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Student-Athlete Endorsement Deals and the Beginning of the Name, Image, and Likeness Era for College Athletics

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I. Introduction

In 2019, Louisiana State University, Clemson University, the University of Oklahoma, and Ohio State University each received over $6 million dollars for their qualification to the College Football Playoff.[1] Ed Orgeron, the head coach of the national championship winning Louisiana State, received a bonus of over $500,000 for the team's accomplishment.[2] Despite these substantial sums, student-athletes on the participating teams were prohibited from using their own names, images, and likenesses to profit from their own achievements. With a wave of proposed federal legislation and a pending Supreme Court case coming within months of the conclusion of the Louisiana State's championship, it is likely that the 2019 College Football playoff will represent the final major college championship in which the student-athletes were prohibited from marketing and profiting from their participation in the event.

The prohibition on student-athlete compensation dates back to the very beginning of collegiate athletics.[3] Supporters of amateurism in college sports argue that amateurism differentiates college sports from their professional counterparts, and that amateurism advances the legitimate educational needs of both the student-athletes and their respective colleges and universities.[4] As of the Spring of 2021, however, the amateurism model has never faced such uncertainty. A

[1] Kristi Dosh, *College Football Payouts for the 2019 Season*, FORBES, (Dec. 28, 2019) https://www.forbes.com/sites/kristidosh/2019/12/28/college-football-playoff-payouts-for-2019-season/?sh=8401bba3d5a1
[2] *Id.*
[3] Jayma Mayer, et al., *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. OF SPORTS & ENT. LAW 247, 250 (2020).
[4] Greta Anderson, *Supreme Court takes on College Athlete Pay*, INSIDE HIGHER ED (Dec. 17, 2020), https://www.insidehighered.com/news/2020/12/17/supreme-court-will-address-education-related-athlete-pay-amateurism-rules

Supreme Court case, a number of proposed federal laws granting student-athletes the ability to profit from their name, image, and likeness, and mounting public pressure all indicate that the future of college sports will soon look drastically different than it ever has before.

This comment argues that any federal legislation concerning compensation for NCAA student-athletes should include the establishment of an independent oversight body and allow for student-athletes to enter group licensing deals. The proposed oversight body would serve as a replacement for a trade association in representing the interests of the student-athletes in negotiating the group-licensing deals. Importantly, group licensing deals allow student-athletes to profit from such lucrative markets as video games and memorabilia. The benefits of a third-party oversight body also include protection of student-athletes from predatory contracts and agents, ensuring compliance National Collegiate Athletic Association ("NCAA") rules and regulations free of conflicts of interest, and a resource for student-athletes to educate themselves about their possible profitability.

Included in this federal legislation should also be considerations of the NCAA's valid interest in preserving the amateur status of student-athletes and adherence to the guidelines of Title IX. The protection of amateur status of student-athletes, which is the restriction on NCAA schools from compensating student-athletes for non-education related activities, is necessary to preserve the financial security of athletic departments and protect student-athletes who participate in sports other than football and basketball.

Part II of this note provides a brief history of amateurism in collegiate athletics, as well as an overview of current legal challenges to the NCAA's restrictions on "non-educational" benefits to student-athletes, and state and federal legislation directed at student-athlete compensation. Part III of this note analyzes the positive and negative aspects of selected legal and legislative challenges

to the NCAA's current amateurism model and their potential effects on student-athletes rights as well as collegiate athletic departments. Although this note does not analyze every proposed law dealing with student-athlete compensation, the topics covered by each bill remain similar and consistent. Part III of this note also argues that the most beneficial framework for both NCAA member institutions and student-athletes going forward allows student-athletes to enter into group-licensing deals and establishes an independent oversight board to oversee student-athlete compensation deals. This proposal preserves the amateur status of student-athletes while providing protection against unfair labor practices and bad-faith actors.

This note aims to reach a compromise between the welfare of student-athletes and their right to profit from their labor and name, image, and likeness; and the interest in preserving the difference between college sports and their professional counterparts. The arguments for broader student-athlete rights, such as healthcare, letters of intent, and transfer eligibility, are beyond the scope of this article.

PART II

A Brief History of Amateurism in the NCAA

The complicated relationship between amateurism and college sports dates to the early 20th century, when the popularity of college sports rose across the United States.[5] Although the NCAA originally did not specifically define what made an athlete an "amateur" during the infancy of the Association, member institutions were restricted from providing any form of compensation for a student's participation on an athletic team, including scholarships.[6] In 1916 and 1922, the NCAA finally attempted to clarify what it meant by "amateurism", defining an

[5] Mayer supra note 3 at 50.
[6] *Id.*

amateur sportsman as "one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation."[7] Nearly immediately, however, the NCAA found enforcement of its amateurism rules complex and difficult.[8] One report from 1929 found that three quarters of the NCAA's 112 member institutions violated the NCAA's amateurism rules in some way.[9]

Due in part to the flagrant disregard colleges often had for the restrictions on payment to student-athletes, the NCAA amended amateurism rules multiple times throughout the 20th century.[10] These amendments allowed for schools to provide athletically related financial aid limited to tuition and incidental expenses and commonly accepted education related expenses such as costs for room and board, tuition, and books.[11] Additionally, the NCAA restricted the award of multiyear scholarships to student-athletes.[12] This decision allowed for schools to withdraw a student-athlete's scholarship for any reason, including athletic performance.[13] The NCAA finally amended this rule in 2012, and although the "Power Five" conferences all now guarantee multiyear scholarships for student-athletes, there is a split among other NCAA member institutions on the issue.[14]

Current NCAA regulations state that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."[15] According to the 2020-2021 NCAA

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[7] *Id*.
[8] *Id* at 251.
[9] *Id*.
[10] *Id* at 252-54
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Kyle Winters, *Are Athletic Scholarships Guaranteed for Four Years?*, USA TODAY (July 23, 2019), https://usatodayhss.com/2019/ncsa-are-athletic-scholarships-guaranteed-for-four-years
[15] NAT'L COLLEGIATE ATHLETIC ASS'N., 2020-2021 NCAA DIVISION 1 MANUAL 60 (2020).

Rules Manual, a student-athlete is no longer considered an amateur when any of the following conditions are met:

> (a) the individual uses his or her athletics skill ("directly or indirectly") for pay in any form in that sport;
> (b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
> (c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
> (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
> (e) After initial full-time collegiate enrollment, enters into a professional draft; or
> (f) Enters into an agreement with an agent.[16]

The current NCAA rules allow for schools to compensate student-athletes for "actual and necessary" expenses such as meals, lodging, equipment and supplies, and medical treatment and physical therapy.[17] Additionally, schools may compensate student-athletes for education related expenses, such as books and technology.[18] The NCAA also allows for some limited forms of compensation unrelated to education and "actual and necessary" expenses, such as for participation in Olympic Sports and post-season bowl games for football.[19] Significantly in 2015, the NCAA allowed for the first time student-athletes to be compensated for the "cost-of-attendance", such as travel and other expenses.[20] Much of the current debate surrounding student-athlete compensation deals specifically with these rules, and will be discussed at length in Section III of this comment.

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[16] NAT'L COLLEGIATE ATHLETIC ASS'N., supra note 15 at 61, 62.
[17] NAT'L COLLEGIATE ATHLETIC ASS'N., supra note 15 at 62
[18] NAT'L COLLEGIATE ATHLETIC ASS'N., supra note 15 at 63.
[19] NAT'L COLLEGIATE ATHLETIC ASS'N., supra note 15 at 244, 245.
[20] NAT'L COLLEGIATE ATHLETIC ASS'N, *Cost of Attendance Q&A*, https://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa, (Sept. 3, 2015); *see also* Steve Berkowitz and Andrew Kreighbaum, *College Athletes Cashing in with Millions in New Benefits*, USA TODAY, https://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost--attendance-meals-2015/31904839/, (Aug. 19, 2015).

Further complicating these byzantine amateurism rules, the NCAA permits certain colleges and universities differing amounts of leeway in compensating their student-athletes depending on their conference affiliation. In response to the staggering amounts of revenue and attention received by the more prolific collegiate athletic departments, the NCAA granted the "Power 5 Conferences" (Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference) and their member institutions certain levels of autonomy "to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being."[21]

In April 2020, due to the growing public support for changes to the amateurism model as well as legal and legislative challenges, the NCAA Board of Governors issued a final report on its recommendations for student-athlete compensation through third-party endorsements both related and unrelated to athletics.[22] These recommendations can be read as the NCAA's attempt to maintain its amateurism principles and differentiate itself from the professional leagues, while adjusting to the reality that allowing student-athletes to profit off their name, image, and likeness is the undeniable modern trend. The Board of Governors recommended that any changes to the NCAA's rules must be in accord with such principles as "maintaining the priorities of education and the collegiate experience to provide for opportunities student", "making clear the distinction between collegiate and professional opportunities", and "making clear that compensation for athletics performance or participation is impermissible."[23] In promoting these principles in

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[21] NAT'L COLLEGIATE ATHLETIC ASS'N., supra note 13 at xi; *see also* Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/ (Aug. 7, 2014).
[22] NAT'L COLLEGIATE ATHLETIC ASS'N, *Board of Governors Moves toward allowing Student-Athlete Compensation for Endorsements and Promotions*, http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions, (April 29, 2020).
[23] *Id*.

support of federal NIL legislation, the Board of Governors stated it would "engage Congress" to "safeguard the nonemployment status of student-athletes" and "maintain the distinction between college athletes and professional athletes."[24]

The working group responsible for these recommendations stressed that any rule changes must take into account the role college sports plays in higher education.[25] What exactly that role is, however, remains unclear. The NCAA appeared motivated to implement these proposed rule changes quickly, according to Gene Smith, a member of the Board of Governors, January 31, 2021 was the target date to implement the new rules.[26] The NCAA's haste in implementing favorable NIL rules for their member institutions is understandable, as 2021 will likely be a landmark year for NIL legislation and legal battles overcompensation for student-athletes.

B. Legal Challenges to the NCAA's Amateurism Model

Since the 1980's, when the rise of cable television brought with it increased exposure for college athletics, the NCAA has faced a series of lawsuits over compensation for both schools and athletes.[27] A significant number of these lawsuits raise anti-trust challenges to the NCAA's model, beginning with *Board of Regents of the University of Oklahoma v. NCAA* in 1984.[28] In *Board of Regents,* the University of Oklahoma successfully argued that the NCAA violated Section I of the Sherman Antitrust Act by restricting the number of football games NCAA member schools could play on national television.[29] As the groundbreaking case on applying

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[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Alicia Jessop, *The Supreme Court Set the NCAA on New Ground in 1984. Will it Again in Alston?* THE ATHLETIC, https://theathletic.com/2267535/2020/12/18/supreme-court-alston-ncaa/ (Dec. 18, 2020); Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 183 (Winter/Spring 2020).
[28] Benjamin Feiner, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J. L. & ARTS 93, 99, 101 (Fall 2020); Edelman, supra note 25 at 183.
[29] NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984); Edelman, supra note 27 at 183.

anti-trust law to the NCAA's model, *Board of Regents* is significant in many ways, including its application of the "rule of reason" in the context of college sports and its acknowledgment in dicta that amateurism and competitive balance are both potential justifications for otherwise potentially impermissible practices by the NCAA.[30]

Although the NCAA has argued *Board of Regents* created an amateurism exception under antitrust law, Marc Edelman, a prominent sports and entertainment lawyer specializing in student-athlete rights, has criticized this position as too broad a reading of the Court's holding.[31] Edelman argues that the *Board of Regents* Court referenced the value of amateurism in considering whether to apply the rule of reason test or the *per se* test for illegality under the Sherman Antitrust Act, not as carving out an entire exception for the amateurism of college athletes.[32] In this case, the Court did find in favor of applying the rule of reason test, in which the Court analyzed the anticompetitive harm of the restriction as compared to the counteracting procompetitive benefits of the rule.[33] Additionally, Edelman references the unique style of Justice Stevens's opinion writing as limiting the holding of the Court to the specific facts before the Court, which concerned the broadcast rights of college athletic departments, not the amateurism of student-athletes.[34] According to Edelman, this leaves open the possibility that future courts may find that some NCAA amateurism rules serve as a procompetitive effect on a Sherman Antitrust rule of reason analysis, but the holding of *Board of Regents* does not establish a rule that *all* NCAA amateurism rules are *per se* legal.[35]

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[30] Feiner, supra note 29 at 102; *Bd. Of Regents*, 468 U.S. at 120.
[31] Edelman, supra note 27 at 200.
[32] Edelman, supra note 27 at 200.
[33] *Bd. Of Regents*, 468 U.S. at 100-03; Feiner, supra note 29 at 101.
[34] Edelman, supra note 27 at 200, 201.
[35] Edelman, supra note 27 at 201.

The *Board of Regents* decision has gained added significance in recent years, with the NCAA facing increased litigation concerning its amateurism rules. In 2015, The Ninth Circuit applied *Board of Regents* to reach its breakthrough ruling for student-athlete rights in *O'Bannon v. NCAA* ("*O'Bannon II"*).[36] In *O'Bannon II*, the Ninth Circuit upheld a district court's finding that the NCAA's amateurism rules implicated antitrust law.[37]

In *O'Bannon II*, Ed O'Bannon, a former college basketball player at the University of California-Los Angeles, originally sued the NCAA after finding out his likeness appeared in an officially licensed NCAA video game without his permission and without a promise of compensation.[38] O'Bannon sought to enjoin the NCAA from preventing student-athletes from profiting off their NILs in three specific markets: (1) live game telecasts; (2) sports video games; and (3) game rebroadcasts, advertisements, and other archival footage.[39] Both the district court and Ninth Circuit found that under the Sherman Antitrust Act, the NCAA's prevention of name, image, and likeness payments in these markets was a commercial restraint of trade.[40] To reach this conclusion, the Ninth Circuit applied the Rule of Reason three-step burden shifting framework to analyze the validity of the Sherman Act claims.[41] In applying the Rule of Reason analysis, the Ninth Circuit affirmed the district court's finding of an LRA allowing NCAA member schools to award student-athletes full scholarships up to the Cost of Attendance.[42]

The Ninth Circuit however did find some of the NCAA's arguments in favor of preserving amateurism in college persuasive, and overruled the district court's ruling allowing

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[36] Mayer, supra note 5, at 270, 271.
[37] O'Bannon v. NCAA (O'Bannon II*)*, 802 F.3d 1049, 1051 (9th Cir. 2015).
[38] Mayer, supra note 5, at 270, 271.
[39] O'Bannon v. NCAA (O'Bannon II*)*, 802 F.3d 1049, 1053 (9th Cir. 2015); Mayer, supra note 5 at 271.
[40] O'Bannon v. NCAA (O'Bannon II), 802 F.3d 1049, 1053 (9th Cir. 2015).
[41] *Id* at 1051.
[42] *Id a*t 1054.

schools to award student-athletes up to $5,000 a year.[43] In reaching this decision, the *O'Bannon II* Court differentiated between payments tied to educational related activities and payments not related to education.[44] Both the Plaintiffs and NCAA appealed after the Ninth Circuit's decision, but the Supreme Court denied both petitions.[45]

In May of 2020,the 9th Circuit once again rolled back NCAA prohibitions on student-athlete compensation in *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., ("Alston").*[46] In *Alston,* the Ninth Circuit ruled that NCAA limits on "non-cash compensation related to education related benefits" for student-athletes violated antitrust law. [47] The court found that such limits did not serve a procompetitive purpose.[48] Examples of education related benefits identified by the district court include: "computers, science equipment, musical instruments, post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships."[49] To reach this conclusion, the 9th Circuit relied on demand analyses that demonstrated that since the NCAA loosened restrictions on cost-of-attendance payments to student-athletes after *O'Bannon II*, consumer demand for college sports had actually increased.[50] Additionally, the court found persuasive evidence that implementation of the

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[43] *Id.*
[44] *Id.*
[45] Mayer, supra note 5, at 270, 271.
[46] *958 F.3d 1239, 1255 (9th Cir. 2020);*Greta Anderson, *Court Panels Rules Against NCAA Restrictions on Athlete Pay*, INSIDE HIGHER ED., (May 19, 2020).
[47] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020).
[48] *Id.*
[49] In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1088 (N.D. Cal., Mar. 8, 2019)
[50] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1258 (9th Cir. 2020)

requested seven-education related benefits would not harm demand for college sports, either.[51] The court also found that the NCAA implemented the restrictions on education-related benefits arbitrarily, and without consulting any demand analyses.[52]

Like *O'Bannon II*, however, the court found the NCAA's prohibition on non-education related payments permissible.[53] Here, the court held that only the NCAA's restriction on non-cash education related benefits failed the antitrust Rule of Reason test.[54]The court found the NCAA's argument against "unlimited cash payments untied to education" for student-athletes credible.[55] These restrictions, the court held, served a procompetitive purpose of preventing college sports from becoming "professionalized."[56] The court found sufficient evidence to support the argument that the distinction between college and professional sports drives consumer demand and benefits the sports-entertainment industry.[57]

Judge Milan Brown, authoring a concurring opinion in *Alston,* cast doubt on the legitimacy of the Court's interpretation of antitrust law and the amateurism of college athletes.[58] Judge Brown emphasized that the harm suffered by student-athletes because of the NCAA's amateurism rules "is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services."[59]

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[51] *Id.*
[52] *Id.*
[53] Anderson, supra note 46.
[54] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., supra note 33 at 1265.
[55] *Id.*
[56] *Id.*
[57] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., supra note 33 at 1265; *See also* Anderson, supra note 46.
[58] *See* Anderson, supra note 46.
[59] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, supra note 33 at 1265; *See also* Anderson, *supra* note 46

Alston represents the most significant challenge to the NCAA's amateurism rules since at least *Board of Regents,* and quite possibly ever, as the Supreme Court decided in October 2020 to grant the NCAA's petition to hear the case.[60] Supporters of both the NCAA and those in favor of increased compensation for student-athletes see the Supreme Court's decision as an opportunity to finally clear up the confusion over applying antitrust law to NCAA rules and the dicta from *Board of Regents*.[61]

On March 31, 2021, the Supreme Court heard oral arguments in *Alston*.[62] The majority of Justices seemed skeptical of the NCAA's arguments in favor of restricting NIL compensation for student-athletes.[63] In particular, the Justices seemed concerned with "price-fixing" by the NCAA.[64]Other notable moments from the *Alston* oral arguments included the Justices noting the hypocrisy in paying coaches incredibly large salaries while restricting student-athlete earnings; and the discussions around the massive revenues brought in by "powerhouse" programs.[65] While it is too early to predict how the Supreme Court will rule in *Alston*, the Justices' line of questioning seemed to indicate that they did not view the NCAA's interpretation of amateurism favorably.

Additionally, it is important to note another area in which the judiciary may yet involve itself on the issue of student-athlete rights. As well as seeking the ability to benefit from their

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[60] Robert Barnes and Rick Mase, *Supreme Court Will Hear NCAA Dispute Over Compensation for Student-Athletes*, WASH. POST., https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html, (Dec. 16, 2020).
[61] *Id.*
[62] Dan Wetzel, *NCAA v. Alston: Supreme Court not impressed with old arguments, but how will it rule?*, YAHOO SPORTS., https://sports.yahoo.com/nca-as-stubborn-apathetic-nature-on-display-in-front-of-supreme-court-195237939.html, (Mar. 31, 2020).
[63] *Id.*; Michael McCann, *SCOTUS Justices Challenge NCAA Amateurism in Historic Oral Argument,* SPORTICO, https://www.sportico.com/law/analysis/2021/ncaa-v-alston-supreme-court-1234626223/ (Mar. 31, 2020)
[64] McCann, supra note 63.
[65] *Id.*

name, image, and likeness, and increased benefits from their respective schools, college athletes in recent years have also attempted to obtain increased benefits through unionization.[66] In 2013, football players at Northwestern University formed the College Athletes Players Association ("CAPA") and sought to gain similar rights to professional athletes under the National Labor Relations Act.[67] After an initial favorable ruling for CAPA, the National Labor Relations Board declined to address the merits of CAPA's argument, and instead found that the unionization of college athletes would not "promote stability in labor relations."[68] In declining the case on jurisdictional grounds, the NLRB emphasized the transitional period college athletics was in in 2015, the inconsistency in only applying the ruling to seventeen of 128 Division 1 FBS private colleges, and the need to resolve ongoing market issues and labor disputes in college athletics (some of which have been now, others have not).[69] The decision of NLRB is not binding and does not require deferential treatment going forward.[70] As the debate around student-athlete group licensing and NIL continues, this is likely an important area to revisit. A proposal for a student-athlete trade union is discussed further in Section IV.

C. State and Federal Legislation

As well as the looming Supreme Court decision in *Alston*, the NCAA is also dealing with both state and federal legislation aimed at giving student-athletes increased rights to profit from endorsement deals and their own name, image, and likeness. When NIL legislation takes effect, whether at the state or federal level, the NCAA will enter a groundbreaking era for student-

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[66] Mayer, supra note 5, at 284.
[67] Mayer, supra note 5, at 284.
[68] Northwestern University, Employer and College Athletes Players Ass'n, Case 13-RC-121359, 2014 NLRB LEXIS 221 (March 26, 2014).
[69] Mayer, supra note 5, at 284.
[70] Dawson v. NCAA, 250 F. Supp. 3d 401, 406 (N.D. Cal., Apr. 25, 2017)

athlete rights. College athletic departments must be prepared to deal with the complexities of this new era to ensure student-athletes are protected from exploitation, and that the principles of the NCAA remain intact.

I. Proposed State NIL Legislation

Taking effect on January 1, 2023 California's Senate Bill 206, also known as the "Fair Pay to Play Act", was the first NIL bill to receive a state legislature's approval and become law.[71] By enacting SB 206, California became the first state to allow for student-athletes to profit off their own publicity and sign endorsement deals with third-parties without interference from the NCAA or their own universities.[72] The Act also prohibits the NCAA from preventing a member institution from competition if the institution's student-athletes are compensated for profiting from the use of their name, image, or likeness.[73] The Act, however, does not allow for NCAA member schools to directly pay student-athletes.[74] The NCAA staunchly opposed the "Fair Pay to Play Act" initially, threatening to ban California schools from NCAA competitions in what appeared to be an attempt to deter other states from passing similar legislation.[75] Eventually, the NCAA changed its position on the legislation and issued its own statement supporting student-athlete NIL rights.[76]

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[71] Edelman, supra note 27 at 177, 181.
[72] *Id.*
[73] Melody Gutierrez & Nathan Fenno, *California Will Allow College Athletes to Profit from Endorsements Under Bill Signed by Newsom,* L.A. TIMES (Sept. 30, 2019), https://www.latimes.com/california/story/2019-09-30/college-athlete-endorsement-deals-ncaa-california-law
[74] *Id.*
[75] Edelman, supra note 27 at 181.
[76] *See* Feiner, supra note 28 at 94 *citing* NAT'L COLLEGIATE ATHLETIC ASS'N *Board of Governors Starts Process To Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), https://perma.cc/R55C-F22E.

In June 2020, Florida passed their own legislation allowing for student-athletes to profit off from their name, image, and likeness.[77] The Florida legislation, which would take effect on July 1, 2021, is distinguished from the California "Fair Play to Pay Act" with its limits on NIL compensation tied to "market-value" and its prohibition on compensation related to a student-athlete's attendance at a particular university.[78] The growing trend nationwide points to the vast majority of states introducing similar legislation, at the time of this outline dozens of other legislatures are considering their own state-specific NIL bills.[79]

II. Rep. Anthony Gonzalez's Proposed Federal Legislation

To avoid varying state enforcement of NIL legislation and litigation across multiple states, the NCAA has advocated for a uniform federal law addressing student-athlete compensation.[80] An important aspect of the NCAA favored legislation is also antitrust protection, which would prevent further litigation about student-athlete compensation.[81] As of January 2021, three proposals for federal NIL legislation appeared to be set for Congressional review, one from Rep. Anthony Gonzalez (R-OH), another from Sen. Roger Wicker (R-MS.), and a third, expansive "Student-Athlete Bill of Rights" from Cory Booker (D-NJ.)[82]

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[77] Colin O'Brien, *Florida is Latest State to Sign NIL Legislation into Law*, NEWS TRIBUNE (June 13, 2020), https://www.newstribune.com/news/sports/college/mizzou/story/2020/jun/13/florida-latest-state-sign-nil-legislation-law/830677/

[78] Steve Berkowitz, *Florida Governor Signs Bill on College Athletes' Name, Image, and Likeness*, USA TODAY (June 12, 2020), https://www.usatoday.com/story/sports/college/2020/06/12/florida-bill-college-athletes-name-image-likeness/5347470002/

[79] *Id.*

[80] NAT'L COLLEGIATE ATHLETIC ASS'N., *Statement from Federal and State Legislation Working Group co-chairs on name, image and likeness efforts*, (Jan. 23, 2020); *see also* Billy Witz, *A State Skirmish over N.C.A.A. Amateurism Rules has Quickly become a National Battle*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/sports/ncaa-amateurism-rules.html

[81] Witz, supra note 80.

[82] Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image, and Likeness Bill to be Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 10, 2020), https://www.si.com/college/2020/12/10/ncaa-name-image-likeness-bill-congress; 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 proposed federal legislation from Rep. Anthony Gonzalez would allow for student-athletes to profit from their name, image, and likeness through endorsement deals, while satisfying several NCAA requests.[83] These requests include federal preemption over state law, and restriction on student-athletes profiting from endorsement deals with certain third parties, such as casinos and gaming companies, alcohol and tobacco companies, and marijuana dispensaries, among others.[84] Importantly, this legislation also does not classify student-athletes as employees of their respective schools, and bars endorsement deals with persons considered "boosters" by the NCAA.[85]

Rep. Gonzalez's legislation does contain some student-athlete friendly provisions, however.[86] Notably, Rep. Gonzalez's proposed legislation does not include antitrust protection for the NCAA and does not restrict student-athletes from endorsing products that conflict with their respective school's own endorsement deals.[87] Although Rep. Gonzalez's bill includes a Democratic co-sponsor, Rep. Emmanuel Cleaver (D-MO), experts predict that the bill will face criticism from advocates of more expansive student-athlete rights and Democratic senators due to the bill's inclusion of state preemption and its lack of such provisions as long-term healthcare for student-athletes and revenue sharing with schools.[88]

III. The Collegiate Athlete Compensation Rights Act

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[83] Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED, (Sept. 24, 2020), https://www.si.com/college/2020/09/24/name-image-likeness-bill-congress-endorsements
[84] *Id.*
[85] Steve Berkowitz, *Two Members of U.S. House Introduce Bill Regarding NCAA Athletes' Name, Image, and Likeness*, USA TODAY (Sept. 24, 2020), https://www.usatoday.com/story/sports/2020/09/24/house-bill-would-set-name-image-and-likeness-rules-ncaa-athletes/3515875001/; Dellenger, supra note 77.
[86] Dellenger supra note 83.
[87] *Id.*
[88] *Id.*

The second significant federal NIL legislation proposal in 2020 came from Senator Roger Wicker, (R-MS.), chair of the Senate Commerce Committee.[89] Sen. Wicker's bill, S.5003, The Collegiate Athlete Compensation Rights Act, contains many of the provisions sought by the NCAA in a federal NIL law.[90] The notable aspects of the Collegiate Athlete Compensation Rights Act include restrictions on "conferences and schools from adopting any contracting, rule, or requirement that 'prevents or unduly restricts' a college athlete from earning NIL compensation."[91] The bill also allows student-athletes to hire agents to negotiate endorsement deals with such businesses as apparel, shoe, and video game companies, and emphasizes the need for schools to allow student-athletes to earn "market-value" for entering into such deals.[92]

Significantly, the Collegiate Athlete Compensation Rights Act does not include language prohibiting student-athletes from forming a trade association or 501(c)(4) non-profit.[93] If this bill is eventually passed, this omission could provide an opportunity for student-athletes to enter into group-licensing deals.

Unlike Rep. Gonzalez's proposed bill, Sen. Wicker's legislation includes the NCAA's sought after anti-trust protection and restrictions on endorsement deals for student-athletes which conflict with endorsement deals for their respective schools.[94] A further inclusion in Sen. Wicker's bill that is likely to draw criticism is the tying of NIL opportunities for student-athletes to their number of credit hours completed in college.[95] This proposal, while likely too far of a restriction on student-athlete rights, is rooted in the important issue of educating student-athletes

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[89] Dellenger, supra note 82(a).
[90] Michael McCann, *Wicker's NIL Bill Allows Agents for Athletes and Liability Shields for Schools*, SPORTICO (Dec. 14, 2020), https://www.sportico.com/law/analysis/2020/roger-wicker-name-image-likeness-1234618233/
[91] *Id.*
[92] *Id.*
[93] McCann, supra note 90.
[94] Witz, supra note 80(b); Dellenger, supra note 82(a).
[95] McCann, supra note 90.

on what their NIL rights actually mean.[96] The education of student-athletes on their NIL rights and how they can profit from endorsement deals while protecting themselves from predatory deals and actors is an issue that will be further addressed in Section III.

Also notable about the Collegiate Athlete Compensation Rights Act is the assignment of the FTC for oversight and enforcement, with the option of promoting a nonprofit third-party for the "daily administration of NIL activities."[97] The "Power Five" conferences are in favor of establishing the Federal Trade Commission ("FTC") as the regulator of student-athlete endorsement deals.[98] Under the NCAA's preferred model, a "Certification Office" responsible for licensing and regulating agents hired by student-athletes for their endorsement deals would be established under FTC control.[99]

The FTC is an attractive agency to enforce any NIL legislation because the Commission has statutory authority to regulate agents under the "Sports Agent Responsibility and Trust Act" (SPARTA).[100] SPARTA prohibits agents from directly or indirectly recruiting student-athletes "by giving any false or misleading information, making a false promise or representation, or providing anything of value to a student athlete, or anyone associated with the athlete, before he or she has entered into an agency contract."[101] Under SPARTA, the FTC has the authority to issue cease and desist orders and other civil penalties for violations.[102] However, SPARTA has rarely, if ever, been enforced since it was enacted in 2004, and questions exist over its efficacy in

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[96] *Id*.
[97] Dellenger, supra note 82(a).
[98] Michael McCann, *Sports Agents and College Athletes: Is the FTC the Answer?*, SPORTICO (July 29, 2020), https://www.sportico.com/law/analysis/2020/sports-agents-college-athletes-feds-1234610203/
[99] *Id*.
[100] *Id*.
[101] 15 U.S.C. § 7802.
[102] McCann, supra note 92.

handling the regulation of agents.[103] Industry professionals have also raised concerns about the expertise of the FTC in handling NIL endorsement deals and the logistics of implementing a government-run oversight body for such a broad field.[104]

IV. The College Athlete Bill of Rights

Of all the proposed federal NIL legislation, by far the most expansive and favorable for student-athletes is Cory Booker's (D-NJ) "College Athletes Bill of Rights."[105] Senator Booker's bill includes many groundbreaking proposals, such as lifetime scholarships for student-athletes, government involvement with student-athlete healthcare, a transparent donation process for boosters, and unrestricted transfers for student-athletes.[106]For the purposes of this comment, the most significant aspects of the College Athletes Bill of Rights are its requirements of revenue sharing between colleges and student-athletes for all sports-related profits, and the opportunities it creates for student-athletes to pursue group-licensing deals.[107]

Regarding the revenue-sharing portion of the College Athletes Bill of Rights, Senator Booker proposes a 50% share of the profits between colleges and their student-athletes for their respective sports.[108]This revenue sharing model could potentially lead to football and men's basketball players receiving six-figure payments or higher from their schools.[109] To ensure fair-dealing with the revenue sharing model, the bill also requires schools to provide annual reports

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[103] *Id*.
[104] *Id*.
[105] Michael McCann, *Booker's Athletes' Rights Bill Seeks Profit-Sharing and Health Standards Amid Overhaul*, SPORTICO, (Dec. 17, 2020), https://www.sportico.com/law/analysis/2020/college-athletes-bill-of-rights-1234618640/; Dellenger, supra note 82(b)
[106]Billy Witz, *Bill Offers New College Sports Model: Give College Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html#:~:text=The%20proposal%2C%20called%20the%20College,subpoena%20power%20to%20ensure%20compliance; *see also* McCann, supra note 105(a).
[107] McCann, supra note 99(a).
[108] *Id*.
[109] Witz, supra note 106(a).

on the salaries of their coaching staffs, and detailed accountings of donations made by boosters.[110]

The NIL portion of the College Athletes Bill of Rights grants student-athletes a broad range of freedom, as well. Like Rep. Gonzales's bill, and in contrast with Senator Wicker's legislation, this proposal would restrict schools from preventing student-athletes from signing endorsement deals with competitive sponsors to their respective athletic department for promotion outside of official team activities.[111] Additionally, the College Athletes Bill of Rights allows for student-athletes to sign with agents and explicitly endorses group licensing through either trade associations or a 501(c)(4) nonprofit.[112] For enforcement purposes, Senator Booker proposes the establishment of nine-member body appointed by the President with five spots reserved for former college athletes and the power to investigate and fine colleges up to $250,000 for violations of the provisions of the bill.[113]

PART III

Practical Issues in the Proposed Solutions

It is possible for student-athletes to receive broad NIL rights which allow them to maximize their earnings potential all the while satisfying the NCAA's stated goals of amateurism and maintaining the role of college sports in the role of higher education. By doing this, student-athletes can maximize their earning potential (like any one of their classmates) while NCAA schools do not have to take on the added expense of directly paying their student-athletes. Additionally, this framework incentives student-athletes to stay in school rather than pursue

[110] McCann, supra note 105(a).
[111] McCann, supra note 105(a); Dellenger supra note 82(b).
[112] McCann, supra note 105(a)
[113] Witz, supra note 106(a).

professional careers prematurely out of financial necessity. Toachieve these goals, however,, concessions must be made by both advocates for student-athlete rights and by the NCAA itself. The risks of failing to reach a compromise which balances the valid interests of both sides includes the continued mistreatment of student-athletes, loss of opportunities for student-athletes in "non-revenue" sports (especially female athletes), and in an extreme scenario, the end of scholarship athletics as a whole.

Both student-athletes and the NCAA can achieve their stated goals for student-athlete compensation through federal NIL legislation which allows for group licensing for student-athletes and the establishment of an independent oversight and advisory committee in charge of regulation and enforcement, all the while preserving amateurism and maintaining a clear distinction between college sports and professional leagues. Under this proposed approach, schools will make no direct payments to student-athletes, and payments tied specifically to athletic performance will be prohibited. However, student-athletes will have broad freedom to enter into endorsement deals for their NIL, sign with agents, and receive trade union status with the opportunity to enter group licensing deals.

A. Preemption over State Law and a Limited Antitrust Exemption for the NCAA

One of the few things both the NCAA and student-athletes can agree on is the need for federal NIL legislation.[114] As Rep. Anthony Gonzalez noted in support of his proposed NIL bill, there should be a "balance" between the needs of NCAA member institutions and student-athlete rights.[115] The parties are co-dependent on one another, and if one side is too heavily favored in the legislation, the entire system could end up broken.

[114] *See* Mayer, supra note 5, at 270, 271.
[115] Dellenger, supra note 83.

Properly enacted federal legislation will ensure the welfare of student-athletes is protected; and the legitimate interest the NCAA has in maintaining its amateurism rules are maintained. Although there is a current partisan split over whether this federal NIL bill will include preemption over state law, it is probable that preemption will likely serve the best interests of both parties.[116]

Both Representative Gonzalez's and Senator Wicker's proposed NIL legislation include preemption over state laws, while Senator Booker's proposal does not.[117] It is true that allowing states to enact their own NIL laws will allow for more expansive rights for student-athletes as states seek to attract top athletic talents to their universities. However, if preemption is not included in a federal NIL bill, a potentially "chaotic" situation will emerge for the NCAA, upsetting the current competitive nature of college sports.[118] The NCAA maintains a valid interest in preventing a group of schools from gaining an advantage in the recruitment of student-athletes because of NIL laws.[119] This "piecemeal" state-by-state experimentation approach to NIL legislation would go against the NCAA's objective of providing a "fair and level playing field for 1,100 campuses and nearly half-a-million student-athletes nationwide."[120] A possible result of not including preemption in any federal NIL bill is that a state could pass extremely favorable student-athlete compensation laws in which it classifies student-athletes as employees and directs state funds to pay their salaries while not requiring any academic standards. In this

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[116] *Id.*
[117] Dellenger, supra note 82(a)
[118] Ross Dellenger, *Congress Members Lambaste NCAA's Vague and Restrictive NIL 'PR Document'*, SPORTS ILLUSTRATED, https://www.si.com/college/2020/04/30/ncaa-nil-changes-congress-reaction (Apr. 30, 2020).
[119] *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L LAW REVIEW, OCT. 15, 2020.
[120] Justin W. Aimonetti and Christian Talle, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, STAN. L. REV., (Dec. 2019).

case, the competitive balance the NCAA seeks to achieve is harmed, as are the other programs at the state's universities who receive less funds.

Student-athletes would benefit from federal NIL legislation as well. Federal NIL legislation would allow a level playing field for student-athletes across the country to benefit from their NIL, without distinction based on where they chose to attend school. Student-athletes who choose to attend a particular university based on factors such as the school's academic reputation, course and major offerings, or proximity to home and family, should not be prevented from earning the same amount as a student-athlete at a school in a different state just because that state chose to adopt different NIL legislation.

A limited antitrust exemption may also be necessary in conjunction with a federal NIL bill.[121] While the NCAA pushes for a full antitrust exemption, a limited exemption restricting direct payments for student-athletes and private rights of action is likely a more beneficial approach for both colleges and student athletes.[122] Critics of the antitrust exemption claim that the exemption will infringe on free market principles and will deter colleges from enacting favorable student-athlete compensation rules, while supporters of the limited exemption claim that it will actually benefit the market for college sports and further the legitimate goal of distinguishing college sports from the professional leagues.[123]

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[121] *See* Mayer, supra note 5, at 270, 271

[122] *See* Feiner, supra note 28 at 114-16; *but see* Marc Edelman, *Why Congress Would be Crazy to Grant the NCAA an Antitrust Exemption*, FORBES, (May 6, 2020) (Arguing that any anti-trust exemption for the NCAA will lead to ineffective NIL legislation) https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption/?sh=618e6c8070a9.

[123] *Compare* Feiner, supra note 28 at 114-16 ("While this approach would naturally be a weaker form of protection for the NCAA than an outright exemption, it would assuage any potential concerns that creating an exemption would lead to the NCAA abusing the system by generating a host of new eligibility rules.") *with* Edelman, supra note 122(a) ("[D]enying the many thousands of college athletes the opportunity under antitrust law to challenge the NCAA's collective restraints of trade in student-athletes labor markets would undermine the sanctity of America's entire free market system and lead to substantial unfairness to college athletes.")

This limited exemption should allow for a federal right of action, preferably brought by an independently established commission in charge of enforcing and regulating NIL rules, to ensure the interests of the student-athletes are protected and that colleges are in compliance with the legislation.[124] This approach likely alleviates the concern that colleges will not make any further concessions for student-athlete compensation rights and lead to "unsubstantial unfairness for student-athletes."[125] Justifications for the limited antitrust exemption include the argument that distinguishing college sports from professional leagues by restricting direct payments from colleges to athletes will benefit the market for college sports, and that the value of education for student-athletes is integral to protecting the special status of secondary education.[126]

B. Group-Licensing, Trade Unions, and Few Restrictions on Endorsement Deals

The NCAA should allow broad freedom for student-athletes to pursue endorsement deals, with limited exceptions for morality and other legal reasons. This approach would allow student-athletes to enter endorsement deals "away from the playing field" with athletic apparel, sneaker, or food and beverage companies that compete with endorsement deals signed by their respective institutions. Only when student-athletes are in their official representative capacity with their college athletic team should they be required to abide by the college's endorsement deals. Under this framework for example, a basketball player can sign an endorsement deal with adidas to promote their shoes outside of NCAA competition even though their respective school has a contractual agreement to outfit all athletic teams with Nike footwear. In this scenario, the

[124] *See* Feiner, supra note 28 at 114-16.
[125] Edelman, supra note 122(a).
[126] *See O'Bannon*, supra note 141 at 1072; Feiner, supra note 26 at 114-16.

student-athlete could promote adidas in his personal capacity away from competition, but still be required to wear Nike footwear while competing for his college.

Both Senator Booker's and Representative Gonzalez's bills do not include restrictions on endorsement deals between student-athletes and competitors of sponsors of their respective schools, conflicting with both NCAA's request in its report on NIL legislation and Senator Wicker's bill.[127] Chief among the NCAA's concerns on this issue is that student-athletes will enter endorsement deals undermining the interests of their schools, and Senator Wicker's legislation takes this concern into account by allowing schools to prohibit conflicting endorsements unless the ban constitutes an "undue restrict[ion]." [128]

Restrictions of this nature do not further any of the NCAA's enumerated principles or reasons for enforcing their amateurism rules.[129] While the NCAA does have a valid interest in preventing student-athletes from entering into endorsement deals with companies such as adult entertainment providers, casinos and gaming companies, and alcohol providers because of various moral and legal implications, prohibiting conflicting endorsement deals does not fit in with this category of restrictions . While a school's financial interest is a recognized principle of the NCAA, so is the well being of the student-athlete.[130] The only practical reason for including these restrictions is to increase athletic department profitability by limiting possible issues

[127] McCann, supra note 84; Dellenger, supra note 76(a); *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L LAW REVIEW, OCT. 15, 2020
[128] McCann, supra note 84.
[129] *See* Mayer, supra note 3, at 290, 291.
[130] *See* The 16 Principles for Conduct of Intercollegiate Athletics, https://www.ncaa.org/about/16-principles-conduct-intercollegiate-athletics (Last visited Apr. 13, 2021 at 8:31 PM) (listing the sixteen guiding principles of the NCAA, including: institutional control and responsibility, student-athlete well being, rules compliance, gender equity, amateurism, financial aid, and economy of athletics program operation.)

between the schools and their sponsors, resulting in undue burdens on the student-athlete by limiting a legitimate revenue source.

Another proposed restriction by the NCAA that does not further any of its stated principles is the proposed cap on the amount of money a student-athlete can receive from an endorsement deal based on "fair-market value."[131] None of the proposed legislation headed for Congressional review uses this language, however. Even Senator Wicker's bill only refers to "market-value" for endorsement deals.[132] While it is understandable that schools wish to avoid boosters and other third parties from engaging in "pay-for-play" schemes in which student-athletes are awarded endorsement deals which are grossly inflated, other methods of enforcement on the issue are more suited to deal with this problem, such as transparent reporting on booster donations and a third-party regulatory committee with investigatory power.[133] Again, this restriction does nothing to advance any legitimate NCAA's objectives such as distinguishing college athletics from professional ones or maintaining uniformity of rule enforcement. Including such only harms student-athletes, and should be an area the NCAA is willing to compromise on to receive concessions in other areas.[134]

The NCAA does have a valid interest in preventing student-athletes from entering into endorsement deals with certain companies such as adult entertainment providers, casinos and gaming companies, and alcohol providers.[135] These restrictions are in line with similar ones

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[131] Dellenger, supra note 72.
[132] McCann, supra note 84.
[133] *See* Witz, supra note 100 (Describing Senator Booker's proposal for a transparent reporting process on booster donations); *see also* McCann, supra note 92 (Advocating for an enforcement body independent of the FTC).
[134] *See* Mayer, supra note 3, at 290.
[135] *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L LAW REVIEW, OCT. 15, 2020
[135] *See* Mayer, supra note 3, at 288, 289.

imposed by professional sports leagues in "morals clauses".[136] Additionally, the NCAA does have a valid interest in preventing student-athletes from endorsing any product while engaged in official NCAA competitions.[137] These positions are officially supported in Rep. Gonzalez's proposed bill.[138]

C. Maintaining the Differences between College Athletics and Professional Leagues

Maintaining a distinction between NCAA sponsored competitions and professional leagues is a legitimate goal that should be achieved in federal NIL legislation. As this is the case, it would likely be beneficial for the future of college sports that student-athletes are not considered as employees of their respective schools in NIL legislation. In addition to blurring the lines of professional and college sports and harming the NCAA's legitimate aim of distinguishing its product from that of professional sports, classifying student-athletes as employees of schools will place an enormous financial strain on athletic departments.[148] This impact on athletic departments could result in the cutting of varsity sports and elimination of scholarship opportunities for other student athletes in favor of the "revenue sports" (football, men's basketball, women's basketball).[149]

The argument that the NCAA has a compelling interest in differentiating between college and professionalized sports is a convincing one[150] Similar to the reasoning of the *Alston* court, the amateurism of college sports attracts interest from consumers and serves a procompetitive

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[136] Dellenger, supra note 77; Carole Epstein, *Morals Clauses: Past, Present, and Future*, 5 N.Y.U. INTELL. PROP. & ENT. LAW LEDGER 1
[137] Dellenger, supra note 77.
[138] Dellenger, supra note 77.
[148] *See* Mayer, supra note 3, at 260, 261.
[149] *See* Mayer, supra note 3, at 260, 261.
[150] *Id.*

purpose of distinguishing college athletics from professional sports.[151] Both Representative Gonzalez's and Senator Wicker's bills declare that student-athletes are not employees of their colleges.[152] Senator Booker's bill does not officially take a stance on the employment status of student-athletes.[153] Importantly in Senator Wicker's bill, there is no language barring the possibility of student-athletes forming a trade association or 501(c)(3) nonprofit.[154] By following Senator Wicker's model, student-athletes can still organize and have adequate labor protections, and colleges do not have to take on the added costs of hundreds of new employees in their athletic departments.

The NCAA should also leave in place restrictions on schools directly compensating student-athletes for their NILs.[155] The rulings in *O'Bannon II* and *Alston* support the position that NCAA has a valid interest in preserving some form of amateurism for its student athletes.[156] The key factor in the courts' interpretation of amateurism is the restriction on payments from schools not tied to any education related benefits.[157]

Schools classifying student-athletes as employees and paying them directly may also come into conflict with Title IX rules.[158] Title IX requires schools provide equitable

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[151] *Id.*
[152] *See* McCann, supra note 84 (Explaining that while Senator Wicker's bill declares student-athletes are not employees of their colleges, it acknowledges non-employee status is "notwithstanding any other federal or state provision." This leaves open the possibility that student-athletes at public universities in some states could eventually be declared employees if their states pass legislation declaring so.); *See also* Michael McCann, *Latest NIL Bill Overrides States but Leaves Tax and Labor Questions Behind*, SPORTICO (Sept. 29, 2020) (In discussing Representative Gonzalez's NIL bill, states "[N]othing in the act will affect 'employment status' of a college student.") https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/
[153] Witz, supra note 74(b)
[154] McCann supra note 84.
[155] Dellenger, supra note 77.
[156] *O'Bannon v. NCAA (O'Bannon II),* 802 F.3d 1049, 1051 (9th Cir. 2015).
[157] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.,* 958 F.3d 1239, 1258 (9th Cir. 2020)
[158] Paul Steinbach, *What Title IX Fallout Might NIL Legislation Pose?*, ATHLETIC BUSINESS, https://www.athleticbusiness.com/college/how-might-nil-legislation-be-impacted-by-title-ix.html, (Jan. 2020).

opportunities to male and female student-athletes based on interest and participation numbers.[159] Financial support for benefits and promotions, recruitment, and support services must be equal between male and female athletes at schools receiving federal funding.[160] By classifying student-athletes as employees, colleges run the risk of devoting too much money to athletes in the revenue sports, which are overwhelmingly male, and neglecting their obligations to female athletes.[161]

D. Group Licensing and aThird-Party Oversight Committee Responsible for Regulation and Enforcement

A third-party committee responsible for regulation and enforcement of violations would be the most efficient and balanced option to ensure compliance with NIL rules and oversee student-athlete enforcement deals. Both Senator Wicker's and Senator Booker's proposed legislations contemplate the creation of an oversight committee.[162] To operate effectively, this committee should also be granted a federal right of action to enforce NIL rules. The right of action would conform to the limited anti-trust exemption previously discussed. This theoretical oversight body could also include equal representation from NCAA member institutions, former athletes from "revenue sports" (football, men's basketball, women's basketball), former athletes from "Olympic Sports" (such as track and field and swimming and diving) and experienced industry professionals (retired sports agents/judges) to act as quasi-arbitrators. Equal

[159] *See* Mayer, supra note 3, at 260, 261;
[160] *See* Mayer, supra note 3, at 260, 261.
[161] *See* Mayer, supra note 3, at 260, 261.
[162] *See* Dellenger supra note 76(a) ("[Senator Wicker's] legislation assigns the Federal Trade Commission for oversight and enforcement, but allows the FTC to identify a nonprofit third party for more of the daily administration of NIL activities."); *see also* Witz, supra note 100(a) ("[Senator Booker's legislation] would establish a nine-member commission, appointed by the president, with at least five former college athletes, with the power to investigate and fine universities as much as to $250,000 for violating its provisions and ban individuals from working in college athletics.")

representation is necessary from all interested parties to ensure that student-athletes in all sports receive equal treatment from NCAA rules and NIL legislation.

The role of the oversight body would be to regulate and issue licenses to prospective agents interested in working with student-athletes, ensure endorsement deals comply with NCAA rules, and monitor activity of colleges to avoid any "pay-to-play" deals. The oversight board would hopefully take a more active role in its administration than the current NCAA enforcement staff, preventing such incidents as the college basketball corruption scandals.[163] Borrowing from Senator Wicker's proposal, this committee should also be in charge of educating student-athletes on what their NIL rights actually means.[164]

Furthermore, an independent commission is preferable because of the enormity of enforcing the provisions of any federal NIL legislation. Burdening the FTC with the role of NIL enforcement will likely lead to a number of issues. Critics have raised concerns about the effectiveness of a government oversight body for the provisions of NIL legislation, such as the framework proposed by Senator Wicker.[165] Inexperience with the complexities of NCAA rules and endorsement contracts, and the effectiveness of SPARTA are areas of concern about how effective a government oversight body would operate.[166]

However, the framework in Senator Booker's legislation, a committee made up of at least nine members from various backgrounds representing the legal profession and college athletics

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[163] Matt Ford, *"The Dark Underbelly" of College Basketbal*l, THE ATLANTIC (Sept. 26, 2017) (Describing the federal investigation and subsequent arrest of college basketball coaches, sports agents, and shoe company executives for directing payment to prospective college basketball players in violation of NCAA rules and federal law.) https://www.theatlantic.com/politics/archive/2017/09/the-dark-underbelly-of-college-basketball/541155/
[164] *See* Dellenger, supra note 76(a).
[165] *See* McCann, supra note 15; *see also* Dellenger, supra note 76(a).
[166] McCann, supra note 15.

with subpoena power, appears to be a step in the right direction.[167] While lacking in representation from NCAA member schools, and including some questionable enforcement powers (such as banning individuals from working in college athletics), Senator Booker's independent commission does take into consideration representation from the various parties invested in the future of college athletics, and provides a form of protection for student-athletes.[168]

Whether it is included in the NIL legislation, or the NCAA amends its rules to permit it, student-athletes should also be allowed to enter group-licensing agreements with athletic associations, conferences, and their respective schools.[169] Group licensing is included the proposed legislation from Senator Cory Booker, but is not explicitly included in Representative Gonzalez's bill nor Senator Wicker's legislation.[170] To the surprise of many involved with college sports, the NCAA inexplicably failed to include a provision for group licensing in its April 2020 report on student-athlete compensation.[171] Industry experts speculate that the NCAA feared further encroaching on the "employee-employer" relationship with student-athletes if it allowed for group-licensing in its proposal.[172] Although the NCAA claimed group licensing appeared unworkable without a union (and thus another step towards classifying student-athletes

[167] *See* Witz, supra note 100(a).
[168] *Id*.
[169] *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L LAW REVIEW, OCT. 15, 2020.
[170] *See NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L LAW REVIEW, OCT. 15, 2020; Dellenger, supra note 77.
[171] Ross Dellenger, *Group Licensing is the Key to the Return of NCAA Video Games – So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing
[172] Dellenger, supra note 134 (quoting Ellen Zavian, law professor at George Washington, "It would be another step closer for the national labor board to say, 'You look like you have employees.'")

as employees), skeptics strenuously disagree with that assertion, claiming the NCAA's stance is "self-serving" and "misleading".[173]

The ability to group license paves the way for student-athletes to profit off their NILs in video games, a massively profitable market.[174] Before *O'Bannon* and *O'Bannon II* forced the NCAA to change its approach to the use of player likeness, video games such as *NCAA Football 2014* were widely popular.[175] Group licensing also allows for student-athletes to enter into apparel and memorabilia deals.[176] A significant benefit of allowing group licensing is that it allows a greater number of student-athletes to profit from their NIL.[177] Instead of just the superstars of athletic teams being able to profit from their NIL from endorsement deals, group licensing deals would enable lesser known players to be compensated for their time and effort as well.

PART IV. CONCLUSION

In conclusion, the NCAA, college athletic directors and presidents, and politicians, should work together to compromise on NIL legislation which provide student-athletes the same opportunities as their fellow classmates. This goal is possible without sacrificing the NCAA's core principles, but the NCAA must be willing to relent on some of its harsher restrictions on student-athlete endorsements from competitive sponsors and group-licensing.[178] By compromising on these issues, the NCAA would be allowing its student-athletes to increase their

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[173] Dellenger, supra note 134.
[174] Dellenger, supra note 77.
[175] Steven Godfrey, *Why has NCAA Football's Popularity Exploded Mid-Pandemic?* BANNER SOCIETY, (May 13, 2020), https://www.bannersociety.com/2020/5/13/21257660/ncaa-football-2014-ea-sports-video-game-ebay-resale-prices; Dellenger, supra note 134.
[176] Dellenger, supra note 134.
[177] Dellenger, supra note 134.
[178] *See generally* Mayer, supra note 5.

opportunities for profitability, likely without significant impact to their own revenues and while protecting their stated mission. Additionally, the NCAA would likely improve the

Furthermore, with compensation for student-athletes enrolled at NCAA member schools becoming a reality through state and possible federal legislation, group licensing and a third-party oversight body are necessary to protect the welfare of all student-athletes. The benefits of a third-party oversight body include protection of student-athletes from predatory contracts and agents, ensuring compliance with NCAA rules and regulations free of conflicts of interest, and a resource for student-athletes to educate themselves about their possible profitability.

While the landscape of college athletics is undoubtedly in for some seismic changes in the near future, by implementing federal NIL legislation with the aforementioned provisions, the NCAA will have the opportunity to sponsor its best product yet, college sports where student-athletes are on a “level playing field” with their classmates and can profit from their own worth.