TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 37 | Number 3 Article 15

2021

The Billion Dollar Industry That Has Never Paid Its Money-Makers: The NCAA's Attempt at Compensation through Names, Images and Likeness

Christopher Palmieri
Touro Law Center

THE BILLION DOLLAR INDUSTRY THAT HAS NEVER PAID ITS MONEY-MAKERS: THE NCAA'S ATTEMPT AT COMPENSATION THROUGH NAMES, IMAGES AND LIKENESS

Christopher Palmieri[*]

ABSTRACT

The National Collegiate Athletic Association ("NCAA") has regulated collegiate sports for over one hundred years. The NCAA has long relied upon the principle of amateurism to prohibit college athletes from profiting from their name, image and likeness ("NILs"). However, recently this principle has drawn a lot of attention and has all but crumbled. States across the nation have passed legislation that will soon come into effect to bypass the NCAA bylaws and allow student athletes to profit from their NILs, even the United States Supreme Court has called the NCAA's business model into question. This has left the NCAA with no choice but to pivot and allow athletes to profit from their NILs for the first time. This Note will explore the NCAA's history of exploiting student-athletes for profit, and how their attitude towards the concept of NILs has changed overtime. This Note begins by looking at the NCAA's business model and how they have turned themselves into a billion-dollar business that does not pay their money-makers, the athletes. Prior to addressing the various state legislations and federal proposals, this Note will also recount prior Supreme Court cases. Ultimately, this Note will propose standardized federal legislation to govern NIL laws.

[*] Touro College Jacob D. Fuchsberg Law Center, J.D. Candidate Class of 2022; Pennsylvania State University, B.A. in Criminology with a minor in History, 2019. I would like to thank my Notes Editors, Katherine Carroll and Hayley Valla, for all of their help during this process, as well as my faculty advisor Dean Citron for guiding me through the publication process. Lastly, a huge thank you to my parents, brother and sister for listening to me talk nonstop about this for two years and for all of their support.

I. INTRODUCTION

California recently became the first state in the nation to allow compensation to the workhorses of a billion-dollar industry: college athletics. The state recently passed a bill that will allow college athletes to profit from their Names, Image and Likeness (NILs).[1] This change has caused the National Collegiate Athletic Association (NCAA) to reconsider its stance on NILs. California's statute allows athletes to be compensated for their popularity and has inspired Congress and other states to contemplate and propose similar legislation.[2] The NCAA can no longer ignore the fact that the multi-billion-dollar industry it created, and continues to regulate, needs to compensate its money-makers, the athletes.

While historically the players have remained uncompensated, athletic programs at universities and colleges have been raking in money hand over fist through apparel deals, ticket sales, and various non-monetary benefits. All the while, every Division 1[3] football and basketball program has exclusive deals with either Adidas, Nike or Under Armour.[4] These apparel deals are incredibly lucrative marketing opportunities that allow the respective companies to reach a massive national audience.

---

[1] Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes To Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/?sh=2d70c02457d0.

[2] Nicole Berkowitz et al., *More States Draft Legislation To Address Student Athlete Compensation As The NCAA Passes The Ball To Congress*, LEXOLOGY (Feb. 5, 2020), https://www.lexology.com/library/detail.aspx?g=5701fc57-8d88-46bc-9569-43f5b3ca6a5e.

[3] *See The Difference in the College Division Levels*, NEXT COLL. STUDENT ATHLETE, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last visited Mar. 13, 2021) (describing what Division I sports have to offer: "DI offers a higher level of competition and is home to some of the largest and most prestigious schools in the country." *Id.* Further when describing what Division I sports are like for the athletes "You will be tired. Internships, spring break getaways, even part-time jobs are pretty much out of the question. The DI athlete is truly dedicated to their sport for the next four years." *Id.*).

[4] SI Wire, *How Adidas, Nike and Under Armour Have Divvied Up Major College Basketball*, SPORTS ILLUSTRATED (Oct. 2, 2017), https://www.si.com/college/2017/10/02/adidas-nike-under-armour-contracts-schools-conferences.

Since its inception, the NCAA has proclaimed that its true interests include educating student-athletes and attempting to separate collegiate and professional sports. However, this attempted separation is nothing more than a half-hearted attempt to keep the commercial nature of college sports behind closed doors. Apparel deals, ticket sales, and school reputations have made it so that some college games have over one billion dollars at play when student-athletes gear up.[5] Despite this, the NCAA still prevented all college athletes from making a single cent from their own popularity without facing serious repercussions.[6] Today, tensions surrounding this topic are high.[7] A current class action lawsuit, in the United States District Court for the Northern District of California, alleges that the NCAA is violating antitrust regulations.[8] The plaintiffs argue that it is unjust for the universities, apparel companies, and many others to profit from the hard work of these athletes without allowing them to earn money for themselves.[9] Furthermore, states across the nation have pushed the issue by adopting various legislation that will allow these athletes to profit on their NILs.[10] All of this pressure has resulted in

---

[5] *See* Kate Gibson, *Nike's high-profile shoe fail costs $1.1 billion in stock value*, CBS NEWS (Feb. 21, 2019, 4:23 PM), https://www.cbsnews.com/news/nike-stock-drop-zion-williamson-shoe-incident-and-injury-costs-1-1-billion-in-stock-value. (Of importance, Nike lost over one billion dollars in stock value after a star player was injured wearing their sneakers).

[6] *See* N.C.A.A. Const. art. XII, § 12.5.2.1 (effective Aug. 1, 2020); N.C.A.A. Const. art. XII, § 12.5.2.2 (effective Aug. 1, 2020).

[7] *See generally* Steve Berkowitz, *New name, image, likeness lawsuit against NCAA could put hundreds of millions of dollars at stake*, USA TODAY (Jun. 15, 2020, 11:08 A.M.), https://www.usatoday.com/story/sports/college/2020/06/15/ncaa-lawsuit-over-athletes-images-likeness-puts-big-money-stake/3189283001. The article speaks about a new filing against the Power Five and NCAA over NIL control and compensation, it also speaks about the increasing tensions on this issue due to a recent judgement rendered by the Ninth Circuit Court of Appeals which "unanimously upheld a district court ruling that the NCAA had violated antitrust law with its limits on various benefits athletes can receive from their schools." *Id.*

[8] House et al. v. National Collegiate Athletic Association et al., 4:20-cv-0319, June 15, 2020.

[9] *Id.*

[10] Dave Eminian, *How will the NCAA's new NIL rules affect the Missouri Valley Conference. What we know*, JOURNAL STAR (July 4, 2021, 5:20 AM), https://www.pjstar.com/story/sports/college/basketball/bradley-hoops/2021/07/04/ncaa-nil-rules-how-they-affect-missouri-valley-conference/7845665002 (discussing all the states that have adopted NIL legislation).

the momentous decision by the NCAA to adopt an interim NIL policy.[11] This policy allows for student athletes to monetarily capitalize from his or her NILs without violating any NCAA bylaw.[12] This Note will argue that there will need to be federal action to override the NCAA's interim NIL policy without violating any NCAA bylaw. Federal legislation is the only way to protect the sanctity of college athletics, while also preventing the NCAA from continuously being unjustly enriched.

Section II of this Note will focus on the athletes that the NCAA regulates and delve into the commercial nature of college sports. After setting the background, Section III will discuss the attempts to change NILs through the courts and the proposed solutions, in addition to the NCAA's evolving stance on NILs. Section IV will examine the state statutes that have been proposed across the country and the impact they can have on college sports. Section V will address and juxtapose the NCAA's original proposal and the interim policy it recently adopted. Finally, section VI will investigate the existing congressional proposals and offer a solution to address the uniform standard for regulating NILs.

II. THE HISTORY AND BACKGROUND OF THE NCAA AND COLLEGE ATHLETES

A. The Athletes

The NCAA regulates over 480,000 athletes at the collegiate level.[13] Of those athletes, 18,816 play Division I men's basketball and 73,712 play Division I football.[14] This is an important distinction because it is reported that across all markets, the athletes in those sports bring in a total of $14 billion in annual revenue.[15] Out of all of

[11] Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[12] *Id*.

[13] *Estimated Probability of Competing In College Athletics*, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-college-athletics (Apr. 8, 2020).

[14] *Id*.

[15] Tom Huddleston Jr., *College Football Stars Could Be Earning As Much As $2.4 Million Per Year, Based On NCAA Revenues: Study*, CNBC (Sept. 2, 2020, 3:01 PM), https://www.cnbc.com/2020/09/02/how-much-college-athletes-could-be-earning-study.html.

those players, only 1.2% of those men's basketball players, and 1.6% of those football players make the step to the professional level.[16] Thus, for the overwhelming majority of college athletes, the biggest stage they will play on is at the intercollegiate level. Consequently, the typical student-athletes' popularity peaks during their years in college, and so does their ability to monetarily capitalize on it. However, prior to adoption of the interim NIL policy, [17] any attempt to do so would be a direct violation of NCAA bylaws 12.5.2.1[18] and 12.5.2.2.[19]

Section 12.5.2.1 of the NCAA bylaws prohibited an athlete from being eligible to play in college sports if, at any time, the athlete was compensated for the use of his NILs in advertising, or for promoting the sale of any commercial product.[20] An athlete would also be ineligible to participate in athletics if the NCAA learned that the athlete received any money from endorsing products through individual use.[21] Whereas section 12.5.2.1 was a limitation on the athlete's ability to monetize his NILs,[22] section 12.5.2.2 prohibited another's use of an athlete's NILs, but only punished the athlete if it was violated.[23] More specifically, if an athlete's "name or picture appears on commercial items or is used to promote a commercial product sold by an individual or agency *without the student-athlete's knowledge or permission*" that athlete must proactively take steps to stop it.[24] Failure to do so could have resulted in players losing their eligibility to play in collegiate athletics.[25] This meant that even if the athletes were not aware their NILs were being used to generate revenue, the NCAA was still at liberty to revoke their amateur status and consequently their ability to play collegiate sports.[26] These limitations on college athletes' ability to monetize their NILs was a

[16] *Estimated Probability of Competing In College Athletics*, *supra* note 12.
[17] Hosick, *supra* note 11.
[18] N.C.A.A. Const. art. XII, § 12.5.2.1 (effective Aug. 1, 2020).
[19] N.C.A.A. Const. art. XII, § 12.5.2.2 (effective Aug. 1, 2020).
[20] N.C.A.A. Const. art. XII, § 12.5.2.1 (effective Aug. 1, 2020).
[21] *Id*.
[22] *Id.*
[23] N.C.A.A. Const. art. XII, § 12.5.2.2 (effective Aug. 1, 2020).
[24] *Id*. (emphasis added).
[25] *Id*.
[26] *Id.*

limitation exclusively imposed upon college athletes.[27] All other college students, from college musicians to student journalists to students not involved in extracurriculars students, had the ability to profit from their NILs.[28]

B. What Are NILs and How Are They Used?

The NCAA defines the term "Names, Image and Likeness" as "the three elements that make up the legal concept known as 'right of publicity.'"[29] This involves situations where "permission is required of a person to use their name, image or likeness. For example, no permission is required for a newspaper to publish a photo of an athlete playing in a game because the legal copyright would belong to the photographer, not the person pictured."[30] More generally, the term and concept of "names, image and likeness" encapsulate an athlete's ability to "sell [his or her]NILs to entities for a host of activities other than in-game broadcasts: including endorsements, advertisements, items of clothing, appearing at clinics, appearing in video games, or commercializing an athlete's social media site."[31]

Although athletes have been prohibited from using their own NILs to make a profit, that did not stop universities and the NCAA from doing just that.[32] They do so in a variety of ways. Similar to many modern companies today, conferences, schools, and the NCAA itself use social media as a promotional tool.[33] They also use the athletes to participate in social media blitzes, a marketing strategy

---

[27] Peter Colin, *What's in a Name? The Battle Over Name, Image & Likeness Rights for NCAA Student-Athletes Continues*, THOMSON REUTERS LEGAL CURRENT (May 21, 2020), http://www.legalcurrent.com/whats-in-a-name-the-battle-over-name-image-likeness-rights-for-ncaa-student-athletes-continues.

[28] *Id*.

[29] Rachel Stark-Mason, *What Name, Image and Likeness Means for College Sports. and how the NCAA is Turning to Student-Athletes to Navigate a Path Forward*, NCAA, http://www.ncaa.org/champion/name-image-likeness (The NCAAA took down the page after adopting their interim NIL policy) (last visited Sept. 18, 2020).

[30] *Id*.

[31] Jayma Meyer & Andrew Zumbalist, *A Win Win: College Athletes get paid for their Names, Image and Likeness and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT L. 247, 286 (Spring 2020) (discussing what NILs encompass).

[32] *See* House et al. v. Nat'l Collegiate Athletic Ass'n et al., 4:20-cv-0319, June 15, 2020.

[33] *Id.*

designed to promote a product or brand, that garners commercial benefits for the NCAA and its members.[34] Moreover, college coaches may also reap the financial rewards of their teams' popularity through the online economy of social media.[35] However, the commercial benefits do not stop with social media opportunities and e-commerce.[36] In fact, the class action complaint filing of *House et al. v. NCAA* explains how elite college athletes are exploited for the profitable gain of others.[37] While football and basketball bring in the majority of revenue for the NCAA, the inability to profit from NILs had a harsher impact on athletes who participated in small market sports, such as gymnastics.[38]

Katelyn Ohashi was a gymnast for the UCLA Bruins.[39] During her senior year, in 2019, Ms. Ohashi's top-scoring floor routine "went viral[,] making her one of the most famous college gymnasts ever. But NCAA rules prevented Ohashi from making any money from the performance."[40] Ms. Ohashi was featured in an op-ed video, published by the New York Times, arguing for college athletes to be able to monetize their achievements.[41] She explained

---

[34] *Id.*

[35] The cyber economy encapsulates different aspects of using the internet to create revenue. Such as when:

> The NCAA, conferences, and schools (…) promote themselves and their athletic programs via social media such as Instagram and Twitter, and have their athletes participate in social media blitzes for the commercial benefit of the NCAA and its members. Coaches and others associated with college athletic programs also reap the financial rewards of payments from social media companies and other lucrative aspects of the online economy. Yet, the NCAA's draconian NIL restrictions prevent student-athletes from commercially benefitting from their postings on social media, despite the fact that other college students are able to commercially benefit from social media opportunities and many do.

Id.

[36] *See generally* House et al., 4:20-cv-0319, June 15, 2020 (referencing the many ways that social media is used to generate money for college athletic programs).

[37] *Id.*

[38] *Id*.

[39] *Id.* at 4.

[40] Katelyn Ohashi, *Everyone Made Money Off My N.C.A.A. Career, Except Me*, N.Y TIMES (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html.

[41] House et al., 4:20-cv-0319, June 15, 2020 at 4.

how both UCLA, the school she attended, and the NCAA were able to profit from the 100 million views on her routine, yet she was not able to earn a single dollar from this social media popularity.[42] Ms. Ohashi's NIL value post-graduation, simply due to the sport that she plays, will quickly diminish as there is not any viable professional sports option in gymnastics.[43] Those who play similar sports are not left with lucrative options post-college, and even in sports that do have a professional level, the chance of reaching it is slim at best.[44] This is just one story of many other athletes whose NILs have been exploited for the profit of others without any compensation to the athletes themselves.

C. The Line Between College and Professional Sports

Under the section titled "Commitment to the Division I Collegiate Model" of the NCAA Division I manual is a subsection titled "The Commitment to Amateurism."[45] This subsection outlines the NCAA's attempt to separate collegiate and professional sports.[46] It provides that all Division I members of the NCAA must run their athletics programs in accordance with the NCAA bylaws.[47] It further adds that students "choose to participate in intercollegiate athletics as a part of their educational experience thus maintaining a line of demarcation between student athletes who participate in Collegiate Model and athletes competing in the professional model."[48]

The NCAA bolsters the division between professional and collegiate athletics by requiring all prospective student-athletes in Division I and II schools to register with the NCAA as amateur athletes prior to competing.[49] Once registered as amateur athletes, the athletes become subject to specific stipulations in order to retain

---

[42] Ohashi, *supra* note 39.
[43] House et al., 4:20-cv-0319, June 15, 2020 at 4.
[44] *Estimated Probability Of Competing In Professional Athletics*, NCAA, https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics, (Apr. 8, 2020).
[45] N.C.A.A. Const., Commitment to the Division I Collegiate Model, XIII (effective Aug. 1, 2020).
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited Sept. 26, 2020).

their amateur status.[50] If athletes are found to have violated any of the enumerated stipulations, their amateur status become at risk, and thus so does their eligibility to participate in college sports at the Division I and II level.[51]

Although the athletes must receive a certificate of amateurism from the NCAA in order to be eligible to play and are subject to NCAA bylaws, they are not unionized and therefore cannot collectively bargain like athletes in leagues such as the NFL and NBA.[52] In 2015, the Northwestern football team attempted to challenge this and become a recognized union with the National Labor Relations Board.[53] This attempt was shut down, failing to address the issue of "whether the players, who spend long hours on football and help generate millions of dollars for Northwestern, are university employees."[54] The National Labor Relations Board dismissed the case due to the "potentially wide-ranging impacts on college sports [that] would not have promoted 'stability in labor relations.'"[55] After the decision, Northwestern University spokesperson, Alan Cubbage released a statement that the University was "pleased that the N.L.R.B. has agreed with the university's position."[56] The chief legal officer of the NCAA, Donald Remy, released a similar statement saying "[t]his union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. Student-athletes are not employees."[57]

---

[50] *Id*.
[51] *Id*.
[52] Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html.
[53] *Id*.
[54] *Id.*
[55] *Id.*
[56] *Id*. (Northwestern University was opposed to the idea of a unionized team, and the implications of such a decision.).
[57] Donald Remy, *NCAA Responds to Union Proposal*, NCAA, http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal (last visited Mar. 12, 2020).

D. The Commercial Nature of College Athletics

NCAA President Mark Emmert says that college sports are about education of students and competing.[58] This is the same NCAA that reported a revenue of $1,118,495,545.00 in August of 2019.[59] In August 2019, television deals brought in a whopping $867,527,070.00, accounting for the majority of the NCAA's revenue.[60] Despite how astounding those numbers may seem, it is just a drop in the bucket of the money college athletics produce. The true money at play in a *single college* game was perfectly highlighted on February 20, 2019.[61]

The highly anticipated and biggest rivalry game in college basketball just tipped off.[62] The number one team in the nation during the 2019 season, the Duke Blue Devils, played against the eighth ranked team, the University of North Carolina (UNC) Tar Heels.[63] Duke, outfitted in their Nike sponsored gear, took the ball out after UNC scored on their opening possession.[64] The ball was brought up the court and passed over to the future number one overall pick in the NBA draft, Zion Williamson. As everyone watching had their eyes glued to their screens hoping to see one of his patented high-flying dunks, Zion drove to the rim at full speed. Zion made a hard cut, causing his Nike sneaker to rupture underneath him. He subsequently slipped and suffered a knee injury.[65] The following day, Nike stock dropped over one billion dollars.[66] This situation exemplifies the fact that these young athletes can have nearly a billion dollars riding on their performance and health in every matchup. Furthermore, if Zion had been more seriously injured and

---

[58] Mark Emmert, *Office of the President*, NCAA, http://www.ncaa.org/about/who-we-are/office-president (last visited Sept. 18, 2020).

[59] *National Collegiate Athletic Association Consolidated Financial Statements, August 31, 2019 and 2018*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/finance/2018-19NCAAFin_NCAAFinancials.pdf.

[60] *Id*.

[61] Kate Gibson, *Nike's High-Profile Shoe Fail Costs $1.1 Billion In Stock Value*, CBS NEWS (Feb. 21, 2019, 4:23 PM), https://www.cbsnews.com/news/nike-stock-drop-zion-williamson-shoe-incident-and-injury-costs-1-1-billion-in-stock-value/.

[62] *Id*.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

"slipped past the number sixteen overall pick in the 2019 National Basketball Association ("NBA") draft," he would have "been entitled to collect on an $8 million loss-of-value insurance policy--that Duke University paid $50 thousand in premiums for."[67]

Star-players like Zion have turned the NCAA into a money-making machine, which in turn has led to lucrative salaries for the athletic directors and coaches of Division I schools. The average salary for an athletic director at a Division I school has surpassed five hundred thousand dollars a year.[68] This is a number that barely scratches the surface of coach salaries. As reported in 2019, "there were 176 college football and men's basketball coaches who received salaries exceeding $1 million, 71 whose salaries exceeded $3 million, and 38 whose salaries exceeded $4 million."[69] Among the highest paid is Dabo Swinney, the head coach of the Clemson University football team, with a reported salary of $9.3 million dollars and $1.1 million dollars in bonuses.[70] If Clemson decides they want to move on from Swinney before his contract is up, they will have to pay him $50 million dollars pursuant to his buyout clause.[71] Swinney is not the "exception to the rule" either, and "the head football or basketball coach on a college team within the state makes more in guaranteed compensation than the state's governor."[72] Additionally, it is not just lucrative salaries that these coaches receive. Generally speaking, members of the coaching staff get a variety of off the field benefits from "free use of cars, housing subsidies, country-club memberships, private jet services, exceptionally generous severance packages and more."[73] Moreover, they gain the opportunity to subsidize their salaries by way of apparel and sneaker endorsements to book

---

[67] Meyer & Zumbalist, *supra* note 30, at 257, *citing* Mike Chiari, *Report: Zion Williamson's $8M Insurance Policy Revealed After Injury vs. UNC*, BLEACHER REP. (Feb. 12, 2019), https://bleacherreport.com/articles/2821748-report-zion-williamsons-8m-insurance-policy-revealed-after-injury-vs-unc.

[68] *House et al.*, 4:20-cv-0319, June 8, 2020. at 1.

[69] Meyer & Zumbalist, *supra* note 30, at 261.

[70] *2019 NCAAF Coaches Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/ (last visited Sept. 18, 2020).

[71] *Id*.

[72] Meyer & Zumbalist, *supra* note 30, at 262, citing, Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228.

[73] *Id.* at 261.

contracts.[74] All the while, the athletes themselves have historically been prohibited from reaping the benefits of their own athletic abilities.

Although the NCAA likes to claim that the athletes are amateurs and the main goal of the NCAA is to educate the student-athletes,[75] the NCAA has still turned college sports into a billion-dollar industry.[76] The NCAA brings in nearly one billion dollars through television deals alone.[77] The apparel companies get to display their products before the eyes of millions of weekly viewers, which, as previously shown, leads there to be billions of dollars at play each time superstar athletes suit up.[78] The universities strategically use the popular athletes in their athletic programs to promote their merchandise, ticket sales and social media influence.[79] In turn, the athletic directors are rewarded with lucrative salaries,[80] salaries that still pale in comparison to the salaries of the coaches,[81] who also gain off the field benefits.[82] All of this demonstrates that the NCAA's loud proclamations of education are nothing but a smoke screen to hide the multi-billion-dollar business that it has created on the backs of uncompensated athletes.

---

[74] *Id.* at 261-62.
[75] Remy, *supra* note 56.
[76] Steve Cameron, *The NCAA Brings In $1 Billion A Year – Here's Why It Refuses To Pay Its College Athletes*, INSIDER (Mar. 26, 2019, 10:14 AM), https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3.
[77] *NCAA Consolidated Financial Statements, August 31, 2019 and 2018*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/finance/2018-19NCAAFin_NCAAFinancials.pdf.
[78] Kate Gibson, *Nike's High-Profile Shoe Fail Costs $1.1 Billion In Stock Value*, CBS NEWS (Feb. 21, 2019, 4:23 PM), https://www.cbsnews.com/news/nike-stock-drop-zion-williamson-shoe-incident-and-injury-costs-1-1-billion-in-stock-value.
[79] House et al. v. Nat'l Collegiate Athletic Ass'n et al., 4:20-cv-0319, June 8, 2020.
[80] *Id.* at 1.
[81] Meyer & Zumbalist, *supra* note 30, at 261.
[82] *Id.* at 262.

III. THE NCAA AND COURTS EVOLVING APPROACH TO NILS

A. Brief History

One of the earliest reforms of intercollegiate sports was the adoption of the amateurism rule in 1921.[83] This adoption was an attempt to curb the problem of schools paying athletes to attend their universities.[84] However, the schools found creative ways around the NCAA's attempts.[85] In 1948, the NCAA adopted the "Sanity Code" which did not allow universities to give out scholarships, or financial aid in any way that was not available to an ordinary student.[86] The NCAA also created "a Compliance Committee that could terminate an institution's NCAA membership."[87] In 1956, the NCAA changed its rules to allow schools to give scholarships on athletic ability, yet were still limited to "full grant-in-aid,"[88] and anything over it would leave athletes at risk of losing their amateur status.[89] It was not until 2014 that schools were able to offer scholarships for the full cost of attendance due to athletic ability.[90] Nevertheless, NCAA bylaws still restricted an athlete "with few exceptions – from receiving *any* 'pay'" based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness."[91] As these rules have evolved, there has been litigation challenging them. The most successful way litigants have attacked the NCAA bylaws has been through the Sherman Antitrust Act.[92]

---

[83] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054 (9th Cir. 2015).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 333 (2007).
[88] Grant in aid covers only cost of tuition, room and board and required textbooks.
[89] *O'Bannon*, 802 F.3d at 1054 (9th Cir. 2015).
[90] *Id.*
[91] *Id.*
[92] Meyer & Zumbalist, *supra* note 30, at 269.
[92]683 F.3d 328, 340 (7th Cir. 2012).

B. The Sherman Antitrust Act and the NCAA Bylaws

The Sherman Antitrust Act was enacted to regulate commerce,[93] prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."[94] Although the Sherman Antitrust Act was not originally intended to regulate organizations such as the NCAA, it has "been the most fertile ground for chipping away at the NCAA's amateurism rules."[95] In *Agnew v. National Collegiate Athletic Association*, the Seventh Circuit held that "no knowledgeable observer could earnestly assert that big-time college football programs . . . do not anticipate economic gain from a successful recruiting program."[96] The court further added that even though universities that are members of the NCAA are nonprofit in status, "the transactions those schools make with premier athletes--full scholarships in exchange for athletic services--are not noncommercial, since schools can make millions of dollars as a result of these transactions."[97] Thus, both the NCAA and the member universities are subject to the Sherman Antitrust Act.[98]

C. O'Bannon Litigation

In 2009, former UCLA Bruin basketball player Ed O'Bannon brought suit against the Collegian Licensing Company (CLC) after recognizing himself as a character in a video game created by EA Sports.[99] O'Bannon challenged the NCAA's amateurism rules on the ground that they violated the Sherman Antitrust Act by not permitting him or other athletes to gain compensation on their NILs.[100] In 2013, class certification was granted for all former and current Division I athletes in football and basketball, whose NILs were used in video games licensed by the CLC.[101] The athletes sought payment in specific areas, all of which were prohibited by the NCAA bylaws at

---

[93] *See generally* 15 U.S.C. § 1.
[94] *Id.*
[95] Meyer & Zumbalist, *supra* note 30, at 269.
[96] 683 F.3d 328, 340 (7th Cir. 2012).
[97] *Id*.
[98] *Id*.
[99] *O'Bannon,* 802 F.3d at 1056 (9th Cir. 2015).
[100] *Id.*
[101] *Id.* at 1055-1056.

the time: sports video games, game rebroadcasts, advertisements, and other archival footage.[102]

The United States District Court for the Northern District of California recognized that few athletes chose to play in foreign markets or minor league professional sports, "and athletes are not allowed to join either the NFL or the NBA directly from high school."[103] The conclusion drawn by the district court led it to hold that "there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services that the Football Bowl Subdivision (the "FBS") and Division I basketball schools provide."[104] Consequently, the court held that the NCAA bylaws were subject to the Sherman Antitrust Act even though they are not directly commercial in nature.[105] Ultimately, the lower court held that the bylaws were in violation of the Sherman Antitrust Act.[106]

On appeal, the Ninth Circuit Court of Appeals found that the schools were actively engaging in price-fixing agreements by obtaining the athletes' licensing through the CLC without having to pay the athletes themselves.[107] The court, however, agreed with the NCAA that amateurism and its integration into NCAA regulations did have pro-competitive aspects, such as giving athletes a robust choice of schools, as well as maintaining the popularity of intercollegiate sports.[108] Lastly, when addressing the "less restrictive alternative" proposed, which would allow the schools to place deferred compensation of up to $5 thousand per year into a trust based on licensing revenue that the athlete brought in,[109] Judge Bybee wrote:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed,

---

[102] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).
[103] *Id.* at 966.
[104] *Id.* at 968.
[105] *Id*. at 1061.
[106] *Id.*
[107] *O'Bannon,* 802 F.3d at 1057 (9th Cir. 2015).
[108] *Id*. at 1072.
[109] *Id*. at 1053.

> we see no basis for returning to a rule of amateurism and no defined stopping point . . . At that point the NCAA will have surrendered its amateurism principles and transitioned from its 'particular brand of football' to minor league status.[110]

Judge Bybee's opinion was not fully shared by the majority.[111] Judge Thomas wrote separately on the decision to voice his displeasure.[112] Judge Thomas argued that the NCAA's own expert witness's testimony proved that putting the money in trusts would have a very limited impact on consumer demand for college athletics.[113] Furthermore, he asserted that any negative impact "could be partially mitigated by placing the compensation in trust funds to be paid out after graduation."[114]

Ultimately, the court was split, with the majority finding that the deferred compensation option violated the amateurism principles due to the lack of a tie to academics.[115] This decision left neither party going home happy, which became clear when both sides petitioned the Supreme Court for a writ of certiorari, which was ultimately denied.[116] As a result, the NCAA's regulations were left vulnerable to more challenges.[117]

1. Reaction of The NCAA And Major Conferences Post O'Bannon Decision

The NCAA's dissatisfaction with the ultimate ruling can be clearly shown through its petition to the Supreme Court,[118] stating that "[t]he NCAA should not have to undergo a full trial (and years of litigation) or face treble damages whenever a plaintiff or counsel hits

---

[110] *Id.* at 1078-79 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101-02 (1984)).
[111] *Id.* at 1080 (Thomas, C.J., concurring in part and dissenting in part).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 1078.
[116] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016).
[117] Meyer & Zumbalist, *supra* note 30, at 274.
[118] Nat'l Collegiate Athletic Ass'n v. O'Bannon, 137 S. Ct. 277 (2016) (No. 15-1388).

on a supposedly better way to administer college athletics."[119] In addition to its petition to the Supreme Court, NCAA President Mark Emmert released an initial statement where he said that while the NCAA "agree[d] with the court that the injunction 'allowing students to be paid cash compensation of up to $5,000 per year was erroneous . . .'[the NCAA] disagree[s] that it should be mandated by the courts" because the NCAA allows schools to "provide up to full cost of attendance" for student athletes.[120]

The top thirty-one conferences released a joint statement as well.[121] They collectively stated that they were pleased with the court's decision only to the extent that it reversed the district court's ruling with regard to the $5 thousand deferred payment option.[122] The conferences underlined their "company motto" by stating "[i]t's important to remember that we're talking about students, not employees. Our goal is for our students to learn teamwork and leadership through sports, and then graduate and be successful."[123]

2. Summary of the Major O'Bannon Implications

In addition to O'Bannon's disappointment, the NCAA and the major conferences were not pleased with the outcome of the case. This case demonstrated that that the NCAA was vulnerable to litigation, especially through the Sherman Antitrust Act.[124] It is important to note the tone in the responses to *O'Bannon* from the NCAA and the conferences,[125] as it quickly evolved over time. At this juncture, the NCAA understood that this decision left it

---

[119] *Id.* at 26-27.

[120] Mark Emmert, *Initial NCAA Statement Regarding O'Bannon Decision,* NCAA (Sept. 30, 2015, 10:51 AM), http://www.ncaa.org/about/resources/media-center/news/initial-ncaa-statement-regarding-o-bannon-decision.

[121] *The Coalition to Protect and Improve the Student-Athlete Experience Responds to 9th Circuit Court of Appeals Decision in O'Bannon Case*, NCAA (Sept. 30, 2015), http://www.ncaa.org/about/resources/media-center/other-statements-about-9th-circuit-court-appeals-decision-o-bannon-case.

[122] *Id*.

[123] *Id.*

[124] *See* O'Bannon, 802 F.3d at 1061 (9th Cir. 2015).

[125] *Id.; see also* Emmert, *supra* note 119; *see also The Coalition to Protect and Improve the Student-Athlete Experience responds to 9th Circuit Court of Appeals decision in O'Bannon Case*, *supra* note 120.

vulnerable to future litigation,[126] which made it uneasy. Consequently, the NCAA and the conferences stood together starkly against compensating athletes in any manner.[127] Despite the NCAA's clear view on the subject, future challenges arose.

D. Grant-In-Aid Litigation

The fear of the NCAA becoming susceptible to further litigation quickly became reality when two class action suits raised challenges to the NCAA's amateurism rules: *Jenkins v. National Collegiate Athletic Association,*[128] and *Alston v. National Collegiate Athletic Association.*[129] Collectively, these claims became known as *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*[130]("Grant-in-Aid"), and the case made its way to the Ninth Circuit Court of Appeals. *Grant-in-Aid* had three parties certified for the class: (1) students who played in the Football Bowl Subdivision ("FBS"); (2) male Division I basketball players; and (3) female Division I basketball players.[131]

While both *O'Bannon* and *Grant-in-Aid* targeted the NCAA's amateurism rules, *O'Bannon* focused specifically on NILs,[132] whereas *Grant-in-Aid* widened the scope.[133] The plaintiffs in this action argued – perhaps not successfully that schools are "buyers of athletic services."[134] As the buyers, the schools "exercise [a] monopoly power to artificially cap compensation at a level that is not commensurate with student-athletes' value."[135] Consequently, but for the restraints in the NCAA bylaws, specifically bylaw 15.01.2, which prohibits any student-athlete from receiving financial aid other

---

[126] *See* Meyer & Zumbalist, *supra* note 30, at 274.
[127] *See* Emmert, *supra* note 119; *see also The Coalition to Protect and Improve the Student-Athlete Experience responds to 9th Circuit Court of Appeals decision in O'Bannon Case*, *supra* note 120.
[128] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019).
[129] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015).
[130] 958 F.3d 1239 (9th Cir., 2020).
[131] *Id*. at 1243.
[132] *O'Bannon,* 802 F.3d at 1056 (9th Cir. 2015).
[133] *See generally Grant-in-Aid,* 958 F.3d at 1248.
[134] *Id.*
[135] *Id.*, citing In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058, 1068 (2019).

than what they are eligible for through intercollegiate athletics and penalizes violations by stripping the athlete of their amateur status,[136] the plaintiffs argued that schools would offer recruits coming out of high school a higher compensation package that correlates more closely to their talents and values.[137] Therefore, they argued, these restraints violated section 1 of the Sherman Antitrust Act.[138]

The District Court for the Northern District of California held that the NCAA's limitations on benefits that student athletes could receive were unreasonable restraints on trade, and the court went on to enjoin those limits.[139] However, the court did not go as far as the plaintiffs wanted and held that the NCAA limits on compensation did not violate the Sherman Antitrust Act.[140] The NCAA appealed this decision to the Ninth Circuit Court of Appeals.[141]

1. Before the Appeal

In the time after the ruling from the Northern District Court of California and before the appeal to the Ninth Circuit there was a ground-breaking development. California enacted the Fair Pay to Play Act.[142] Generally, the Fair Pay to Play Act provides that any California school that is a member of the NCAA is not allowed to limit an athlete's ability to receive compensation from his NILs.[143] In the wake of this legislation, NCAA President Mark Emmert stated that the NCAA would not take "any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with respect to the type of NIL payments that were at issue in the *O'Bannon* case[.]"[144]

---

[136] N.C.A.A. Const. art. XV, § 15.01.2 (effective Aug. 1, 2020).
[137] *Grant-in-Aid*, 958 F.3d at 1248.
[138] *See id.*
[139] Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp.3d at 1109.
[140] *Id*.
[141] *Grant-in-Aid*, 958 F.3d at 1241.
[142] *Infra* note 160.
[143] *See* Compensation from use of student's name, image, or likeness; participation and scholarship eligibility; professional representation, Cal. Educ. Code § 67456 (West 2020, operative Jan. 1, 2023).
[144] *See* Hearing Before U.S. S. Commerce Subcomm. on Manufacturing, Trade and Consumer Protection, (Feb. 11, 2020) (statement of Mark Emmert, President,

2. On Appeal

The Ninth Circuit Court of Appeals held that the lower court properly applied the "Rule of Reason."[145] The Rule of Reason has three steps. As applicable to this litigation those steps were: (1) the athletes would have to show that the alleged restraint has a significant anticompetitive impact within the identified relevant market; (2) if this is met, the NCAA would have to combat the anticompetitive impact by showing evidence that the restraints in fact have a procompetitive impact; and (3) finally, if the NCAA meets its burden, the athletes will then have to produce another proposal to the restraints that is substantially less restrictive.[146] To meet this third step, the athlete must prove that the alternative is practically as effective, while still serving the same procompetitive purpose of the NCAA.[147]

Ultimately, the Ninth Circuit affirmed the ruling of the lower court on all points.[148] The court held that the district court properly found that the restriction had anticompetitive behavior due to "elite student-athletes lack[ing] any viable alternatives to [Division I], [forcing them] to accept[.]"[149] The court further added that it is still anticompetitive with "whatever compensation is offered to them by [Division I] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services."[150] The NCAA met its burden on step two of the Rule of Reason by justifying that the restrictions preserve the demand in that it prevents salaries to the equivalent of professional athletes. However, the Court extended the holding as it pertains to the education-related benefits.[151] On the third step of analysis, the athletes' proposed that there should be uncapped education-related benefits, which the Ninth Circuit also upheld.[152] The court found that such a rule change was practically as effective as the current

---

NCAA), https://www.commerce.senate.gov/services/files/A3E515B6-A2A3-4453-BB32-DE37F4D72FB5.

[145] *Grant-in-Aid*, 958 F.3d at 1241.

[146] *Id.* at 1257.

[147] *Id*. at 1260.

[148] *Id* at 1241.

[149] *Id.* at 1257.

[150] *Id.*

[151] *Id.* at 1260.

[152] *Id.*

standards in place, and that it would not deter the fans.[153] Ultimately, the Ninth Circuit held that the education-related restraints were in violation of the Sherman Antitrust Act and were enjoined, however the court refused to extend the restraints to include non-education related compensation.[154] Thus, the athletes won the battle, but not the war, albeit a massive battle.

3. NCAA Response to the Ruling

Almost immediately following the Ninth Circuit decision, the NCAA petitioned the Supreme Court to review the determination.[155] The NCAA's chief legal officer, Donald M. Remy, published a press release in which he challenged the Ninth Circuit ruling, stating that it inconsistently applied the antitrust rules comparatively to other federal courts as well as the Supreme Court.[156] Mr. Remy was highly concerned with the potential fallout following this decision, and went on to say that he believed this ruling "blurs the lines between college and professional sports."[157] Further, he added that the decision "appoints a single court to micromanage collegiate sports, and encourages never-ending litigation following every rule change."[158] As expected, the same fears the NCAA had post-*O'Bannon* had only been expounded by another adverse ruling. Ultimately, *Alston* made it all the way to the Supreme Court.[159]

4. Supreme Court Ruling

In a landmark unanimous decision, delivered on June 21, 2021, the Supreme Court affirmed the Ninth Circuit's decision by holding that the NCAA rules that limit education-related benefits are

---

[153] *Id.*

[154] *Id*. at 1241.

[155] Donald M. Remy, *NCAA Statement Regarding Supreme Court Petition For Alston Case*, NCAA (Oct. 15, 2020, 10:32 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] Nat'l Collegiate Athletic Ass'n v. Alston, 141. S.Ct. 1231 (Dec. 16, 2020) (granting the writ of certiorari.).

inconsistent with antitrust principles.[160] While this case did not involve the NIL policy of the NCAA, it practically rubs elbows with it. Justice Gorsuch wrote, "[p]ut simply, this suit involved admitted horizontal price fixing in a market where the [NCAA] exercise monopoly control."[161] The NCAA tried to argue that the Ninth Circuit holding would be exploited by universities, resulting in college athletes receiving unnecessarily valuable items.[162] However, the Court specified that "[u]nder the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a 'no Lamborghini' rule.'"[163] While the Court was careful to make a distinction between what was at issue in this case and the NIL policy of the NCAA, Justice Kavanaugh did not hold back in his concurrence. Justice Kavanaugh put it bluntly when he stated "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[164] Justice Kavanaugh added an extra jab when he stated that the NCAA's argument for justifying not paying student athletes was "circular" and "highly questionable."[165] Justice Kavanaugh further added "if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules."[166] Justice Kavanaugh further clarified his stance when he stated that the "bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenue for colleges every year."[167] As such, the NCAA was put on notice by the Supreme Court whose justices essentially provided the NCAA with an ultimatum: either make a change or we will.

5. Summary of Grant-in-Aid

The Supreme Court affirmed the Ninth Circuit's holding that the lower court had properly applied the Rule of Reason and affirmed

---

[160] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. ___ (2021), supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] *Id*. (Kavanaugh concurrence).
[165] *Id*. (noting that the NCAA argues "that its compensation rules are procompetitive because those rules help define the product of college sports.").
[166] *Id*.
[167] *Id*.

the district court judgment enjoining the NCAA rules regulating education related compensation.[168] This is one of the biggest wounds in the NCAA's regulations regarding the amateur status of college athletes. This class action and its outcome was exactly what the NCAA and the thirty-one conferences were worried about in the wake of the *O'Bannon* decision.[169] Their fears became reality in the following two forms: (a) the Court took the NCAA's regulations into their hands, which is something that the NCAA believes the Court lacks the proper expertise and qualifications to do; and (b) various states have struck down NCAA regulations on NILS through legislation.[170]

IV. STATES TAKING THE REGULATIONS INTO THEIR OWN HANDS

A. The Fair Pay to Play Act

Shockwaves echoed throughout the sports world when the California State legislature unanimously passed,[171] and Governor Gavin Newsom signed the Fair Pay to Play Act (S.B. 206) into law.[172] Nancy Skinner, a California state senator and author of the bill, said of the bill's intent: "[s]tudent athletes need to financially strike while the iron is hot and draw compensation for their performance in collegiate athletics. It is only fair because it is the athletes who are the draw in these hugely profitable activities."[173]

---

[168] *Grant-in-Aid*, 958 F.3d at 1241.

[169] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016); *see also* Emmert, *supra* note 119, *see also The Coalition to Protect and Improve the Student-Athlete Experience responds to 9th Circuit Court of Appeals decision in O'Bannon Case*, *supra* note 120.

[170] *Infra* note 172.

[171] California Legislature, *SB-206 Collegiate Athletics, Student Athlete Compensation And Representation*, CAL. LEGIS. INFO. (2019-2020), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200SB206.

[172] CAL. EDUC. CODE § 67456 (West 2019).

[173] *See* Alicia Jessop, *Fool Me Once, Shame On You; Fool Me Twice, Shame On Me: Why Congress Must Grant NCAA Athletes Group Licensing And Organization Rights in Name, Image and Likeness Legislation*, HARV. J. SPORTS & ENT L. (Aug. 31, 2020), https://harvardjsel.com/2020/08/fool-me-once-shame-on-you-fool-me-twice-shame-on-me-why-congress-must-grant-ncaa-athletes-group-licensing-and-organization-rights-in-name-image-and-likeness-legislation (citing Collegiate Athletics: Fair Pay to Play Act: Hearing on SB 206 Before the Cal. S. Assembly

The act, just a mere two-pages long, is set to go toe-to-toe with the institutional goliath that is the NCAA when it goes into effect in 2023.[174] Although it will be preempted by the NCAA's interim NIL policy, the California state legislature effectively put a time limit on the old NCAA business model by being the first state to push the envelope.

1. What the Act Provides

The Fair Pay to Play Act "requires intercollegiate athletic programs at 4-year private universities or campuses of the University of California or the California State University that receive, as an average, $10 million or more in annual revenue derived from media rights for intercollegiate athletics to comply with prescribed requirements relating to student athlete rights."[175] Significantly, S.B. 206 provides that any school that meets these requirements are not allowed to uphold any standard, requirement, rule or any other limitation that in turn prevents, in any way, student athletes' ability to earn compensation from their NILs.[176] Additionally under the law, the ability to earn compensation from their NILs has no effect on the respective student athlete's scholarship eligibility.[177]

It is important to note that the Act does not apply to prospective athletes, and if student athletes hire a sports agent, they still must be licensed by and follow the federal Sports Agent Responsibility and Trust Act.[178] Moreover, the title of the Act may be slightly misleading. The Fair Pay to Play Act "does not create an employer-employee relationship: neither of those words even appear in the bill."[179] Furthermore, "California student-athletes will not be paid to play, nor is there any text pondering what pay would be 'fair.'"[180]

Committee on Arts, Entertainment, Sports, Tourism, and Internet Media (2020) (comments of Nancy Skinner, California state senator and bill author)).

[174] CAL. EDUC. CODE § 67456 (West 2019).

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] CAL. EDUC. CODE § 67456 (West 2019).

[179] Alexander Lowitt, *Full Court Press: Legal Vulnerabilities Of California's Fair Pay To Play Act*, 11 WAKE FOREST J. L. P.S.S. 20, 27-28 (2020).

[180] *Id.* at 28.

B. The Others Following Suit

Although California was the first to pass such a bill, it has not been the last. Many states have followed suit, passing their own respective versions of the Fair Pay to Play Act.[181] The following states have either adopted, or considered a similar bill: Florida, Georgia, Illinois, Michigan, Missouri, New Jersey, Oklahoma, South Carolina, and Tennessee.[182] The various bills are all vastly similar. Among the similarities are the inability to limit or prevent a student athlete from being compensated from their NILs, athletes being entitled to representation either by a lawyer or sports agent. Additionally, student athletes have to disclose any NIL contracts with the institution they attend, to ensure that these agreements do not conflict with any other deals the institution is a party to.[183]

Although there are similarities between these bills, there are also variations among them. A notable difference is "whether they prohibit or are silent as to providing compensation for prospective student athletes."[184] This variation is of specific importance in relation to recruiting athletes. Schools that are located within states that allow compensation for prospective student athletes will be at an inherent advantage in comparison to those schools in states where it is prohibited. In an almost avalanche-like fashion, this will have an impact on the competitive nature of all college sports across the nation. The consequences of a potential nationwide standard, or lack thereof will be further discussed in Section VI.[185] The bills also differ in terms of dates where each state's respective bill goes into effect.[186] The earliest change to go into effect is Florida's bill, S.B. 646 which is set to be effective on July 1, 2021.[187] Now that the NCAA has adopted a preliminary interim policy, the clock is ticking for potential standardized federal legislation.

---

[181] Nicole Berkowitz et. al, *More States Draft Legislation To Address Student Athlete Compensation As The NCAA Passes The Ball To Congress*, LEXOLOGY (Feb. 5, 2020), https://www.lexology.com/library/detail.aspx?g=5701fc57-8d88-46bc-9569-43f5b3ca6a5e.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *See infra* Section VI.
[186] Berkowitz et al., *supra* note 180.
[187] FLA. STAT. § 1006.74 (2020).

C. Why This Creates More Issues

States across the nation have presented their own solutions for how the NCAA bylaws should change. However, as mentioned above, allowing these statutes to come into effect without a form of national standardization will have a significant impact on the competitive nature of college sports, particularly in the area of recruiting. Recruiting is one of the most essential parts of building a highly competitive and profitable sports program. For example, imagine a highly talented athlete is choosing between two schools: one where a version of the "Fair Pay-for-Play Act" has been enacted (school one) and one with a law that is more restrictive (school two). No matter what school two has to offer, the athletes at school two are at an inherent disadvantage because school one will be able to tell the athletes that while they receive an education and compete in the highest level of amateur athletics, they will also be able to earn money from their popularity in more ways than school two can offer. This is clearly a strong incentive for students to attend schools located in states with laws like the "Fair Pay-for-Play Act." This is a situation that the NCAA wants to avoid at all costs, as it directly impacts the completive nature of college sports and further adds to the need for standardized legislation.

V. THE NCAA RESPONSE

A. The Initial Response Pre-Alston

After the Pay-for-Play Act was signed into law, the NCAA sent a letter to Governor Newsom stating that the bill was both "harmful" and "unconstitutional."[188] Yet, in a seemingly inconsistent act with that statement a month after the bill was signed, the NCAA stated in a press release that its Board of Governors unanimously agreed to look into opportunities for student athletes to obtain compensation derived from NILs, so long as it was consistent with the core principles of the NCAA.[189] The NCAA convened a meeting

[188] Letter from NCAA Bd. of Governors to Gavin Newsom, Governor, State of Cal. (Sept. 11, 2019), http://www.ncaa.org/about/resoresou/media-center/news/ncaa-repsonds-california-senate-bill-206.

[189] *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-

of a "D-I Name, Image and Likeness Legislative Solutions Group," which authored a 22-page document outlining all the changes to the bylaws specific to NILs.[190] Among the changes outlined in the document was allowing athletes to be compensated for hosting private lessons, operating their own camps and clinics, starring in commercials, hosting autographing sessions, as well as obtaining money for emergencies through sources such as GoFundMe and other crowdfunding methods.[191]

In the original proposal, there were still limits. One of the most significant limitations applying to almost all of the changes is the inability to use school marks or revealing what school that student-athlete attends.[192] Moreover, schools themselves are given the ability to prohibit an athlete's involvement in NIL "activities that conflict with existing institutional sponsorship arrangements or other school 'values.'"[193] This prohibition is similarly seen across state statutes.[194] The NCAA proposal also places significant limitations on athletes entering into deals with a sports agent, only allowing these relationships under three circumstances:[195] "NIL ventures, assist[ing] in contract negotiations and help[ing] market an athlete's NIL ventures."[196] This is a much stricter limitation than those of the state proposals.[197]

The proposed changes were supposed to be voted on and formally approved in January 2021;[198] however, the NCAA halted its proposal.[199] The vote to change the bylaws was tabled two days prior

---

center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

[190] Pat Forde & Ross Dellenger, *NCAA's Name, Image, Likeness Legislation Proposal Revealed in Documents*, SPORTS ILLUSTRATED (Oct. 12, 2020), https://www.si.com/college/2020/10/13/ncaa-proposal-athlete-compensation-name-image-likeness.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] Berkowitz et al., *supra* note 180.

[195] Forde & Dellenger, *supra* note 189.

[196] *Id.*

[197] *Id.*; *compare* FLA. STAT. § 1006.74; *see also* CAL. EDUC. CODE § 67456 (West 2019).

[198] Forde & Dellenger, *supra* note 189.

[199] Dennis Dodd & Matt Norlander, *NCAA Expected To Table Planned Vote On Name, Image, Likeness Rights Amid Supreme Court Case, Senate Changes*, CBS SPORTS (Jan. 9, 2021, 4:53 PM), https://www.cbssports.com/college-

to when it was scheduled to take place.[200] The NCAA cited a pending Supreme Court case,[201] other legal challenges, and changes in the White House and the Senate as the reasons for the indefinite delay.[202] NCAA President Mark Emmert doubled down in a letter to the assistant attorney general, where he stated that "'[the NCAA's] current amateurism and other rules are indeed fully compliant' with federal antitrust rules."[203] He further added that the NCAA welcomes the invitation extended by the Justice Department to consult with and understand their views on the subject.[204]

B. Post Alston Policy

In the wake of the game-changing Supreme Court decision in *Alston*,[205] the NCAA position on NILs changed drastically. After having previously tabled its vote on the NIL policy, within a matter of days after the *Alston* decision came down, the NCAA adopted an interim NIL policy.[206] While *Alston* did not address whether the anti-NIL policy of the NCAA violated antitrust laws, the writing on the wall was clear, especially in Kavanaugh's concurrence, that the

---

football/news/ncaa-expected-to-table-planned-vote-on-name-image-likeness-rights-amid-supreme-court-case-senate-changes.

[200] *Id.*

[201] The NCAA was waiting for a decision in Nat'l Collegiate Athletic Ass'n v. Alston. The NCAA challenged the decision from the Ninth Circuit Court of Appeals which held that the NCAA compensation rules violated federal antitrust laws. Nat'l Collegiate Athletic Ass'n v. Shawne Alston, et al., 141 S.Ct. 2141, 2144 (2021). The Ninth Circuit applied the Rule-of-Reason analysis; however, the NCAA argued that the court was too fact intensive in its approach. *Id*. The NCAA further argued that the Ninth Circuit holding would effectively allow a single court the powers of nationwide supervision over the entirety of intercollegiate athletics, stating that "antitrust laws do not deputize district judges as one-man regulatory agencies. *Id* at 5 (citing American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3rd Cir. 1975)). Adding that antitrust suits are not the manner to "second guess *business judgments*" (emphasis added). *Id.* (citing Chicago Professional Sports Ltd. Partnership v. NBA, 95 F.3d 593, 597 (7th Cir. 1996)).

[202] *Id.*

[203] Alan Blinder, *N.C.A.A. President Seeks Delay on Vote to Let Students Profit From Fame*, N.Y. TIMES (Jan. 11, 2021), https://www.nytimes.com/2021/01/09/sports/ncaabasketball/ncaa-delays-vote-athlete-endorsements.html.

[204] *Id.*

[205] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S., at 36 (2021), supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.

[206] Hosick, *supra* note 11.

NCAA business model would not stand for much longer.[207] The NCAA's interim policy is a mere outline of what will be needed to address this issue. Yet, this policy is a historic step for the rights of college athletes, and a reversal of the previous stance of the NCAA.[208]

1. What the Interim Policy Provides

The policy as shown on the NCAA website spans a total of four bullet points.[209] It provides that

> Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions. College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness. Individuals can use a professional services provider for NIL activities. Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.[210]

The flood gates are now open. With states taking a different stance on how they choose to address NILs, the current policy impacts respective schools and consequently the athletes at those schools differently.[211] Understanding this issue, NCAA President Mark Emmert stated that due to "the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level."[212] The need for a standardized solution is more prominent now than ever.

---

[207] *See supra* notes 159-66.
[208] *See* Binder, *supra* note 202.
[209] Hosick, *supra* note 11.
[210] Hosick, *supra* note 11.
[211] *See supra* notes 183-86.
[212] Hosick, *supra* note 11.

2. What The Results Have Been

Universities across the nation are preparing for the change and hoping to put the athletes who attend their school in the best situations possible, for now and the future. This is the biggest stage that nearly all of these athletes will ever play on;[213] therefore, their four years as college athletes give them the largest opportunity to capitalize on their popularity. Among the first of surely many other universities, the University of Nebraska and the University of Colorado ("CU"), have announced programs "designed to help student-athletes build their personal brand if the NCAA's NIL restraints are lifted."[214] The athletic director at CU "expressed his support for the new program, noting that, 'building a personal brand, and developing the skills to be a successful entrepreneur will help our student-athletes capitalize and build on their time at CU and beyond.'"[215]

Additionally, college athletes from all sports, all over the nation have been capitalizing on the new policy change and have wasted no time to do so. Antwan Owens, a Jackson State football player, had a "midnight signing" with the company 3 Kings Grooming, making him the first athlete to sign an NIL deal.[216] To date, the athlete making the most out of this new policy seems to be Bryce Young, the man set to be the starting quarterback for the Alabama Crimson Tide this upcoming season.[217] Although he barely saw the field his first season with the Crimson Tide, Alabama head coach Nick Saban told the media that Young's deals have totaled almost one million dollars.[218] These deals have not only reached football players; Olivia Dunne, an 18 year old gymnast for LSU may

---

[213] *Estimated Probability of Competing in Professional Athletics*, *supra* note 12.
[214] House et al., 4:20-cv-0319, June 15, 2020 at 6.
[215] *Id.* (quoting David Plati, *CU Announces "Buffs With A Brand" Program*, CUBUFFS (June 1, 2020), https://cubuffs.com/news/2020/6/1/general-cu-announces-buffs-with-a-brand-program.aspx.
[216] Elizabeth Karpen, *Players Getting Paid: Here's Who Signed NIL Deals on Policy's First Day* (July 1, 2021, 4:29 PM), N.Y. POST, https://nypost.com/2021/07/01/here-are-players-who-signed-nil-deals-on-policys-first-day.
[217] Des Bieler, *Nick Saban Reveals Alabama QB Bryce Young is Already Making 'Ungodly' Profits off NIL Rights* (July 20, 2021, 7:52 PM), WASH. POST, https://www.washingtonpost.com/sports/2021/07/20/nick-saban-bryce-young-ungodly-nil-profits.
[218] *Id.*

be the poster child for NIL deals.[219] She is currently the only collegiate athlete to have over 1 million followers on both social media platforms TikTok and Instagram, with 4 million and 1.1 million followers on both respectively.[220] Olivia recently met with the "international talent agency giant Creative Artist Agency at 2000 Avenue of the Stars in Los Angeles, which has represented Madonna and Cher."[221] Entertainment lawyers in the Baton Rouge area, where LSU is located, speculate that a deal with CAA or a similar company could bring her anything between four to five million dollars.[222] While some athletes have gone as far as starting their own companies to help their fellow athletes book events,[223] others have not found their schools as open to NIL opportunities.[224] Of note, Brigham Young University has informed their athletes that any and all deals they enter must conform to the schools' honor code.[225] It is important to note that at the time of writing, the NCAA's interim NIL policy has only been in place for twenty-three days.

VI. WILL THERE BE FEDERAL RESOLVE?

To date there have been four congressional proposals made regarding college athletes' rights to NIL compensation.[226] Each of

---

[219] Glenn Guibeau, Olivia Dunne, *LSU Gymnast and Social Media Queen, Could be NIL Multi-Millionaire* (July 8, 2021, 1:57 PM), USA TODAY, https://www.usatoday.com/story/sports/college/2021/07/08/lsu-gymnast-olivia-dunne-tik-tok-social-media-nil-gold/7903126002.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] Tommy Beer, *These NCAA Athletes Have Already Inked Endorsement Deals* (July 1, 2021, 4:56 PM), FORBES, https://www.forbes.com/sites/tommybeer/2021/07/01/these-ncaa-athletes-have-already-inked-endorsement-deals/?sh=150cbdb44676 (stating that University of Miami quarterback D'Eriq King "partnered with Florida State quarterback McKenzie Milton to co-found Dreamfield, a company that will assist student-athletes in booking live events, such as autograph signings and speaking engagements.").

[224] *Id.*

[225] *Id.*

[226] Senators Booker (D-NJ) and Blumenthal (D-Conn) proposed the "College Athlete Bill of Rights", Senator Wicker (R-Miss) introduced the Collegiate Athlete and Compensation Rights Act introduced, Senator Rubio (R-Fla) introduced the Fairness in Collegiate Athletics Act presented by, and Representatives

the four proposals differ, and some of them are very far apart. Nevertheless, with the variation seen among state legislation, as well as the different stances taken by some universities, one thing is clear: there is a need for standardized legislation.

A. The College Athlete Economic Freedom Act

The most recent proposal from Connecticut Senator Chris Murphy and Massachusetts Congresswoman Lori Trahan is a bill dubbed the "College Athlete Economic Freedom Act."[227] They propose that there should be "unrestricted access to earning NIL income in individual and group NIL agreements."[228] The proposed Act provides that no college or university can collude with a third party to limit an athlete's ability to contract and be compensated for his or her NILs.[229] Moreover, the Act would not allow the NCAA to prohibit an athlete from retaining representation, whether that be an attorney, a financial advisor, or an agent,[230] a provision that various state bills and laws do not include.[231] This proposal also circumvents the unionization issues previously discussed, by legislating that the athletes would be granted the right to "organize through collective representation, like a trade association or 501(c) nonprofit."[232] This right would effectively allow the athletes to make group NIL agreements, such as video game agreements.[233] Furthermore, the bill states that any violation of section 3 of the act shall be treated as a

---

Gonzalez (R-Ohio) and Cleaver (D-Mo) introduced the bi-partisan Student Athlete Level Playing Field Act, *see id.*

[227] *Id.*

[228] Andrew Zimbalist, *The College Athlete Economic Freedom Act Proposed In Congress Is A Step Forward On NIL Rights*, FORBES (Feb. 7, 2021, 1:20 PM), https://www.forbes.com/sites/andrewzimbalist/2021/02/07/the-college-athlete-economic-freedom-act-proposed-by-senator-chris-murphy-d-ct-and-congresswoman-lori-trahan-d-ma-is-a-step-forward/?sh=77e0688f2bbd.

[229] College Athlete Economic Freedom Act, S. 1, 117th Cong. § 3(a)(2) (2021).

[230] *See id.* at § (3)(b)(1)(a); *id* at § (3)(b)(1)(b); *id* at § (3)(b)(2).

[231] Berkowitz, et al., *supra* note 180.

[232] *Id.*

[233] Gregg E. Clifton, *Senator Murphy Introduces Additional Federal Name, Image and Likeness Legislation*, NAT. L. REV. (Feb. 6, 2021), https://www.natlawreview.com/article/senator-murphy-introduces-additional-federal-name-image-and-likeness-legislation.

violation of 15 U.S.C. 57a(a)(1)(B).[234] Lastly, any aggrieved private party may bring suit in the proper federal jurisdiction and any "violation of [the] Act shall be deemed to be a per se violation of the Sherman Act."[235] Despite the many rights that this proposal would afford college athletes, this is still not the most drastic proposal.

B. The College Athlete Bill of Rights

New Jersey Senator Cory Booker's proposal is titled the "College Athlete Bill of Rights," and out of all proposals it is the most expansive with respect to the rights awarded to the athletes.[236] Senator Booker, a former college athlete who played tight-end for Stanford football, took this issue to heart and offers first-hand experience with regard to the issues that these athletes face.[237] Regarding NIL rights, the proposal only allows colleges and institutions to restrict an athlete's ability to market his or her NILs "if

---

[234] College Athlete Economic Freedom Act, S. 1, 117th Cong. § 5(a)(1) (2021). 15 U.S.C. 57a(a)(1)(B) is a "violation of a rule defining an unfair or deceptive act or practices deprescribed under section 18(a)(1)(B) of the Federal Trade Commission Act." *Id*. Federal Trade Commission Act18(a)(1)(B) is codified as 15 U.S.C. 57(a)(1)(B). *Id*.; *see also* 15 U.S.C. 57a(a)(1)(B) (2011) which provides that the Federal Trade Commission may prescribe:

> rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

Id.

[235] College Athlete Economic Freedom Act, S. 1, 117th Cong. § 5(c) (2021).

[236] Doriyon C. Glass & Gregg E. Clifton, *The Proposed "College Athletes Bill of Rights" Joins Growing Number of Federal Bills on Student-Athlete Rights*, JACKSONLEWIS (Dec. 20, 2020), https://www.collegeandprosportslaw.com/uncategorized/the-proposed-college-athletes-bill-of-rights-joins-growing-number-of-federal-bills-on-student-athlete-rights.

[237] Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020), https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football.

the State also prohibits institutions of higher education located in the State from entering into agreements with such entities."[238] The athletes would also be prohibited from entering endorsement contracts with a list of entities provided by the institution they play for.[239] While the act provides fewer freedoms in terms of NILs than the College Athlete Economic Freedom Act, this provision would require "schools to share 50% of their profit with athletes from revenue-generating sports, after accounting for cost of scholarships."[240] It also looks to bring in the Department of Health and Human Services (HHS) and the Center for Disease Control and Prevention (CDC) to work with the Sports Science Institution as well as the NCAA to address "everything from how to handle concussion and traumatic brain injuries to sexual assault and interpersonal violence to athletics health care administration,"[241] all of which are prominent issues in sports and college generally. Along the lines of player safety and health, Senator Booker proposed that Congress should create a medical trust fund paid into by the higher education institutions to cover any and all "out-of-pocket expenses relating to any sports-related injury" extending for the five years after a player's college athletic career has ended.[242] Even though this proposal is more limited with respect to NILs, it is the most expansive in every other area.

C. Student Athlete Level Playing Field Act

Ohio Congressman Anthony Gonzalez's plan is born from his experience as a former Ohio State wide receiver and NFL player. This plan deviates from the other proposals by calling for the creation of what is called the "Covered Athletic Organization Commission" ("Commission").[243] The Commission's job, among other things, would be to make recommendations to Congress about NIL rules.[244] The proposal also allows schools to prohibit an athlete from entering

[238] College Athletes Bill of Rights, S. 2, 116th Cong. § 3(a)(3)(A) (2020).
[239] *Id.* at § 3(a)(3)(B).
[240] *Id.*
[241] *Senators Booker and Blumenthal Introduce College Athletes Bill of Rights* (Dec. 17, 2020), https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights.
[242] College Athletes Bill of Rights, S. 2, 116th Cong. § 6(a)(1)(A-C) (2020).
[243] Student Athlete Level Playing Field Act, S. 2, 116th Cong. § 3(a) (2020).
[244] *Id.* at § 3(a)(1).

into endorsement contracts with: "[any] tobacco company or brand, including any vaping device or e-cigarette or related products, any alcohol company or brand, any seller or dispensary of a controlled substance including marijuana, any adult entertainment business, any casino or entity that sponsor or promote gambling activities."[245] The committee would also have the power to add any type of company or brand that it sees fit to the prohibited list.[246] Lastly, this proposal seeks to regulate the recruiting process by prohibiting any booster[247] "to directly or indirectly provide or offer to provide any funds or thing of value as an inducement for a student athlete to enroll or remain at a specific institution or group of institutions."[248]

VII. FINDING THE MIDDLE GROUND

The state acts and bills discussed above are not nearly as comprehensive as is needed to address this issue. These statutes are a start, but do not go far enough. Similar to the state laws and proposals, the NCAA's interim bylaw changes simply are not detailed enough to cover all areas of this complicated issue. Any such changes that fall short of fully allowing athletes from being compensated for their NILs will lead to more litigation. The NCAA has correctly identified that it should not be up to a single court to overhaul the entirety of a nationwide regulating body. No decision would be able to anticipate all of the issues that would later arise from it, due to the fact-intensive nature of governing student-athletes from across the nation.

Thus, the best solution is a standardized federal act. This act would theoretically take away any of the recruiting issues that can arise from the lack of uniformity of state acts and remove the power

---

[245] *Id.* at § 2(a)(2)(A-E).
[246] *Id.* at § 3(a)(4).
[247] The proposal defines a booster as:

> [I]ndividual (other than an individual who is related to a student athlete) or an organization, including a sponsor of an institution's athletic program, that provides substantial financial assistance or services to the athletic program of an institution of higher education or that promotes a team or athletic program of an institution of higher education for such individual's or organization's own substantial financial interest.

Id. at § 5(a)(4).
[248] *Id.* at § 3A.

from the NCAA's hands which have a clear bias in the outcome. However, none of the proposed pieces of federal legislation, as they currently stand, should be the final answer. Rather, a hybrid approach that combines sections from the various federal proposal would be a better outcome.

The College Athletes Bill of Rights effectively provides college athletes with the ability to capitalize on their NILs, while also allowing the schools to limit their options.[249] This seemingly results in the best of both worlds. As such, taking from the Student Athlete Level Playing Field Act, industries such as alcohol, marijuana, gambling and the like should be prohibited outright.[250] However, the Act should not go as far as allowing athletes to profit share with the schools, as this borders on an employee employer relationship. Moreover, the athletes should be able to organize together to enable them to enter to enter into group NIL deals and make a profit collectively in different fields, for example, the lucrative field of video games.[251] Lastly, as provided in the Student Athlete Level Playing Field Act, boosters should be prohibited and there should be regulation around incentivizing or attempting to incentivize a recruit in attending a school.[252] This combined proposal would address the needs of a college athlete now. It would give them the rights that they deserve, and the ability to make money that *they* earn. All the while, colleges, universities, and the NCAA will be able to retain some control over the companies that these athletes are eligible to profit from, thereby limiting any conflicts of interest and respecting the prestige and name of the NCAA and schools alike.

VIII. CONCLUSION

In 2015, Lebron James, the face of the NBA, signed a lifetime contract with Nike that "is likely to pay him over $1 billion by the time he is 64."[253] These same big name apparel companies are

[249] College Athletes Bill of Rights, S. 2, 116th Cong. § 3(a)(3)(A) (2020); *see also id*. at § 3(a)(3)(B).
[250] Student Athlete Level Playing Field Act, S. 2, 116th Cong. § 2(a)(2)(A-E) (2020).
[251] Berkowitz, et al., *supra* note 180.
[252] Student Athlete Level Playing Field Act, S. 2, 116th Cong. § 3A (2020).
[253] Michael Cannivet, *Lebron James' Mega-Deal Shows Why Globalization is Here to Stay*, FORBES (July 17, 2018, 6:41 PM),

paying large sums to universities to ensure that the athletes who attend their schools are wearing their gear on game day.[254] Although college athletes do not have the same "stardom" as a player with the caliber of Lebron James, there is still a nearly equal amount of money at play when they lace up.[255]

There have been attempts to make changes through the use of the courts, and while they have shown that the NCAA bylaws are permeable,[256] the outcomes have not been substantial enough. Regardless, it should not be left up to one court to determine how a national agency regulates its members..[257] States have started to propose and pass legislation to strike down these archaic NCAA bylaws in favor of allowing athletes to have the right to profit from their NILs.[258] The state actions, compounded with the Supreme Court ruling in *Alston,*[259] have forced the hand of the NCAA to adopt an interim NIL policy.[260] While this is an unprecedented step from the NCAA, it is imperative that there is federal resolution of this issue, something that the NCAA is directly calling for.[261] The best action would be to combine the provisions from three of the leading proposals. This would give athletes the ability to profit from their NILs and other lucrative fields such as the video game industry, while also protecting universities and the NCAA from being associated with brands or companies that could lead to conflicts of interest with their current contracts, or those they feel do not best represent them.

---

https://www.forbes.com/sites/michaelcannivet/2018/07/07/lebron-james-mega-deal-shows-why-globalization-is-here-to-stay/?sh=61757e885c1e.

[254] Wire, *supra* note 4.

[255] Gibson, *supra* note 60.

[256] Meyer & Zumbalist, *supra* note 30, at 274.

[257] Nat'l Collegiate Athletic Ass'n v. Shawne Alston, et al., 2020 WL 7366281, 5 (2020) (citing American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975)).

[258] Berkowitz et al., *supra* note 180.

[259] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S., at 36 (2021), supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.

[260] Hosick, *supra* note 12.

[261] *Id*. (quoting NCAA President Mark Emmert "… we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment – both legal and legislative – prevents us from providing a more permanent solution and the level of detail student-athletes deserve.").