they thought made it difficult to finalize rosters before the season.⁴⁷ The coaches also worried about their own exhaustion based on the volume of players they needed to recruit and retain during the transfer period.⁴⁸ Football is unique in this setting: NCAA rules allow for as many as 85 scholarship players on a roster, far more than other sports, such as basketball, with 15 spots.⁴⁹

C. Deppe

This is not the first time transfer restrictions have come under antitrust scrutiny. In the early 1980s, former quarterback Jon English attempted to challenge the NCAA's transfer rules under Louisiana state antitrust law.⁵⁰ Several other athletes have also attempted to challenge individual conference restraints on transfers.⁵¹

45. See Chip Patterson & David Cobb, *NCAA Council Meeting: Approved Measures Include Reduced Transfer Portal Window, "Modernized" Gambling Rules*, CBS SPORTS (Oct. 4, 2023, 10:53 AM), <https://www.cbssports.com/college-football/news/ncaa-council-meeting-approved-measures-include-reduced-transfer-portal-window-modernized-gambling-rules> [<https://perma.cc/5NMW-7FFS>] (noting the vote to "shorten [the] transfer portal windows from 60 to 45 days for all sports, starting with the 2023–24 academic year"); see also *Bylaw § 13.1.1.3.1 Notification of Transfer – Undergraduate Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 4, 2023), <https://web3.ncaa.org/lstdbi/bylaw?ruleId=101136&refDate=20231012> [<https://perma.cc/9MPR-XVAM>].

46. See, e.g., Dennis Dodd, *College Football Coaches Eager to Catch Breath as Transfer Portal's May 1 Deadline Pauses Roster Churn*, CBS SPORTS (Apr. 25, 2022, 7:19 AM), <https://www.cbssports.com/college-football/news/college-football-coaches-eager-to-catch-breath-as-transfer-portals-may-1-deadline-pauses-roster-churn> [<https://perma.cc/82HF-7SHZ>]; Ross Dellenger, *Matt Luke Left the Toils of College Coaching to Be a Dad—and He Won't Be the Last*, SPORTS ILLUSTRATED (Apr. 22, 2022), <https://www.si.com/college/2022/04/22/matt-luke-ncaa-football-coaches-walk-away> [<https://perma.cc/U4TC-E3RA>].

47. See Dodd, *supra* note 46 (discussing coaches' opposition to prolonged transfer portal).

48. See *Id.*; see also Dellenger, *supra* note 46.

49. See Patrick Zier, *NCAA Rules to Increase Rosters in '21 Creates Problems Down the Road*, LEDGER (June 15, 2021, 8:36 PM), <https://www.theledger.com/story/sports/2021/06/15/ncaa-rules-increase-rosters-21-creates-problems-down-road/7700815002> [<https://perma.cc/36LT-ZNSA>] (explaining NCAA football roster rules); *Basketball Roster Size*, ROOKIE ROAD, <https://www.rookieroad.com/basketball/rules/roster-size/> [<https://perma.cc/5K9E-LTNV>] (Jan. 25, 2023) (explaining NCAA basketball roster rules).

50. See *English v. Nat'l Collegiate Athletic Ass'n*, 439 So. 2d 1218, 1223–24 (La. Ct. App. 1983) (dismissing the state antitrust claim because NCAA conduct involves interstate commerce and thus an antitrust challenge can only be considered under federal antitrust law).

51. See, e.g., *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (challenging Pac-10's restraints on athlete transfers); *Weiss v. E. Coll. Athletic Conf.*, 563 F. Supp. 192 (E.D. Pa. 1983) (challenging the Eastern College Athletic Conference's transfer restraints).

The most notable recent challenge came in 2018 when the Seventh Circuit in *Deppe v. NCAA* addressed the one-year restriction on transfer eligibility.⁵² In *Deppe*, a punter who believed he would receive an athletic scholarship began pursuing transfer opportunities after learning that he would not.⁵³ Pursuant to the NCAA's "year-in-residence" rule, the punter would have been forced to sit out one year before he could play for his new school.⁵⁴ The punter claimed that the NCAA's rule violated antitrust law.⁵⁵ But the district court dismissed the claim, and the Seventh Circuit affirmed, finding that the rule was "presumptively procompetitive."⁵⁶

In earlier work, we explained how the Seventh Circuit's ruling suffered from multiple flaws based on misreading antitrust precedent, misconstruing antitrust law, ignoring the procedural setting of a motion to dismiss, and neglecting the economics that showed the restriction's anticompetitive nature.⁵⁷ Two examples of how the court went astray on the facts suffice here.

First, the court assumed that the NCAA's rule "is plainly an eligibility rule" because it "appears in the eligibility section of the NCAA Division I Manual."⁵⁸ Such a conclusion, however, allowed the court to "avoid[] scrutinizing the one-year rule on its merits," which instead led it to conclude that "all eligibility rules are presumptively procompetitive."⁵⁹

Second, the court assumed that overturning the restriction would result in college athletes "be[ing] 'traded' from year to year like professional athletes," as they "could begin the season playing for one school and end the season playing for a rival."⁶⁰ Such an assertion, however, was undermined by multiple factors, including college athletes themselves initiating player transfers, NCAA rules preventing trading because of class-enrollment requirements, and the absence of player contracts with assignment clauses typical in professional sports leagues.⁶¹

III. ANTITRUST: GENERAL

The setting for analyzing NCAA restrictions changed dramatically in 2021. In that year, the Supreme Court in *NCAA v. Alston* unanimously

52. *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 499 (7th Cir. 2018).

53. *Id.* at 499–500.

54. *Id.* at 500.

55. *Id.*

56. *Id.* at 500, 503–04.

57. Michael A. Carrier & Marc Edelman, *College Athletics: The Chink in the Seventh Circuit's "Law and Economics" Armor*, 117 MICH. L. REV. ONLINE 90, 90–91 (2019), <https://doi.org/10.36644/mlr.online.117.college>.

58. *Deppe*, 893 F.3d at 502.

59. Carrier & Edelman, *supra* note 57, at 99.

60. *Id.* at 100 (quoting *Deppe*, 893 F.3d at 503).

61. *Id.* at 100–01.

ruled that the Association's restraints on education-related compensation violated antitrust law.⁶² In its ruling, the Court made clear that the NCAA cannot avoid the application of antitrust law, rejecting claims based on the NCAA's noncommercial status and an earlier Supreme Court ruling.⁶³

A. *No Immunity*

The NCAA first raised a broad, general claim about its status, contending that “[it] and its member schools are not ‘commercial enterprises’ and instead oversee intercollegiate athletics ‘as an integral part of the undergraduate experience.’”⁶⁴ Relatedly, the NCAA claimed that “it [sought] to ‘maintain amateurism in college sports as part of serving [the] societally important non-commercial objective’ of ‘higher education.’”⁶⁵

The Court made quick work of this claimed immunity, explaining that: “[t]he NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to” antitrust law; “the Sherman Act had already been applied to other nonprofit organizations”; and “the economic significance of the NCAA’s nonprofit character is questionable at best” given that “[it] and its member institutions are in fact organized to maximize revenues.”⁶⁶ The Court pointed to the NCAA’s “massive business,” with a “current broadcast contract for the March Madness basketball tournament . . . worth \$1.1 billion annually” and a television deal for the College Football Playoff “worth approximately \$470 million per year.”⁶⁷

In short, the Court refused to grant the NCAA “a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade” on the grounds that its restrictions “happen to fall at the intersection of higher education, sports, and money.”⁶⁸ Citing landmark cases rejecting attempts to avoid antitrust law by claiming that competition was undesirable,⁶⁹ the Court explained how it “has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”⁷⁰

62. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

63. *Id.* at 91–96.

64. *Id.* at 94.

65. *Id.*

66. *Id.*

67. *Id.* at 79.

68. *Id.* at 94.

69. *See id.* at 95 (citing *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978)).

70. *Id.* at 94–95.

B. *Board of Regents*

The NCAA also sought a second path to near-immunity from anti-trust law. For decades, the Association had relied on the Court's 1984 ruling in *NCAA v. Board of Regents of the University of Oklahoma* that had addressed the validity of restrictions on schools' ability to televise football games.⁷¹ In that case, the Court struck down the NCAA's rules, finding that they amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned as . . . 'illegal *per se*.'"⁷² As the *Alston* Court explained, the Court "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.'"⁷³

Despite concluding that the NCAA violated antitrust law, the Court in dicta stated that compensation-related rules could be viewed differently, as "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and "[t]here can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."⁷⁴

In the decades since *Board of Regents*, it is hard to understate the extent to which the NCAA has relied on the decision. In the brief it filed in the *Alston* case, it cited *Board of Regents* 145 times in 61 pages.⁷⁵ It claimed that *Board of Regents* "required" courts to recognize that its "conception of amateurism is procompetitive"⁷⁶; reiterated *Board of Regents*' dicta that amateur players "must not be paid"⁷⁷ (even while acknowledging that it pays its players "modest" amounts⁷⁸); and said that this was the Court's "holding."⁷⁹

To put it mildly, the Court in *Alston* was not persuaded by these attempts to rewrite *Board of Regents*. The Court stated that its ruling was "fully consistent" with its earlier ruling, and in fact, "if any daylight exists it is only in the NCAA's favor."⁸⁰ For "[w]hile *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful,

71. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 89 (1984).

72. *Id.* at 100.

73. *Alston*, 594 U.S. at 91 (quoting *Bd. of Regents*, 468 U.S. at 101–02).

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

75. Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae Supporting Respondents at 2, Nat'l Collegiate Athletic Ass'n v. *Alston*, 594 U.S. 69 (2021) (Nos. 20-512, 20-520).

76. Brief for Petitioner at 43, Nat'l Collegiate Athletic Ass'n v. *Alston*, 594 U.S. 69 (2021) (No. 20-512).

77. *Id.* at 3, 6, 14, 16–17, 22, 27, 34–35, 38, 46.

78. *Id.* at 6–7, 27, 29, 37, 46 n.4.

79. *Id.* at 28–29. See also Michael A. Carrier & Christopher L. Sagers, *The Alston Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461, 1470 (2021).

80. Nat'l Collegiate Athletic Ass'n v. *Alston*, 594 U.S. 69, 91 (2021).

it invoked abbreviated antitrust review as a path to condemnation, not salvation.”⁸¹ The Court made clear that the NCAA’s reliance on *Board of Regents* was misplaced as “[s]tudent-athlete compensation rules were not even at issue in *Board of Regents*” and the Court “was only assuming the reasonableness of the NCAA’s restrictions,” which meant it “did not have occasion to declare—nor did it declare—the NCAA’s compensation restrictions procompetitive both in 1984 and forevermore.”⁸² Finally, the *Alston* Court recognized that “there can be little doubt that the market realities have changed significantly since 1984,” as “the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes.”⁸³

IV. ANTITRUST: RULE OF REASON

The NCAA’s lack of special treatment means that it is subject to the general analysis that applies to agreements: the rule of reason. The rule of reason involves a burden-shifting analysis that evaluates a restraint’s anticompetitive effects, a defendant’s procompetitive justifications, less restrictive alternatives that could achieve the defendant’s goals, and a balancing of the competitive effects.⁸⁴

A. Anticompetitive Effects

Central to hornbook antitrust analysis is the effect of restraints on consumers.⁸⁵ One element of proving these effects is market power.⁸⁶ Although that is contested in the vast majority of rule-of-reason cases, in this case, it would not be. The Supreme Court found in *Alston* that the NCAA did “not contest that [it] enjoys monopoly (or, as it’s called on the buyer side, monopsony⁸⁷) control in [the relevant] market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor.”⁸⁸ The Court also explained that the “NCAA *accepts* that its members collectively enjoy monopsony power in the market for [college athlete] services, such that its restraints can (and in fact do) harm competition.”⁸⁹ These concessions

81. *Id.* at 91–92.

82. *Id.* at 92–93.

83. *Id.* at 93.

84. *E.g.*, *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983–94 (9th Cir. 2023).

85. *Id.* at 983. Considering effects beyond consumers, such as those felt by athletes, does not alter our conclusions.

86. *Id.*

87. The NCAA can be viewed as a *seller* of college athletics contests, which is relevant to a claim of monopoly, or a *purchaser* of college athletes’ services, reflecting monopsony. Whichever way this nuanced issue is interpreted does not alter the conclusion that the NCAA has significant market power, enough to easily satisfy the requirements of the rule of reason.

88. *Alston*, 594 U.S. at 86.

89. *Id.* at 90.

make sense: as any fan of college sports knows, and as the U.S. Supreme Court recognized in *Board of Regents*, there is no substitute for NCAA football.⁹⁰

Together with market power, a plaintiff must show anticompetitive effects, which typically are effects on price, output, innovation, or quality.⁹¹ Anticompetitive output effects could be shown in this setting through reduced choice for fans.⁹² Fans can express their preference for viewing games in their home city by paying more to buy tickets or packages of televised games.

In this setting, a shorter transfer period reduces the window in which colleges and players can seek a better match. In some cases, the window may close before players who would find a more comfortable fit with a different school decide to transfer. For example, a player seeking to transfer for academic reasons might not have received fall semester grades at the time the first transfer period closes. Or a player who seeks to play for a specific coach might not know where that coach will be the following season until after the end of the period.

Adding to this concern, transfer-restriction rules protect schools in the strongest conferences by making it easier for them to keep star players as reserves. Relatedly, the rules harm weaker teams by preventing them from signing players at stronger schools who are not playing but could immediately enter their starting lineup. Transfers, in these cases, could improve the team's performance and in the process enhance fan interest in attending games and buying merchandise.⁹³

An example illustrates this. Imagine that Alabama has five excellent quarterbacks on its roster. Given that most of the playing time is typically reserved for the starter, the other four quarterbacks will receive no (or at most limited) playing time, even though these players may be among the most talented in the country and desirable for fans to watch. Once Alabama chooses its starter, the other four should be able to select the school that would provide a better fit. And these four should have a reasonable period to assess the football cultures and academic climates at other colleges.

An added benefit of any of the four backup quarterbacks transferring to different schools is improved competitive balance throughout college football. After Jalen Hurts lost his starting quarterback job at Alabama in 2018 to Tua Tagovailoa, he transferred to the University of Oklahoma, where he was able to play the following season because

90. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 111–12 (upholding district court finding of market for college football telecasts for which there is no substitute).

91. *Epic Games*, 67 F.4th at 983.

92. Focusing on the restraints' effects on the college athletes themselves would make any anticompetitive effects even more apparent as the athletes are not able to be closer to family, enroll in more academically rigorous schools, escape abusive coaches, or increase playing time.

93. Carrier & Edelman, *supra* note 57, at 102.

of a graduate-student exception to the transfer restrictions.⁹⁴ And after Hurts transferred, he became a starter and led his team to the Big 12 Championship, finishing the season second in the nation in Heisman Trophy voting rather than sitting on Alabama's bench.⁹⁵ His transfer thus enhanced on-field competitive balance and improved the caliber of college football by allowing fans to watch one of the best college football players in the country compete.

It is difficult to assess precisely how long a transfer process should take, but it seems safe to conclude that a 45-day window is insufficient to afford athletes enough time to determine whether to enter their names into the portal. This is especially the case given the athletes' recognition that by entering the portal, they risk losing their scholarships.⁹⁶ As a result, it is more likely that these athletes will not leave their schools despite the imperfect environment. The 45-day transfer window, in other words, reduces player movement.

This is even more concerning given the potentially abusive treatment facing college athletes.⁹⁷ For example, according to a July 2023 report, former football players at Northwestern University accused their head coach of allowing "hazing of a sexual nature" and promoting a culture "enabling racism and other microaggressions."⁹⁸ Other Division I football coaches also have been accused of physically assaulting players.⁹⁹ In a free market, the immediate ability to transfer out of schools with abusive coaches and into schools where coaches are better role models would benefit the athletes and reduce the number of poorly behaving coaches.¹⁰⁰ Restraints on transfers threaten to keep athletes

94. See Alex Scarborough, *Alabama QB Jalen Hurts Will Transfer to Oklahoma for Senior Season*, ESPN (Jan. 16, 2019, 1:27 PM), https://www.espn.com/college-football/story/_/id/25778069/alabama-quarterback-jalen-hurts-transfer-oklahoma-senior-season [<https://perma.cc/V3BC-PGF9>] (explaining that "[a]s a graduate transfer, Hurts is eligible to play immediately").

95. See Seth Oliveras, *Oklahoma Sooners Football: Jalen Hurts Finishes Second in the 2019 Heisman Trophy Voting*, CRIMSON & CREAM MACH. (Dec. 14, 2019, 8:13 PM), <https://www.crimsonandcreammachine.com/2019/12/14/21022289/oklahoma-football-jalen-hurts-2019-heisman-trophy-voting-joe-burrow-lsu-justin-fields-chase-young> [<https://perma.cc/CC8S-5VAJ>].

96. See Andrea Leitner, *8 FAQs About the NCAA Transfer Process*, 2ADAYS: BLOG (June 27, 2023), <https://www.2adays.com/blog/8-faqs-about-the-ncaa-transfer-process/> [<https://perma.cc/BU64-8T23>] (explaining that once an athlete enters the transfer portal, their current school "has the right to void or reduce [the athlete's] scholarship and [is] not obligated to keep [the athlete who entered the portal] on the team").

97. See Holden, Edelman, Baker & Shuman, *supra* note 10, at 445–46.

98. Bruce C.T. Wright, "Racist": *Ex-Northwestern Football Players Accuse Fired Coach Pat Fitzgerald of Being Anti-Black amid Hazing Fallout*, NEWSONE (Jul. 11, 2023), <https://newsone.com/4638646/pat-fitzgerald-northwestern-racism-report> [<https://perma.cc/W963-YW9P>].

99. See, e.g., Nick Selbe, *Washington Suspends Coach Jimmy Lake for Upcoming Game vs. ASU*, SPORTS ILLUSTRATED (Nov. 8, 2021), <https://www.si.com/college/2021/11/08/washington-head-coach-jimmy-lake-suspend> [<https://perma.cc/CQ6N-CWB2>] (noting suspension of University of Washington football coach Jimmy Lake for purportedly hitting a player).

100. See Holden, Edelman, Baker & Shuman, *supra* note 10, at 445.

in hostile environments, reducing the incentive for schools to address unacceptable conduct.¹⁰¹ Such restraints may even lead players unable to transfer to leave the sport, affecting not only them but also fans who are deprived of the opportunity to watch them play.¹⁰²

B. Procompetitive Justifications

After plaintiffs introduce anticompetitive effects, the NCAA could offer two justifications for its 45-day transfer rule: (1) ensuring that coaches enjoy balanced lives and (2) maintaining the team stability needed to preserve fan interest.

Coaches cite the first of these justifications, limiting the amount of time they devote to recruiting, as an important reason for the truncated transfer window.¹⁰³ This, however, is not an appropriate antitrust justification. As the Supreme Court explained in *National Society of Professional Engineers v. United States*, procompetitive justifications must relate to economic effects, not noneconomic policies.¹⁰⁴ A contrary rule would constitute “a frontal assault on the basic policy” of antitrust law.¹⁰⁵ Just to give one example from the sports setting, the D.C. Circuit in 1978 rejected the NFL’s justification for the player selection system known as the draft on the grounds that the “assertion that competition in the market for entering players’ services would not serve the best interests of the public, the clubs, or the players themselves . . . is precisely the type of argument that the Supreme Court [in *Engineers*] declared to be unavailing.”¹⁰⁶

101. *Id.*

102. See generally *Rutgers Football Player Quits, Alleging Verbal Abuse from Coach*, CBS NEWS (Nov. 16, 2013, 6:56 PM), <https://www.cbsnews.com/news/rutgers-football-player-quits-alleging-verbal-abuse-from-coach> [<https://perma.cc/Y8UG-8H96>] (explaining how a Rutgers University football player quit the team and sport after alleging he was a victim of verbal and threatened physical abuse from coach).

103. See Matt Norlander, *Citing Burnout from N.I.L., Transfer Portal and Non-Stop Recruiting, College Basketball Coaches Make Big Changes*, CBS SPORTS (July 27, 2023, 2:56 PM), <https://www.cbssports.com/college-basketball/news/citing-burnout-from-nil-transfer-portal-and-non-stop-recruiting-college-basketball-coaches-make-big-changes/> [<https://perma.cc/JFL4-G3SN>] (quoting a college coach as calling for a change in the transfer portal because “we are all exhausted”); see also Dellenger, *supra* note 46 (explaining the perceived exhaustion of college football coaches in the modern era when they compete to recruit and sign players during the transfer period).

104. *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695–96 (1978) (rejecting application of enhanced safety standards as alleged procompetitive effect of ban on competitive bidding); see also, e.g., *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 421–22 (1990); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 463 (1986); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220–222 (1940).

105. *Pro. Eng’rs*, 435 U.S. at 695.

106. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186–87 (D.C. Cir. 1978). In the aftermath of the *Smith* decision, the NFL teams and their players union collectively bargained over the terms of their first-year player draft, thereby insulating the draft from further antitrust scrutiny based on the “non-statutory labor exemption,” which is an antitrust exemption that applies to the products of good-faith collective bargaining agreements. E.g., Eriq Gardner, *Rookie Abuse*, SLATE (Apr. 23, 2009, 5:57 PM),

While one may sympathize with coaches' desire to devote less time to recruiting players,¹⁰⁷ they are paid well for their efforts to build winning football teams. And even if they were not, spending nights and weekends to secure the services of the nation's best players is nothing more than rigorous marketplace competition. Quashing such competition would be anticompetitive, not procompetitive.

The second potential justification, maintaining team stability, is more likely to be considered. Pointing to examples of unbridled player movement from the early days, such as Yost's one-time, one-week transfer from West Virginia University to Lafayette College, as well as the 49 transfer players who entered the University of Colorado football program for the 2023 season,¹⁰⁸ the NCAA might contend that the commercial business of college sports would suffer if fans had no reason to presume the continuity of a team from one week to the next. An absence of roster continuity, in theory, could drive fans away by denying them the opportunity to build knowledge of any group of players before their departure. It also theoretically could lead to football teams with weaker on-field performance as the players lack the time to become comfortable playing together. Finally, the NCAA could claim that the schools should have the certainty of knowing who their athletes are for purposes of marketing and preparing for the upcoming season, with this certainty strengthened as the transfer period is shortened.

The NCAA would bolster its justification claim by conducting surveys that show that fans are less likely to watch college sports on account of transfers that reduce team cohesion and familiarity with the players. This justification would particularly be stronger if the interest was linked to the 45-day period. A cursory analysis of fan interest during the 2023 season, however, suggests that this likely would not be the case. Indeed, no college experienced a bigger uptick last year in fan interest and revenue generated than the University of Colorado: the school that took in 49 transfers.¹⁰⁹ The same can be said for the University of Southern California, which improved from a 3–6 Pac-12 Conference

<https://slate.com/culture/2009/04/in-1970-james-yazoo-smith-sued-the-nfl-to-shut-down-the-draft-what-happened-next.html> [<https://perma.cc/EWG2-ZDHA>]; Mackey v. Nat'l Football League, 543 F.2d 606, 611–12 (8th Cir. 1976) (explaining that, in the context of a multiemployer bargaining unit, "certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions").

107. See Dellenger, *supra* note 46.

108. See Edward Sutelan, *Colorado Football Depth Chart: How Deion Sanders Overhauled Roster with 2023 Transfers, from Travis Hunter to Sons*, SPORTING NEWS (Sept. 16, 2023), <https://www.sportingnews.com/us/ncaa-football/news/colorado-football-depth-chart-2023-transfers/e1266a0f9a465fa754f60c23> [<https://perma.cc/D5S3-5LJP>].

109. See David Rumsey, *Colorado Football's \$14M Ticket Revenue Surge Amid Revival*, FRONT OFF. SPORTS (Oct. 30, 2023, 3:09 PM), <https://frontofficesports.com/colorado-footballs-14m-ticket-revenue-surge-amid-revival> [<https://perma.cc/P48E-BMXD>]; see also Sutelan, *supra* note 108.

record in 2021¹¹⁰ to an 8–1 conference finish the next year after bringing in 20 transfers.¹¹¹

C. *Less Restrictive Alternatives*

Any justification based on team stability must be grounded in the effect on consumers—in other words, fans. If the NCAA could demonstrate that team stability increased fan interest, the analysis would shift to whether the Association could attain its objectives through an alternative, less restrictive form of competition.

In this case, it is not hard to conceive of such an alternative. The NCAA already has allowed a transfer portal with a 60-day period.¹¹² Nor has the Association shown that this period is so long that it decreased team stability, thereby reducing interest in college sports.¹¹³ On the contrary, the 60-day period was successful, as many of the roughly 3,600 football players who entered the portal in the 2022–23 year moved to schools where their services had higher utility, thereby increasing the quality of play and helping to level the playing field.¹¹⁴

A number of examples illustrate how transfers under the 60-day rule increased player utility. Cade McNamara, for example, would have been, at best, the backup quarterback at the University of Michigan in the 2022–23 season.¹¹⁵ Through the transfer portal, he became the starting quarterback for the University of Iowa, leading his new team to a 4–1 record before suffering a season-ending injury.¹¹⁶

110. *Football Standings*, PAC-12, <https://pac-12.com/football/standings?year=2021> [<https://perma.cc/R4VQ-93TN>] (Jan. 2, 2022, 12:41 AM) (2021–22 Season).

111. *Football Standings*, PAC-12, <https://pac-12.com/football/standings?year=2022> [<https://perma.cc/9JE5-59CD>] (Jan. 8, 2023, 10:15 AM) (2022–23 Season); see also James Parks, *College Football Transfer Portal Team Rankings for 2022 Season*, SPORTS ILLUSTRATED (Aug. 3, 2022, 10:52 AM), <https://www.si.com/fannation/college/cfb-hq/ncaa-football-rankings/college-football-rankings-10-transfer-portal-teams-2022-season> [<https://perma.cc/TF7T-M2UH>] (describing USC as having the best transfer recruiting class in 2022); *AP Top 25 College Football Rankings 2022 Final*, COLL. FOOTBALL NEWS (Jan. 10, 2023), <https://collegefootballnews.com/ap-poll/ap-top-25-college-football-rankings-2022-final> [<https://perma.cc/J8BT-EMSK>] (listing USC as the 12th-ranked team in the country in 2022).

112. See Hosick, *supra* note 7 and accompanying text.

113. As discussed above, see *supra* notes 103–07 and accompanying text, coaches' unhappiness arising from their own "exhaustion" reflects competition against other coaches and does not count as a procompetitive justification. As a result, the less-restrictive-alternative analysis does not apply to this issue.

114. See VanHaaren, *supra* note 44.

115. See Sahil Kurup, *Why Did Cade McNamara Transfer from Michigan to Iowa? Hawkeye QB's Decision, Explained*, DES MOINES REG. (Dec. 1, 2023, 10:50 AM), <https://www.desmoinesregister.com/story/sports/college/iowa/football/2023/11/30/cade-mcnamara-transfer-quarterback-michigan-football-iowa/71734005007/> [<https://perma.cc/YL75-7HJK>] (explaining that McNamara transferred after two weeks of being benched, a season-ending injury, and learning that there would be a starting quarterback competition).

116. See Kevin Skiver, *Cade McNamara Injury Update: Iowa QB, Michigan Transfer to Reportedly Miss Rest of Season*, DETROIT FREE PRESS (Oct. 3, 2023, 4:19 PM),

Another example is the University of Colorado. After finishing the 2022 season last in the Pac-12 Conference with a 1–11 record, the school began 2023 with three straight wins and quickly emerged as one of the most exciting turnaround stories in college football, thanks in large part to 49 new players entering the program through the 60-day portal.¹¹⁷ One of the players who transferred before the 2023 season, Shedeur Sanders, arrived from Jackson State University, where he had led his team to a 21–3 season over two seasons and was described as the most “NFL-ready quarterback” in the school’s history.¹¹⁸

Beyond restoring the previous 60-day period, there are still other, even less restrictive, alternatives. One such rule could prevent player movement only during the middle of a season or semester. The NCAA, for example, could implement a rule that limited eligibility to “student-athletes enrolled in classes on the first day of the sports season or academic semester.”¹¹⁹ Pursuant to such a rule, the NCAA could achieve its objectives to limit movement in a season and connect the rule to academic engagement while not preventing athletes who transfer between seasons or semesters from immediately competing.¹²⁰

Another option would be to implement a rule allowing athletes who maintain a certain grade point average to transfer.¹²¹ Such a rule would not prevent transferring students from competing and would still allow the NCAA to achieve its objectives, as the athletes would show an “ability to succeed in the classroom while playing sports.”¹²² This option also would comport with the spirit of one of the requirements of the 2021 rule: that transferring athletes make reasonable progress toward their degrees.¹²³ It also could reduce the number of players who are eligible to transfer at any moment, reducing concerns about maintaining team cohesion.

Pushing the boundaries even further, a plaintiff could claim that the NCAA could apply the same rule as that governing non-athlete transfers or the movement of coaches and other personnel. Unless contractually agreed otherwise, this means no rule at all. Removing all transfer limits would appear to offer the most direct threat to team stability. But it could, in fact, strengthen coaches’ obligations to keep their players

<https://www.msn.com/en-us/sports/ncaafb/cade-mcnamara-injury-update-iowa-qb-michigan-transfer-helped-off-field-after-awkward-landing/ar-AA1hqvNL#image=AA1hvoDM|2> [<https://perma.cc/QW67-L5JF>].

117. See Sutelan, *supra* note 108.

118. Mark McIntosh, *Colorado’s Shedeur Sanders Is the Most NFL-Ready QB, But Still No “Mr. Magic”*, SPORTS ILLUSTRATED (Oct. 18, 2023, 8:05 AM), <https://www.si.com/college/colorado/football/colorado-shedeur-sanders-is-the-most-nfl-ready-qb-but-still-no-mr-magic> [<https://perma.cc/58FZ-95Q6>].

119. Carrier & Edelman, *supra* note 57, at 98.

120. *Id.*

121. *Id.*

122. *Id.*

123. Hosick, *supra* note 7.

happy, and it might even lessen stability concerns by spreading out the period of player movement.¹²⁴

In short, a plaintiff could offer several less restrictive alternatives that promote the goal of maintaining team stability.

D. *Balancing*

If a plaintiff could show that a less restrictive alternative achieves the NCAA's objectives, then the restraint should be struck down. But even if the less restrictive alternative does not, the final stage should involve a weighing of the restraint's anticompetitive and procompetitive effects.¹²⁵

On balance, it would seem that the 45-day rule, which harms colleges, athletes, and fans, is anticompetitive. Other than a handful of the most competitive schools, colleges would benefit from having access to players who otherwise would be sitting on the bench. Athletes would have the chance to play or move to an environment with coaches or academic programs that are a better fit. And fans would enjoy more competitive balance. On the other side, transfer restrictions like the 45-day rule provide, at most, only a limited benefit for a few schools that have the luxury of filling their bench with talented players or fans who prefer roster stability over all other factors, including teams' on-field success. It is plausible that every college football team, other than perhaps the number-one ranked team, would benefit from access to player transfers.¹²⁶

Important to this analysis is the NCAA's previous implementation of the less restrictive restraint of the 60-day period. While the previous Section discusses a range of alternatives, the 60-day window already achieved intended procompetitive effects without affecting interest in college football, providing a prototypical less restrictive alternative.

As a final point, it is problematic to consider the NCAA's restriction on transfers coming within two years of Justice Kavanaugh's concurrence in *Alston*. In that opinion, the Justice stated that "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny."¹²⁷ In light of this dicta, it does not appear appropriate for the NCAA to add restraints to its rulebook. Indeed, even relying on just the *Alston* majority opinion,

124. Allowing free transfers might not substantially reduce on-field performance in a manner that harms fan interest as coaches who accept in-season transfers have an economic incentive to win, which means they are unlikely to utilize players who have not yet learned the team's plays and built cohesiveness with their teammates.

125. *E.g.*, Michael A. Carrier, *The Four-Step Rule of Reason*, 30 ANTITRUST 50, 50–51 (2019).

126. It is conceivable that even the top-ranked team could benefit from an open transfer portal if a star player on that team were to suffer an injury or lose interest and a disgruntled player on a different team would be uniquely suited for the opening.

127. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 109 (2021) (Kavanaugh, J., concurring).

there is reason for skepticism about the NCAA implementing new restraints on player movement.

V. CONCLUSION

The NCAA yet again finds itself in the antitrust cross-hairs. *Alston* showed how it lost the benefit of the doubt by overplaying its hand. In this context, its 45-day transfer rule faces an uphill climb. And it would seem that the restriction raises significant concerns under the rule of reason.

The rule threatens anticompetitive effects by not allowing fans to see an improved product and harming players who are stuck on the bench, face abusive coaches, or cannot move to be closer to family or enroll in more academically rigorous schools. The NCAA might introduce justifications based on encouraging fan interest through team stability. But even if interest could be linked to team stability, any justification could be achieved through a less restrictive alternative on a silver platter: the 60-day period the NCAA previously employed, which already proved successful. And even without such an alternative, it would seem that the anticompetitive effects outweigh the procompetitive justifications.

In short, we caution the NCAA in restricting its transfer rules, which would appear to harm colleges, fans, and players without an offsetting justification.