



## Sports and Entertainment Immigration New NCAA Rules Are Afoot . . . It's Time To Let Those College Kids Pay Off Their Loans!

By Michael Cataliotti

In this edition of Sports and Entertainment Immigration, we will be looking at amateur/collegiate athletes and their ability to earn revenue from their names, images, and likenesses in light of the Supreme Court's opinion and the National Collegiate Athletic Association's (NCAA) interim decision.

### **College Athletes: Unpaid, Underappreciated, but Finally Able to Capitalize on Their Achievements . . . So Long As They Are American**

As per the NCAA's website, "Nearly half a million college athletes make up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA's 90 championships in 25 sports across three divisions." So, what does that mean in terms of dollars and cents? "The total athletics revenue reported among all NCAA athletics departments in 2019 was \$18.9 billion."<sup>1</sup> College sports is big business.

One might assume that student-athletes must be financially stable. However, they have not been. They were not to be paid. More to the point, those athletes who make up the driving force for this multi-billion-dollar enterprise are not permitted to receive salaries or com-

penensation for their work. More painful, "a 2019 study conducted by the National College Players Association found that 86 percent of college athletes live below the federal poverty line."<sup>2</sup> This is apparently because they are students and/or amateurs.

At least the designation of "amateur" is slowly, but steadily, being diminished through various efforts, bringing us to some recent developments: (1) the Supreme Court telling the NCAA to give it up with the "amateur" nonsense and (2) the NCAA adopting an "interim rule" allowing athletes to profit off of their names, images, and likenesses (NILs), through endorsement deals. These are huge for what has clearly been an inequitable relationship. Unfortunately, however, the developments still leave out a significant number of individuals, like immigrants.



## SCOTUS Dunks on the NCAA! Boom Shaka Laka!

On June 21, 2021, Justice Gorsuch wrote for a *unanimous* Court, that:

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.<sup>3</sup>

The underlying procedural facts are relatively simple: Student-athletes sued the NCAA, arguing that the NCAA operates in violation of U.S. antitrust laws by stifling competition and suppressing wages. The NCAA argued that those student-athletes are merely amateurs and students who do not operate at a professional level, and therefore cannot be deemed to be entitled to various antitrust or employment considerations. The district court found that while some of the NCAA’s restrictive practices were within the realm of reasonableness, others—specifically, “education-related benefits”—were not. The Ninth Circuit affirmed the district court’s injunction, “holding that the district court ‘struck the right balance in crafting a remedy that both prevents anti-competitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.’”<sup>4</sup> The student-athletes accepted the Ninth Circuit’s affirmation, but, unfortunately for them, the NCAA did not, and so, it appealed.

Clearly perturbed by the NCAA’s ask of “the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny,” Justice Gorsuch continued to write that “[t]he Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined [ . . . ] based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.”<sup>5</sup> The Supreme Court held: “The district court’s injunction is consistent with established anti-trust principles.”<sup>6</sup>

It was not only Justice Gorsuch who was offended by the NCAA’s ask, though:

In a blistering concurring opinion, Justice Brett Kavanaugh added that the sports traditions near and dear to alumni and others “cannot justify the NCAA’s deci-

sion to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate,” he said, adding: “The NCAA is not above the law.”<sup>7</sup>

As per the reportage of NPR:

“This is a victory for students,” declared Oliver Luck, a former top NCAA official, a former NFL player and the father of three former college athletes. “The substantive decision in this case would allow a university or conference to provide benefits that cannot be capped by the NCAA as long as they are tethered to education.”

He thinks that the rules for what can and cannot be offered are likely to be institutional. “If you’re a star gymnast and you’re 17 years old and choosing between three different schools, those schools theoretically could offer you all sorts of academically related benefits,” said Luck. “A year abroad, internships. They could pay for your law school or medical school if you decided to.”<sup>8</sup>

Well, that is a fantastic plus for student-athletes.

Some, however, feel that this could be detrimental to various programs that are lesser-funded and, as such, will be disenfranchised from making those types of offers to prospective student-athletes. On the immigration side of things, this could get a bit dicey, but likely will not be problematic unless those education-related benefits were considered income for which the international student-athlete did not have authorization to receive. Student-athletes across the board, most likely, can benefit from the Supreme Court’s unanimous decision.

### Did Somebody Say . . . Endorsements?

Although the Supreme Court decision likely affords all student-athletes opportunities to benefit from a more equitable playing field with respect to benefits that can be tied to the student-athlete’s education, California’s and other states’ laws, as well as the NCAA’s rules changes, however, would benefit some, but not all. “A mixture of new state laws and NCAA rules changes that went into effect on July 1 have provided athletes with varying degrees of new protections and opportunities to make money by selling their name, image and likeness (NIL) rights.”<sup>9</sup>

That sounds good, right? It is, but, as per another ESPN article,

[t]he new laws, [ . . . ] provide a framework for domestic college athletes to make

money from things like endorsements, autographs or hosting camps. However, international student-athletes, **which account for about 12% of Division I athletes, according to the NCAA's latest report**, remain in a legal no man's land, thanks to a caveat within the visa program that prevents anyone on an F (or student) visa from earning a substantial income while studying in the U.S.<sup>10</sup>

Moreover, "While F1 visas allow for international students to work on campus, as well as other limited forms of income with prior approval from immigration officials, any revenue from NIL would not appear to fit under those narrow guidelines."<sup>11</sup>

Although this may not seem like it would impact many student-athletes, particularly as "international students represent less than 1% of Division I college football players, according to the NCAA's most recent report through the 2018-19 school year, other Division I sports have a far higher proportion of players participating on F visas—including more than 60% of tennis players, 37% of men's soccer players and 32% of women's golfers—and the number of international student-athletes has increased from 9.8% in 2014 to 12.4% in 2019."<sup>12</sup>

That is a significant number, and only increasing. This would both impact those international student-athletes and the colleges and universities that are expanding their recruiting methods and energies to look to non-domestic talent: What would they be allowed to offer? What would they be allowed to do to entice an Australian or South African rugby player, or a Spanish tennis player, to come and compete for their Division I, II, or III schools?

This could get very messy, very quickly, and there is no definitive path to resolve the issue at this time. As per ESPN:

For clarity on the issue, ESPN reached out to the U.S. Department of State, which referred the question to the U.S. Citizenship and Immigration Services, which then deferred to Immigration and Customs Enforcement (ICE) for all issues regarding study visas. ESPN shared a half-dozen questions with ICE in reference to NIL legislation and was told simply that ICE's "student and exchange visitor program is currently evaluating new developments in Florida law as they pertain to college athletes with F visas," according to a statement from public affairs director Jonathan Moor.

[. . .]

The bureaucratic runaround is emblematic of a process that has unfolded in fits and starts with individual state legislatures, the federal government and the NCAA all working on different versions of NIL legislation with varying degrees of success, leaving many athletic departments in a state of limbo on how to move forward.<sup>13</sup>

This is an area in which anyone working with international athletes, universities, colleges, athletic programs, agents, or the like, should keep watch.

## Endnotes

1. <https://www.ncaa.org/about/resources/research/finances-inter-collegiate-athletics>.
2. <https://www.linkedin.com/pulse/should-college-athletes-get-paid-anna-davis>.
3. [https://www.supremecourt.gov/opinions/20pdf/20-512\\_gfbh.pdf](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf).
4. *Id.* quoting the Ninth Circuit in 958 F. 3d 1239, 1263.
5. *Id.* at 594 U.S. at \_\_\_\_.
6. *Id.*
7. <https://www.npr.org/2021/06/21/1000310043/the-supreme-court-sides-with-ncaa-athletes-in-a-narrow-ruling>.
8. *Id.*
9. [https://www.espn.com/college-sports/story/\\_/id/31086019/everything-need-know-ncaa-nil-debate](https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate).
10. [https://www.espn.com/college-sports/story/\\_/id/31575978/international-student-athletes-face-nil-conundrum-seems-answer](https://www.espn.com/college-sports/story/_/id/31575978/international-student-athletes-face-nil-conundrum-seems-answer) (*emphasis added*).
11. *Id.*
12. *Id.*
13. *Id.*

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