

*NCAA v. BOARD OF REGENTS 2.0: POTENTIAL  
ANTITRUST LAW CLAIMS ARISING  
FROM THE NCAA'S REGULATION  
OF COLLEGE ATHLETES' NIL*

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*Abstract*

*This Article outlines potential antitrust law claims arising from the NCAA's current regulation of college athletes' name, image and likeness ("NIL"). 2021 was a watershed year for the NCAA. First, it lost 9-0 at the Supreme Court in NCAA v. Alston, an antitrust law case challenging its restrictions on education-related compensation to college athletes. Days later, the effectuation of state laws recognizing college athletes' right to profit from their NIL began. Following its Supreme Court defeat, the NCAA acquiesced from its historic amateurism policy and released an interim policy allowing NCAA athletes to financially benefit from their NIL while remaining eligible. The NCAA provided updated guidance on the policy in 2022, restricting how schools, conferences, and college athletes can engage in the NIL marketplace. This Article examines the antitrust law challenges that could emerge under the NCAA's new restrictions on college athletes' NIL rights. Part I discusses the Supreme Court's decision in NCAA v. Board of Regents for the University of Oklahoma and the marketplace for schools' sport broadcast rights that followed. Part II outlines the legislation and litigation that led the NCAA to change its NIL policy. Part III overviews the marketplace for NIL that subsequently emerged. Part IV discusses the potential antitrust law violations existing under the NCAA's new regulation of college athletes' NIL. Part V concludes with recommendations for the NCAA, athletics departments, conferences and college athletes to address the potential antitrust law violations and explains why Congress should not grant the NCAA antitrust immunity.*

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*Introduction*

“The times they are a-changin’” for NCAA college athletes.<sup>1</sup> Nobody recognizes this more perhaps than Jeremy Bloom.<sup>2</sup> Ahead of the 2002 season, the NCAA Division I University of Colorado Buffaloes recruited Bloom to play college football.<sup>3</sup> Bloom had already succeeded in his skiing career, competing in the Olympic Games and becoming the World Cup champion in freestyle moguls.<sup>4</sup> At the time, the NCAA enforced a standard of amateurism for NCAA athletes where “participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.”<sup>5</sup> The NCAA carried out this principle through amateurism-related bylaws, including NCAA Bylaw 12.5.2.1, which prohibited its athletes from accepting compensation for the use of their name or picture for advertising or endorsing a product.<sup>6</sup> This limitation was detrimental for Bloom, whose skiing career necessitated sponsorship income to pay for travel and competition expenses. Thus, Bloom, through the University of Colorado, sought a waiver from Bylaw 12.5.2.1 allowing him to be paid for his participation in media activities as a skier while remaining eligible for NCAA football.<sup>7</sup> The NCAA denied the waiver request.<sup>8</sup> Initially, Bloom stopped his skiing-related endorsement activities and competed for the University of Colorado football team in 2002.<sup>9</sup> Recognizing that endorsement income was necessary to further his skiing career, however, Bloom later sued the NCAA seeking declaratory and injunctive relief.<sup>10</sup> Bloom argued that because his

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1. BOB DYLAN, *The Times They Are A-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).

2. See Jeremy Willis, *Former College Football and Basketball Greats Celebrate Start of NIL Laws*, ESPN (July 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31744308/former-college-football-basketball-greats-celebrate-start-nil-laws](https://www.espn.com/college-sports/story/_/id/31744308/former-college-football-basketball-greats-celebrate-start-nil-laws) (highlighting Bloom’s excitement following college athletes gaining the ability to profit from their name, image and likeness).

3. See *Bloom v. NCAA*, 93 P.3d 621, 622 (Colo. App. 2004) (detailing Bloom’s recruitment as an NCAA athlete by the University of Colorado and subsequent challenge of its amateurism bylaws).

4. *Id.*

5. *Id.* at 626.

6. *Id.* at 625.

7. *Id.* at 622.

8. *Id.*

9. *Id.*

10. *Id.*

endorsement income arose from skiing and before becoming an NCAA athlete, he was eligible to compete in NCAA football.<sup>11</sup>

Bloom's challenge was unsuccessful; the Colorado Court of Appeals declined to issue a preliminary injunction. The court found Bloom failed to prove a reasonable probability of success on the elements, a factor necessary to attain a preliminary injunction in Colorado.<sup>12</sup> It reasoned that "the NCAA bylaws express a clear and unambiguous intent to prohibit student-athletes from engaging in endorsements" and that "although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement . . . activity and . . . participate in amateur competition."<sup>13</sup> Thus, application of the NCAA's bylaws to Bloom was not arbitrary and capricious.<sup>14</sup>

Bloom was left to decide between foregoing endorsement income to play college football or continuing with existing endorsement deals to further an award-winning skiing career.<sup>15</sup> Bloom threw one last Hail Mary attempt to save his college football career and requested another waiver from the NCAA. In August 2004, the NCAA denied that waiver request, and Bloom ended his college football career to pursue endorsement income and professional skiing.<sup>16</sup>

Two decades after Bloom's battle, the NCAA adopted an interim policy granting college athletes the right to financially benefit from their name, image, and likeness ("NIL") on June 30, 2021.<sup>17</sup> The NCAA's decision followed the enactment of several statutes by states codifying college athletes' right to profit from their NIL and the NCAA's 9-0 Supreme Court

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11. *Id.*

12. *Id.* at 628.

13. *Id.* at 626.

14. *Id.* at 626–28.

15. *See Bloom to Quit Football if Appeal Fails*, ESPN (July 18, 2004), <https://www.espn.com/college-football/news/story?id=1842131> (discussing that following the denial of his appeal, Bloom was prepared to give up college football).

16. *See No Football for Bloom While Taking Ski Endorsements*, ESPN (Aug 24, 2004, 06:40 PM ET), <https://www.espn.com/college-football/news/story?id=1867015> (noting that following denial of his waiver request by the NCAA, Bloom ended his intercollegiate football playing career).

17. *See Michelle Brutlag Hosick, NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (outlining the NCAA's initial policy allowing college athletes to financially benefit from their NIL).

loss in the *NCAA v. Alston* antitrust law case.<sup>18</sup> College athletes like Bloom were once on the opposite side of athletic departments when securing endorsements. Suddenly, an arms race between NCAA athletic departments emerged to provide college athletes with unique NIL-related offerings.<sup>19</sup>

This Article examines looming antitrust law challenges the NCAA faces in the NIL era connected to its governance of athletics departments' NIL-related offerings. Part I highlights the Supreme Court's decision in *NCAA v. Board of Regents for the University of Oklahoma*<sup>20</sup> and the resultant newly opened market for schools' sport broadcast rights. This part also overviews section 1 of the Sherman Act. Part II briefly outlines the litigation and legislation that caused the NCAA to permit college athletes to remain eligible for competition while obtaining NIL-related income. Part III discusses how the marketplace—including athletic departments, third-party vendors, and boosters—responded to the change in NCAA policy. Part IV outlines how, in light of this burgeoning marketplace, current NCAA policy and athletic department practices create potential antitrust challenges. Finally, Part V sets forth recommendations for the NCAA, member institutions, conferences and college athletes to adopt that could facilitate the NIL marketplace in adherence with federal antitrust law.

*I. A Supreme Court Decision Creating a Robust Open Market  
for Schools' Sport Broadcast Rights Spurs Expansive  
Spending on Intercollegiate Athletics*

The path to college athletes financially benefiting from their NIL in compliance with the NCAA's bylaws arguably began on June 27, 1984, when the Supreme Court ruled in *NCAA v. Board of Regents of the University of Oklahoma*, a case examining whether the NCAA's broadcast plan for college

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18. See Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, ATLANTA JOURNAL-CONSTITUTION (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/> (providing a timeline of the state legislation and Supreme Court loss that led to the NCAA adopting an interim policy allowing college athletes to profit from their NIL).

19. See *Bloom*, 93 P.3d at 622 (noting that the University of Colorado was an “indispensable” defendant in Bloom’s lawsuit seeking to waive application of the NCAA’s amateurism rules to him); Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SI.COM (July 1, 2021), <https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa> (highlighting the range of services NCAA member institution athletic departments provide college athletes to help them navigate endorsement deals).

20. 468 U.S. 85 (1984).

football violated the Sherman Act.<sup>21</sup> The challenged plan between the NCAA and two broadcast networks, ABC and CBS, began in 1951 following NCAA research showing that broadcasting football games negatively impacted in-person football game attendance.<sup>22</sup> The terms of the plan limited how often schools' football games could be broadcast on television.<sup>23</sup> Networks could negotiate the fees for television rights directly with member institutions, but the NCAA recommended what fee should be paid to schools from a pool of money the NCAA received under the agreement.<sup>24</sup> Schools were precluded from negotiating television rights deals outside of the plan.<sup>25</sup>

The University of Pennsylvania, which around 1940 became one of the first NCAA programs to broadcast a college football game<sup>26</sup> and thereafter entered into a ten-year deal broadcasting deal, initially challenged the plan.<sup>27</sup> The university quickly acquiesced when the NCAA "declared Pennsylvania a member in bad standing" and the teams scheduled to compete against the school canceled their games.<sup>28</sup> After that, the NCAA's broadcast plan exercising "complete control" over the number of televised games went unchallenged until 1981.<sup>29</sup> That August, a group of schools organized as the College Football Association ("CFA") negotiated a broadcast agreement with NBC to televise a greater number of the schools' football games and pay them higher telecast revenues.<sup>30</sup> In turn, the NCAA threatened serious discipline, prompting the University of Oklahoma and the University of Georgia to seek a preliminary injunction preventing the NCAA from disciplining the schools or interfering with the contract.<sup>31</sup> The case reached

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21. *Id.*

22. *Id.* at 89–92.

23. *Id.* at 92–94.

24. *Id.* at 93.

25. *Id.* at 94.

26. Allen R. Sanderson & John J. Siegfried, *The Role of Broadcasting in National Collegiate Athletic Association Sports*, 52 REV. INDUS. ORG. 305, 309 (2018). The Court gave 1938 as the date of the University of Pennsylvania's first televised football game, referencing an NCAA publication from 1981. *Bd. of Regents*, 468 U.S. at 89. Since then, however, multiple sources, including the NCAA itself, have cited a 1939 contest between Fordham University and Waynesburg College as the first televised game in history. *See College Football History: Notable Firsts and Milestones*, NCAA (June 22, 2022), <https://www.ncaa.com/news/ncaa/article/2020-01-31/college-football-history-notable-firsts-and-milestones>; Sanderson & Siegfried, *supra*.

27. *Bd. of Regents*, 468 U.S. at 89.

28. *Id.* at 90.

29. *Id.* at 91–92.

30. *Id.* at 94–95.

31. *Id.* at 95.

the Supreme Court, which held that the NCAA's television plan violated section 1 of the Sherman Act.<sup>32</sup>

Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."<sup>33</sup> The Act only bans unreasonable restraints on trade.<sup>34</sup> For a claimant to establish the existence of an unreasonable restraint on trade, two threshold elements must be proven: (1) an effect on interstate trade or commerce; and (2) an agreement forming a contract, combination, or conspiracy.<sup>35</sup>

If the threshold elements are met, the court conducts a competitive effects test to assess the agreement's impact on competition in the marketplace.<sup>36</sup> Courts rely on one of three competitive effects tests: the per se test, the rule of reason, and sometimes, though rarely, the quick-look test.<sup>37</sup> The per se test is applied when convincing evidence of anticompetitive behavior exists on the surface.<sup>38</sup> Such restraints violate the Sherman Act without further inquiry into the restraint's anticompetitive effects unless an exception exists.<sup>39</sup> The rule of reason applies when a restraint may serve a procompetitive purpose.<sup>40</sup> The test involves a "three-step, burden-shifting framework."<sup>41</sup> The plaintiff must first show "that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."<sup>42</sup> If that burden is met, the defendant may "show a procompetitive rationale for the restraint" in their defense.<sup>43</sup> If the defendant proves such, the plaintiff must "demonstrate that the procompetitive efficiencies could be reasonably

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32. *Id.* at 120.

33. 15 U.S.C. § 1.

34. See Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 70–71 (2013) (explaining that section 1 of the Sherman Act only bans unreasonable restraints of trade and detailing how the law operates).

35. See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp 1049, 1062 (C.D. Calif. 1971) (citing 15 U.S.C. § 1) (detailing the threshold elements necessary to prove an unreasonable restraint on trade in violation of section 1 of the Sherman Act).

36. See Edelman, *supra* note 34, at 71.

37. *Id.* at 73.

38. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103–04 (1984).

39. See Edelman, *supra* note 34, at 73.

40. *Id.*

41. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (outlining how the rule of reason operates).

42. *Id.*

43. *Id.*

achieved through less anticompetitive means.”<sup>44</sup> Finally, the quick-look test is an abbreviated application of the rule of reason.<sup>45</sup> This test is applied to “restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry.”<sup>46</sup> Here, rather than conducting the rule of reason’s in-depth, burden-shifting analysis, the alleged restraint is examined “in the twinkling of an eye.”<sup>47</sup>

The Supreme Court applied the rule of reason in *Board of Regents* and held that the NCAA’s television plan violated section 1 of the Sherman Act.<sup>48</sup> The Court found that the NCAA’s television plan amounted to a horizontal restraint on trade.<sup>49</sup> First, by restricting the number of games a school could broadcast, the plan was a limitation on output.<sup>50</sup> Second, setting a “minimum aggregate price” under the plan amounted to price fixing.<sup>51</sup> The existence of these horizontal restraints would typically invoke use of the per se test, resulting in an immediate finding of a violation of section 1 of the Sherman Act.<sup>52</sup> The NCAA operates as a joint venture, though, where member institutions must collaborate to produce intercollegiate athletics events, and so the less restrictive rule of reason was applied.<sup>53</sup>

*Board of Regents* permitted schools to begin negotiating their individual or conference-collective television broadcasting rights for regular season games. As a result, a burgeoning marketplace for schools’ broadcast rights grew following the decision. The University of Notre Dame was the first to strike a deal, signing a five-year, \$30 million agreement with NBC in 1990.<sup>54</sup> In 1994, the Southeastern Conference became the first conference to negotiate its own broadcast deal, entering a five-year, \$100 million

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44. *Id.*

45. *See* Edelman, *supra* note 34, at 74.

46. *California Dental Ass’n v. FTC*, 526 U.S. 756, 763 (1999) (quoting *California Dental Ass’n v. FTC*, 128 F.3d 720 (9th Cir. 1997), *vacated* 526 U.S. 756).

47. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984) (referencing Phillip Areeda, The “Rule of Reason” in Antitrust Analysis: General Issues 38 (Federal Judicial Center, June 1981)).

48. *Id.* at 89, 120.

49. *Id.* at 99.

50. *See id.*

51. *Id.* at 99–100.

52. *See id.* at 98–100.

53. *See id.* at 100–04.

54. *See* John Rohde, *NCAA Lost TV Case in '84, Giving College Football an Open Market*, OKLAHOMAN (Aug. 29, 2004, 12:00 AM), <https://www.oklahoman.com/story/news/2004/08/29/ncaa-lost-tv-case-in-84-giving-college-football-an-open-market/61976745007/> (detailing how the Supreme Court’s decision changed the landscape of intercollegiate athletics media rights deals).

agreement with CBS.<sup>55</sup> In 2022, the Big Ten Conference made history when it negotiated the most lucrative broadcast contract in history, inking a seven-year, \$7 billion agreement with Fox, NBC, and CBS.<sup>56</sup>

Beyond securing broadcast fees gargantuanly bigger than anything commanded under the NCAA's television plan, college sports teams today enjoy wider broadcast exposure. In 1984, only nine college football games were broadcast on ESPN.<sup>57</sup> Comparatively, in 2022 ESPN broadcasted over 500 college football games on its nascent digital streaming platform ESPN+ alone.<sup>58</sup>

Post *Board of Regents*, both money and exposure flooded college sports. Coincidentally, the decision also benefitted university athletic departments and NCAA Division I college football and men's basketball coaches. Athletics departments benefitted in the so-called "facilities arms race" waged between schools that are parties to the most lucrative broadcast deals, namely schools in the "Power 5" conferences.<sup>59</sup> In 2014 alone, forty-eight Power 5 conference schools spent \$772 million on athletic facilities, up eighty-nine percent from the decade prior.<sup>60</sup> Schools' interest in matching other programs' facilities tit-for-tat drove this increased cost. Take the University of Alabama which, a mere three years after renovating a recruiting room, built a new recruiting lounge after competitors shelled out more dollars on

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55. Richard Sandomir, *CBS Gets Football*, *College Variety*, N.Y. TIMES (Feb. 12, 1994), <https://www.nytimes.com/1994/02/12/sports/football-cbs-gets-football-college-variety.html> (discussing the terms of the Southeastern Conference's television agreement with CBS).

56. Alan Blinder & Kevin Draper, *Topping \$1 Billion a Year, Big Ten Signs Record TV Deal for College Conference*, N.Y. TIMES (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/sports/ncaaf-football/big-ten-deal-tv.html> (detailing the Big Ten Conference's record-breaking broadcast rights agreement).

57. Rohde, *supra* note 54.

58. Christine Calcagno, *ESPN+ to Stream More than 500 College Football Games This Fall*, ESPN PRESS ROOM (Aug. 31, 2022), <https://espnpressroom.com/us/press-releases/2022/08/espn-to-stream-more-than-500-college-football-games-this-fall-2/> (highlighting the record-breaking number of games ESPN planned to stream on its digital broadcast platform).

59. *Cf. Here's a Look at All the Current Conference TV Deals*, ON3 (Aug. 2, 2021), <https://www.on3.com/news/conference-tv-deals-current-status-college-football/> (detailing broadcast contract valuations for the Power 5 conferences, consisting of the ACC, Big Ten, Big 12, Pac-12, and SEC.).

60. Will Hobson & Steven Rich, *The Latest Extravagances in the College Sports Arms Race? Laser Tag and Mini Golf*, WASH. POST (Dec. 21, 2015, 4:01 PM EST), [https://www.washingtonpost.com/sports/colleges/for-college-athletic-departments-building-the-best-is-never-ending-task/2015/12/21/e8384dd4-a558-11e5-9c4e-be37f66848bb\\_story.html](https://www.washingtonpost.com/sports/colleges/for-college-athletic-departments-building-the-best-is-never-ending-task/2015/12/21/e8384dd4-a558-11e5-9c4e-be37f66848bb_story.html).



their facility builds.<sup>61</sup> The facilities arms race spreads beyond the Power 5 conferences. Between 2005 and 2020, spending on facilities and equipment by NCAA Division I Football Bowl Subdivision (“FBS”) and Football Championship Subdivision (“FCS”) schools increased from \$713.27 million to \$2.168 billion, a 131% increase adjusted for inflation.<sup>62</sup>

Coaches have also been financially rewarded handsomely post-*Board of Regents*. Though once a position fielded by volunteers,<sup>63</sup> twenty-one NCAA Division I football coaches earned salaries above \$5 million in 2021.<sup>64</sup> In 2020-21, twenty-nine men’s college basketball coaches earned salaries of at least \$3 million, up from twenty-one coaches in 2019-20 and fourteen coaches in 2018-19.<sup>65</sup>

Despite this influx of profit to programs and coaches, after the Court’s decision in *Board of Regents*, expanded broadcast revenue did not flow into college athletes’ pockets. Despite rising college sports revenues and growing expenditures, the compensation college athletes could receive for NCAA participation remained fixed at a scholarship, until, that is, lawyers and legislators got involved.<sup>66</sup>

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61. See Dan Wetzel, *How ‘Direct Dollars’ Have Totally Changed College Football Recruiting*, YAHOO! SPORTS (May 25, 2022), <https://sports.yahoo.com/how-direct-dollars-have-totally-changed-college-football-recruiting-162125803.html> (detailing athletics departments’ expenditures on athletic facilities driven to attract recruits).

62. Jeffrey C. Petersen & Lawrence W. Judge, *Reframing the Collegiate Facilities Arms Race: The Looming Impact of NIL and Conference Realignment*, 13 J. APPLIED SPORT MGMT. 36, 36–37 (2021), <https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1468&context=jasm> (providing data on the expansive spending on facilities and equipment by NCAA Division I athletics departments).

63. Richard Johnson, *A History of Skyrocketing College Football Coach Salaries, From Camp to Dabo*, BANNER SOC’Y (Aug. 15, 2019, 11:53 AM EDT), <https://www.banner-society.com/2019/8/15/20732192/coach-salaries-history-highest> (noting that Walter Camp, who is recognized as one of the first college football coaches, was a volunteer).

64. *Who Are the Highest-Paid College Football Coaches? These Are the Five Top Salaries*, USA TODAY (Nov. 16, 2021, 8:14 AM ET), <https://www.usatoday.com/story/sports/ncaaf/2021/11/08/highest-paid-college-football-coach-salaries/6319667001/>.

65. Brent Schrottenboer et al., *Cheating Allegations, Corruption Scandal Don’t Slow Men’s Basketball Coaches’ Pay*, USA TODAY (Mar. 11, 2020, 3:37 PM ET), <https://www.usatoday.com/story/sports/ncaab/2020/03/11/college-basketball-coaches-salaries-schools-pay-more-after-fbi-probe/5012939002/>.

66. See Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 527 (2008) (discussing the NCAA’s past limitation on college athletes’ earnings for competition in NCAA athletics to a scholarship).

## II. Litigation and Legislation Pave the Way to the NIL Era

Prior to July 1, 2021, the NCAA forbade college athletes at the over 1,000 U.S. colleges and universities over which it governs intercollegiate athletics<sup>67</sup> from monetizing their NIL.<sup>68</sup> This part first discusses the NCAA's own revenue growth following the *Board of Regents* decision. It then examines two subsequent key legal decisions—*O'Bannon v. NCAA* and *NCAA v. Alston*—and a series of state NIL statutes that stripped away the NCAA's ability to restrict college athletes from financially benefiting from their NIL.

Following the Supreme Court's *Board of Regents* decision, the NCAA—like its university and college member institutions—reaped significant broadcast revenues, mainly from its sale of broadcast rights for March Madness.<sup>69</sup> In 1994, the NCAA sold the rights to CBS in a seven-year deal valued at \$1.73 billion.<sup>70</sup> It re-upped the deal in 2003 for \$6 billion across eleven years, and again in 2010 for fourteen years at \$10.8 billion.<sup>71</sup> In 2016, CBS, Turner and the NCAA entered into an eight-year, \$8.8 billion extension through 2032.<sup>72</sup>

After *Board of Regents*, the NCAA also expanded its revenue through video game development. The NCAA partnered with Nintendo in 1992 on *NCAA Basketball*, which featured teams from five Division I-A conferences.<sup>73</sup> Three years later, it partnered with Electronic Arts (“EA Sports”) on *College Football USA 96*, which featured all Division I-A teams and their players.<sup>74</sup> EA Sports' *NCAA Football 98* expanded the roster of

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67. See *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited June 24, 2023) (providing information on the NCAA's reach and governance).

68. See generally Kristin R. Muenzen, Comment, *Weakening It's [sic] Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003) (outlining the NCAA's amateurism bylaws governing NCAA athletes' eligibility for college sports at that time).

69. Cf. NCAA Television Rights Overview 1 (Oct. 5, 2022), [https://www.ncaa.com/\\_flysystem/public-s3/files/Television%20Rights%20Overview\\_0.pdf](https://www.ncaa.com/_flysystem/public-s3/files/Television%20Rights%20Overview_0.pdf) (detailing that the NCAA owns the broadcast rights for postseason events and individual schools own the broadcast rights for regular season events).

70. Greg Andrews, *March Madness TV-Rights Price Tag Continues to Soar*, INDIANAPOLIS BUS. J. (Mar. 13, 2021), <https://www.ibj.com/articles/tv-rights-skyrocket> (outlining the historic valuation of the NCAA's March Madness broadcast rights).

71. *Id.*

72. *Id.*

73. See Larry Hester, *A History of College Basketball Video Games*, COMPLEX (Mar. 19, 2013), <https://www.complex.com/pop-culture/2013/03/a-history-of-college-basketball-video-games/> (outlining the history of the NCAA's basketball-related video games).

74. See *The History of NCAA Football*, ELEC. ARTS (Nov. 27, 2013), <https://www.ea.com/news/ncaa-football-history> (setting forth the history of the NCAA's partnership with video game maker Electronic Arts).

players that gamers could play with through its “Dynasty Mode” offering, which allowed gamers to “fill roster spots of graduating players with incoming freshman.”<sup>75</sup> The late 1990s also saw the NCAA’s launch of its *Final Four Series* with 2K Sports<sup>76</sup> and *NCAA March Madness* with EA Sports.<sup>77</sup> The NCAA continued producing new iterations of *NCAA Football* in partnership with EA through 2014.<sup>78</sup>

EA Sports generated over \$80 million in annual revenue from sales of *NCAA Football* alone,<sup>79</sup> with estimates indicating that the company earned \$1.3 billion from sales of the title through 2013.<sup>80</sup> Based on their team’s ranking, schools received annual royalties from *NCAA Football* ranging from \$7,500 to \$143,000.<sup>81</sup> Schools also earned thousands in annual royalties from EA Sports’ *NCAA Basketball*.<sup>82</sup>

In 2009, former University of California Los Angeles men’s basketball player, Ed O’Bannon, sued the NCAA and Collegiate Licensing Company, which oversaw licensing schools’ intellectual property to EA Sports.<sup>83</sup> The lawsuit alleged that the NCAA’s amateurism bylaws were a restraint of trade under the Sherman Act.<sup>84</sup> The court consolidated the *O’Bannon* case with a lawsuit filed by former Arizona State University quarterback, Sam Keller,

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75. *Id.*

76. Hester, *supra* note 73.

77. *Id.*

78. *The History of NCAA Football*, *supra* note 74.

79. Steve Berkowitz, *How EA Sports’s NCAA Football Video Game Could Make a Comeback*, USA TODAY (May 20, 2019, 11:16 AM ET), <https://www.usatoday.com/story/sports/2019/05/20/how-ea-sportss-ncaa-football-video-game-could-make-comeback/3704876002/> (detailing the revenue generated by EA through sales of *NCAA Football* video games).

80. Roger Groves, *EA Sports Will Still Score Even More Financial Touchdowns Without the NCAA*, FORBES (Sept. 28, 2013, 10:47 AM EDT), <https://www.forbes.com/sites/roger-groves/2013/09/28/ea-sports-will-still-score-even-more-financial-touchdowns-without-the-ncaa/?sh=562b2b84554a> (highlighting the revenue generated by EA through sales of *NCAA Football*).

81. See Chris Smith, *NCAA Football Video Game Is Worth Over \$75,000 Per Year for Top Teams*, FORBES (Aug. 22, 2013), <https://www.forbes.com/sites/chris-smith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-for-top-teams/?sh=343da02b26d4> (detailing the payment structure to schools for use of their intellectual property in EA’s *NCAA Football* video game); see also Kristi Dosh, *Is EA Sports Revenue Worth Schools’ Risk?*, ESPN (Aug. 21, 2013), [https://www.espn.com/blog/ncfnation/post/\\_id/81020/is-ea-sports-revenue-worth-schools-risk](https://www.espn.com/blog/ncfnation/post/_id/81020/is-ea-sports-revenue-worth-schools-risk) (highlighting the range of royalties schools received for the use of their intellectual property in EA Sports video games).

82. See Dosh, *supra* note 81.

83. *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

84. *Id.*

against the NCAA, Collegiate Licensing Company and EA Sports.<sup>85</sup> That suit alleged that the use of NCAA athletes' NIL in NCAA licensed video games violated the athletes' right of publicity.<sup>86</sup> The consolidated case was certified as a class action.<sup>87</sup>

Collegiate Licensing Company and EA Sports settled their claims.<sup>88</sup> The \$60 million settlement covered nearly 25,000 claims by former NCAA athletes "whose names and likenesses appeared in [EA Sports] video games from 2003 to 2014."<sup>89</sup> The court then deconsolidated the claims and *O'Bannon's* antitrust claims moved to a bench trial.<sup>90</sup>

There, the district court judge ruled in favor of *O'Bannon*, finding that NCAA amateurism bylaws prohibiting college athletes from being paid for their NIL violated section 1 of the Sherman Act.<sup>91</sup> To reach this holding, the court applied the rule of reason to determine if the amateurism bylaws unreasonably restrained trade in two markets: the college education market and the group licensing market.<sup>92</sup> The district court found that the NCAA's amateurism bylaws had an unlawful anticompetitive effect in the college education market, because prohibiting compensation to college athletes for the use of their NIL is price fixing.<sup>93</sup> At the second step in the rule of reason analysis, the court found two procompetitive purposes for the amateurism bylaws: preserving amateurism in NCAA athletics, and "integrating academics and athletics."<sup>94</sup> At the final step of analysis, the district court identified two less restrictive alternatives to the NCAA's "total ban on compensating student-athletes for use of their NILs."<sup>95</sup> First, schools could increase their athletic stipend awards up to the total cost of attendance.<sup>96</sup> Second, schools could maintain some licensing revenues in trust for

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85. *Id.*

86. *See id.*

87. *Id.* at 1055–56.

88. *Id.* at 1056.

89. Darren Rovell, *Athletes Whose Likenesses Appeared in Electronic Arts Games Will Share a \$60 Million Settlement*, ESPN (Mar. 15, 2016), [https://www.espn.com/college-sports/story/\\_/id/14980599/college-football-basketball-players-receive-average-1600-settlement-electronic-arts](https://www.espn.com/college-sports/story/_/id/14980599/college-football-basketball-players-receive-average-1600-settlement-electronic-arts) (detailing terms of the settlement between the *O'Bannon* plaintiffs and EA).

90. *O'Bannon*, 802 F.3d at 1056.

91. *Id.* at 1056.

92. *Id.* at 1056–57.

93. *See id.* at 1057–58.

94. *Id.* at 1058–60.

95. *Id.* at 1060–61.

96. *Id.* at 1061.

distribution to NCAA athletes after the conclusion of their NCAA eligibility.<sup>97</sup> Notably, neither less restrictive alternative required the NCAA to amend its bylaws to allow college athletes to monetize their NIL.

The NCAA appealed to the Ninth Circuit Court of Appeals.<sup>98</sup> There, the NCAA asserted that the Supreme Court's decision in *Board of Regents* held its "amateurism rules are 'valid as a matter of law.'" <sup>99</sup> The Ninth Circuit disagreed, finding that because the NCAA's bylaws "are part of the 'character and quality of the [NCAA's] 'product,'" no NCAA rule should be invalidated without a Rule of Reason analysis."<sup>100</sup> The Ninth Circuit explained that the Supreme Court's discussion of the NCAA's amateurism standard in *Board of Regents* was dicta and, as such, it was not required "to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."<sup>101</sup> Thus, applying the rule of reason, the Ninth Circuit found that the lower court did not clearly err in permanently enjoining the NCAA from prohibiting schools from granting college athletes up to full cost of attendance scholarships.<sup>102</sup> However, the Ninth Circuit vacated the portion of lower court's judgment allowing member institutions to pay up to \$5,000 per year in deferred compensation to FBS football and Division I men's basketball players. There, the Ninth Circuit reasoned that allowing NCAA member institutions to directly pay college athletes for use of their NIL is not a less restrictive alternative under the rule of reason.<sup>103</sup> Thus, the judicial outcome of *O'Bannon* seemingly kept the NCAA's amateurism model intact. In actuality, though, the Ninth Circuit's application of the Sherman Act and rule of reason analysis to the NCAA's amateurism bylaws carved a pathway for college athletes to benefit financially from their NIL.

This pathway was struck open in June 2021 when the U.S. Supreme Court decided *NCAA v. Alston*, a case again considering the immunity of the NCAA's bylaws from antitrust scrutiny.<sup>104</sup> The Supreme Court granted certiorari based on writs filed by the NCAA and the American Athletic Conference following their Ninth Circuit loss in the case.<sup>105</sup> *Alston* arose

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1063 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

101. *Id.*

102. *Id.* at 1074.

103. *Id.* at 1076, 1079.

104. 141 S. Ct. 2141, 2147 (2021).

105. *NCAA v. Alston*, 141 S. Ct. 1231 (2020); *Am. Athletic Conf. v. Alston*, 141 S. Ct. 972 (2020).

when current and former NCAA Division I FBS football and men's and women's basketball athletes filed a class action antitrust challenge to "the NCAA's entire compensation framework."<sup>106</sup> The reach of the case narrowed after the district court held that NCAA bylaws limiting education-related benefits to college athletes violate section 1 of the Sherman Act, but limitations on non-education-related benefits to college athletes do not.<sup>107</sup>

On appeal, the Ninth Circuit held that the district court correctly applied the rule of reason to find the NCAA's limits on education-related benefits violated the Sherman Act.<sup>108</sup> Here, the Ninth Circuit agreed with the district court that the NCAA's bylaws "have 'significant anticompetitive effects'" on the "market for Student-Athletes' labor on the gridiron and the court."<sup>109</sup> In the second step of its rule of reason analysis, the Ninth Circuit found that the NCAA's rules restricting non-cash education-related benefits did not serve the NCAA's procompetitive purpose of preserving amateurism.<sup>110</sup> Next, the Ninth Circuit found that the district court did not err in approving the plaintiffs' less restrictive alternatives.<sup>111</sup> The Ninth Circuit asserted the "district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports."<sup>112</sup>

Despite the Ninth Circuit whittling down a case initially seeking to eviscerate any limitation on college athlete compensation<sup>113</sup> to an outcome merely enjoining the NCAA's ability to restrict education-related benefits,<sup>114</sup> the NCAA sought review. In its review, the Supreme Court considered whether the lower courts erred in applying the rule of reason.<sup>115</sup> The NCAA asserted that the lower courts should have conducted an "abbreviated

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106. *Alston v. NCAA (In re NCAA Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1247 (9th Cir. 2020), *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 972.

107. *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019) [hereinafter *In re NCAA District Court*], *aff'd sub nom. NCAA v. Alston*, 141 S. Ct. 972.

108. *In re NCAA*, 958 F.3d at 1256.

109. *Id.* (citing *In re NCAA District Court*, 375 F. Supp. 3d at 1070).

110. *Id.* at 1258–59.

111. *See id.* at 1260.

112. *Id.* at 1263.

113. *See* Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the N.C.A.A.*, N.Y. TIMES (Aug. 27, 2014), <https://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html> (outlining the initial desired outcome for the *Alston* case from Jeffrey Kessler, attorney for the plaintiffs).

114. *See NCAA v. Alston*, 141 S. Ct. 2141, 2154 (2021).

115. *Id.* at 2155.

deferential review” to approve the restraints on athlete compensation, asserting that its status as a joint venture necessitated a “quick look” review.<sup>116</sup> The Court disagreed, noting that most joint venture restrictions are subject to the rule of reason.<sup>117</sup> Further, the NCAA’s monopsony power means that if it “is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.”<sup>118</sup>

The NCAA further asserted that *Board of Regents* foreclosed the Court’s ability to apply antitrust scrutiny of any kind to NCAA rules restricting compensation to college athletes.<sup>119</sup> The Court disagreed, noting: “*Board of Regents* may suggest that courts should take care when assessing the NCAA’s restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reject *all* challenges to the NCAA’s compensation restrictions.”<sup>120</sup>

Finally, the NCAA argued that its restrictions on college athlete compensation should not be subject to rule of reason analysis, because neither it nor its member institutions are “commercial enterprises.”<sup>121</sup> Here again, the Court disagreed, noting that the Court in *Board of Regents* found that the NCAA’s restraints affected interstate commerce and were thus subject to antitrust scrutiny.<sup>122</sup> Additionally, courts have subjected other nonprofit associations to the Sherman Act and “‘the economic significance of the NCAA’s nonprofit character is questionable at best’ given that ‘the NCAA and its member institutions are in fact organized to maximize revenues.’”<sup>123</sup> Just because the NCAA’s restrictions “happen to fall at the intersection of higher education, sports and money” does not warrant antitrust immunity.<sup>124</sup>

Finding the NCAA subject to antitrust scrutiny under a rule of reason analysis, the Supreme Court then assessed the district court’s application of the rule.<sup>125</sup> Here, the Court upheld the district court’s rationale and affirmed the ruling in a 9-0 decision.<sup>126</sup> The Court’s ruling was substantial. *Alston* not

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116. *Id.*

117. *Id.*

118. *Id.* at 2156.

119. *Id.* at 2157–58.

120. *Id.* at 2158.

121. *Id.* (quoting Brief for Petitioner at 31, *Alston*, 141 S. Ct. 2141).

122. *Id.* at 2159.

123. *Id.* (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100–01 n.22 (1984)).

124. *Id.*

125. *See id.* at 2160.

126. *Id.* at 2166.

only paved the way for NCAA member institutions to provide greater education-related benefits to college athletes, but also made precedent the applicability of the Sherman Act and rule of reason analysis to the NCAA.

As *Alston* moved through the courts, states began enacting statutes recognizing college athletes' ability to monetize their NIL.<sup>127</sup> On September 27, 2019, California became the first state to pass such a statute when Governor Gavin Newsom signed into law the unanimously enacted Senate Bill 206, the Fair Pay to Play Act.<sup>128</sup> The law prohibits California colleges and universities, along with entities governing college sports, including the NCAA, from preventing college athletes from monetizing their NIL.<sup>129</sup> The Act also disallows NIL-related payments to prospective student-athletes by colleges, universities, athletic associations, conferences, and other intercollegiate athletic governing bodies.<sup>130</sup> These entities must permit college athletes to engage with representatives, including agents and attorneys, on contracts and legal matters.<sup>131</sup> California students' athletic scholarships cannot be revoked if a college athlete financially benefits from their NIL or obtains representation.<sup>132</sup> The Act does, however, limit how college athletes can financially benefit from their NIL. First, Californian college-athletes cannot enter into deals that conflict with their athletic program's contracts.<sup>133</sup> They must also disclose any NIL contracts to a representative at their institution.<sup>134</sup>

The NCAA and other intercollegiate athletic leaders initially criticized California's Fair Pay to Play Act. Then NCAA president, Mark Emmert, denounced that Act as "a new form of professionalism and a different way of converting students into employees."<sup>135</sup> The Ohio State University athletic

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127. See, e.g., *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1252 (9th Cir. 2020) (discussing the enactment of California's Fair Pay to Play Act amidst the NCAA's appeal of the *Alston* case), *aff'd sub nom.*, *Alston*, 141 S. Ct. 2141).

128. *Gov. Newsom Signs SB 206, The 'Fair Pay to Play Act'*, NANCY SKINNER (Sept. 30, 2019), <https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99> (discussing the historic enactment by California of a bill restoring college athletes' right of publicity).

129. See CAL. EDUC. CODE § 67456(a) (2022).

130. *Id.* § 67456(b).

131. *Id.* § 67456(c)(1).

132. *Id.* § 67456(d).

133. *Id.* § 67456(e)(1).

134. *Id.* § 67456(e)(2).

135. Dana Hunsinger Benbow, *NCAA President Mark Emmert Says Fair Pay to Play Act Turns Student-Athletes into Employees*, (Oct. 3, 2019, 8:14 PM ET) INDYSTAR,



director Gene Smith vowed to not schedule games against schools whose states adopted NIL laws.<sup>136</sup> Even the Pac-12 Conference, whose membership then included four California schools, decried the law, claiming it would professionalize college sports, impact recruiting and competition in California, reduce resources for Olympic sports, and negatively impact women's sport athletes.<sup>137</sup>

Nevertheless, criticism and threats did not stymie states from enacting similar bills. Following California's enactment of the Fair Pay to Play Act, a majority of other U.S. states have since enacted NIL-related laws as of August 2023.<sup>138</sup> The earliest effectuation date of these laws was July 1, 2021.<sup>139</sup> As that date approached, the NCAA had not enacted NIL-related regulations to guide its member institutions on how to comply with state law and the NCAA's bylaws.<sup>140</sup> The NCAA reportedly intended to vote on NIL-related guidance in January 2021, but noted that "a threatening letter from the Department of Justice about potential antitrust violations led it to table the vote indefinitely."<sup>141</sup> Thus, questions loomed over whether the NCAA

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<https://www.indystar.com/story/sports/college/2019/10/03/ncaa-president-mark-emmert-responds-california-fair-play-pay-act/3850522002/> (detailing NCAA president Mark Emmert's initial negative reactions to the Fair Pay to Play Act and intercollegiate athletes financially benefiting from their NIL).

136. Edward Aschoff, *Ohio State AD Gene Smith Against Fair Pay to Play Act*, ESPN (Oct. 1, 2019), [https://www.espn.com/college-sports/story/\\_/id/27743871/ohio-state-ad-gene-smith-fair-pay-play-act](https://www.espn.com/college-sports/story/_/id/27743871/ohio-state-ad-gene-smith-fair-pay-play-act) (discussing Ohio State athletics director Gene Smith's negative reaction to college athletes gaining the right to financially benefit from their NIL).

137. Kristi Dosh, *The Sports World Begins to React to California's Fair Pay to Play Act*, FORBES (Sept. 30, 2019, 5:00 PM EDT), <https://www.forbes.com/sites/kristidosh/2019/09/30/the-sports-world-begins-to-react-to-californias-fair-pay-to-play-act/?sh=1c7bed1a1e0e> (outlining reactions to California's enactment of the Fair Pay to Play Act).

138. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (last updated July 28, 2023) (detailing NIL-related legislation enacted by individual states).

139. *See id.* (noting that NIL-related bills from Colorado, Florida, Georgia, Illinois, Kentucky, Mississippi, New Mexico, Ohio, Oregon, Texas, and South Carolina went into effect on July 1, 2021).

140. *See* Gregg E. Clifton & John G. Long, *State Name, Image, and Likeness Laws with July 1st Effective Dates Continue to Grow*, NAT'L L. REV. (May 7, 2021), <https://www.natlawreview.com/article/state-name-image-and-likeness-laws-july-1st-effective-dates-continue-to-grow>.

141. Liz Mullen & Michael Smith, *The Supreme Court Is Set to Hear Arguments This Week on NCAA v. Alston That Could Finally Bring Clarity on Athlete Compensation*, SPORTS BUS. J. (Mar. 29, 2021), <https://www.sportsbusinessjournal.com/en/Journal/Issues/2021/03/29/Portfolio/Athletes-and-nil> (highlighting the NCAA's rationale for its latency in enacting NIL-related legislation).

would legally challenge states' NIL-related laws.<sup>142</sup>

After the Supreme Court's ruling in *Alston* that NCAA restrictions on education-related compensation are subject to the Sherman Act and rule of reason scrutiny, any planned legal challenge abruptly ended. A mere nine days after the Court's decisive ruling, the NCAA adopted an interim NIL policy.<sup>143</sup> That policy suspended then-existing bylaws surrounding NIL, but offered member institutions minimal guidance on how to operate in the space.<sup>144</sup> The interim policy merely specified that NIL cannot be utilized as pay-for-play or recruiting inducements and that college athletes can utilize professional service providers for NIL-related activities, as consistent with state law.<sup>145</sup>

### III. The Burgeoning Marketplace for College Athletes' NIL

A robust marketplace for college athletes' NIL swiftly emerged. Signing an NIL deal at midnight on July 1, 2021, Jackson State University defensive end Antwan Owens became the first NCAA athlete in history to legally profit from their NIL.<sup>146</sup> College athletes in women's sports also capitalized on their NIL. Twin NCAA Division I women's basketball players, Haley and Hanna Cavinder, signed an NIL deal on the first day of the rule change, partnering with Boost Mobile.<sup>147</sup> College athletes also quickly launched individual businesses. University of Miami quarterback D'Eriq King and Florida State University quarterback McKenzie Milton co-founded the NIL-related platform Dreamfield.<sup>148</sup> Some NCAA athletes captured the moment by

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142. Tim Mullaney, *Supreme Court NCAA Ruling and the New Future of Paying College Athletes*, CNBC (June 23, 2021, 11:53 AM EDT), <https://www.cnbc.com/2021/06/21/supreme-court-ncaa-decision-how-college-athletes-plan-to-cash-in.html> (discussing that the NCAA considered bringing legal challenges to states' NIL-related laws).

143. Hosick, *supra* note 17; *Interim NIL Policy*, NCAA (July 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf).

144. *See Interim NIL Policy*, *supra* note 143.

145. *Id.*

146. *See* Blake Schuster, *Jackson State's Antwan Owens Becomes 1st D1 Player to Sign NIL Contract*, BLEACHER REP. (June 30, 2021), <https://bleacherreport.com/articles/10006839-jackson-states-antwan-owens-becomes-1st-d1-player-to-sign-nil-contract> (discussing Antwan Owens' history-making NIL deal).

147. Elizabeth Karpen, *Players Getting Paid: Here's Who Signed NIL Deals on Policy's First Day*, NY POST (July 1, 2021, 4:29 PM), <https://nypost.com/2021/07/01/here-are-players-who-signed-nil-deals-on-policys-first-day/> (setting forth NCAA athletes who entered into NIL deals on the first day they could legally do so under the NCAA's bylaws).

148. *Id.*

becoming entrepreneurs, like Clemson University wide receiver Justyn Ross, who designed and sold a clothing line.<sup>149</sup>

As college athletes quickly capitalized on the opportunity to benefit from their NIL, individual athletic departments worked to distinguish themselves through unique NIL-related offerings. By July 1, 2021, at least fifty-three Power 5 conference athletic departments had adopted NIL-related programming.<sup>150</sup> This programming fell into several categories. Many athletics departments partnered with third-party marketplace providers that connect college athletes with companies seeking endorsers.<sup>151</sup> Athletics departments partnered with companies providing NIL-related education to college athletes and compliance services to athletics departments.<sup>152</sup> Other athletics departments developed in-house NIL-related educational opportunities with faculty and departments on their campuses.<sup>153</sup> Some programs partnered with their school's respective law school to help college athletes navigate legal issues surrounding NIL deals.<sup>154</sup>

Beyond access to marketplaces and education, some athletics departments created new staff positions to assist NCAA athletes with their NIL.<sup>155</sup> Programs including the University of Arkansas and Duquesne University hired employees to develop NIL-related education programs.<sup>156</sup> Other

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149. *Id.*

150. Bromberg, *supra* note 19 (outlining individual NCAA athletics departments' approaches to NIL on the first day college athletes were allowed to financially benefit from their NILs under the NCAA's bylaws).

151. *See id.*; Alex Silverman, *Name, Image and Likeness Marketplace Platforms Offer Money-Making Opportunities for Lesser-Known College Athletes*, MORNING CONSULT (June 30, 2021, 4:07 PM CDT), <https://morningconsult.com/2021/06/30/ncaa-nil-online-platforms/> (highlighting NIL marketplaces that partnered with athletic departments and NCAA athletes to facilitate athlete-brand partnerships).

152. *See* Amanda Christovich, *The Company Educating College Sports' Biggest Programs on NIL*, FRONT OFF. SPORTS (Dec. 22, 2021, 6:56 PM), <https://frontofficesports.com/the-company-educating-georgia-usc-lsu-on-nil/> (highlighting Altius Sports Partners, a third-party NIL education and compliance partner of athletics departments).

153. *See* Bromberg, *supra* note 19.

154. *See* Jordan Morey, *IU Law Students Helping University's Athletes with NIL Deals*, INSIDE IND. BUS. (Sept. 28, 2022, 5:25 PM EDT), <https://www.insideindianabusiness.com/articles/iu-law-students-helping-universitys-athletes-with-nil-deals> (noting that University of Indiana School of Law students partnered with the school's college athletes to provide legal advice on their NIL deals).

155. *See* Bromberg, *supra* note 19.

156. *Id.*

programs offered brand advisors to their teams' college athletes.<sup>157</sup> Brand advisors collaborate with college athletes on "brand strategy, improving marketability, content creation, social activism and understanding NIL rules."<sup>158</sup> Athletics departments even hired employees to facilitate NIL deals for college athletes.<sup>159</sup> In fact, several athletic departments created "general manager" positions within their staffs specifically for this purpose.<sup>160</sup> Others, like Boise State University, developed in-house marketing agencies for college athletes.<sup>161</sup> At its founding, Boise State University's in-house agency sourced, negotiated, and facilitated individual and group licensing NIL deals for the school's college athletes opting into the free program.<sup>162</sup>

Other athletics departments turned to outside agencies to oversee NIL deal flow for college athletes. In June 2022, the University of Southern California partnered with a media company to develop an agency outside the athletics department to foster NIL opportunities for its college athletes.<sup>163</sup> Through

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157. See, e.g., See Jesse Washington, *Duquesne Empowers Athletes by Hiring 'Personal Brand Coach,'* ANDSCAPE (May 3, 2021), <https://andscape.com/features/duquesne-empowers-athletes-by-hiring-personal-brand-coach> (discussing that Duquesne University hired a personal brand coach to guide its college athletes' marketability even before college athletes could financially benefit from their NIL under the NCAA bylaws).

158. See, e.g., *Jordon Rooney Named Personal Brand Coach,* DUQUESNE (May 3, 2021, 9:55 AM), <https://goduquesne.com/news/2021/5/3/general-jordon-rooney-named-personal-brand-coach.aspx> (outlining the responsibilities of a college athletics department's brand advisor for college athletes).

159. See, e.g., Dan Murphy, *Players, Schools, Boosters Adjusting to New NIL Reality – and Opportunity,* ESPN (Aug. 17, 2022), [https://www.espn.com/college-sports/story/\\_/id/34404567/players-schools-boosters-adjusting-new-nil-reality-opportunity](https://www.espn.com/college-sports/story/_/id/34404567/players-schools-boosters-adjusting-new-nil-reality-opportunity) (noting a Louisiana State University employee hired to oversee NIL-related matters for the athletics department planned to connect the school's college athletes with NIL deals).

160. See *id.* (discussing athletics departments' hiring of general managers to assist college athletes in securing NIL deals); see also Joseph Zucker, *Duke Men's CBB Hires Rachel Baker as 1st-Ever GM to Oversee NIL Contracts, More,* BLEACHER REP. (June 7, 2022), <https://bleacherreport.com/articles/10037928-duke-mens-cbb-hires-rachel-baker-as-1st-ever-gm-to-oversee-nil-contracts-more> (explaining Duke men's basketball's NIL-related rationale in hiring a seasoned sport marketing executive as its first-ever general manager).

161. See Michael Smith, *Boise State Takes Aggressive Early Adopter Approach to NIL, Others Follow,* SPORTS BUS. J. (June 20, 2022), <https://www.sportsbusinessjournal.com/Journal/Issues/2022/06/20/Portfolio/Name-Image-Likeness.aspx> (detailing the in-house agency that Boise State University's athletics department created to facilitate NIL opportunities for its college athletes).

162. *Id.*

163. Ryan Kartje, *USC's Answer to NIL? A New Third-Party Agency Facilitating Deals,* L.A. TIMES (June 15, 2022, 7:43 PM PT), <https://www.latimes.com/sports/usc/story/2022-06-15/usc-third-party-media-agency-athletes-seek-nil-opportunities> (discussing USC's strategy to remain competitive amidst the NIL landscape).

this arrangement, athletics department officials would not participate in facilitating NIL deals for Southern California's college athletes, but instead, the newly formed corporation would work directly with its college athletes.<sup>164</sup>

In August 2022, the University of South Carolina athletics department partnered with Everett Sports Management, an existing marketing agency, to launch a subsidiary agency to facilitate NIL deals for the university's athletes.<sup>165</sup> The parties signed a \$2.2 million, two-year partnership agreement to offer the agency's services for free to the university's athletes.<sup>166</sup> Five employees were hired to manage operations, intending to first assist the school's high-profile athletes. Thereafter, a longer-term focus would serve athletes department-wide through negotiation of team-wide or department-wide sponsorships.<sup>167</sup>

Another market emerging to facilitate NIL opportunities for college athletes is the collective. A collective is typically a third-party non-profit corporation that benefits college athletes by providing them with NIL opportunities.<sup>168</sup> Collectives are often founded and funded by university alumni, fans, and boosters of respective athletics programs.<sup>169</sup> These donors fund the organization through either one-time donations or recurring subscriptions.<sup>170</sup> The funds are distributed to college athletes within the athletics department that the collective was formed to support.<sup>171</sup> College athletes receive funds from collectives in various ways. Student-athletes can

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164. *Id.*

165. Randall Williams, *South Carolina Partners with ESM on Park Ave NIL Subsidiary*, BOARDROOM (Aug. 30, 2022), <https://boardroom.tv/south-carolina-park-ave-nil/> (detailing the University of South Carolina athletics department's creation of a subsidiary agency to facilitate NIL deals).

166. Pete Nakos, *South Carolina Creates First In-House NIL Firm with Help of Everett Sports Marketing*, ON3 (Aug. 30, 2022), <https://www.on3.com/nil/news/south-carolina-gamecocks-everett-sports-marketing-park-avenue-esm-nil/> (outlining the terms of the University of South Carolina's agreement with Everett Sports Marketing to provide NIL agency services to its college athletes).

167. *Id.*

168. *See Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> (last updated Oct. 4, 2023) (providing information on NIL collectives).

169. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> (defining NIL collectives and setting forth current trends amongst and prevalence of collectives).

170. *Id.*

171. *Id.*

engage in charity work in exchange for a payout from the collective.<sup>172</sup> College athletes can also interact with collective donors through in-person or virtual events to receive compensation from the collective.<sup>173</sup> Some collectives also operate as de facto agencies, facilitating NIL deal flow to college athletes.<sup>174</sup>

#### *IV. NCAA NIL Regulations Pose Sherman Act Violations*

The NCAA attempted to rein in the burgeoning NIL marketplace by issuing updated guidance on its interim NIL policy in October 2022. This part first overviews the updated guidance, and then sets forth the potential unreasonable restraints presented therein. The part concludes with an examination of the Sherman Act claims that could be brought relating to the NCAA interim guidance by three groups of plaintiffs: athletics departments, conferences and college athletes.

##### *A. Overview of the NCAA's Updated Guidance on Its Interim NIL Policy*

The NCAA's updated guidance on its interim NIL policy consists of four categories of direction: (1) education and monitoring; (2) institutional support for college athlete NIL activity; (3) institutional support for collectives; and (4) institutional negotiation of college athlete NIL deals, revenue sharing, and compensation.<sup>175</sup>

Related to education and monitoring, the updated guidance clarifies that athletics departments can provide college athletes, collectives, boosters, and recruits with NIL-related education.<sup>176</sup> Further, athletics departments can require college athletes to report their NIL activities to them.<sup>177</sup>

The most significant shift outlined under the updated guidance relates to institutional support for college athlete NIL activity. Here, athletics departments or companies owned by athletic department staff members cannot be directly involved in the “development/creation, execution or implementation” of any college athlete’s NIL activity, “unless the same

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172. *Id.*

173. *Id.*

174. *Id.*

175. NCAA, NCAA Division I: Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities 3 (Oct. 26, 2022) [hereinafter NCAA, Institutional Involvement], [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL\\_InstitutionalInvolvementNILActivities.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf) (outlining the NCAA’s guidance issued on its interim NIL policy).

176. *Id.*

177. *Id.*

benefit is generally available to the institution's students."<sup>178</sup> Athletics departments cannot hire third-party agents to represent college athletes for NIL deals nor allow their third-party rights holders to do the same.<sup>179</sup> Additionally, athletics departments cannot communicate with outside entities to facilitate college athletes' NIL requests.<sup>180</sup> The guidance prohibits athletics departments from providing non-education-related NIL services to college athletes, such as graphic design, tax preparation, or legal review, if not provided to students at large.<sup>181</sup> Athletics departments also cannot provide college athletes with "equipment to support NIL activity," like cameras, software, and computers, if the same is not provided to the student body.<sup>182</sup> Athletics departments may not allow college athletes to engage in NIL-related activities during NCAA-related events, including practices, games, and press conferences.<sup>183</sup>

Institutions cannot subscribe or make direct financial contributions to collectives.<sup>184</sup> Universities may assist in collectives' fundraising efforts.<sup>185</sup> Institutions can ask donors to contribute to collectives, but cannot provide assets like tickets or suite access to incentivize donations.<sup>186</sup> Athletic departments can provide assets to NIL entities with whom they have a sponsorship agreement as long as "access to assets [is] available to and on the same terms, as other sponsors."<sup>187</sup> The interim guidelines prohibit schools from specifying that donors fund a collective on behalf of a particular sport or college athlete.<sup>188</sup> The guidance also disallows athletics department staff from holding simultaneous employment with a collective.<sup>189</sup>

As for revenue sharing and compensation, conferences cannot share broadcast or NIL revenue with college athletes.<sup>190</sup> Schools cannot enter into deals with college athletes to sell products related to the students' NIL.<sup>191</sup> Athletics department staff who own outside businesses cannot provide

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178. *Id.* at 4.

179. *Id.* at 3.

180. *Id.*

181. *Id.*

182. *Id.* at 4.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

college athletes with NIL deals.<sup>192</sup> Coaches likewise cannot pay college athletes to promote their camps.<sup>193</sup> Finally, college athletes cannot be paid to promote a competition in which they participate.<sup>194</sup>

*B. The NCAA's Interim NIL Policy Presents Potentially Unreasonable Restraints on Trade*

The NCAA's updated guidance on its interim NIL policy presents potentially unreasonable restraints on trade through price fixing and group boycotts. This subsection first sets forth what amounts to price fixing or a group boycott under the Sherman Act. Then, specific aspects of the updated guidance that could amount to price fixing or a group boycott are delineated.

Price fixing in violation of section 1 of the Sherman Act takes many forms.<sup>195</sup> Examples include setting minimum<sup>196</sup> and maximum<sup>197</sup> prices and fee schedules.<sup>198</sup> Most succinctly, “any naked agreement among competitors—whether by sellers or buyers—that fixes components that affect price meets the definition of a horizontal price-fixing agreement” in violation of the Sherman Act.<sup>199</sup> As for group boycotts, an unlawful group boycott exists if there is “a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level.”<sup>200</sup>

Table 1 details elements of the NCAA's updated guidance on its interim NIL policy that could lead three groups of plaintiffs—athletics departments, conferences, and college athletes—to allege the existence of price fixing or a group boycott in violation of the Sherman Act.

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192. *Id.*

193. *Id.*

194. *Id.*

195. *See generally* United States v. Jindal, No. 20-CR-00358, 2021 U.S. Dist. LEXIS 227474, at \*12 (E.D. Tex. Aug. 11, 2022) (detailing the types of agreements that amount to illegal horizontal price fixing under the Sherman Act).

196. *Id.* (citing United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927)).

197. *Id.* (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 335 (1982)).

198. *Id.* (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 783 (1975)).

199. *Id.* at \*13.

200. Nw. Real Est. Bd., Inc. v. Multiple Listing Serv., Inc., No. 90 C 6015, 1991 U.S. Dist. LEXIS 11809, at \*6 (N.D. Ill. Aug. 22, 1991) (citing Phil Tokan Datsun v. Greater Milwaukee Datsun Dealers' Advert. Ass'n, 672 F.2d 1280 (1982)).



**Table 1: Elements of the NCAA’s Updated Guidance on Its Interim NIL Policy That Could Amount to Price Fixing or a Group Boycott**

<b><u>Price fixing</u></b>	<b><u>Group boycotts</u></b>
<p><b>A. Price fixing impacting athletics departments</b> Prohibiting athletics departments from subscribing or donating to collectives.</p>	<p><b>A. Boycotts against athletic departments</b> Disallowing athletics departments from hiring third-party agents to represent college athletes for NIL deals.</p>
Prohibiting athletics departments from providing potential collective donors with assets.	Disallowing involvement by athletics departments or their staff members in NIL deal development, creation, execution or implementation for college athletes.
Prohibiting coaches from paying college athletes to promote coaches’ camps.	Disallowing athletics departments from facilitating college athletes’ NIL requests.
<p><b>B. Price fixing impacting college athletes</b> Prohibiting coaches from paying college athletes to promote coaches’ camps.</p>	Disallowing athletics departments from providing college athletes with non-education-related NIL services.
Prohibiting college athletes from being paid to promote an NCAA competition they participate in.	Disallowing athletics departments from providing college athletes with equipment to support NIL activity.
Prohibiting conferences from sharing broadcast or sponsorship revenue with college athletes.	Prohibiting athletics departments from entering into deals with college athletes to sell products related to their NIL.
	<p><b>B. Boycotts against conferences</b> Prohibiting conferences from sharing broadcast or sponsorship revenue with college athletes.</p>
	<p><b>C. Boycotts against college athletes</b> Forbidding college athletes from engaging in NIL-related activities during NCAA activities.</p>
	Prohibiting college athletes from being paid to promote an NCAA competition they participate in.

*C. An Analysis of the Antitrust Law Claims That May Be Brought by Athletics Departments, Conferences, and College Athletes Related to the Updated Guidance on the Interim NIL Policy*

As detailed in Table 1 above, the NCAA's updated guidance on its interim NIL policy risks antitrust litigation brought by three potential categories of plaintiffs. This subsection examines how these claims could unfold under a rule of reason analysis.<sup>201</sup>

The restraints presented in the NCAA's updated guidance on its interim NIL policy could be categorized as price fixing or group boycotts. In defending a lawsuit, the NCAA would likely first argue that the restraints fit neither category of anticompetitive action. Should the restraints be considered price fixing or group boycotts, the NCAA would likely assert that such restraints serve the pro-competitive purpose of preserving the NCAA's constitutional principles, as it did in the *Alston* case.<sup>202</sup> One principle titled, "The Collegiate Student-Athlete Model," found in the NCAA's new constitution, states: "Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by their NCAA division."<sup>203</sup> Tied to this principle are the NCAA's operating bylaws on amateurism. These bylaws require that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."<sup>204</sup> The NCAA's constitution and bylaws, combined with Supreme Court's decision in *NCAA v. Alston*, signal that the outcome of any antitrust challenge to the restrictions in Table 1 could shift on whether the restriction relates to services or payments to college athletes.<sup>205</sup> Note that *Alston* only found the NCAA's restraints on education-related benefits violative of the Sherman Act.

Table 2 categorizes the restrictions presented in the NCAA's updated guidance to its interim-NIL policy as either service restrictions or payment restrictions. Following the Table is an analysis of the antitrust law claims that

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201. See generally *NCAA v. Alston*, 141 S. Ct. 2141, 2155–57 (2021) (applying the rule of reason to the NCAA's compensation restrictions).

202. See *id.* at 2152 (noting that the NCAA asserted preserving amateurism as a procompetitive justification for its restraints on education-related compensation to college athletes).

203. NCAA CONSTITUTION art. 1(B), in NCAA, 2022-23 NCAA DIVISION I MANUAL at 2 (2022) [hereinafter 2022-23 NCAA DIVISION I MANUAL], <https://www.ncaapublications.com/productdownloads/D123.pdf>.

204. 2022-23 NCAA DIVISION I MANUAL, *supra* note 202, art. 12.01.1, at 39.

205. *Alston*, 141 S. Ct. at 2163–67 (affirming the lower court's decision that the NCAA's restrictions on education-related benefits to college athletes violate the Sherman Act).

could be made related to the service restrictions, and an analysis of the antitrust law claims that could be made related to the payment restrictions.

**Table 2: Restrictions on Services and Payments to College Athletes Under the NCAA's Updated Guidance to its Interim NIL Policy**

<b><u>Service Restrictions</u></b>	<b><u>Payment Restrictions</u></b>
Disallowing athletics departments from hiring third-party agents to represent college athletes for NIL deals.	Prohibiting athletics departments from subscribing or donating to collectives.
Disallowing involvement by athletics departments or their respective staff members in NIL deal development, creation, execution or implementation for college athletes.	Prohibiting athletics departments from providing potential collective donors with assets.
Disallowing athletics departments from facilitating college athletes' NIL requests.	Prohibiting coaches from paying college athletes to promote coaches' camps.
Disallowing athletics departments from providing college athletes with non-education-related NIL services.	Prohibiting college athletes from being paid to promote an NCAA competition they participate in.
Disallowing athletics departments from providing college athletes with equipment to support NIL activity.	Prohibiting conferences from sharing broadcast or sponsorship revenue with college athletes.
	Prohibiting athletics departments from entering into deals with college athletes to sell products related to their NIL.
	Forbidding college athletes from engaging in NIL-related activities during NCAA activities.

*1. Analysis of Antitrust Law Claims Arising from the Service Restrictions*

Athletic departments or college athletes could bring a suit asserting that the NCAA's updated guidance and interim policy create service restrictions that are unreasonable restraints on trade under the Sherman Act. These two categories of plaintiffs could argue that the above-noted restrictions violate the injunction affirmed in *Alston* that explicitly authorizes athletic departments "to offer enhanced education-related benefits."<sup>206</sup> Every service listed in Table 2 is arguably an education-related benefit. Each service can be executed in a manner facilitating the education of college athletes on how to build, grow, and successfully manage their NIL. For instance, in securing or activating an NIL deal for a college athlete, athletic department staffers can guide college athletes through each element of the process, educating students on the fundamentals of branding and negotiation. By providing equipment to engage in these activities, athletics departments can teach college athletes how to use software and tools, like cameras, graphic design platforms, and podcast equipment. Athletics department officials are primed to offer this education, as their work requires them to build, grow, and successfully elevate an athletics department's brand and use such tools in the processes. In guiding college athletes in NIL deal development, creation, execution, or implementation, athletics departments could also help educate college athletes on how to execute these points in alignment with the NCAA's bylaws. Further, in outsourcing these activities to an agency, an athletics department can oversee the process to ensure its educational components remain intact and NCAA bylaws are followed.<sup>207</sup> As recruits increasingly seek NIL-related benefits when making their college decisions, either athletic departments or college athletes could challenge the restrictions as violating *Alston's* injunction on NCAA restrictions to education-related benefits.

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206. *Id.* at 2166 (affirming the lower court's holding enjoining the NCAA from limiting schools' abilities to provide colleges athletes with greater education-related benefits).

207. See Ryan Kartje, *USC Football vs. Its Own Donors and Fans? A Fight Develops for Control of Endorsements*, L.A. TIMES (Aug. 9, 2022, 5:13 PM PT), <https://www.latimes.com/sports/usc/story/2022-08-09/usc-football-collective-nil-student-body-right> (discussing that the University of Southern California partnered with a third-party agency to facilitate NIL deals in part to ensure the processes followed NCAA bylaws and state laws).

## 2. Analysis of Antitrust Law Claims Arising from the Payment Restrictions

Either college athletes, athletic departments, or conferences could bring antitrust law challenges stemming from the payment restrictions in the NCAA's updated guidance on its interim NIL policy.

The legality of payment restrictions would be analyzed under the rule of reason.<sup>208</sup> First, a plaintiff would have to prove that the payment restraint “has a substantial anticompetitive effect.”<sup>209</sup> Like in *Alston*, plaintiffs could highlight that “the NCAA enjoys the power to set wages in the market for student-athletes’ labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects.”<sup>210</sup> In this instance, such anticompetitive effects include fixing the direct cash compensation athletics departments, coaches, and conferences can pay college athletes at zero and prohibiting the collaborative production of goods between athletics departments and college athletes. As college sport revenues and distributions to conferences, athletics departments, and coaches grow,<sup>211</sup> these entities may desire to distribute cash compensation to college athletes beyond scholarships for different reasons, including gaining competitive advantages.<sup>212</sup> Further, now that college athletes can monetize their NIL, athletics departments and conferences may want to engage in the marketplace by partnering with college athletes to launch co-branded products, such as video games, collectibles, and apparel.<sup>213</sup>

After *Alston*, it may be difficult for the NCAA to successfully offer a procompetitive rationale for its payment restrictions. Recall that in *Alston*, the NCAA asserted preserving amateurism as a procompetitive rationale for

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208. See *Alston*, 141 S. Ct. at 2155–66 (applying the rule of reason to the NCAA's restrictions on compensation and detailing why the quick look analysis is inapplicable to the NCAA's compensation restrictions).

209. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (outlining how the rule of reason operates).

210. *Alston*, 141 S. Ct. at 2161.

211. See *id.* at 2158 (discussing the rising revenues received by the NCAA and its member institutions).

212. See Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSP. 115, 124 (2015) (detailing the competitive benefits of paying college athletes salaries).

213. See Becky Sullivan, *UNC Becomes the First School to Organize Group Endorsement Deals for Its Players*, NPR (July 21, 2021, 3:57 PM ET), <https://www.npr.org/2021/07/21/1018887697/unc-group-licensing-college-sports-players> (demonstrating schools' interest in leveraging college athletes' NIL in conjunction with schools' logos).

restraining compensation to college athletes.<sup>214</sup> The Supreme Court rejected this rationale, explaining that a defendant cannot “relabel a restraint as a product feature and declare it ‘immune from § 1 scrutiny.’”<sup>215</sup> The Court also agreed with the lower court’s finding that the NCAA neither consistently defined “amateurism” nor proved it was necessary to maintain consumer demand for its product.<sup>216</sup> While the Supreme Court only considered the NCAA’s restraints on education-related benefits in *Alston*,<sup>217</sup> Justice Brett Kavanaugh’s concurrence signals the possibility the Court would similarly reject amateurism as a procompetitive rationale for limiting non-education-related forms of compensation to college athletes. In his concurrence, Justice Kavanaugh wrote:

[T]here are serious questions whether the NCAA’s remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.<sup>218</sup>

Asserting the NCAA price fixes labor by “set[ting] the price of student athlete labor at a below-market rate,” Justice Kavanaugh focused on the “billions of dollars in revenues” produced by college sports that “flow to seemingly everyone except the student athletes.”<sup>219</sup> He questioned whether the NCAA could reasonably justify the lack of revenue sharing based solely on amateurism principles that circularly are based on nonpayment in the first place.<sup>220</sup> The final nail into the coffin of the NCAA’s procompetitive justification for amateurism may be his assertion that:

[T]raditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary

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214. *Alston*, 141 S. Ct. at 2152.

215. *Id.* at 2163 (quoting *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 199 (2010)).

216. *Id.*

217. *Id.* at 2157.

218. *Id.* at 2167 (Kavanaugh, J., concurring).

219. *Id.* at 2168.

220. *Id.*

principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.<sup>221</sup>

Even if the NCAA could meet its burden under the rule of reason, the same procompetitive maintenance of marketplace demand for college sports could be effectuated in a less restrictive manner. Less restrictive means already require anyone who competes in college sports to be an enrolled student in good standing at an NCAA member institution.<sup>222</sup> These less restrictive means satisfy the rule of reason, as *Alston* demonstrated that the unpaid status of college athletes does not fully drive demand for NCAA sports.<sup>223</sup> In fact, viewership of college sports has grown since college athletes have been able to profit from their NIL.<sup>224</sup> *Alston* showed that NCAA bylaws “aimed at ensuring ‘student-athletes do not receive unlimited payments unrelated to education’” could differentiate college sports from professional sports and drive demand.<sup>225</sup> This holding does not mean that cash compensation by schools, coaches, and conferences to college athletes must be fixed at zero. Instead, such payments could be allowed if tied partly to college athletes’ enrollment and good standing at an NCAA member institution. Requiring enrollment in good standing by college athletes at an NCAA member institution independently distinguishes the NCAA’s brand of athletics from professional sports.

#### V. Recommendations for a Post-Alston College Sport Marketplace

Since the Supreme Court’s decision in *Board of Regents*, the marketplace for college sports has drastically changed, with increasing revenue flowing

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221. *Id.* at 2169.

222. *See id.* at 2168 (explaining that it is well settled that the NCAA can impose a restriction of being an enrolled student in good standing to be eligible for competition in NCAA athletics).

223. *Id.* at 2152–53 (majority opinion).

224. *See, e.g.,* Amanda Brooks, *2022 College Football Playoff Semifinals on ESPN Score Most-Watched Non-New Year’s Day Semifinals of CFP Era with 22.1 Million Viewers*, ESPN PRESS ROOM (Jan. 4, 2023), <https://espnpressroom.com/us/press-releases/2023/01/2022-college-football-playoff-semifinals-on-espn-score-most-watched-non-new-years-day-semifinals-of-cfp-era-with-22-1-million-viewers> (highlighting the history-making viewership of college football bowl games during a period when college athletes could receive compensation for their NIL); *2022 DI Men’s Basketball Championship Game Sets Single-Game Viewing Records*, NCAA (Apr. 5, 2022), <https://www.ncaa.com/news/basketball-men/article/2022-04-05/2022-di-mens-basketball-championship-game-sets-single-game-viewing-records> (discussing the record-breaking viewership of March Madness during a period when college athletes could receive compensation for their NIL).

225. *Alston*, 141 S. Ct. at 2153.

to the NCAA, conferences, and member institutions.<sup>226</sup> Thanks to state legislation and the Supreme Court's decision in *Alston*, college athletes can finally tap into the revenue they help create in the college sport marketplace. Yet, the NCAA's bylaws and updated guidance on its interim NIL policy still prevent students from fully benefiting from the revenue they contribute significantly in producing. As Justice Kavanaugh's concurrence in *Alston* notes, these restrictions likely violate federal antitrust law. Thus, amidst the shifting nature of the college sport marketplace, college sports stakeholders must consider how to comply with the Sherman Act. The following part details recommendations for the NCAA, athletics departments, conferences, and college athletes.

#### A. Recommendations for the NCAA

Failing to secure a judicially granted antitrust exemption from the Supreme Court in *Alston*,<sup>227</sup> the NCAA has spent millions lobbying Congress to enact a federal NIL bill which includes antitrust immunity for the Association.<sup>228</sup> The NCAA seeks "an exemption from antitrust law so that its 1,200 member colleges can make nationwide rules to limit college athletes' financial rights."<sup>229</sup> Further demonstrating its desire for federal legislation supporting its interests, in late 2022 the NCAA hired former-Massachusetts Governor Charlie Baker as president.<sup>230</sup> The out-of-the-box hiring decision was likely motivated by Baker's political expertise and ability to work across the aisle on legislation.<sup>231</sup>

Despite its current strategic course seeking federal antitrust immunity, from feasibility and efficiency perspectives, the NCAA would be well-

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226. *Id.* at 2158.

227. *See id.* at 2147 (noting that the NCAA sought antitrust immunity from the Supreme Court in appealing the lower court's decision in *Alston*).

228. *See* Nicole Auerbach, *With Charlie Baker, the NCAA Is Banking on a Political Path Out of Its Troubles*, ATHLETIC (Dec. 15, 2022), <https://theathletic.com/4006731/2022/12/15/ncaa-president-charlie-baker-political-career/> (discussing the NCAA's expenditures on lobbying efforts toward a national NIL law and antitrust immunity for the association).

229. *See* Marc Edelman, *Why Congress Would Be Crazy to Grant the NCAA an Antitrust Exemption*, FORBES (May 6, 2020, 9:50 AM EDT), <https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption/?sh=4b2552c870a9> (discussing the motivation behind the NCAA's seeking antitrust immunity from Congress).

230. *See Baker Faces Unique Challenges in NCAA President Role*, SPORTS BUS. J. (Dec. 16, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/12/16/Colleges/charlie-baker-ncaa-president.aspx> (discussing the hiring of and motivation behind the NCAA selecting Charlie Baker as its new president).

231. *Id.*



guided to end this quest. First, it is unlikely that a bill proposing antitrust immunity for the NCAA will receive floor time or a vote by Congress anytime soon. As of 2022, Congress proposed seventeen pieces of legislation surrounding the NCAA; none reached the floor.<sup>232</sup> While some members of the 118th Congress are optimistic that this could change,<sup>233</sup> the reality is that NCAA governance does not rank in Congress' top priorities.<sup>234</sup> Further, given the current economic and political climates, Congress' appetite to grant a multi-billion-dollar-generating enterprise immunity from the Sherman Act may be slim. Even former college football coach and Republican Senator Tommy Tuberville noted, "We can help to some point, but we don't want to go overboard on antitrust and all those things."<sup>235</sup>

There is a more fiscally responsible and time-efficient manner for the NCAA to impose restrictions on college athlete compensation. Institutions may voluntarily recognize the employee status of college athletes in revenue-producing sports, and doing so would clear the path to their unionization.<sup>236</sup> The unionization of college athletes would necessitate that their joint employers—the NCAA, conferences, and member institutions—collectively bargain with their college athletes' union on wages, hours, and conditions of employment.<sup>237</sup> Through collective bargaining, the joint employers could limit college athlete compensation and restrict certain NIL activities in alignment with their principles. Such collectively bargained restrictions

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232. See Daniel Libit, *NCAA Reform on Capitol Hill: 6 Questions on the Prospects of Passage*, SPORTICO (Dec. 20, 2022, 12:02 AM), <https://www.sportico.com/leagues/college-sports/2022/ncaa-reform-and-congress-1234698977/> (highlighting the status of NCAA-related legislation proposed by Congress).

233. *Id.*

234. See Li Zhou, *What the Split Congress Can Actually Accomplish in 2023*, VOX (Jan. 3, 2023, 6:00 AM EST), <https://www.vox.com/policy-and-politics/23523103/118-congress-2023-house-republicans-senate-democrats> (outlining the 118th Congress' priorities).

235. See Daniel Libit, *Tuberville Throws Cold Water on NCAA Antitrust Exemption*, SPORTICO (Dec. 19, 2022, 2:08 PM), <https://www.sportico.com/leagues/college-sports/2022/tuberville-nixes-ncaa-antitrust-exemption-1234698957/> (outlining Congress' resistance to grant the NCAA antitrust immunity).

236. See Memorandum from Gen. Couns. Jennifer A. Abruzzo on Statutory Right of Players at Academic Institutions Under the National Labor Relations Act 2 (Sept. 29, 2021) [hereinafter Abruzzo Memo], <https://apps.nlr.gov/link/document.aspx/09031d458356ec26> (providing guidance to regional offices of the National Labor Relations Board that certain college athletes are employees under the National Labor Relations Act who can benefit from the right to unionize).

237. See 29 U.S.C. §§ 157–158.

would be protected under antitrust law through the non-statutory labor exemption.<sup>238</sup>

This union strategy runs fiercely counter to current NCAA practices.<sup>239</sup> But given Congress' disinterest in debating NCAA-related bills on the floor, and the NCAA's fantastic loss at the Supreme Court in *Alston*, the Association must consider more feasible and fiscally responsible solutions for governance. An employment strategy provides the NCAA the quickest, least expensive pathway to what it wants: the ability to legally restrict compensation to college athletes. The NCAA may argue that it is less expensive to shell out millions to lobbyists and lawyers to stave off paying college athletes. Yet, even if Congress acts, it is unlikely it will do so in a manner legalizing the complete restriction of compensation to college athletes.

#### *B. Recommendations for Athletics Departments and Conferences*

Like the NCAA, individual conferences have spent significant sums lobbying Congress to enact a federal NIL bill permitting restrictions on college athlete compensation.<sup>240</sup> This expenditure is a new line item for conferences, as ahead of states legalizing college athletes' right to profit from their NIL, few had registered to lobby.<sup>241</sup> Beyond lobbying, coaches and athletics directors have stumped Capitol Hill, seeking congresspeople willing to support the cause.<sup>242</sup> These lobbying efforts to date have been largely futile. Thus, athletics departments and conferences should consider two different approaches to governance in the NIL era.

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238. See generally *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975) (discussing the non-statutory labor exemption); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995) (same).

239. See Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafotball/nlr-says-northwestern-football-players-cannot-unionize.html> (noting that Northwestern University opposed a unionization bid filed by the school's football team); Dan Papsun, *For NCAA's Antitrust Woes, Athlete Unions Pose Ironic Solution*, BLOOMBERG L. (Aug. 6, 2021, 4:56 AM), <https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution> (featuring a quote by this author on the unlikelihood that the NCAA would willingly support the unionization of college athletes).

240. See Hailey Fuchs, *Major College Sports Are Under Siege and They Want K Street to Save Them*, POLITICO (Sept. 14, 2021, 4:30 AM EDT), <https://www.politico.com/news/2021/09/14/ncaa-college-sports-athletes-511700> (discussing the lobbying endeavors of the Power 5 conferences related to NIL).

241. See *id.*

242. *Id.*

First, athletics departments and conferences should accept the recommendation above and recognize the employee status of college athletes by supporting their unionization to allow the collective bargaining of compensation restrictions.

A second option may be more appealing. Following the path executed by the University of Oklahoma in *Board of Regents*, athletic departments individually or collectively as conferences can sue the NCAA for alleged violations of the Sherman Act. Here, plaintiffs could allege that the restrictions present in the NCAA's updated guidance to its interim NIL policy violate federal antitrust law, as discussed in Part IV. Schools that developed in-house agency services or partnered with outside agencies may desire to continue offering these services if doing so gives them a competitive advantage in recruiting. Research has shown that a highly-ranked recruiting class is important to a team's success.<sup>243</sup> NIL opportunities are a growing concern for college athletes.<sup>244</sup> College athletes increasingly desire greater help from their athletics departments and universities around NIL.<sup>245</sup> Thus, to maintain a competitive advantage in recruiting and retain their teams' athletes, schools may challenge the NCAA's updated guidance on its interim NIL policy as violative of antitrust law.

Beyond recruiting and retaining college athletes, money motivates schools to challenge the NCAA's updated guidance. Under the updated interim policy, schools cannot contract with college athletes to sell products related to the student's NIL.<sup>246</sup> This restriction limits schools' abilities to tap further into the lucrative sports licensing market.<sup>247</sup> Schools are precluded from contracting directly with college athletes to create co-branded products, like

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243. See Jeffrey A. Mankin et al, *The Effectiveness of College Football Recruiting Ratings in Predicting Team Success: A Longitudinal Study*, RES. IN BUS. & ECON. J., Feb. 2021, at 10–15, <https://www.aabri.com/manuscripts/182841.pdf> (setting forth how a team's recruiting class ranking positively effects its ability to win games).

244. See Manny Navarro, *All-America Recruiting Confidential: Elite '23 Prospects Discuss NIL Deals, Photo Shoots, Best Visits*, ATHLETIC (Jan. 3, 2023), <https://theathletic.com/4044579/2023/01/03/college-football-recruiting-nil-2/> (discussing where NIL opportunities rank in selecting a university for the best high school football players).

245. Murphy, *supra* note 159 (explaining areas in which college athletes seek help from athletics departments and universities related to their NIL).

246. NCAA, *Institutional Involvement*, *supra* note 175, at 1.

247. See Grand View Research, *Licensed Sports Merchandise Market Size, Share & Trends Analysis Report by Products (Sports Apparel, Toys and Games, Others), by Distribution Channel, by Region, and Segment Forecasts 2023–2030*, GRAND VIEW RSCH. (2023), <https://perma.cc/HZH3-T3RJ> (estimating the value of the global sports licensed merchandise market at \$33.48 billion in 2022).

athletic apparel featuring players' NIL. Athletics departments will likely feel the fiscal pinch of this restriction the most in the way it hinders their ability to broker group licensing deals with college athletes.<sup>248</sup> Since college athletes are not currently unionized, athletics department officials are best positioned to broker a group licensing arrangement with their school's respective athletes due to the parties' frequent interactions.

The need for an entity to broker group licensing deals for college athletes in the NIL marketplace is seen in the slow release of EA Sports' reprisal of its *NCAA* videogame series. Announcing a 2024 release date, the company remains unclear on how an agreement will be reached for college athletes' NIL to appear in the games.<sup>249</sup> This issue could quickly be overcome, permitting both schools and their athletes to immediately profit from generated royalties, if athletic departments were allowed to facilitate group licensing for college athletes. Thus, athletics departments bullish on the potential opportunities and revenues NIL presents could sue the NCAA, alleging its updated guidance on its interim NIL policy violates federal antitrust law. Recall the University of Oklahoma did just that, and successfully tapped into the revenue television broadcast rights presented in *Board of Regents*.

### C. Recommendations for College Athletes

To fully benefit from their NIL rights, college athletes must affirm their employee status<sup>250</sup> under the National Labor Relations Act and unionize.<sup>251</sup> Unionization allows for the most efficient and optimal brokerage of group licensing deals for college athletes.<sup>252</sup> Through a union, college athletes would gain representation by an impartial advocate representing their rights,

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248. See Alicia Jessop, *Fool Me Once, Shame on You; Fool Me Twice, Shame on Me: Why Congress Must Grant NCAA Athletes Group Licensing and Organization Rights in Name, Image and Likeness Legislation*, HARV. J. SPORTS & ENT. L. ONLINE (Aug. 31, 2020), <https://harvardjssel.com/2020/08/fool-me-once-shame-on-you-fool-me-twice-shame-on-me-why-congress-must-grant-ncaa-athletes-group-licensing-and-organization-rights-in-name-image-and-likeness-legislation/> (highlighting the financial benefits of group licensing in the licensed sport merchandise market).

249. See Michael Rothstein, *EA Sports to Release College Football Game in Summer 2024*, ESPN (Nov. 22, 2022), [https://www.espn.com/college-football/story/\\_/id/35082744/ea-sports-release-college-football-game-summer-2024](https://www.espn.com/college-football/story/_/id/35082744/ea-sports-release-college-football-game-summer-2024) (discussing EA Sport's challenge in securing license rights from college athletes for their NIL to appear in the videogame).

250. See Abruzzo Memo, *supra* note 236 (providing guidance to regional offices of the National Labor Relations Board that certain college athletes are employees under the National Labor Relations Act who can benefit from the right to unionize).

251. See Jessop, *supra* note 248.

252. See *id.*

interests, and needs. Their union representatives would collectively bargain with the NCAA, conferences, and athletics departments on wages, hours, and conditions of employment.<sup>253</sup> Unionization would close the gap on the significant negotiation leverage said parties currently have over college athletes.<sup>254</sup> Like in professional sports, college athletes' unions would also regulate their agents,<sup>255</sup> providing better safeguards for college athletes' interactions with agents than those currently existing under NCAA policy,<sup>256</sup> state, or federal law.<sup>257</sup>

### Conclusion

When it comes to college sports in America, the times are changing. But laws enacted in 1890<sup>258</sup> and 1935<sup>259</sup> provide the NCAA, member institutions, athletic departments, and college athletes ample guidance on how to proceed in the twenty-first century. Rather than enacting a national bill legislating college athletes' NIL or granting the NCAA antitrust immunity, Congress should point to existing federal law as adequate tools to regulate college athletes' market share and participation in the intercollegiate athletics marketplace.

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253. 29 U.S.C. § 157.

254. See Alicia Jessop & Thomas A. Baker III, *Big Data Bust: Evaluating the Risks of Tracking NCAA Athletes' Biometric Data*, 20 TEX. REV. ENT. & SPORTS L. 81, 100–09 (2019) (detailing the differential in bargaining power between the NCAA member institutions and college athletes).

255. See, e.g., Jodi Balsam, *How Agents Are Regulated in the NFL and the Potential Lessons for FIFA*, LAW IN SPORT (Dec. 7, 2018), <https://www.lawinsport.com/topics/item/how-agents-are-regulated-in-the-nfl-and-the-potential-lessons-for-fifa> (providing an example of how the union representing NFL players regulates agents).

256. See Adrian Wojnarowski, *NBA Agents Reject NCAA's Certification Proposal*, ESPN (Sept. 14, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/27614802/nba-agents-reject-ncaa-certification-proposal](https://www.espn.com/mens-college-basketball/story/_/id/27614802/nba-agents-reject-ncaa-certification-proposal) (depicting questions of the veracity of the NCAA's ability to regulate college athletes' agents).

257. See Alicia Jessop, *Students First: The Need for Adoption of Education and Incentive-Based Sport Agent Policies by NCAA Division I FBS Member Institutions*, 29 J. LEGAL ASPECTS SPORT 197, 205-09 (2019) (discussing the inadequacy of existing state and federal law in regulating sport agents).

258. See generally *Milestone Documents: Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/sherman-anti-trust-act> (last visited June 30, 2023) (noting that Congress enacted the Sherman Antitrust Act in 1890).

259. See generally *Milestone Documents: National Labor Relations Act (1935)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/national-labor-relations-act> (last visited June 30, 2023) (noting that Congress enacted the National Labor Relations Act in 1935).