

Congress Limiting the Future of College Antitrust Exemptions by allowing the Ivy League's Antitrust Exemption to Expire.



Photo Source: Ricky, *Princeton Stadium flies the flags of*, FLICKR (Oct 12, 2012)

By: Veronica Sansone

10/13/22

Background

Since 1994, Ivy league schools have been able to decline student's merit scholarships based on academic excellence, musical talent, athletic performance, or any other ability.¹ The select group of eight schools awarded scholarships solely based on a student's financial situation.² The exemption, can be found in Section 568 of the Higher Education Act stating the schools scholarship agreement.³ The antitrust exemption, in Section 568 of the Higher Education Act, specifically stated "It shall not be unlawful under the antitrust laws for [two] or more institutions of higher education at which all students admitted are admitted on a need-blind basis, to agree or attempt to agree- to award such students financial aid only on the basis of demonstrated financial need for such aid"⁴

Due to this exemption, the Ivy League is currently the only conference in Division I to not offer merit-based scholarships to their athletes.⁵ But on September 30, 2022, Congress allowed the Ivy

¹ See Robert Litan, *Why Does Congress Let the Ivy League Operate as a Monopoly?*, The New Republic (July 20, 2021), <https://newrepublic.com/article/163001/congress-let-ivy-league-operate-monopoly> (explaining the Ivy League's antitrust agreement that has been in place for 28 years.)

² See *id.* (demonstrating how abnormal this scholarship approach is compared to other schools in the United States.).

³ See *id.*; §568 of the Higher Education Act goes in depth regarding the common principle antitrust exemption the schools had from Congress.

⁴ §568(a)(1) of the Higher Education Act (providing the evidence of the wording of the exemption. Additionally, the Ivy league schools were allowed to have this exemption because it was 8 schools meeting the minimum requirement of two schools.).

⁵ Philip Mousavizadeh and James Richardson, *Ivy aid in limbo ahead of antitrust exemption expiration in 2022*, Yale News (OCT 01, 2021), <https://yaledailynews.com/blog/2021/10/01/ivy-aid-in-limbo-ahead-of-antitrust-exemption-expiration-in-2022/> (demonstrating how there are only a small fraction of schools under this exemption).

League's antitrust exemption to expire,⁶ costing the Ivy League Congressional protection and allowing the conference to become more vulnerable to lawsuits.⁷ This sudden decision to let the exemption expire all traces back to the *NCAA v. Alston* decision.⁸

Alston's impact on the Anti-Trust Exemptions

Over the past decade the business model for college sports has been changing drastically due to various antitrust lawsuits.⁹ The unanimous opinion in *NCAA v. Alston*, held that "the NCAA could not collude to limit the academic-based compensation they provide to their athletes."¹⁰ After this decision, college athletes were permitted to earn compensation for their name, image, and likeness.¹¹ Additionally, Justice Kavanaugh concurred by explaining that no other type of business in America would be able to get away with what the NCAA had done with their athletes.¹² The NCAA and leaders in college sports responded to the *Alston* decision by asking members of Congress to draft new legislation, so NCAA members could have guidance on how to regulate compensation for athletes.¹³ The leaders all approached Congress with the hope of getting the same type of outlined legislation similar to the schools in the Ivy League.¹⁴ Even after years of lobbying and proposed bills this request remained an unpopular topic for members of congress.¹⁵ Thus, Congress' decision to allow the Ivy League antitrust exemption to expire demonstrated that the various leaders in college sports should not expect a similar exemption from Congress.¹⁶

The Big Implication

The impact of The Ivy League's antitrust exemption extended far beyond athletics, mainly because the exemption made it hard for sought-after students to attend these elite schools, due to the lack of financial support.¹⁷ Members of Congress were well aware of the negative impact this exemption had and spoke out on the issue.¹⁸ In particular, Senators Marco Rubio and Mike Lee published a letter in August stating "as a result of the Exemption, anticompetitive agreements,

⁶ See generally Dan Murphy, *Congress allows Ivy League antitrust exemption to expire*, ESPN (Sept. 30, 2022), https://www.espn.com/college-sports/story/_/id/34696671/congress-allows-ivy-league-antitrust-exemption-expire

⁷ See *id.* (summarizing what the negative effects of losing the exemption for the Ivy League schools).

⁸ See generally Litan, *supra* at note 1 (noting the case the impacted this decision by Congress).

⁹ See generally Murphy, *supra* at note 5 (providing background information needed to understand the importance of the *Alston* decision).

¹⁰ See generally *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (changing the way college athletes are compensated by finding the schools could not deny them any compensation).

¹¹ See *id.* (summarizing one of the major outcomes from this decision).

¹² See *id.* at 64. (summarizing one of the most quoted line from the opinion that has been referenced when determining more antitrust issues). The quoted language of Justice Kavanaugh states "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."

¹³ Murphy, *supra* at note 5 (describing how the NCAA and leaders in college sports responded to the *Alston* decision).

¹⁴ See *id.*

¹⁵ See generally *id.* (summarizing how congress reacted to this request).

¹⁶ See *id.* (revealing what the decision to let the anti-trust exemption to expire meant for the regulation request college leaders have been asking for).

¹⁷ See Litan, *supra* at note 1

¹⁸ Murphy, *supra* at note 6 (demonstrating how this exemption was not supported by everyone in congress).

often between Ivy League universities, have impeded hundreds of thousands of students' abilities to receive competitive financial awards while faced with skyrocketing education costs.”¹⁹ It is no surprise, due to backlash and recent Supreme Court decision, that Congress did not extend the exemption for the fourth time.²⁰

Conclusion

The expiration of the Ivy League’s antitrust exemption seems to imply that more athletes will be given the opportunity to compete for and attend some of the most prestigious universities in the country.²¹ However, it is still too soon to tell what the actual impact of allowing the exemption to expire will be.²² By Congress allowing the Ivy League’s exemption to expire, there is a clear answer about how the government plans to handle athlete compensation and other antitrust issues for college sports in the future.²³ The NCAA and college leaders finally got their answer although it was not the one they all desired.²⁴

This next recruiting cycle will demonstrate how the Ivy League will handle student athletes, because for the first time since 1994 the eight schools will have to compete with one another for the student athletes they want using scholarships.²⁵ Hopefully, there will soon be an understanding about how merit scholarships will be handled going forward.²⁶ As well as what the penalties would be for the Ivy League schools if they choose to ignore the expiration of their exemption and not offer scholarships.²⁷

¹⁹ *id.*

²⁰ *See generally* Mousavizadeh, *supra* at note 5 (demonstrating how even a year earlier there was an indication the exemption would not be renewed for a fourth time).

²¹ *See generally* Litan, *supra* at note 1 (concluding about the possible outcome from the exemption expiration).

²² Bridget O’Neill, *Athletic recruitment could face instability as antitrust exemption expires*, *The Daily Princetonian* (Oct. 6, 2022) (explaining how there is still a lot of uncertainties even with Congress’ choice).

²³ *see* Murphy, *supra* at note 5 (describing how the NCAA and leaders in college sports responded to the *Alston* decision and what this means for the future).

²⁴ *id.* (concluding the leaders wanted Congress to regulate athlete compensation and that is not what they got).

²⁵ *See generally* O’Neill, *supra* at note 22 (noting what could come due to the decision not to renew the exemption).

²⁶ *id.*

²⁷ *id.* (questioning if the Ivy league will face penalties for ignoring that the exemption expired).