

Conference Realignment: Another Example of the Lasting Effect of Name, Image, and Likeness



Photo Source: Randall Chancellor, [Texas Longhorns vs Florida Atlantic University](#), FLICKR (Nov. 20, 2010) ([CC BY-SA 2.0](#))

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Posted: 10/13/2022

Introduction

The Supreme Court’s decision in *N.C.A.A. v. Alston* held that the National Collegiate Athletic Association’s (“NCAA”) guidelines limiting student-athletes’ ability to earn education-related compensation violated Section 1 of the Sherman Act.¹ While the NCAA adopted new policies allowing student-athletes to benefit off their name, image, and likeness (“NIL”) shortly after the *Alston* decision, universities are still prohibited from directly paying their players wages.² As *Johnson v. N.C.A.A.* awaits a decision in the Third Circuit Court of Appeals, possibly setting it on a path to the Supreme Court, several major collegiate athletic programs have announced their

¹ See *N.C.A.A. v. Alston*, 141 S. Ct. 2141, 2166 (2021) (affirming the Ninth Circuit’s decision that NCAA guidelines limiting compensation for student athletes is a violation of the Sherman Act).

² See Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA Media Center (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (announcing updated policies allowing students opportunity to engage in name, image, and likeness activities and hire agent).

intention to switch conferences.³ This growing trend of conference realignment has many sources, with NIL leading the charge.⁴

Background

One month following the NCAA's updated rules on NIL compensation, the Universities of Texas and Oklahoma announced their intention to leave the Big 12 Conference ("Big 12") to join the Southeastern Conference ("SEC") in 2025.⁵ In July of 2022, the University of California, Los Angeles ("UCLA") and the University of Southern California ("USC") announced their departure from the Pacific-12 Conference ("Pac-12") to become a member of the Big Ten Conference ("Big Ten").⁶ The exodus of these four schools from their longtime homes resulted in an avalanche of moves over the coming months.⁷ The Big 12 avoided collapse by adding Brigham Young University from the West Coast Conference and the University of Houston, the University of Cincinnati, and the University of Central Florida from the American Athletic Conference ("AAC").⁸ Subsequently, the AAC acquired Florida Atlantic University, the University of North Texas, Rice University, the University of Alabama at Birmingham, the University of Texas at San Antonio, and the University of North Carolina at Charlotte all from Conference USA.⁹

³ See Nicole Auerbach & Mike Vorkunov, *Understanding Johnson v. NCAA, the next case that could upend the college sports model*, The Athletic (August 12, 2022), <https://theathletic.com/3497617/2022/08/12/johnson-v-ncaa-college-athletes-employees/> (outlining current thinking of legal experts on likelihood and consequences of Johnson v. NCAA rising to the U.S. Supreme Court); see also Shiloh Carder, *Looking back at over 50 years of college football conference realignment*, Yardbarker (July 3, 2022), https://www.yardbarker.com/college-football/articles/looking-back-at-over-50-years-of-college-football-conference-realignment/s1_35741384#slide_1 (explaining past, present, and future instances of conference realignment).

⁴ See *id.* (summarizing conference realignment history).

⁵ See Heather Dinich & Mark Schlabach, *Texas Longhorns, Oklahoma Sooners unanimously accept invitation to SEC*, ESPN (July 30, 2021), https://www.espn.com/college-football/story/_/id/31920686/texas-longhorns-oklahoma-sooners-unanimously-accept-invitation-sec (reporting impending departure of Universities of Texas and Oklahoma from Big 12 Conference).

⁶ See Andrea Adelson, Kyle Bonagura & Adam Rittenberg, *Inside the stunning USC-UCLA move to the Big Ten -- and the chaos that followed*, ESPN (July 11, 2022), https://www.espn.com/college-football/story/_/id/34217498/inside-stunning-usc-ucla-move-big-ten-chaos-followed (reporting departure of UCLA and USC from Pac-12).

⁷ See Carder (summarizing history of conference realignment).

⁸ See *id.* (detailing additions of multiple schools to Big 12 Conference following loss of Texas and Oklahoma).

⁹ See *id.* (summarizing additions to American Athletic Conference following departures of three schools to Big 12 Conference).

Existing NIL Standard

The NCAA's interim NIL policy permits college athletes to "engage in NIL activities that are consistent with the law of the state where the school is located."¹⁰ If an athlete's school is located in a state with no existing NIL legislation, the athlete may still engage in NIL activities without violating NCAA rules.¹¹ College athletes are also allowed to hire agents for NIL activities.¹² However, college athletes may still not be awarded wages or other forms of compensation directly from their respective schools.¹³ As expressed by Division II Presidents Council chair Sandra Jordan, "[t]he new policy preserves the fact college sports are not pay-for-play."¹⁴

Possible Impending Changes

Following the *Alston* decision's monumental effect on amateur sports, *Johnson* looks to bring an even bigger win for college athletes.¹⁵ The District Court removed the case to the Third Circuit Court of Appeals to determine the question of whether college athletes can be considered employees under the Fair Labor Standards Act ("FLSA").¹⁶ A ruling of "yes" would put the Third Circuit against the opposite rulings of both the Seventh and Ninth Circuits, increasing the likelihood of the case's removal to the Supreme Court.¹⁷ A federal decision deeming college athletes to be employees under the FLSA would open the door for increased athlete freedoms, including possible unionization, workers' compensation, healthcare benefits, and, most importantly, wages.¹⁸

Analysis

In the 2020 fiscal year, the Big Ten and the SEC led all other conferences in gross revenue, totaling \$768.9 million and \$728.9 million, respectively.¹⁹ The next highest was the Pac-12 with

¹⁰ See *Hosick* (outlining exact changes to NCAA name, image, and likeness policy).

¹¹ See *id.* (providing excuse from violation for athletes at schools not located in states with NIL legislation).

¹² See *id.* (providing allowance of athletes to hire "professional service provider[s]" in pursuit of NIL activities).

¹³ See *id.* (stating that pre-existing NCAA prohibition of "pay-for-play" remains in effect until state or federal legislation is passed opposing NCAA regulations).

¹⁴ See *id.* (highlighting statement from Division II Presidents Council chair restating NCAA policy against "pay-for-play").

¹⁵ See *Auerbach & Vorkunov* (explaining potential legal consequences of *Johnson v. NCAA* reaching Supreme Court).

¹⁶ See *id.* (stating argument presented to Third Circuit Court of Appeals in *Johnson v. NCAA*).

¹⁷ See *id.* (citing legal experts' predictions on the consequences of a "circuit split" in *Johnson v. NCAA*).

¹⁸ See *id.* (laying out potential effects of a Supreme Court decision labeling college athletes as employees under FLSA).

¹⁹ See Zach Barnett, *Here's how much each Power 5 conference made last year*, Football Scoop (May 20, 2021), <https://footballscoop.com/news/heres-how-much-each-power-5-conference->

gross revenue of a mere \$533.8 million, around \$200 million less than each of the prior two conferences.²⁰ Therefore, based on these revenue numbers that took place during the COVID-19-impacted 2020 year, UCLA and USC would have received possibly \$20 million more in per-school payouts as members of the Big Ten compared to the Pac-12.²¹ Additionally, Oklahoma and Texas would have received north of \$7 million more in per-school payouts as members of the SEC rather than the Big 12.²² These rises in school revenue will most likely increase even more due to college athletics' shift back to normal operations, now three years removed from the start of the COVID-19 pandemic.²³

Impact/Conclusion

The impact of *Alston*, combined with the upcoming monumental decision in *Johnson*, has had a clear impact on schools' decision-making on which conference to call home for the foreseeable future.²⁴ While schools cannot yet pay players directly, joining major conferences provides their athletes with a greater spotlight, bringing in bigger NIL deals.²⁵ However, with a possible Supreme Court decision in *Johnson* declaring college athletes as employees under the FLSA looming on the horizon, universities have a growing incentive to move into higher-paying conferences, such as the SEC and the Big Ten.²⁶ Today, these top conferences are attractive merely for their national exposure.²⁷ Tomorrow, they may be necessary for schools with major athletic programs to afford paying their star players high enough wages to lure them away from other universities.²⁸

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[made-last-year](#) (reporting financial records of major conferences from fiscal year 2020); *see also* Steve Berkowitz, *Power Five conference revenues slowed by COVID-19 pandemic, tax records show*, USA Today (May 20, 2021), <https://www.usatoday.com/story/sports/college/2021/05/20/power-five-college-sports-conference-revenues-slowed-covid-pandemic/5184848001/> (reporting changes in gross revenue of major conferences from fiscal year 2020).

²⁰ *See id.* (identifying effects of COVID-19 pandemic on gross revenue of major conferences).

²¹ *See id.* (stating effects of gross revenue distributions in major conferences).

²² *See id.* (stating effects of gross revenue distributions in major conferences).

²³ *See id.* (identifying effects of COVID-19 pandemic on gross revenue of major conferences).

²⁴ *See Carder* (summarizing recent conference changes for major schools).

²⁵ *See Hosick* (outlining exact changes to NCAA name, image, and likeness policy).

²⁶ *See Auerbach & Vorkunov* (discussing possibility of Supreme Court ruling on *Johnson v. NCAA*).

²⁷ *See Dinich & Schlabach* (discussing possible reasoning of Oklahoma and Texas leaving the Big 12 Conference for the Southeastern Conference).

²⁸ *See Auerbach & Vorkunov* (discussing implications of Supreme Court ruling on *Johnson v. NCAA*).