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Revenue Sharing: A Potential Method of Compensating Athletes

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REVENUE SHARING: A POTENTIAL METHOD OF COMPENSATING ATHLETES.

I. INTRODUCTION.

The National Collegiate Athletic Association ("NCAA") was founded in 1906 to regulate collegiate sports and protect athletes.[1] College sports have been commercialized to some extent since their inception, with the first intercollegiate sporting event, a regatta between Harvard and Yale in 1852, being commercially sponsored by a railway company.[2] Over the past 170 or so years, college sports have exponentially increased in popularity and commercialization, with schools now

[1] "NCAA History" https://www.ncaa.org/sports/2021/5/4/history.aspx

[2] Molly Harry, *NIL Adds to Confusion of 'Commercialization,' 'Professionalization,'* Sportico (Mar. 2, 2022 at 8:50 A.M.), https://www.sportico.com/leagues/college-sports/2022/study-table-commercialization-professionalization1234666444/

earning hundreds of millions of dollars annually from athletics and major conferences such as the Big 10 securing multi-billion dollar media deals.[3]

Suffice to say that college sports is a profitable enterprise and a beyond lucrative industry, with participants such coaches and athletic directors being compensated to the tune of hundreds of thousands—if not millions—of dollars annually.[4] Despite the fact that college sports generates such large amounts of money, the athletes who produce the product that is worthy of commercialization are still only entitled to limited compensation for their efforts.

While athletes' abilities to benefit from the use of their name, image, and likeness over the past two years has certainly benefitted some of the athletes competing at the intercollegiate level, the average NIL deals pay the athletes a few thousand dollars, which is a drop in the bucket compared to the amount of money these athletes can generate for their schools.[5] Given that athletes are severely undercompensated compared to the value they bring to their schools, revenue sharing may be a potentially effective solution to compensate athletes.

II. A REVERED HISTORY OF ANTITRUST VIOLAITONS: THE NCAA STORY.

The rapid advancements in technology and general population's ability to own and watch television exponentially increased the power the NCAA held over member schools.[6] The early 1950s proved to be pivotal in the growth of the NCAA's authority. Concerned that television

[3] Adam Rittenberg, *Big Ten Completes 7-Year, $7 billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billionmedia-rights-agreement-fox-cbs-nbc

[4] John Riker, *College Football Coaching Salaries: Big Ten*, Business of College Sports (Nov. 29, 2022), https://businessofcollegesports.com/football/college-football-coaches-salaries-big-ten/

[5] Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?* NBC 4 New York (July 7, 2022 at 3:13 P.M.), https://www.nbcnewyork.com/news/sports/one-year-of-nil-how-much-have-athletes-made/3765040/ (research shows that the average NIL deal within the first year of NIL only paid between $1,525 and $1,815, and the median deal only paid $53, with large discrepancies based on gender, sport, and division)

[6] Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9 (2000) Available at: http://scholarship.law.marquette.edu/sportslaw/vol11/iss1/5

broadcasts of college football games threatened ticket sales and live attendance revenue, the NCAA largely limited member schools' broadcast rights.[7] The NCAA Television Committee instituted its first controls on college football in 1953, which provided that television broadcast of college football was limited to one game per week, that no team would appear on television more than once per season, and that the revenues would be divided among the teams playing the game and the NCAA.[8] The NCAA's plans to reduce the negative effects of live television in college football remained in place through the early 1980s.[9]

The NCAA first received antitrust scrutiny after CFA members began to advocate for colleges with major football programs to have a greater voice in formulating the broadcast contracts, which eventually led CFA members to enter into a contract with NBC.[10] In response, the NCAA announced that it would take disciplinary action against any CFA member who complied with the CFA-NBC contract.[9]

As a result of the disciplinary action taken by the NCAA, the sanctioned CFA members brought suit, and the District Court found that the NCAA's controls restricting the broadcast of college football games violated the Sherman Act.[10]

The Supreme Court affirmed the lower courts' findings that the NCAA's restriction on broadcast rights constituted an unreasonable restraint on trade in violation of § 1 of the Sherman Act, with significant potential for anti-competitive effects.[11] The Court further rejected the NCAA's "Rule

[7] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 90 (1984)
[8] *Bd. of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1283 (W.D. Okla. 1982)
[9] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 91-92 (1984) [10] *Id*. at 94
[9] *Id*. at 95
[10] *Id*.
[11] *Id*. at 104

of Reason" defense, which argued that the television plan is permissible because it protects ticket sales by limiting output.[12] Instead, the Court says this proffered argument directly contradicts the basic purpose of the Sherman Act, because the argument assumes that competition itself is unreasonable and can be circumvented.[15]

The Court's holding in *NCAA v. Board of Regents* marked an important shift in college football, by dramatically increasing the number of television broadcast contracts, amount of money schools receive in broadcast rights, and the overall consumer welfare.[13] The holding also illustrated that the NCAA is not immune from antitrust laws. In the aftermath of the holding in *Board of Regents*, the media jumped on the opportunity to broadcast more college football games to their consumers, and schools started selling their own media rights collectively as conferences.[14]

Nearly forty years after the Supreme Court released its opinion in *NCAA v. Board of Regents*, conferences are negotiating television deals that would provide them with media rights worth *billions* of dollars.[15] Given the massive sums of money involved in college athletics today, it is unsurprising that the athletes (who are instrumental in generating this money for colleges and conferences) want to receive compensation for their hard work, given that so many other people are making money off of the efforts of these athletes.[16]

The court's opinion in *Board of Regents* played an instrumental role in subjecting NCAA rulemaking to numerous antitrust challenges. As a result of commercialization and the ability of

[12] *Id*. at 117 [15]
Id.
[13] Mary H. Tolbert and D. Kent Meyers, *The Lasting Impact of NCAA v. Bd. of Regents of the University of Oklahoma: The Football Fans Win*, Okla. Bar, J. 22, 25 (Oct. 2018).
[14] Richard Deitsch, *What the Big Ten's Seismic move means for College Football's TV Future*, July 5, 2022, https://theathletic.com/3397692/2022/07/05/college-football-tv-espn-fox/
[15] *Id*.
[16] Andrew Limbong, *College Football is back, and players still aren't getting paid*, Sept. 2, 2022 at 3:13 P.M. ET, https://www.npr.org/2022/09/02/1120610858/college-football-nil-big-ten

schools to make money off of media rights, the growth of football revenues provided coaches with leverage to demand salaries reflective of the money being brought in by the sport.[17] The NCAA saw that the salary increases to certain coaches (mostly at schools with larger revenues) placed a strain on smaller schools looking to compete with schools with greater revenues, and as a result established a category for restricted earnings coaches, which capped the salaries of people in this category to $16,000 per year.[21] The NCAA restrictions were immediately met with an antitrust challenge from affected coaches in *Law v. NCAA*, where the Tenth Circuit ruled that the restricted salaries constituted an unreasonable restraint on trade under a rule of reason analysis.[18]

Expanded commercialization in the wake of *Board of Regents* in conjunction with increased antitrust challenges to NCAA rules meant that massive amounts of money were coming into college athletics, and that people associated with college athletics were being paid commensurately with the commercial expansion of college sports. Despite this, the athletes actually putting a watchable product on the field did not get to reap any monetary benefits of that others associated with college sports were enjoying.

III. COLLEGE ATHLETES' COMPENSATION: FROM NIL TO N.I.L.

In *O'Bannon v. National Collegiate Athletic Ass'n*, the Ninth Circuit addressed whether the NCAA's compensation rules violated the Sherman Act.[19] Edward O'Bannon, a former AllAmerican basketball player at UCLA, and group of current and former student athletes joined together as a class and brought suit against the NCAA, College Licensing Company (CLC), and

[17] Andrew Bondarowicz, *The NCAA's Historical Challenges with Antitrust Issues and Its Current Battle for Continued Relevance*, 45 Seton Hall Legis. J. 589 (2021) [21] *Ibid*.
[18] *See Law v. Nat'l Collegiate Athletic Ass'n,* 134 F.3d 1010, 1016, 1024 (10th Cir. 1998).
[19] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015)

Electronic Arts, Inc. (E.A.). The Plaintiffs challenged the legality of the NCAA's rules restricting players from receiving revenue that the NCAA earns from the sale of licenses to use studentathletes' names, images, and likenesses in videogames, live game telecasts, and other footage.[20]

The Plaintiffs claimed that the NCAA rules on amateurism and compensation violated § 1 of the Sherman Act.[21]

The gravamen of O'Bannon's complaint was that the NCAA's amateurism and compensation rules and bylaws were an illegal restraint on trade in violation of the Sherman Act insofar as the NCAA and EA Sports used the plaintiffs' NIL in various videogames without the plaintiffs' express consent or compensation, and that they unfairly set the value of an athlete's name, image, and likeness at zero.[22]

The District Court applied the Rule of Reason analysis to determine whether the restraint's harm to competition outweighs its procompetitive effects.[23] Under the Rule of Reason analysis' burden-shifting framework, the plaintiff first bears the burden of showing that the restraint

produces 'significant anticompetitive effects' within a 'relevant market.'[24] Once the plaintiff shows that the restraint produces significant anticompetitive effects within a relevant market, the defendant must demonstrate the restraint's procompetitive effects.[29] The plaintiff must then show

[20] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015); *see also Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (holding that E.A. did not sufficiently transform the identity of former Rutgers football player, Ryan Hart, to escape the right of publicity claim; the use of Hart's likeness, characteristics, and biographical information fails the transformative-use test, and is therefore not 'expressive speech' entitled to First Amendment protection) (Ed O'Bannon's suit concerned the same videogame at the crux of the challenge in *Hart v. Electronic Arts, Inc*.)

[21] *Id*.

[22] *Ibid*.

[23] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)

[24] *Ibid*. [29]

Ibid.

that any of the restraint's legitimate objectives can be achieved in a substantially less restrictive manner.[25]

Under the Rule of Reason burden-shifting framework, the District Court found that the NIL compensation rules had an anticompetitive effect in the college education market; that the rules serve a procompetitive purpose; and that the procompetitive rules could be achieved by less restrictive alternative restraints, therefore making the current rules unlawful.[26] The District Court specifically found that the plaintiffs identified two less restrictive alternatives: (1) allowing schools to award stipends to student-athletes up to the full cost of attendance, thereby making up for any "shortfall" in their grants-in-aid; and (2) permitting schools to hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college, for their NIL use.[32]

After entering the judgment, the District Court permanently enjoined the NCAA from prohibiting member schools from (1) compensating FBS football and Division I men's basketball players for the use of their NILs by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to $5,000 per year in deferred compensation to FBS football and Division I men's basketball players for the use of their NILs, through trust funds distributable after they leave school.[27]

On appeal, the Ninth Circuit largely agreed with the District Court's analysis of the anticompetitive and procompetitive effects under the Rule of Reason framework, finding that: (1) a cognizable "college education market" exists, wherein colleges compete for the services of

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[25] *Ibid*.
[26] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 984-1009 (N.D. Cal. 2014) [32]
Id. at 1006
[27] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015)

athletic recruits by offering them scholarships and various amenities, such as coaching and facilities; (2) that if the NCAA's compensation rules did not exist, member schools would compete to offer recruits compensation for their NIL rights; and (3) that the compensation rules therefore have a significant anticompetitive effect on the college education market, in that they fix an aspect of the "price" that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services).[28]

However, the Ninth Circuit found that the District Court clearly erred in analyzing the "substantially less restrictive alternatives" factor under the rule of reason framework when it found that allowing students to be paid compensation for their NIL rights is virtually as effective as the NCAA's current amateur-status rule.[29] The Ninth Circuit determined that the District Court's holding on this factor was clearly erroneous because an alternative must be virtually as effective in serving the procompetitive purposes of the NCAA's rules, without a significantly increased cost, and the plaintiffs did not demonstrate that this alternative is virtually as effective as the NCAA's current amateur status rule.[36]

Though the Ninth Circuit ultimately struck down the District Court's judgment that permitted student athletes to receive deferred compensation for the use of their NIL, the court effectively affirmed that prohibiting student athletes from receiving compensation for the use of their NIL violated antitrust law.[30]

The *O'Bannon* decision marked a turning point in the rights of student athletes and highlighted the NCAA as a huge business making money off the backs of student athletes, who could, at

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[28] *Id*. at 1070
[29] *Id*. at 1074 [36]
Ibid.
[30] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 984-1009 (N.D. Cal. 2014)

maximum, only receive the full cost of attendance in exchange for the use of their NIL.[31] In the aftermath of *O'Bannon*, state legislatures began introducing their own NIL bills.

In 2019, California became the first state to recognize student NIL rights when Governor Gavin Newsom signed into law California Senate Bill 206 (SB 206), more commonly known as the "Fair Pay to Play Act."[32] The Act became the first of its kind to allow all student athletes in California earn money from the use of their NIL and ban collegiate authorities from deeming student athletes ineligible because they earned compensation from a third-party's use of their name, image, and likeness.[33]

Though the bill was not slated to go into effect until 2023, its passage elicited immediate ramifications, with other state legislatures following suit and the NCAA threatening to sanction all schools where such legislation is passed.[34] [35]

In the midst of states considering and enacting NIL legislation, the Supreme Court agreed to hear *NCAA v. Alston* on appeal from the Ninth Circuit.[36] Though *Alston* does not actually directly address NIL rights, the opinion became instrumental in the ability of student athletes to be

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[31] *The NCAA and the Right of Student-Athletes to Exploit their Names, Images, and Likenesses: Trends and Developments*, Practical Law Article w-034-6471

[32] Michael G. Feblowitz, *One Nil: The Impact and Constitutionality of the Fair Pay to Play Act*, 28 Sports Law. J. 165 (2021)

[33] *Id*.

[34] Nathan Fenno, *NCAA warns California bill that would allow college athletes to be paid is 'unconstitutional'*, Sept. 11, 2019 10:51 A.M. PT, https://www.latimes.com/sports/story/2019-09-11/ncaa-fair-pay-bill-college-athletesgavin-newsom (NCAA writes letter to Governor Newsom warning that if SB 206 becomes law, the critical distinction between collegiate and professional athlete would be erased, and the 58 California schools would become ineligible to compete in NCAA competitions)

[35] Nicholas A. Plinio & Gregg E. Clifton, *Student-Athlete Name, Image, and Likeness Rights What to Expect in 2021 and Beyond, N.J. Law*., February 2021, at 14 (2021) (as of February 2021, six states (California, Colorado, Florida, Michigan, Nebraska, and New Jersey) had passed NIL legislation, nearly thirty states were considering similar legislation, and several proposed federal bills had been introduced)

[36] *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021)

compensated for the use of their NIL. The plaintiffs, a group of current and former student-athletes, originally brought suit in the District Court of the Northern District of California, alleging that the NCAA violated federal antitrust law by limiting the compensation they could receive in exchange for their services.[37] Following the bench trial, a judgment was entered in favor of the plaintiffs with respect to the rules limiting education-related benefits, and a permanent injunction was entered enjoining the NCAA from limiting education-related benefits that member conferences or schools could provide.[38] The Ninth Circuit affirmed and the Supreme Court granted certiorari. In a rare showing of unanimity, the Supreme Court affirmed the Ninth Circuit's opinion in a 9-0 opinion and held that:

1. Rules limiting education-related benefits were subject to the Rule of Reason analysis;
2. The District Court did not require NCAA, contrary to rule of reason analysis, to show that its rules constituted least restrictive means of preserving consumer demand;
3. The District Court did not engage in impermissible product redesign when analyzing rules under rule of reason; and
4. The scope of the permanent injunction was appropriate.[39]

Importantly, while the *Alston* opinion left in place the ban on non-educational benefits and only applies to educational-related compensation rules, it casts doubt on whether the Association's procompetitive business justification of preserving amateurism in college sports would survive under the Rule of Reason analysis for *any* of the compensation rules.[40] The NCAA argued that the

[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 2152, 2162

education-related compensation rules were necessary so the line would not be blurred between collegiate and professional sports insofar as to impair the NCAA's market demand.[41]

Rejecting the NCAA's procompetitive justifications, the Court accepted the District Court's finding that the rules in question were 'patently and inexplicably stricter than is necessary' to achieve the proffered procompetitive benefits, and further that these overly restrictive rules were adopted without reference to consumer demand and at least some of the rules were not necessary for the preservation thereof.[42]

Justice Kavanaugh offered the sharpest critique to the remaining NCAA compensation rules in his fiery concurrence.[43] He emphasizes three points:

1. The Court does not address the legality of the remaining compensation rules and does not affirmatively uphold them;
2. While the Court does not weigh in on the ultimate legality of the remaining NCAA compensation rules, the majority opinion establishes that, going forward, the remaining NCAA compensation rules should receive ordinary "Rule of Reason" scrutiny under antitrust law; and the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), were dicta and have no bearing on whether the NCAA's current compensation rules are lawful; and

[41] *Id*. at 2144
[42] *Id*. at 2162-63
[43] *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021) (Kavanaugh, J., Concurring) [51] *Ibid*.

3. There are serious questions as to whether the NCAA's remaining compensation rules can pass muster under the ordinary Rule of Reason scrutiny, because the NCAA may lack the requisite legally valid procompetitive justifications.[51]

Justice Kavanaugh pointedly remarks that the NCAA merely offers circular arguments regarding the rules preventing colleges from paying athletes, because the defining feature of college sports is that the athletes are not paid.[44] Further rebutting the NCAA's contention that their compensation rules have procompetitive justifications because the defining feature of the product is that students are not paid, Justice Kavanaugh offers several analogies to highlight the absurdity of the NCAA's argument:

> The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.[45]

Justice Kavanaugh further claims that the NCAA is essentially attempting to avoid the consequences of price-fixing labor by incorporating price-fixed labor into the product's definition.[54]

Justice Kavanaugh's concurrence flatly states that the NCAA and its members are

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[44] *Ibid*.
[45] *Ibid*. [54] *Id*. at 2186 [55] *Ibid*.

suppressing the pay of student athletes who generate billions of dollars in revenue annually, while seemingly everybody else is benefitting immensely from the student athletes' labor which, which is a necessary element in the creation of a marketable product.[55] He concludes the impassioned concurrence by simply stating "[t]he NCAA is not above the law."[46]

Although the Supreme Court did not have the occasion to address the remaining NCAA compensation rules in *Alston*, both the opinion and Justice Kavanaugh's concurrence may very well lay the groundwork for restricting, if not dismantling, the rules in the future.[47] Almost immediately after the Court released its *Alston* Opinion, the NCAA issued an interim NIL policy, marking a dramatic shift in the NCAA compensation rules and potentially foreshadowing future, more significant rule changes.

While the *Alston* Opinion precipitated the NCAA's issuance of a long-awaited NIL interim policy, it is important to note that *Alston* did not directly concern the abilities of student athletes to profit off of name, image, and likeness. Instead, it signifies that the NCAA likely wanted to stay consistent with the state policies permitting student athletes to receive compensation for the use of NIL, and importantly avoid any potential legal challenges to its potentially vulnerable compensation policies were it to sanction schools and student athletes in states that enacted NIL legislation. The NCAA ultimately changed its policy in the aftermath of *Alston*; however, it almost certainly would not have made this adjustment without states first taking the initiative and passing their own laws.

[46] *Ibid*.
[47] *Antitrust Leading Case: NCAA v. Alston*, 135 Harv. L. Rev. 471 (Nov. 2021)

Having established that the NCAA is not above the law[48] and that states taking the matter of NIL into their own hands, this begs the question of whether—and how—the states can once again push forward and further the rights of student athletes, in spite of the restrictive (if not illegal) compensation policies currently in place. In the current political climate, very few issues receive largely bi-partisan support; however, the intersection of labor rights and college sports (most specifically college football) has made for the perfect combination of issues to garner largely bipartisan support.[49]

On top of the fact that the majority of states have now enacted laws permitting students to be compensated from the use of NIL, states have additionally amended their already existing NIL laws to ensure that they are not more restrictive and therefore less attractive to student athletes than laws in other states.[50] After decades of student athletes being deprived of the ability to receive monetary benefits from their participation and notoriety related to their participation in sports that make their colleges millions of dollars in revenue every year, the past few years have demonstrated that now more than ever, people are finally starting to realize that since almost every other person and entity associated with college athletics reaps its monetary benefits in an significant way, maybe

[48] *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021) (Kavanaugh, J., Concurring)
[49] But note the plethora of bills introduced in Congress, indicating that difficulties exist in enacting federal legislation on the matter
[50] Rudy Hill and Jonathan D. Wohlwend, *Alabama and Florida Call an Audible on NIL Laws*, Mar. 7, 2022 https://www.bradley.com/insights/publications/2022/03/alabama-and-florida-call-an-audible-on-nil-laws [61] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. at 2186 (2021); *see also* Michael Smith, *Big Ten officially agrees to new media deals with CBS, Fox, NBC*, Street & Smith's Sports Business Journal, (Aug. 18, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx (discussing the Big Ten's media deals worth over $8 billion, which means that the school payouts could reach $70 million or more annually under the deal starting during the 2023-2024 school year)

the athletes who are producing this monetizable product should also be entitled to some compensation other than just the cost of attendance.[61]

With college sports generating more money than ever, states aiding in the increased abilities of student athletes to be compensated for their work, and the Supreme Court casting serious doubt on whether the remaining NCAA compensation rules are permissible restraints against trade under a Rule of Reason analysis, now is a better time than ever for student athletes to push for even more change.

The aftermath of *O'Bannon* led California legislators to pass the country's first student athlete NIL laws with the "Fair Pay to Play Act" in 2019, after people within the state felt that

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limiting students' ability to receive compensation for the use of NIL to the cost of attendance was unjust. Due to the amount of states following California's initiative and adopting similar NIL legislation, and as an indirect result of the Supreme Court's opinion in *Alston*, the NCAA finally adopted an interim policy permitting students to be compensated for NIL.[62]

Going forward, the events leading to student athletes' ability to be compensated for the use of NIL might serve as an important road map for how student athletes' rights and abilities to make money can be increased in the future. As was the case in 2019 with California's passage of the "Fair Pay to Play Act," the road to student athletes' payment might once again begin in California.

IV. REVENUE SHARING AS A WAY TO PAY STUDENT ATHLETES WITHOUT BLURRING THE LINES BETWEEN STUDENT AND EMPLOYEE.

On January 19, 2023, California Assemblymember Chris Holden introduced "The College Athlete Protection Act," which would require schools that earn massive annual revenues from their athletics to share a portion of the revenue with the teams who help earn their colleges the revenue.[63] On February 16, 2023, California Senator Bradford introduced the "Student Athlete Bill of Rights," seeking to amend the existing Student Athlete Bill of Rights in California.[64] Together, these two bills seek to increase the rights and protections afforded to student athletes, and to permit student athletes to receive compensation that is more in line with the fair market value.

A. What "The College Athlete Protection Act" would mean for student athletes:

[62] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA Media Center, (June 30, 2021 at 4:20 P.M.), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likenesspolicy.aspx

[63] 2023 California Assembly Bill No. 252, California 2023-2024 Regular Session

[64] 2023 California Senate Bill No. 661, California 2023-2024 Regular Session, 2023 California Senate Bill No. 661, California 2023-2024 Regular Session

i. Revenue Sharing Provisions.

The Bill, as amended on March 6, 2023, would require all private and public universities in California that receive, as an average, $10,000,000 or more in annual revenue derived from media rights for intercollegiate athletics to provide fair market value compensation to athletes.[5152] The fair market value compensation is determined by subtracting the intercollegiate athletic team's aggregate athletic grants from one-half of the intercollegiate athletic team's revenue and dividing that difference by the number of athletes on the team.[66] For example, if a school's football team generates roughly $6 million in revenue and spends roughly $500,000 on scholarships for its players, the school would have to set aside $2.5 million at the end of the year (half of the total revenue minus the cost of scholarships) for the players if the new bill becomes law.[53]

The bill's general provisions call for universities to establish degree completion funds for its student athletes who receive grants but do not receive fair market value compensation in an academic year, in a total amount that provides fair market compensation to the student athlete for that academic year.[54] These degree completion funds are to be paid out to the student athletes on an annual basis, in an amount not to exceed $25,000.[55]

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[51] *Ibid.*
[52] California Assembly Bill No. 252, California 2023-2024 Regular Session, 2023 California Assembly Bill No. 252, California 2023-2024 Regular Session
[53] Dan Murphy, *New California bill pushes for sports revenue sharing*, Jan. 19, 2023 at 5:00 P.M. ET, https://www.espn.com/college-sports/story/_/id/35483573/new-california-bill-pushes-college-sports-revenuesharing
[54] *Id*. at Art. 3, 67463(a)-(b)
[55] . at 67463(d)
Id

While the bill only permits student athletes to be paid $25,000 a year at maximum, it requires that colleges place any money in excess of $25,000 that would be owed to the student

athletes into a trust, so that the student athletes can be compensated in the amount that represents their fair market value upon graduation.[56]

In addition to the bill's goal of fairly compensating the student athletes for their athletic effort and performance, the bill also seeks to further the repeated goal of California legislators to increase student athletes' graduation rates and help student athletes live successful lives after leaving college.[5758] The bill states that students are entitled to receive the money in excess of the $25,000 yearly revenue permitted to be distributed to each student as long as the student athletes graduate within six years of commencing their full time degrees or submit proof of having a severe medical condition that prevents the student athlete from completing an undergraduate program.[72] This provision is included in the bill as sort of a dangling carrot to incentivize athletes to remain in and graduate from college after they stop participating in their respective sports.

[56] *Id*. at 67463(f)-(h) (note: student athletes may only receive the excess funds held in trust if they graduate within six years of full-time college enrollment or submit proof of having a severe medical condition that prevents the college athlete from completing a baccalaureate degree program)

[57] Id. at 67462(c) (To increase graduation rates and ensure economic equity, institutions of higher education need to establish a degree completion fund for each college athlete with specified rules and manage that fund as a fiduciary for the college athlete without charging the college athlete for any costs incurred); *see* also, Cal. Educ. Code § 67450 (West), Legislative Declarations and Findings, Effective Jan. 1, 2013 (discussing California's goals relating to student athlete graduation rates: "Universities should strive to increase this graduation rate with each successive class. Universities should do everything in their power to successfully educate and graduate all student-athletes so that they are well prepared to lead productive and meaningful lives.")

[58] California Assembly Bill No. 252, California 2023-2024 Regular Session, at 67463(f)-(h) (but note that the bill does not clarify whether a student's severe medical condition has to be related to the student athlete's participation in intercollegiate sports at the school) [73] . at 67461(j)

Id

According to the bill, the amount of money students are entitled to receive for their participation on an intercollegiate team ("fair market value compensation") is determined annually by subtracting the intercollegiate athletic team's aggregate athletic grants from one-half of the intercollegiate athletic team's revenue and dividing that difference by the number of athletic grants provided to college athletes on that team.[73]

According to the 2018 figures provided to the U.S. department of Education, the University of Southern California football generated $50 million of revenue and paid out $6.3 million in scholarships to its 85 football players.[59] Under the bill, the athletes are entitled to the difference between fifty percent of the revenue ($25 million in 2018) and the amount paid in grants and scholarships ($6.3 million in 2018).[60] Based off of the 2018 numbers, the school would have to divide the nearly $19 million difference between the 85 scholarship football players, meaning that each football player in 2018 would have been entitled to $215,000 under the College Athlete Protection Act.[61]

Of this $215,000, up to $25,000 per student would be payable to the athletes on or before March 15th of the following year, and $190,000 would be held in a degree completion fund.[62] Such degree completion funds are considered the property of student athletes instead of the college, and the college owes a fiduciary duty to the student athletes to hold and manage these funds.[78] In this

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[59] Ross Dellenger, *California College Athletes Could Cash in Under Proposed Revenue Sharing Bill*, Sports Illustrated (Jan. 19, 2023), https://www.si.com/college/2023/01/19/california-assembly-college-athletes-revenuesharing-bill-ncaa-nil

[60] *Ibid*.

[61] *Ibid*.

[62] *Id*. at 67463(j) [78]

Ibid.

Id

example, student athletes from the USC football team would be able to collect the additional $190,000.00 held in the degree completion fund within sixty days of their graduation (so long as the student athletes graduate within six years of full-time enrollment, or submit proof of a severe medical condition that prevents the student from completing the degree program).[63]

The above example using USC football's 2018 revenue importantly highlights that the bill would potentially and contingently entitle certain student athletes to hundreds of thousands (if not millions) of dollars. It also suggests that college athletes would be much more incentivized to take

their academics seriously and complete their degrees in a timely fashion, so that they can receive the additional money in the degree completion fund.

ii. **Sports Related Medical Expenses Provisions.**

In addition to the revenue sharing provisions of the College Athlete Protection Act, the bill also provides that institutions of higher education that report twenty-million dollars ($20,000,000) or more in revenue to the U.S. Department of Education shall be financially responsible for student athletes' out-of-pocket sports-related medical expenses for each student athlete.[64] In addition, the school is responsible for the out-of-pocket expenses during the two-year period beginning on the date on which the college athlete officially becomes a former college athlete, provided that the injuries that arose after they are considered a former athlete occurred pursuant to their participation in collegiate sports.[81]

[63] . at 67463(f)-(h)
[64] *Id*. at 67462(a)(1) [81]
Ibid.
Id

In addition to the bill's provision requiring schools that report twenty-million dollars or more in revenue to the U.S. Department of Education to take financial responsibility for the outof-pocket medical expenses that student athletes may incur, the bill also requires schools that report over fifty-million dollars ($50,000,000) or more to offer nationally portable primary medical insurance to each college athlete who is enrolled at the institutions, at the institutions' expense.[65] Further, if a student athlete at an institution that is required to take financial responsibility for certain medical expenses opts to receive medical care that is not provided by or paid for by the institution, the school must offer to the student athlete to pay for either the out-of-pocket medical care expenses or the amount the institution would have paid if the college athlete had received the medical care provided or paid for by the institution, whichever is less.[66]

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[65] *Id*. at 67462(b)(1)(A)
[66] . at 67462(c)
Id

While the bill provisions regarding the payment of student athletes' medical expenses has garnered substantially less attention than the revenue sharing provisions, this would significantly benefit student athletes by alleviating stress and financial burdens related to medical expenses. Currently, the NCAA does not require universities to pay for student athletes' health insurance or medical expenses, and instead requires that each athlete has a health insurance policy that covers athletic injuries, with limits up to the deductible of the NCAA Catastrophic Injury Program ($90,000.00) before the athlete is able to participate in NCAA sanctioned sports.[67]

Member schools are currently permitted, but not required, to provide this often costly insurance coverage to their student athletes.[85] Many universities will cover minimal medical expenses and out-of-pocket expenses unless or until the injury exceeds the NCAA Catastrophic Injury Program deductible of $90,000.

The University of Southern California 2021-2022 Student Athlete Handbook specifically provides that student athletes must either carry their own insurance or purchase a policy through the school, and that a student's athletic scholarship will not pay for the insurance.[68] Moreover, the USC student athletic handbook states that the student athletes' insurance will be billed first, then all subsequent costs that are not covered by the primary insurance will be paid by the USC Athletic Department, but only if the student received prior approval from the school if the student sees outside health care providers.[69]

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[67] Juanita Sheely, *Insurance Coverage for Student Athletes*, NCAA (May 20, 2015), https://www.ncaa.org/sports/2015/5/20/insurance-coverage-for-student-athletes.aspx
[85] *Ibid*.
[68] *USC Athletics Student Athlete Handbook 2021-2022*, at 21, https://customsitesmedia.usc.edu/wpcontent/uploads/sites/99/2021/08/17053647/2021-USC-Student-Athlete-Handbook-8.23.21.pdf
[69] *Ibid*.

Given the significant costs incurred or potentially incurred by student athletes from paying for insurance and out-of-pocket medical expenses, the passage of the California Athlete Protection

Act would substantially alleviate student athletes' monetary burdens by putting the onus on the schools as opposed to the athletes to pay the bills. B. **What are the bill's limits?**

The NCAA has long held onto the idea of "amateurism" being at the core of its athletic competition.[70] While the meaning of amateurism has not always been consistently defined by the NCAA, the idea that a student athlete is not an employee has always existed within the idea of what amateurism means. While many proponents of student athletes' rights continue to push for their recognition as university employees and cases arguing as such are making their way through the federal courts, the College Athlete Protection Act explicitly falls short of this push for employment status.[71] Given that politicians on both sides of the aisle have proven to be weary of deeming college athletes to be employees of their universities, the bill's disclaimer that it does not serve as evidence of an employment relationship will likely increase its chance of success.[72][73]

[70] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 90 (1984); *NCAA Amateurism*, NCAA https://www.ncaa.org/sports/2014/10/6/amateurism.aspx (NCAA article explaining rules and requirements and requiring that all student athletes receive an amateurism certificate)

[71] *Johnson v. NCAA*, 556 F.Supp.3d 491, 512 (E.D. Pa. Aug. 25, 2021); *Johnson, et al v. Nat'l Collegiate Athletic Ass'n, et al.* (No. 22-1223, ECF 74) (3d Cir.); 2023 California Assembly Bill No. 252, California 2023-2024 Regular Session, at 67463(l) ("Degree completion fund payment designations or payments shall not serve as evidence of an employment relationship).

[72] Daniel Libit, *California D-1 Athlete Bill Seeks to Avoid Title IX Pitfalls*, Sportico: The Business of Sports, (Jan. 19, 2023 at 5:00 P.M., https://www.sportico.com/leagues/college-sports/2023/california-ncaa-pay-for-play-billchris-holden-1234706713/ (National College Players Association executive director Ramogi Huma said in an interview that while politicians on both sides of the aisle have proven wary of granting college athletes employee status, he is confident that there is sufficient support among California legislators for athletes to receive additional compensation from their schools.)

[73] California Assembly Bill No. 252, California 2023-2024 Regular Session, at 67463(l)

Instead, the bill explicitly states that the degree completion fund payment designations or payments shall not serve as evidence of an employment relationship.[91] On top of the fact that this makes the bill a bit more palatable to the NCAA by not crossing the line between student athlete and employee, this helps shield the bill from challenges in the Ninth Circuit, which has previously held that a student athlete is not an employee and is not covered under the FLSA.[74]

V. PASSING THE CALIFORNIA ATHLETE PROTECTION ACT: TIPPING THE COMPETITIVE BALANCE IN CALIFORNIA'S FAVOR?

While uncertainty still exists as to whether the progressive California College Athlete Protection Act will become law, the idea of its enactment is not that far-fetched, given that the bill will be voted on by largely the same California Senate and Assembly that voted overwhelmingly in favor of the Fair Pay to Play Act in 2019, with a vote of 31-5 in the Senate and 73-0 in the Assembly.[75] Additionally, while a bill with the same general revenue sharing premise failed to pass in California last year in large part due to gender equity concerns, this tweaked version provides provisions to give schools greater flexibility in adhering to Title IX and revenue sharing, thus breeding optimism that this version will pass in the legislature.[7677] The important changes to this

[74] *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019) (holding a student-athlete in a football program was not an employee of the NCAA or Pac-12 under the FLSA)
[75] Michael McCann, *What's Next after California Signs Game Changer Fair Pay to Play Act into Law?*, Sports Illustrated, (Sep. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12
[76] Ross Dellenger, *California College Athletes Could Cash in Under Proposed Revenue Sharing Bill*, Sports Illustrated (Jan. 19, 2023), https://www.si.com/college/2023/01/19/california-assembly-college-athletes-revenuesharing-bill-ncaa-nil
[77] California Assembly Bill No. 252, California 2023-2024 Regular Session, at 67463(k)

bill include provisions permitting the institutions to adjust the amounts completion fund payment designations to comply with Title IX financial aid proportionality comparisons in athletics under certain conditions, and provisions requiring that the institutions complete annual Title IX compliance evaluations.[95]

So, assuming that the California College Athlete Protection Act becomes law, the big question remains: how will this impact student athletes' rights in other states?

A. **California: a trend setter for student athletes in NIL and Revenue Sharing?** The trajectory of this bill is very similar to the Fair Pay to Play Act in the respect that both bills were introduced during a renaissance of student athlete rights, on the heels of Supreme Court decisions which increased the rights of student athletes, but did not achieve the ultimate goal of compensation at fair market value.[78] Another significant similarity between the revenue sharing bill and the NIL law is that its passage would give California a massive competitive advantage in terms of attracting the best student athletes.[79] Given that the bill entitles all members of a revenue generating team to an equal share of the revenue, this bill becomes even more attractive to a larger number of athletes.

An interesting aspect of bills regarding college sports is that states like California may pass legislation largely in part because they believe in increasing the rights of student athletes, but other

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[78] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021) (Kavanaugh, J., Concurring)

[79] Gus M. Bilrakis, *Why this Congress needs to Pass a National NIL Standard*, Sportico: the Business of Sports, (Jan. 4, 2023 at 8:30 A.M.), https://www.sportico.com/leagues/college-sports/2023/why-congress-needs-to-passnational-nil-standard-1234699718/ [98] *Ibid*.

more conservative states will pass nearly identical laws purely because of the desire to maintain the competitive balance and recruit the best athletes to play for their schools.[98]

Despite the fact that many legislators in states such as Mississippi generally oppose these type of policies, they acknowledge that they are willing to push such bills through despite their opposition for one large reason: the love of the game.

> "I don't think any state is happy about this legislation, but we're seeing this as a necessity," says C. Scott Bounds, a Republican member of the Mississippi House of Representatives who's helping oversee the bill's journey through the state's legislative process. "We don't want to lose a competitive edge in recruiting, both athletically and academically, especially against those in the Southeastern Conference."[80]

While certain states might be even more opposed to passing revenue sharing laws than they were to passing NIL laws, these legislators' reticence may be defeated by their desire to win the big games, especially considering that states who pass revenue sharing laws would have an extreme competitive advantage.

This desire to maintain a competitive advantage and keep up with the Joneses will be more pressing than ever for certain states if the College Athlete Protection Act passes in California, because UCLA and USC join the Big Ten in 2024 and several other schools are currently in the Pacific 12 (Pac-12) Conference.[81]

[80] Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, Sports Illustrated (Mar. 4, 2021), https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congressncaa

[81] Annie Cory, *When Will UCLA, USC Join the Big Ten Conference?*, NBC Sports (Mar. 14, 2023 at 4:46 P.M.), https://sports.nbcsports.com/2023/03/14/when-will-ucla-usc-join-big-ten-conference/

In 2018, USC Football made approximately $50 million in revenue while it was a member Pac-12, with approximately $32.2 million coming from Pac-12 distributions afforded to all members.[82] In comparison, Big Ten schools received an average payout of approximately $54 million each from Big Ten media rights during that same time frame.[83] While the discrepancy in the amount of money Pac-12 and Big Ten schools made in 2018 as a result of media rights, this discrepancy will grow exponentially once the new Big Ten media deal takes effect later this year.[84]

Under the new Big Ten media rights deal which is worth $7 billion over seven years, or $1 billion per year, the conference is projected to distribute between approximately $80 million to $100 million per year to each member school.[85] Given that USC and UCLA will join the Big Ten in 2024, they will both eventually be entitled to these record-breaking annual media rights payouts. If the California College Athlete Protection Act is signed into law, student athletes on certain teams for USC and UCLA will also be entitled to share a large portion of this massive revenue.

Given that USC and UCLA student athletes could eventually earn $25,000.00 per year and potentially hundreds of thousands (if not millions) of dollars in addition to the yearly maximum

[82] Ross Dellenger, *California College Athletes Could Cash in Under Proposed Revenue Sharing Bill*, Sports Illustrated (Jan. 19, 2023), https://www.si.com/college/2023/01/19/california-assembly-college-athletes-revenuesharing-bill-ncaa-nil

[83] Ella Brockway, *Report: Northwestern Received Big Ten Payout of Roughly $54 million for Fiscal Year 2018*, The Daily Northwestern, (May 23, 2019), https://dailynorthwestern.com/2019/05/23/sports/report-northwesternreceived-big-ten-payout-of-roughly-54-million-for-fiscal-year-2018/

[84] Alan Blinder and Kevin Draper, *Topping $1 Billion a year, Big Ten Signs Record TV Deal for College Conference*, New York Times (Aug. 18, 2022), https://www.nytimes.com/2022/08/18/sports/ncaafootball/big-tendeal-tv.html

[85] Adam Rittenberg, *Big Ten Completes 7-Year, $7 billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billionmedia-rights-agreement-fox-cbs-nbc

pay if they graduate college within six years of enrollment, this would make USC and UCLA far more competitive than other schools when recruiting students.

Given that states quickly adopted NIL laws out of fear that failing to do so would put their schools at a significant competitive disadvantage, the potentially massive amount of money student athletes in California could make through the revenue sharing bill would almost certainly force action from certain states.[86]

VI. REVENUE SHARING IN THE COLLEGE ATHLETE PROTECTION ACT COMPARED TO REVENUE SHARING IN PROFESSIONAL SPORTS.

[87]Professional sports leagues split revenues between players and clubs in a manner similar to how the College Athlete Protection Act seeks to split the revenues between institutions and players. While revenue splitting in professional sports is often agreed upon in Collective Bargaining Agreements between the ownership and the players associations, the CAPA revenue sharing requirement closely resembles some of these revenue splitting arrangements, albeit with some stark distinctions.

The CAPA calls for the compensation of athletes by subtracting the intercollegiate athletic team's aggregate athletic grants from one-half of the intercollegiate athletic team's revenue and dividing that difference by the number of athletic grants provided to college athletes on that team.[106] The Act further provides that "revenues" means annual intercollegiate athletics revenue as calculated

[86] Eric Prisbell, *State Governments, especially in SEC Footprints, relaxing their Rules on NIL*, On3 OS, (April 26, 2022), https://www.on3.com/nil/news/state-governments-especially-in-sec-footprint-relaxing-their-rules-on-nil/
[87] California Assembly Bill No. 252, California 2023-2024 Regular Session

and reported pursuant to the federal Equity in Athletics Disclosure Act by an institution of higher education to the United States Department of Education.[88]

The Equity in Athletics Disclosure Act states total revenues means gross revenues, meaning that the CAPA does not permit institutions to deduct expenses such as operating costs from the one-half of the team's revenue allocated to the team's athletes.[89] Instead, only athletic grants may be deducted, and the Act does not specify whether 'athletic grant' includes other education-related benefits that only became available to athletes following the *Alston* opinion. Colleges' inability to deduct certain expenses from the athletes' compensation is the most obvious way in which the CAPA differs from some professional sports leagues' revenue splitting arrangements.

A. Revenue Splitting in Major League Baseball and National Basketball Association vs. the College Athlete Protection Act.

Major League Baseball's revenue splitting arrangement is the most ambiguous out of the top professional sports leagues, because MLB keeps its books closed.[109] However, the most recent CBA which has been made available to the public sheds some light on revenue sharing in MLB and shows how it differs from the plan in the CAPA.[110] The current baseball CBA requires teams to pool 48% of their "net local revenues," meaning that the local revenues *after* accounting for the operating costs and associated expenses.

In terms of splitting revenues between the teams and the players, MLB does not disclose exact numbers, but projections and reports suggest that around 50% of the *net* revenue is allocated to players' salaries.[111] Some researchers have even suggested that MLB and MiLB players have

[88] *Ib*. at 67461(p)

[89] User's Guide For The Equity In Athletics Disclosure Act Web-Based Data Collection, https://surveys.ope.ed.gov/athletics2k20/wwwroot/documents/2019_EADA_Users_Guide.pdf

received a salary split in excess of 57% in the past decade or so.[112] Similarly to MLB, the NBA owners and players evenly split the revenue, minus certain expenses which can be deducted from the players' share.[113]

[109] Dave Manuel, *A Look at Revenue Splits in the NFL, MLB, NHL and NBA*, Sports King (Feb. 27, 2020 at 12:05 A.M.), https://www.sports-king.com/revenue-split-sports-leagues-2771/

[110] Basic Agreement between the 30 Major League Clubs and Major League Baseball Players Association 2022-2026, (2022), https://www.mlbplayers.com/_files/ugd/4d23dc_88609b8210174cfa9fee95fc2be279af.pdf

[111] Ben Lindbergh, *Baseball's Economics Aren't as Skewed as They Seem*, The Ringer, Feb. 21, 2018 at 10:17 a.m., https://www.theringer.com/mlb/2018/2/21/17035624/mlb-revenue-sharing-owners-players-free-agency-rob-manfred (MLB Commissioner Rob Manfred states that around 50% of revenue is spent on players' salaries and MLBPA executive director Tony Clark confirms that the players' share of revenue is about 50%)

[112] Maury Brown, *MLB Spent Less On Player Salaries Despite Record Revenues In 2018*, Forbes (Jan. 11, 2019 at 7:00 A.M.), https://www.forbes.com/sites/maurybrown/2019/01/11/economic-data-shows-mlb-spent-less-on-playersalaries-compared-to-revenues-in-2018/?sh=8fc435439d79

[113] National Basketball Association Collective Bargaining Agreement (Jan. 19, 2017), https://faculty.tuck.dartmouth.edu/images/uploads/faculty/daniel-feiler/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf; *but see* Matthew Netti, *Breaking Down the NBA CBA*, Conduct Detrimental: The Sports Law Intersection (April 10, 2023), https://www.conductdetrimental.com/post/breaking-down-the-nba-cba ("Historically, the NBA's licensing revenue was excluded from basketball-related income with the money generated exclusively going to the owners. The players bargained to have that figure included, $160M for the 2023/2024 season, for which the players will be entitled to $80M. That money will attribute to higher salaries for players.")

While the MLB and NBA players are allocated close to the same percentage of revenue as the athletes under the proposed College Athlete Protection Act, the ability for MLB and NBA teams to deduct operating expenses from the players' share definitely distinguishes the models used by MLB and NBA from the proposed California legislation.

B. The National Football League's revenue splitting model most closely resembles the proposal in the College Athlete Protection Act.

Unlike the revenue splitting models used by MLB and the NBA, which permit teams to deduct certain expenses from the players' share or revenue, the NFL players receive, at minimum, 48% of *gross* revenue.[90] In 2011, the players and the NFLPA negotiated to eliminate expense deductions,

[90] JC Tretter, *NFL Economics 101*, NFLPA (Oct. 27, 2021), https://nflpa.com/posts/nfl-economics-101

shifting from essentially a net/profit share to a gross revenue share system, meaning that the model used by the NFL closely resembles the gross revenue splitting in the College Athlete Protection Act.

VII. LEGALITY OF THE COLLEGE ATHLETE PROTECTION ACT IN A POST-*ALSTON* WORLD.

Precedent suggests that bill, if enacted, would face immediate legal challenges from the NCAA.[91] However, the Supreme Court's opinion and concurrence in *Alston* and the majority of states enacting NIL laws despite the initial NCAA warnings raise the question of whether legal challenges would be successful.

As a result of *Alston*, the remaining compensation rules are all subject to analysis under the rule of reason framework, requiring (1) the plaintiff to show that the restraint produces 'significant anticompetitive effects' within a 'relevant market;'[92] (2) the defendant to demonstrate the restraint's procompetitive effects;[117] and (3) plaintiff to show that any of the restraint's legitimate objectives can be achieved in a substantially less restrictive manner.[93]

Given that *Alston* severely casts doubts on whether the NCAA can demonstrate

[91] Nathan Fenno, *NCAA warns California Bill that would allow college athletes to be paid is unconstitutional*, Los Angeles Times (Sept. 11, 2019), https://www.latimes.com/sports/story/2019-09-11/ncaa-fair-pay-bill-collegeathletes-gavin-newsom (NCAA letter warns that the 2019 NIL bill would be unconstitutional and result in student athletes from the 58 California NCAA schools being unable to participate)

[92] *Ibid*. [117]

Ibid.

[93] *Ibid*.

procompetitive effects of restraints such as the compensation rules that would prohibit legislation like the College Athlete Protection Act from allowing students to earn money through revenue sharing, its entirely possible that NCAA challenges will prove to be futile. The *Alston* opinion in conjunction with Justice Kavanaugh's concurrence has caused substantial uncertainty with the types of compensation that are permissible moving forward.[94]

Additionally making these rules unclear is *Johnson et. al. v. NCAA*, which is gaining momentum in the third circuit and raising questions as to whether student athletes are entitled to hourly wages pursuant to the FLSA.[95] While a lack of clarity exists with respect to the NCAA compensation rules, the climate seems to suggest that numerous influential circuit courts, and more importantly, the Supreme Court, are increasingly likely to rule against the NCAA in antitrust challenges.

As a result, states would likely be placing themselves at a competitive disadvantage with potentially long-lasting ramifications should the California revenue sharing bill become law.

Professional athletes have likened the NCAA to a "dictatorship" with its harsh and inequitable compensation rules, and said that as a result, many college athletes leave without graduating so that they can actually earn money.[96] Between the decision in *Alston*, the NCAA passing an interim NIL policy, *Johnson et. al. v. NCAA*'s momentum in the third circuit, and legislation such as the

[94] Gregory A. Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, Foley & Lardner, LLP, (Aug. 4, 2021), https://www.foley.com/en/insights/publications/2021/08/ncaa-v-alston

[95] *What the Third Circuit's Looming Decision Regarding Whether College Athletes Can Constitute "Employees" Will Mean for Universities and Employers of Unpaid Student Interns*, JD Supra, (Jan. 19, 2023), https://www.jdsupra.com/legalnews/what-the-third-circuit-s-looming-8604968/

[96] Draymond Green, *Opinion Draymond Green: The NCAA is a dictatorship. Its rules on compensating athletes are unfair*, Washington Post, https://www.washingtonpost.com/opinions/draymond-green-yes-college-athletes-shouldbe-able-to-make-a-living/2019/10/09/0ada4776-eaaa-11e9-9c6d-436a0df4f31d_story.html ("People argue that changing these rules will destroy college athletics. Those are just scare tactics from people who want to keep players from being able to make money that's rightfully theirs. This bill does not say the NCAA needs to pay athletes. It simply allows college athletes to endorse products or sell jerseys. It won't slow the money that pours into the NCAA; in fact, it might keep players in college longer.")

College Athlete Protection Act, evidence seems to suggest that if the NCAA is a dictatorship, it's one whose power is rapidly declining.

Given the current state of the NCAA and the extreme competitive advantage California schools (specifically USC and UCLA) would have if the state were to enact the College Athlete Protection Act, other states would be foolish to not at least start considering the possibility of enacting similar legislation.

VIII. CONCLUSION.

When or whether this bill is enacted remains to be seen, however its potential ability to impact college athletes is undeniable. Before this bill moves forward, its proponents will likely have to answer several questions about the proposal: how will this impact coaches' salaries? Does the bill allocate too high a percentage of revenue to the athletes? Do the new Title IX provisions actually ensure Title IX compliance? Are the education-related benefits permitted by *Alston* deducted from the athletes' share?

While these and many other questions likely need to be clarified prior to the bill's passage, college athletes have plenty reason to be optimistic about their ability to receive compensation for their efforts in the upcoming years.