Subcommittee on Innovation, Data, and Commerce
Hearing entitled "NIL Playbook: Proposal To Protect Student Athletes' Dealmaking Rights"
[January 18, 2024]
Documents for the record

At the conclusion of the meeting, the Chair asked and was given unanimous consent to include the following documents into the record:

1. Op-ed titled "Protecting And Continuing The Momentum Behind HBCU Athletics," submitted by the Majority.
2. Letter from the Big Sky Conference to Subcommittee Chair Bilirakis, January 17, 2024, submitted by Rep. Fulcher.
3. Letter from Division I SAAC to various Members of Congress, January 27, 2024, submitted by the Majority.
4. Letter from the Four Historically Black Athletic Conferences (4HBAC) to various Members of Congress, September 18, 2023, submitted by Rep. Dunn and Rep. Pfluger.
5. Letter to the Energy and Commerce Committee from Kristen Nuss, January 12, 2024, submitted by the Majority.
6. Letter from the Middle Atlantic Conference (MAC) to various Members of Congress, January 17, 2024, submitted by Rep. Joyce.
7. NACDA article titled, "What Division I Student-Athletes Want You To Know In This New Era of College Athletics."
8. Letter to Chair Bilirakis from Sofia Chepenik, January 17, 2024, submitted by Rep. Bilirakis.
9. Comments from the Players Associations, January 18, 2024, submitted by the Majority.
10. Comments from The Collective Association (TCA), January 18, 2024, submitted by Rep. Harshbarger.
11. Comments from Commissioner Jon Steinbrecher of the Mid-American Conference (MAC), January 18, 2024, submitted by the Majority.
12. Letter to Chairs Rodgers and Bilirakis and Ranking Members Pallone and Schakowsky from the Uniform Law Commission, January 18, 2024, submitted by Rep. Bucshon.
13. Policy Brief from the American Economic Liberties Project, November 2023, submitted by the Minority.
14. Article from The Athletic titled, "Inside USC, UCLA and the Big Ten's prep for realignment's toughest travel puzzle," July 31, 2023, submitted by the Minority.
15. Letter from 8 Student Athletes regarding opposition to the FAIR College Sports Act, January 10, 2024, submitted by the Minority.
16. Letter from the Women's Sports Foundation regarding the FAIR College Sports Act, January 17, 2024, submitted by the Minority.
17. Letter from Voice in Sport Foundation regarding the FAIR College Sports Act, January 17, 2024, submitted by the Minority.
18. Letter from PL McDonald Law regarding a letter on Johnson v. NCAA, January 11, 2024, submitted by the Minority.
19. Letter from College Basketball Players Association regarding NIL, January 10, 2024, submitted by Minority.

20. Article from the New York Times titled, “At What Point Should College Athletes Be Considered Employees?”, December 23, 2023, submitted by the Minority.
21. Press Release from the National College Players Association, January 11, 2024, submitted by the Minority.
22. Statement from AFL-CIO regarding opposition to the FAIR College Sports Act, January 18, 2024, submitted by Rep. Schakowsky.
23. Statement from Players Associations regarding the FAIR College Sports Act, January 18, 2024, submitted by the Minority.
24. Statement from the Collective Association regarding NIL, January 18, 2024, submitted by the Majority.
25. Article from Huff Post titled, “Why does the NCAA Exist,” August 6, 2013, submitted by Rep. Cardenas.

Protecting And Continuing The Momentum Behind HBCU Athletics

By Commissioner Jacquie McWilliams (CIAC), Commissioner Sonja Stills (MEAC), Commissioner Anthony Hollman (SIAC), and Commissioner Charles McClelland (SWAC)

On Thanksgiving Day, hundreds of thousands of Americans will tune in to this year's "Bayou Classic", the annual rivalry matchup between Grambling State University and Southern University. Those viewers will see more than a football game: they'll see the community, pageantry and spirit of two proud Historically Black Colleges and Universities (HBCUs) on full display.

College sports play a vital role in the life of HBCUs. Today, America's Four Historically Black Athletic Conferences (4HBAC) - the Central Intercollegiate Athletic Conference, Mid-Eastern Athletic Conference, Southern Intercollegiate Athletic Conference and Southwestern Athletic Conference - include 48 schools spanning nearly 20 states and serve approximately 15,000 student-athletes each year. The hundreds of athletic programs within our conferences not only unite and entertain students, communities and millions of alumni, but also provide life-changing opportunities for participating student-athletes, the majority of whom are first generation college students. Life on the HBCU campuses is hard to fathom without the teams we cheer on and root for.

However, as college sports' broader political, legal and cultural landscape continues to shift rapidly, there is a real risk to the long-term viability of HBCU sports programs. That's a risk we must avoid.

As the annual college sports calendar unfolds, with fall sports champions being crowned and the football bowl season commencing, threats that could upend college sports lurk in the background. At this very moment, courts and regulatory agencies are weighing decisions that could potentially reclassify student-athletes as employees of their universities, regardless of the economics associated with the sport they play or the university at which they play it. If those types of legal rulings were to advance, the vast majority of college athletic departments will face steep reductions in the number of athletic programs they can afford to operate. No one would feel these impacts more drastically than HBCUs. For us, it would be untenable.

Many of the legal and political actions we face are motivated by a broad desire to see the model used to operate college sports significantly modernized: We agree with those calls for change. College sports have historically been too slow to change but, thanks in part to the voices of many HBCU leaders, we are finally seeing meaningful transformations advance. In the last year alone, the NCAA has significantly raised the bar for support for student-athletes' physical, mental and academic wellbeing. The NCAA now funds sports injury health coverage for all college athletes, extending up to two years after graduation, and all DI schools must offer health and wellbeing benefits as well as scholarship protections - long after graduation. This transformation effort remains ongoing, as schools across the country are working together with the NCAA to continually assess and address modern student-athletes' needs.

However, it's important that in our zeal to modernize college sports, we don't destroy broad swaths of it in the process.

Like the majority of our Division II and mid-major peers, most HBCU athletic departments do not generate significant revenue and rely heavily on school appropriated funds and donations. Employment or revenue sharing mandates aimed at addressing issues specific to football and basketball programs at a very small subset of the biggest Division I athletic programs would be catastrophic for HBCUs. While those issues are valid and worthy of solutions, broad solutions for narrow problems could ultimately rob our campuses of their beloved athletic programs. Even worse, it could cost countless young people a pathway to education.

To avoid this terrible potential outcome for HBCUs, we ask for Congress to pass laws that would accomplish two important objectives. First, legislation should provide consistent and nimble national governance to oversee the name, image & likeness (NIL) marketplace - replacing today's patchwork of state laws when necessary - while giving student-athletes much needed consumer protections. Second, and most importantly, legislation must codify a special status for student-athletes to ensure they are not designated as employees of their institutions.

HBCU sports are experiencing a period of real momentum, making history with sold out stadiums, the addition of new athletic programs and even DI championship titles. It's clear that HBCU and college sports fans across the country are excited about what's happening; in several cases, we are outpacing our predominantly white institution peers in attendance and viewership. As a result, there is a recent rise in corporate sponsorships, destination contests offers and prominent media prospects. Amid this progress, 4HBAC student-athletes continue to excel off the field, graduating at a higher rate than their non-athlete peers and traditionally leading in federal graduation rates for both the student body and student-athletes.

As we seek to modernize college sports, it's critical that we do so in a way that ensures HBCUs are in position to continue creating life-changing opportunities for young people, bringing our campuses to life and flourishing for generations to come.

January 17, 2024

The Honorable Chairman Bilirakis
Subcommittee on Innovation, Data, and Commerce
United States House of Representatives
2123 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Bilirakis and Distinguished Members of Congress,

As members of the Big Sky Conference Student-Athlete Advisory Committee (SAAC) executive board, we recognize that the current climate around college athletics is changing and we feel it is important that our voices be heard in the legislative process. With the rising threats against our programs and institutions, we respectfully ask that you turn your attention to support national legislation that protects our uniquely American institution of college athletics. As we represent the voice of Big Sky student-athletes, we want to be clear that **we do not support an employment status model.**

We are writing on behalf of the Big Sky Conference Student-Athlete Advisory Committee (SAAC) and the 10 Division I institutions that span across eight states and over 873,000 square miles. Our Executive Team consists of Jamie Zamrin, Portland State University (President); Thomas Paterson, University of Idaho; Madelyn Ferreros, Cal State Sacramento; and Alyssa Wenzel, University of Northern Colorado. The Big Sky SAAC represents student-athletes competing in 16 sports, including men's and women's basketball, cross-country, golf, tennis, indoor track and field, and outdoor track and field, as well as football, softball, and women's soccer and volleyball. As Division I student-athletes, we are navigating a constantly changing landscape that impacts our experiences on and off our respective playing fields. We recognize that it is important as leaders on our campuses to use our voice to enhance and strengthen the student-athlete experience, not just for current student-athletes, but for those yet to enroll. We note that even during this time of turmoil within college athletics, our student-athletes are thriving and our institutions are providing the tools and support we need to compete at a high level while pursuing a degree. However, the college athletic industry is facing a major turning point that could erase these opportunities for current and future student-athletes.

One ongoing lawsuit seeks to classify all Division I student-athletes as employees of their university for purposes of federal minimum wage law, which could impact Division II and Division III student-athletes as well. Another legal action seeks to classify Division I student-athletes in select sports (men's basketball, football and women's basketball) as employees at select schools.

<u>We urge you to pass legislation that would declare a special status for student-athletes, so we do not become employees of our institution.</u>

It is important to note that the vast majority of Division I student-athletes attend college for the prioritization of the student portion of the nomenclature while also competing at an elite level of our chosen sport. Many of our sports do not have professional opportunities; therefore, most student-athletes choose their institutions based on degree programs and educational experiences. The impending threat of employment status coupled with the uncertain implications of academics amplifies our fear that student-athletes will be forced to choose between our education or our athletic endeavors. We are grateful for our opportunities to play the sports we love and have dedicated our lives to and do not believe that should be a choice we have to make. The relationship we have with our institutions are unique and symbiotic, therefore, they should be preserved.

Enclosed below are personal narratives from each author of this letter, offering a glimpse into our unique experiences as student-athletes within institutions that collectively form part of the Big Sky Conference. While we share a conference affiliation, our individual journeys reflect the vast spectrum of opportunities Division I presents, allowing each institution the autonomy to prioritize elements crucial to their interpretation of the student-athlete experience.

Through these narratives, we aim to emphasize the potential vulnerability of specific sports, student-athletes, and identities facing the prospect of exclusion from the NCAA in the event of mandated employment status. This includes, but is not limited to, women's sports, international student-athletes, and non-revenue generating sports. We believe that understanding our stories will shed light on the critical need for protective measures to safeguard these valuable components of collegiate athletics.

I. Thomas Patterson, Men's Golf, University of Idaho

I am currently in my fifth and final season as a men's golfer from the University of Idaho. As a Division 1 athlete, I have been able to obtain a bachelor's degree in Operations Management and I am currently working towards a Master of Technology Management, both of which have been funded by scholarship. I can confidently say that my experience as a Division 1 student athlete is second-to-none and has far exceeded what I ever thought it could be. I have met some of the most amazing people, fostered some incredible relationships, and have grown as an individual more than I ever imagined. I learned crucial life and performance skills balancing continuous improvement in my sport and consistent academic determination. I was fortunate to be nominated as a representative by my coach, to the Student Athlete Advisory Committee (SAAC) based on my academic prowess and leadership skills. I now serve as the President of Idaho's SAAC, and in that role I have gained a tremendous amount of experience in the operations of a collegiate institution.

None of this would have been possible without the opportunity to compete at the highest level in my sport. Unlike football and basketball, golf is not a revenue-generating sport and therefore has a much smaller budget. Golf student-athletes are often not given the same sponsorship opportunities that other student-athletes are. Aspiring student-athletes should not have to choose between education and their sport, and creating a special status for student-athletes is an idea that could save golf and many other sports, as well as opportunities for education for thousands of students.

II. Alyssa Wenzel, Softball, University of Northern Colorado

I am currently in my fifth and final season competing as a member of University of Northern Colorado's (UNC) softball program. During my five years at UNC, I have been able to obtain a bachelor's degree in communications accompanied with a minor in journalism (*media management focused*). I have been lucky enough to not only have all five years paid for by scholarship but I've also had the opportunity to create a home away from home as an out-of-state-athlete. Through my college experience I have been able to make friends from all over the world, receive an amazing education, and become a better person. I am incredibly grateful to compete at a Division I level of softball while attending UNC. Because of my personal determination and leadership, I was nominated as a representative for my team to the Student-Athlete Advisory Committee (SAAC) early in my college career. Fast forward to my last and final year, I am now the president of the UNC SAAC program as well as a representative on the Big Sky conference executive board.

Softball is exclusively a women's sport and is not revenue-generating, and as such, our budget is significantly smaller. As student-athletes, we lack sponsorship opportunities that sports such as football have access to. I strongly support a special status for student-athletes and believe it can save women's sports and the collegiate athletic experience.

III. Madelyn Ferreros, Women's Tennis, Cal State Sacramento (Sacramento State)

I am currently a junior with two seasons left to compete for the women's tennis team at Sacramento State. I will finish my undergraduate degree in Business Finance this fall and will begin my MBA in Finance next semester. I owe my many opportunities for success to my family, mentors, DI athletics, and my institution, as they made furthering my education attainable. I deeply value my family connections and being 5 hours away from home has been challenging. However, I've found a second home within my college community. My family at Sacramento State consists of mainly international athletes who traveled here to receive a higher education while at the same time playing the sport they love. This is not unique to our program, as all of our student-athletes came here for the opportunity. However, being a part of a team that is so culturally diverse made my college experience ten times more rewarding in that it has expanded my worldview and made me appreciate the opportunities we have. As Co-President of the

Sacramento State SAAC, it is my duty to make decisions and speak for my fellow student-athletes and ensure their voices are heard at the highest institutional and conference levels. I've used this voice to advocate for more resources for international student-athletes as well as implementing events and initiatives to foster an inclusive community. The ethnic and cultural diversity of our student-athletes at Sacramento State benefits us all, and has allowed us to learn about places and overseas issues that cannot just be conveyed in the classroom.

I firmly believe that employment status threatens the ability for international student-athletes to compete in the NCAA. Unfortunately, the proper visa to compete as an international student-athlete is already difficult to obtain for many. I support a special status for student-athletes to ensure our non-revenue generating sports and international student-athletes still have opportunities for education and following their competitive dream. Being a student-athlete is an experience I would never want to give up and I thank this experience for I've found my people from it.

IV. Jamie Zamrin, Women's Cross Country/Track and Field, Portland State University

I am a cross-country and track and field runner from Portland State University, who was able to complete my bachelor's degree and compete on the highest stage of my sport. I am currently working towards a Master of Public Administration which I am lucky to say was funded by my athletic and academic success. Overall, my collegiate experience at two different universities on opposite sides of the country went beyond my greatest expectations and I will try my best to convey it in a concise manner. My involvement in the Student-Athlete Advisory Committee (SAAC) started in my sophomore year at Lehigh University. I was afforded an opportunity to be a representative voice for my fellow student-athletes and since then my involvement has blossomed from campus-level advocacy to nationwide advocacy for the Patriot League on National Division I SAAC. Once I began my career at Portland State University in 2022, I was elected as the President of the Big Sky SAAC and I currently serve as our representative on the National Division I SAAC, which has provided me with first-hand experience of the legislative process in the NCAA.

In my capacity on National DI SAAC, I have championed the interests of my fellow student-athletes on a spectrum of critical issues, including the transfer portal, the holistic student-athlete model, name, image, and likeness (NIL), as well as civic engagement, among other topics. My tenure as a SAAC member since 2019 equips me with the unique insights to address the current collegiate athletic climate. As evident from our personal experiences, we are deeply concerned about the impact of employment status, particularly for institutions like ours. The proposed legislation raises numerous questions that remain unanswered, the most important of which in my mind being:

1. What would happen to international student-athletes who comprise over 20% of all NCAA student-athletes? Would they continue to be eligible for competition in the NCAA?
2. What does an employment contract contain? What benefits are taxable? Can athletes be fired for poor athletic performance? If a student-athlete transfers, will they face financial or contractual obligations?
3. How are institutions going to afford supporting women's sports and non-revenue generating sports? How are DII and DIII going to continue financially supporting athletic programs? Are institutions going to continue supporting non-scholarship student-athletes and walk-on athletes? How does this affect Title IX?

Without the answers to any of the questions posited above and earlier in this letter, I simply cannot support any model that does not ensure equal access and protection of all present and future student-athletes. To be extremely clear, this is not a message supporting the status quo: the priorities of student-athletes continue to evolve and the support we receive from our universities, conferences, and the NCAA must evolve, too.

For example, one of the most prominent topics of discussion recently are the attempts to strengthen name, image and likeness opportunities and protections for college student-athletes. Student-athletes should be able to benefit from NIL opportunities in a uniform and transparent environment. Our Division I National Student-Athlete Advisory Committee advocated for the current NIL legislation that provides more opportunities for student-athletes. However, all this work could prove to be meaningless with an employee model, as we would no longer be able to build our individual brand and represent ourselves the way we currently do. The need for a national solution to the current patchwork of state laws and regulations is paramount.

As the Big Sky Student-Athlete Advisory Committee leadership team, we believe that student-athletes are the biggest stakeholders in college sports, and that Congress is the only body that has the ability to stabilize college sports' legal environment and provide student-athletes with a fair, inclusive, and consistent experience. Your leadership could impact the ability of student-athletes to receive inspirational and life-changing athletic experiences in the classroom and on the field, and it can create generational changes that positively impact communities all over the country. The protection of the current NCAA model that prioritizes student-athlete wellbeing, equity and academic excellence are pivotal to the economic growth of our country. This unique experience exemplifies a platform for young leaders to come out of college with versatile skill sets that display resilience and adaptability.

We would be happy to discuss this topic further or provide additional information and ask you to contact any one of us directly using our information below.

Kind regards from the members of the Big Sky Student-Athlete Advisory Committee:

Eastern Washington University
Idaho State University
University of Idaho
University of Montana
Montana State University
Northern Arizona University
Northern Colorado University
Portland State University
California State University, Sacramento
Weber State University

Jamie Zamrin

Women's Cross-Country and Track and Field
Portland State University
Big Sky NCAA DI SAAC Rep
Big Sky SAAC President
[redacted]

Thomas Patterson

Men's Golf
University of Idaho
Idaho SAAC President
Big Sky SAAC Executive
[redacted]

Madelyn Ferroros

Women's Tennis
California State University, Sacramento
Big Sky NCAA DI SAAC Alternate
CSUS SAAC President
[redacted]

Alyssa Wenzel

Women's Softball
University of Northern Colorado
Big Sky SAAC Executive
UNC SAAC President
[redacted]

CC:
Vice Chairman Tim Walberg
Ranking Member Jan Schakowsky
The Honorable Rick Allen

The Honorable Kelly Armstrong
The Honorable Larry Buschon
The Honorable Kat Cammack
The Honorable Jeff Duncan
The Honorable Neal Dunn
The Honorable Russ Fulcher
The Honorable Diana Harshbarger
The Honorable Debbie Lesko
The Honorable Cathy McMorris Rodgers
The Honorable Greg Pence
The Honorable Kathy Castor
The Honorable Yvette Clarke
The Honorable Debbie Dingell
The Honorable Robin Kelly
The Honorable Frank Pallone
The Honorable Lisa Blunt Rochester
The Honorable Darren Soto
The Honorable Lori Trahan

January 17, 2024

The Honorable Maria Cantwell
U.S. Senate
318 Cannon House Office Building
Washington, D.C. 20515

The Honorable Cathy McMorris-Rodgers U.S. House of Representatives
318 Cannon House Office Building Washington, D.C. 20515

The Honorable Bernie Sanders
U.S. Senate
318 Cannon House Office Building Washington, D.C. 20515

The Honorable Virginia Foxx
U.S. House of Representatives 318 Cannon House Office Building
Washington, D.C. 201515

The Honorable Dick Durbin
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The Honorable Jim Jordan
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The Honorable Ted Cruz
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The Honorable Frank Pallone U.S. House of Representatives 318 Cannon House Office Building
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The Honorable Bill Cassidy U.S. Senate
318 Cannon House Office Building Washington, D.C. 20515

The Honorable Bobby Scott U.S. House of Representatives 318 Cannon House Office Building
Washington, D.C. 20515

The Honorable Lindsey Graham
U.S. Senate
318 Cannon House Office Building Washington, D.C. 20515

The Honorable Jerry Nadler U.S. House of Representatives 318 Cannon House Office Building
Washington, D.C. 20515

Dear Congressional Leaders:

I hope this letter finds you in good health and high spirits. As the chair of the Division I Student-Athlete Advisory Committee (SAAC), I am writing to express our strong belief in the necessity of federal action to address the complex and evolving landscape of Name,

Image, and Likeness (NIL) and student-athlete employment status in college sports. Division I SAAC represents the nearly 190,000 student-athletes who participate in Division I sports within the NCAA. The SAAC serves as a voice for student-athletes within Division I governance, providing input and feedback on various issues that affect our collegiate experience. It acts as a liaison between student-athletes, athletic administrators, and the NCAA, advocating for the welfare and well-being of Division I student-athletes. We humbly request your attention and support in this matter to ensure the well-being and fair treatment of student-athletes nationwide.

First and foremost, we seek federal action to enhance safeguards and provide resources for student-athletes, mitigating the risk of bad actors in the NIL market and ensuring that contracts and commitments are honored. While the opening of NIL opportunities is a welcomed development, it is vital that we establish comprehensive mechanisms to protect student-athletes from potential exploitation or unfair treatment. Robust oversight and enforcement mechanisms, including clear guidelines and a regulatory framework, are crucial to safeguarding the interests of all parties involved.

Federal action is necessary in this area for the following reasons:

1. **Protecting Student-Athletes' Interests:** Student-athletes, often young and inexperienced in navigating the business world, may be susceptible to exploitation or unfair treatment by unscrupulous individuals or entities seeking to take advantage of their NIL. Without proper safeguards, student-athletes could find themselves entering into unfavorable or exploitative contracts that could harm their personal and financial well-being.

2. **Upholding Contractual Obligations:** Honoring contracts and commitments is crucial for maintaining trust and stability in the NIL market. Without proper enforcement mechanisms, student-athletes may face situations where contracted parties fail to fulfill their obligations or attempt to back out of agreements. This not only undermines the financial security of student-athletes but also erodes the credibility and integrity of the entire NIL ecosystem.

Furthermore, it is important to affirm the current and unique relationship between universities and student-athletes. **Student-athletes *should not* be employees of their institution.** The collegiate model, which places significant emphasis on the integration of academics and athletics, fosters personal growth, educational attainment, and character development. Preserving the traditional collegiate experience, where student-athletes are first and foremost students, is essential for maintaining the integrity and values inherent in college sports. By recognizing the unique relationship between student-athletes and their institutions, Congress can help ensure that the core purpose of college sports is preserved.

This acknowledgement recognizes the fundamental principle that student-athletes are primarily students, pursuing their education while participating in athletics.
The following are key reasons why preserving the non-employee status is essential for maintaining collegiate sports:

1. **Educational Focus:** Maintaining the non-employee status of student-athletes emphasizes the educational aspect of their college experience. It ensures that the primary focus remains on our academic pursuits and the pursuit of a degree. By prioritizing education, student-athletes are provided with opportunities to excel in both their academic and athletic endeavors.

2. **Workload and Time Commitments:** The demands placed on student-athletes in terms of academics, training, competition, and travel are already considerable. Student-athletes as employees could further increase our workload and time commitments. Balancing academic schedules with athletic requirements could become even more challenging, potentially impacting the well-being and academic performance of student-athletes.

3. **Amateurism and Fair Play**: Amateurism is a founding principle of college sports, distinguishing it from professional sports. Maintaining the non-employee status reinforces the ideals of amateurism, fair play, and equal opportunity for all student athletes. Preserving non-employee status also helps institutions maintain compliance with Title IX. By treating all student-athletes as participants in a non-employment capacity, institutions can ensure fairness and equity in resource allocation and athletic opportunities.

4. **Financial Sustainability:** Treating student-athletes as employees would introduce significant financial implications for institutions. The cost associated with salaries, benefits, compliance with labor laws, and other employment-related expenses would put significant strain on the financial viability of athletic programs. This could lead to budget constraints, program cuts, or even the elimination of certain sports, limiting opportunities for student-athletes. Maintaining non-employee status helps to ensure the financial sustainability of collegiate sports programs.

Overall, treating student-athletes as employees would have a profound impact on the student athlete experience. It would significantly increase time commitments, potentially compromising our ability to balance academics, athletics, and personal life. The added pressure and demands associated with employment could lead to heightened stress levels, limited flexibility, and potential challenges in managing academic coursework. Financial considerations, including compensation, benefits, and tax implications, would also arise, potentially altering the existing scholarship model. Furthermore, reclassifying student-athletes as employees could disrupt the unique collegiate culture, identity, and sense of pride associated with representing their educational institutions, as their focus shifts more towards professional obligations rather than the holistic development and educational experience that college sports aim to provide. Another critical aspect of federal action requested is identifying select areas where the NCAA membership needs safe harbor from legal complaints to effectively oversee college sports nationally. While accountability and transparency are essential, it is equally important to strike a balance that allows the NCAA to regulate and administer collegiate athletics without undue interference. By providing legal protections and clarifying the scope of NCAA authority in

specific areas, we can ensure effective oversight and governance while addressing legitimate concerns.

Safe harbor from constant litigation will allow the NCAA to focus on student-athlete welfare. Safe harbor protection allows the NCAA to concentrate its efforts and resources on initiatives that promote the well-being of student-athletes. By providing a legal framework that shields the NCAA from excessive litigation, it can allocate its time and resources to areas such as academic support, health and safety protocols, mental health resources, and other programs that benefit student-athletes. The focus on student-athlete welfare is essential in preserving the collegiate model and maintaining the balance between academics and athletics.

Finally, we urge Congress to codify that federal law preempt state law in certain areas, such as name, image, and likeness. The current patchwork of more than 30 differing state NIL laws creates an uneven playing field for all college athletes. The absence of consistent regulations across state lines creates logistical challenges, legal ambiguities, and an imbalanced competitive landscape. Federal legislation that supersedes conflicting state laws would establish a level playing field and provide much-needed uniformity. Codifying federal law over state law in the NIL space is essential to establish uniformity, clarity, fairness, and national oversight. It would promote equal opportunities for college athletes, avoid compliance burdens, and ensure a consistent framework for navigating the complexities of NIL. By taking a comprehensive and unified approach, Congress can provide a stable and predictable environment for student-athletes to exercise their NIL rights while preserving the integrity and competitiveness of college sports.

Federal legislation in this area would provide student athletes with the following benefits:

1. **Uniformity and Consistency:** The current patchwork of more than 30 disparate state NIL laws creates an uneven playing field for college athletes. Each state has the autonomy to establish its own rules and regulations, leading to significant variations in NIL rules, restrictions, and compliance requirements. Codifying federal law over state law would establish a unified and consistent framework that ensures all college athletes, regardless of their geographic location, have equal opportunities and protections in the NIL market.

2. **Level the Playing Field:** State NIL laws can create disparities and competitive imbalances among colleges and universities. Institutions in states with more permissive NIL laws may have an advantage in recruiting top athletes and securing lucrative endorsement opportunities. Codifying federal law would help level the playing field by establishing a consistent set of rules that apply nationwide, ensuring fairness and equal opportunities for all college athletes, regardless of their state of residence or the institutions they represent.

In conclusion, we implore you to take decisive action in support of federal legislation addressing NIL and student-athlete employment-status in college sports. By enhancing safeguards, affirming the unique university-student-athlete relationship, providing safe harbor for the NCAA, and

establishing federal preemption in certain areas, we can bring stability, fairness, and consistency to the evolving NIL landscape.

We are available and eager to collaborate with you and your colleagues to ensure that the voices and interests of student-athletes are well-represented in the legislative process. We appreciate your attention to this critical matter and look forward to discussing it further.

Thank you for your dedication to public service and your commitment to the betterment of college sports.

Sincerely,

Cody Shimp

Chair, Division I Student-Athlete Advisory Committee (SAAC)

September 18, 2023

The Honorable Maria Cantwell
U.S. Senate
318 Cannon House Office Building
Washington, D.C. 20515

The Honorable Ted Cruz
U.S. Senate
318 Cannon House Office Building
Washington, D.C. 20515

The Honorable Cathy McMorris-Rodgers
U.S. House of Representatives
318 Cannon House Office Building
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The Honorable Frank Pallone
U.S. House of Representatives
318 Cannon House Office Building
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The Honorable Bernie Sanders
U.S. Senate
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The Honorable Bill Cassidy
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The Honorable Virginia Foxx
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The Honorable Bobby Scott
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The Honorable Dick Durbin
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The Honorable Lindsey Graham
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The Honorable Jim Jordan
U.S. House of Representatives
318 Cannon House Office Building
Washington, D.C. 20515

The Honorable Jerry Nadler
U.S. House of Representatives
318 Cannon House Office Building
Washington, D.C. 20515

Dear Congressional Leaders:

The Four Historically Black Athletic Conferences (4HBAC) represent America's Historically Black Colleges & Universities (HBCUs) college sports programs. We are members of the National Collegiate Athletic Association (NCAA) representing Division I and Division II institutions. Our four conferences - the Central Intercollegiate Athletic Conference, Mid-Eastern Athletic Conference, Southern Intercollegiate Athletic Conference, and Southwestern Athletic Conference – include 48 schools, have a footprint across nearly 20 states, serve nearly 15,000 student-athletes, and bring together millions of HBCU alumni, fans, and communities annually in celebrating our rich history and traditions.

Our schools provide developmental, intellectual, and social experiences as well as stability for our students,

which in turn leads to academic, athletic and ultimately post-graduate success. In most cases, HBCU student-athletes are first generation college students, and it is through their participation in sports and competition that we celebrate and recognize that 4HBAC student-athletes graduate at a higher rate than their non-athlete peers and they traditionally lead in federal graduation rates for both student body and student-athletes. Increasingly, HBCU and college sports fans across the country are excited about what's happening on our campuses and on our athletic fields and, in several cases, we are outpacing our predominantly white institution peers in attendance and viewership. As a result, there is a recent rise in corporate sponsorships, destination contests offers and most importantly prominent media prospects.

With the ever-changing climate of intercollegiate athletics, these increased opportunities for our predominantly Black students are at risk. Pending regulatory decisions and plaintiffs' attorneys threaten to change the face of college sports without our voices, and more importantly without the voices of the student-athletes being considered. Additionally, there is a growing patchwork of state laws impacting college sports and creating disparities and confusion among our student-athletes. The laws have made it difficult for the 4HBAC to manage and support member institutions and student-athletes. In other cases, it has also become a challenge to retain our HBCU student-athlete population due to the differences in laws instituted from state to state.

Like the majority of our Division II and mid-major peers, most HBCUs do not generate significant revenue and rely heavily on school appropriated funds and donations. Therefore, classifying student-athletes as employees would have a staggering impact on our athletic programs and schools.

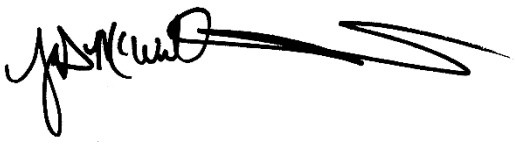
There is no question college sports have been too slow to change, but thanks in part to the voices of many HBCU leaders, college sports are transforming. The NCAA now funds sports injury health coverage for all college athletes, extending up to two years after graduation, and all DI schools must offer health and wellbeing benefits as well as scholarship protections - long after graduation. We enthusiastically support our student-athletes profiting from their name, image and likeness (NIL).

To protect all that we have accomplished on our HBCU campuses, we ask for your support in passing laws that, when necessary, pre-empt state law, to create clear and fair playing fields for HBCU student-athletes. Such legislation will allow for consistent and nimble national governance with consumer protections. Most importantly, we seek special status for student-athletes to ensure they are not designated as employees of their institutions.

We look forward to partnering with each of you and serving as a resource on this important issue. Do not hesitate to contact us directly.

Kind regards,

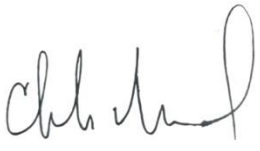
Commissioner Jacqie McWilliams
Central Intercollegiate Athletic Conference



Commissioner Anthony Holloman
Southern Intercollegiate Athletic Conference

Commissioner Sonja Stills
Mid-Eastern Athletic Conference

Commissioner Charles McClelland
Southwestern Athletic Conference



January 12, 2024

HOUSE ENERGY AND COMMERCE COMMITTEE

INDEPENENCE AVE SW BLDG | WASHINGTON, DC 20515

My name is Kristen Nuss, and I am a member of the US Beach Volleyball National Team. I am from New Orleans, Louisiana, a 2021 graduate from Louisiana State University (LSU), and in line to represent the United States in the Paris 2024 Summer Olympics.

I missed out on NIL by one year, but I am writing to you to discuss my stance on the matter. In my opinion, deciding on what college to attend should be about academics, athletics, and culture in that order. I believe the current landscape of NIL has created a toxic environment for many people involved.

Collegiate coaches are taking the brunt of it all. They no longer have any power or ability to build a culture. The athletes have most of the power and if NIL money does not start to get controlled, the coaches will have no power at all. We are currently putting collegiate athletics in the hands of 16–22-year old's who are only seeing money signs and the majority are male football or basketball players. I am aware they bring in a lot of money for the school and maybe some compensation for that is granted but is a free education not enough?

Additionally, I have always dreamed about representing my country at the Olympic Games. If you are not aware, being a professional beach volleyball player is not the most lucrative of professions. We do not graduate college and sign any multi-million-dollar deals. We rely solely on sponsorships to fund our travels around the world for Olympic qualification. With the current NIL landscape, our jobs have gotten significantly harder trying to find sponsors. We are based in Louisiana so with the juggernaut which is LSU athletics we have found it very difficult to get

sponsors to support our journey. Instead, companies would like to throw a lot of money at 16–22-year old's just to get them to attend or stay at LSU. How can you not see how that is tainting collegiate athletics in a negative way?

If you are in favor of granting only revenue generating athletes NIL money, I'll end this with a question for you: Do you want your boss to be an uneducated former collegiate football or basketball player?

SINCERELY,

KRISTEN NUSS

MEGAN MORRISON
Executive Director
10 West Road #1013
Newtown, PA 18940

January 17, 2024

To: The Honorable Maria Cantwell, Senate Commerce Committee
The Honorable Ted Cruz, Senate Commerce Committee
The Honorable Bernie Sanders, Senate Health, Education, Labor, and Pensions Committee
The Honorable Bill Cassidy, Senate Health, Education, Labor, and Pensions Committee
The Honorable Dick Durbin, Senate Judiciary Committee
The Honorable Lindsey Graham, Senate Judiciary Committee
The Honorable Cathy McMorris Rodgers, House Energy and Commerce Committee
The Honorable Frank Pallone, Jr., House Energy and Commerce Committee
The Honorable Virginia Foxx, House Education & the Workforce Committee
The Honorable Bobby Scott, House Education & the Workforce Committee
The Honorable Jim Jordan, House Judiciary Committee
The Honorable Jerry Nadler, House Judiciary Committee

Dear Distinguished Congressional Members of Congress,

We hope this letter finds you in good health and high spirits. We are writing to you today as proud members of the NCAA Division III athletics community, representing the Middle Atlantic Conference. Our conference comprises 16 institutions across Pennsylvania, Maryland, and New Jersey. We provide exceptional athletics opportunities for student-athletes within the Division III framework, sponsoring 27 sports, 40 championships and competition for over 6,000 student-athletes.

The NCAA has and will continue to modernize but the Association can only go so far in the current legal environment. We believe Congress is positioned to update college sports' legal framework and provide student-athletes with a fair, inclusive, and consistent experience. We are united with our colleagues across all three divisions that Congress is best positioned to develop consistent laws as it relates to student-athlete name, image, and likeness and to enhance safeguards and provide resources for student-athletes to mitigate the risk of bad actors in the NIL market and ensure that contracts and commitments are honored.

While we advocate for legislation regulating name, image, and likeness, of greater concern to the Middle Atlantic Conference and Division III, are the ongoing attempts to classify student-athletes as employees. Affirming non-employee status requires immediate legislative action. This issue is a matter with far-reaching implications for the integrity and purpose of collegiate athletics. We implore you to consider and support legislation that unequivocally safeguards the non-employee status of student-athletes across the NCAA.

NCAA Division III athletics is steadfast in its commitment to the holistic development of student-athletes. It upholds the principle that academics should remain the primary focus, with athletics serving as a valuable complement to a well-rounded education. By prohibiting athletic

scholarships, Division III ensures that students participate in sports as a co-curricular development opportunity. Our student-athletes participate in highly competitive athletics programs, without compromising their education or other extracurricular pursuits. Classifying Division III student-athletes as employees would fundamentally alter the essence of collegiate athletics at this level. Ultimately, it would introduce a financial burden that likely would mean the end of intercollegiate athletics at Division III institutions (not to mention most Division II and Division I institutions as well). None of our institutions realize enough revenue to cover the expenses associated with sponsoring intercollegiate athletics. Instead, institutions rely on the draw of athletics programs to aid in meeting enrollment goals.

Moreover, reclassifying student-athletes as employees would jeopardize our ability to sponsor upwards of 20 varsity sports at our institutions that are vital in contributing to our enrollment goals. Student-athletes comprise from approximately 20-50% of the students on our campuses. It is imperative for the sustainability of our institutions that Congress takes a proactive stance in preserving this model, ensuring that Division III student-athletes are not considered employees, but rather valued participants in a time-honored tradition of college athletics.

We kindly request your support in advocating for legislation that explicitly affirms the non-employee status of NCAA student-athletes at all levels, but particularly Division III. By doing so, you will be safeguarding the integrity and purpose of Division III athletics while upholding the fundamental principles of higher education.

Thank you for your attention to this important matter. We would be grateful for the opportunity to discuss this issue further and provide any additional information that might assist you in your deliberations. We remain dedicated to working collaboratively with you to protect the interests of NCAA Division III student-athletes and the institutions and conferences they represent.

Kind regards from the Middle Atlantic Conference Board of Directors,

Dr. Jacquelyn Fetrow
President
Albright College

Dr. Glynis Fitzgerald
President
Alvernia University

Dr. Ajay Nair
President
Arcadia University

Dr. Benjamin Rusiloski
President
Delaware Valley University

Fr. Jim Greenfield
President
DeSales University

Dr. Ronald Matthews
President
Eastern University

Dr. Michael Avaltroni
President
Fairleigh Dickinson University, Florham

Dr. Andrea Chapdelaine
President
Hood College

Fr. Thomas Looney
President
King's College

Dr. James MacLaren
President
Lebanon Valley College

Dr. Kim Phipps
President
Messiah University

Dr. Daniel Myers
President
Misericordia University

Dr. Nariman Farvardin
President
Stevens Institute of Technology

Dr. Elliot Hirshman
President
Stevenson University

Dr. Stacey Robertson
President
Widener University

Dr. Thomas Burns
President
York College of Pennsylvania

cc: Mr. Charlie Baker, President, NCAA
Ms. Louise McCleary, Vice President for Division III, NCAA

Megan Morrison
Executive Director
Middle Atlantic Conference
10 West Road #1013
Newtown, PA 18940

What Division I Student-Athletes Want You To Know In This New Era of College Athletics

As the Chair of Division I Student-Athlete Advisory Committee, I want to address the dynamic shifts in the collegiate athletic landscape that are shaping and will impact our future experiences as student-athletes.

In the midst of these changes, there's a growing conversation about classifying student-athletes as employees. This discussion challenges traditional amateurism norms and raises important questions about compensation, labor rights, and the overall relationship between student-athletes and their respective institution. While this concept is complex and still under debate, it underscores the need for continued dialogue. As we engage in these conversations, let's remain informed and vocal about our own experiences. How we contribute to these discussions can influence the direction taken and impact the future landscape of collegiate athletics.

The discussion around classifying student-athletes as employees centers around 5% of the student-athletes, schools, and conferences. This conversation is nuanced and should be primarily focused on student-athletes participating in revenue-generating sports, schools with robust athletic programs, and conferences with significant financial stakes. For the subset of student-athletes involved in revenue generation, employee classification could open avenues for compensation beyond education-related benefits. However, it also prompts discussions about how these changes may impact the broader landscape of college sports, potentially leading to adjustments in athletic department budget allocations, scholarship availability, and the future of non-revenue generating athletic programs. While this segment may be a minority, the implications of such a shift could reverberate across the entire landscape of collegiate athletics.

An employment model presents many unknowns about the future of what collegiate athletics looks like with many questions to consider: Would institutions cut athletic programs to fund the revenue generating sports? How would this impact Title IX protections? What would happen to athletic scholarships? What does this do to the status of international student-athletes? Many of these questions are at the forefront of the minds of student-athletes and need to be resolved before any new model is implemented.

The employment debate also underscores the need to maintain a delicate balance between academics and athletics. Ensuring that student-athletes can fully engage in their educational pursuits while meeting the demands of their sports remains a central concern. Student-athletes already juggle demanding training schedules, travel commitments, and the inherent physical demands of their sports while attempting to maintain the lifestyle of a college student. Any adjustment to employment status should be carefully calibrated to avoid undue strain on our academic responsibilities. Striking the balance requires a nuanced approach that acknowledges the unique challenges each of us faces in maintaining both academic and athletic excellence. Any changes in employment status should align with the fundamental principle of supporting the holistic development of student-athletes.
Among the current changes, conference realignment has been at the forefront of the changing

landscape. The impact of conference realignment on student-athletes and college athletics is profound, reshaping the competitive landscape and altering the experiences of those participating in collegiate athletics. Conference realignment often stems from financial considerations, media rights deals, and the pursuit of competitive balance, leading to shifts that transcend geographical boundaries. For student-athletes, this means adapting to new rivalries, increased travel demands, and exposure to different styles of play.

Conference realignment, among other factors, is a leading element that is perpetuating the employment status conversation. As institutions make moves, the economic landscape within college sports undergoes changes, leading to varying levels of financial resources and exposure for different programs. This dynamic environment, where certain athletic programs garner more commercial value, intensifies discussions about the fair compensation of student-athletes. The disparities accentuated by conference realignment contribute to the broader conversation, providing momentum to arguments supporting a reevaluation of the employment status of student-athletes, especially in high-profile, revenue-generating sports and conferences.

As we continue to navigate the evolving landscape of collegiate athletics, it's crucial to address the pressing need for guardrails and nationwide uniformity concerning name, image, and likeness (NIL). The recent shifts in NIL regulations have granted student-athletes unprecedented opportunities, but with these opportunities come the responsibility to establish a clear, fair, and consistent framework. Without guardrails, the potential for inequity and confusion looms large.

Uniformity is key. A cohesive set of rules ensures that every student-athlete, regardless of their program or location, can benefit from their NIL without unnecessary complications. Guardrails help maintain the integrity of collegiate sports while offering student-athletes the chance to capitalize on their personal brand. It's not just about the present, but also about creating a sustainable and fair system for future generations of student-athletes. By advocating for uniformity, we can contribute to an environment where every student-athlete has an equal opportunity to navigate the realm of NIL.

We, as student-athletes, stand at the forefront of this transformation. Our voices and actions can influence the trajectory of collegiate athletics, ensuring that future generations benefit from a more equitable and supportive system. It is incumbent upon us to engage in constructive dialogue, advocating for our rights and the well-being of those who will follow in our footsteps.

Remember, change is a collective effort. Together, as Division I student-athletes, we possess the power to shape the narrative of collegiate athletics. Let's leverage our unity, resilience, and determination to build a future that respects and supports the holistic development of student-athletes.

Stay engaged, stay united, and let our collective voice be the driving force behind positive change.
Cody Shimp

January 17, 2024

The Honorable Gus Bilirakis
Chairman
House Energy and Commerce Subcommittee on Data, Innovation and Commerce
2306 Rayburn House Office Building
Washington, DC 20515

Chairman Bilirakis,

Thank you for the opportunity to share my experience as a student-athlete with name, image and likeness (NIL) deals with the distinguished Members of your Subcommittee on Innovation, Data and Commerce, as well as fellow student-athletes and all who are following this hearing.

My name is Sofia Chepenik, and I am a sophomore and lacrosse player at the University of South Florida. Without NIL, my college experience would be a completely different experience.

During my junior and senior year of high school, I watched the documentary on Michael Jordan called *The Last Dance*, literally over 100 times. I was in awe of the legacy he was able to leave through his determination, dedication and competitiveness. About the same time as the documentary was released, NIL came into existence. Similar to Jordan, I knew I too wanted to leave a legacy, one that empowered young female players to know anything could be accomplished with hard work.

I viewed NIL as an opportunity to help build that legacy to more effectively get my message out. Prior to the start of my freshman year, I came up with an action plan of what I wanted to achieve through NIL. I set out goals and reverse engineered the processes I would have to do to accomplish them.

Initially, I felt my plan was dependent on me achieving specific milestones with lacrosse to be more appealing to companies. Prior to the season beginning, Christian Addison, a sports agent who owns ASE Representation, reached out to set up a meeting to discuss representing me. His plan was very similar to mine and based on aligning myself with companies who share the same beliefs and values.

A short time later, the week I was selected ACC Player of the Week for women's lacrosse, I signed my first big NIL deal.

The combination of these events created a tremendous amount of exposure for me. Since then, I have been fortunate enough to work with amazing companies, representing amazing products I believe in, one of which includes my own line of merchandise called emp0wered (the “0” is my number in college) with Dryworld, a sports apparel company.

In addition, this led to opportunities for me to go on podcasts, interviews and more sharing my thoughts and views on women’s empowerment.

What I am most appreciative of is the exposure I have received from NIL. Because of that exposure, I have had young female athletes reach out and ask for advice on how they can accomplish their goals. They have shared feedback about how I inspired them to believe anything is possible. Without NIL, I am confident I would not have been able to positively impact so many athletes.

NIL has enabled me to bring more eyes on my beliefs about women’s empowerment. It has given me a platform to be more in the public eye and I am very appreciative of all the exposure it has brought to me as an athlete.

And while I have benefitted significantly, NIL has also helped bring eyes to the sport I love and play.

I hope my insight into my perspective of NIL will shed light on how impactful and positive it can be for all student athletes. Thank you for your time and attention on this important topic. I appreciate the opportunity to provide comments.

Sincerely,

Sofia Chepenik

Players Associations' Joint Statement on
Legislation Affecting the Rights of College Athletes

January 18, 2024

The Major League Baseball Players Association (MLBPA), Major League Soccer Players Association (MLSPA), National Basketball Players Association (NBPA), National Football League Players Association (NFLPA), and National Hockey League Players Association (NHLPA) ("Players Associations") represent the players in the five major professional sports in the United States. We write today to express our thoughts and concerns about legislation the Committee is considering which would affect the rights of college athletes, many of whom will someday be members of our Associations.

Each Association is governed by an Executive Board of Player Representatives who are elected directly by their fellow players. Collectively, we have over 200 years of experience serving the interests of our athlete members. Our sole focus is establishing, enforcing, and advancing the rights and benefits of athletes, thousands of whom are no older than the college athletes whose rights are being discussed at this week's Subcommittee hearing.

Since the early days of the Players Associations, our work on behalf of athletes has expanded and diversified exponentially. While our core function remains to negotiate and enforce the collective bargaining agreements which set terms and conditions of employment such as wages, hours, and working conditions, for years we have also represented our athlete members at the forefront of issues that relate directly to the legislation currently under consideration by the Subcommittee on Innovation, Data, and Commerce. These issues include:

- Player Name, Image, and Likeness ("NIL")
- Rights of publicity
- Individual & group licensing agreements
- Athlete corporate sponsorships
- Collection, protection & monetization of athletes' performance data
- TV broadcasting
- Enhanced access TV programming
- Monetization of social media
- Sports betting
- Regulation of player agents & agencies

The issues now before the Subcommittee are intimately familiar to the Players Associations. We have decades of experience in protecting athletes' rights in NIL-related matters, and we write to express significant concerns with the "discussion draft" of the FAIR College Sports Act that was recently released.

Any federal intervention aimed at "Protecting Athletes' Dealmaking Rights" must actually place athletes' interests first.

It is imperative that any legislation advanced by the Subcommittee act to protect and advance athletes' rights. There are several ways that federal NIL legislation can be tailored to achieve such ends:

- **Keep It Simple:** Any legislation should simply prohibit the NCAA and other related entities from denying athletes the right to profit from their NIL, consistent with existing laws, as a condition of their athletic participation.

- **Prohibit Lifetime Contracts:** Any legislation should ensure NIL contracts signed during an athlete's college eligibility do not interfere with the athlete's NIL rights and freedom to contract after their college eligibility has expired.

- **Create Additional Safeguards from Predatory Contracts**: Any legislation should establish safeguards against predatory NIL contracts and specifically prohibit contracts that entitle third parties to receive a percentage of a college athlete's future earnings (in college or beyond).

- **Protect International Athletes:** Any legislation should establish that international college athletes receive the same protections and can utilize their NIL rights in the same manner as their teammates.

- **Reinforce, and Do Not Eliminate, Existing Protections:** Any legislation that seeks to standardize NIL rules should include the strongest possible protections against unauthorized commercial use of NIL, and any federal right of publicity should act as a baseline standard that state law is permitted to exceed. As explained in more detail below, NIL legislation purporting to protect athletes should not be used as a trojan horse to nullify athletes' legal rights or status.

Legislation that is meant to protect college athletes should under no circumstances eliminate or diminish their rights under contract, tort, antitrust, and/or labor laws.

The Players Associations have a strong interest in protecting all athletes against illegal exploitation by third parties. Our interest applies not just to the college athletes who will one day become our members, but to all collegiate athletes and indeed to athletes of all ages. For this reason, we continue to closely monitor the college NIL bills which are or will

be under consideration in both the House and Senate, including the FAIR College Sports Act. The Players Associations are deeply concerned that what was once a narrowly tailored legislative draft has recently morphed into a wide-ranging permission slip for the NCAA to continue exploiting the very individuals that the FAIR College Sports Act is meant to protect.

For months, the drafts of the FAIR College Sports Act have been silent on the NCAA's well-publicized campaign to secure legislative immunity from antitrust laws, labor laws, and other state and federal worker protections. Recently, however, provisions have been added that would appear to, in the stroke of a pen, nullify thousands of athletes' rights under important and long-standing federal and state antitrust laws, tortious interference laws, and laws prohibiting unfair competition.[1]

Equally concerning, the updated bill also prevents college athletes from being considered employees of a school, a conference, or the NCAA, thereby stripping them of a wide range of rights and benefits that arise under federal and state laws that protect workers. For the reasons explained below, the Players Associations unequivocally oppose the NCAA immunity and employee-status prohibition recently added in Sections 201 and 301 of the draft of the FAIR College Sports Act.

While no one could credibly dispute that the NCAA finds itself enmeshed in multiple high-stakes lawsuits, these and past lawsuits illustrate that it is athletes, not the NCAA, who have been improperly exploited. And it is the NCAA, not athletes, or Congress for that matter, who bears the responsibility to effect change going forward.

This is apparent from a multitude of court decisions that have attacked the NCAA's policies and practices. Consider Supreme Court Justice Kavanaugh's recent observation (in his concurring opinion in *NCAA v. Alston*) that "the NCAA's business model would be flatly illegal in almost any other industry in America."[2] It is also apparent from the words and deeds of important NCAA stakeholders. Look no further than University of Michigan Head Football Coach Jim Harbaugh, a recent national championship coach and former college athlete himself, who recently remarked of the NCAA's restrictions on athlete compensation: "the thing I would change about college football is, to let the talent share in the ever-increasing revenues…***we're all robbing the same train***."[3] To the extent that the FAIR College Sports Act's newly inserted liability carve-out might in any way enable the

[1] Steve Berkowitz, *NCAA President Charlie Baker to appear at legislative hearing addressing NIL*, USA Today (Jan. 11, 2024) (*available at* https://www.usatoday.com/story/sports/college/2024/01/11/ncaa-president-charlie-baker-congressional-hearing-on-nil/72191813007/)

[2] *NCAA v. Alston*, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J. concurring)

[3] Tara Suter, *Michigan coach Jim Harbaugh suggests college athletes unionize after championship win*, The Hill (Jan. 9, 2024) (emphasis added) (*available at* https://thehill.com/homenews/education/4393414-michigan-harbaugh-college-athletes-unionize-championship-nil/)

NCAA or other entities to "continue robbing the same train," that provision should be removed in its entirety.

So too should the Subcommittee excise any bill language that prevents college athletes from being deemed employees or that otherwise blocks their right to organize and collectively bargain.

- First, despite the NCAA's self-serving protests to the contrary, the nature scope, and economic value of the work performed by college athletes fits the definition of an employee under relevant federal and state laws.[4]

- Second, even if one accepts for argument's sake that collegiate athletics will implode without some form of antitrust immunity or limitation of liability, treating college athletes as employees with the right to unionize and collectively bargain is actually the most direct, fairest, legally recognized, and repeatedly proven way to accomplish this goal. Many, if not all, of the unilaterally implemented policies that have put the NCAA in its billion-dollar bind would be legal if they were instead negotiated via good faith collective bargaining with a Players Association, consistent with existing law.[5]

- Finally, and perhaps most importantly, Congress should not only reject all efforts to preemptively strip college athletes of employee status, it should proactively take up recently introduced legislation that moves in the opposite direction by codifying college athletes' right to organize and collectively bargain.[6] As even university officials and others associated with the NCAA are beginning to recognize, collective bargaining is the best way

[4] Joshua Hernandez, *The Largest Wave in the NCAA's Ocean of Change: the 'College Athletes are Employees' Issue Reevaluated*, 33 Marq. Sports L. Rev. 781 (2023); Marc Edelman, Michael McCann, and John Holden, *The Collegiate Employee-Athlete*, Univ. of Ill. L. Rev. (2023) (*available at* https://ssrn.com/abstract= 4360802); Robert McCormick & Amy McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 72 (2006); *see also* NLRB General Counsel Memorandum 21-08, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, (Sept. 29, 2021) (*available at* https://apps.nlrb.gov/link/ document.aspx/09031d458356ec26); Milly Harry, *A Reckoning for the Term "Student Athlete,"* Diverse (Aug. 26, 2020) (*available at* https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete)

[5] Dan Papscun, *For NCAA's Antitrust Woes, Athlete Unions Pose Ironic Solution*, Bloomberg Law (Aug. 6, 2021) (*available at* https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution)

[6] *See* Sen. Chris Murphy, Press Release (Dec. 6, 2023) (*available at* https://www.murphy.senate.gov/ newsroom/press-releases/ with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights)

to offer the athletes a true seat at the table.[7] Moreover, collective bargaining can also ensure that players' voices are heard on critical non-economic issues such as: health and safety, work hours, travel, diagnosis and treatment of work-related injuries, assessment of concussions and return to play protocols, health benefits, mental health resources, post-playing medical benefits, anti-bullying and hazing policies, and sports betting policies (to name just a few).

In sum, we implore the Subcommittee to focus on protecting college athletes' dealmaking rights, as the title of today's hearing suggests. Any bill it advances should do so with no strings attached. Enactment of even the most player-friendly NIL regulations imaginable will represent an entirely pyrrhic victory if lawmakers simultaneously nullify athletes' rights under antitrust laws, labor laws, or any other federal or state laws that protect other adults in the American workforce.

# # #

Tony Clark
Executive Director
Major League Baseball
Players Association

Martin J. Walsh
Executive Director
National Hockey League
Players Association

Andre Iguodala
Executive Director
National Basketball
Players Association

Bob Foose
Executive Director
Major League Soccer
Players Association

Lloyd Howell
Executive Director
National Football League
Players Association

[7] Joe Moglia, *Is College Athletics Ready to Take on Players Unions?*, Sportico (Dec. 13, 2023) (*available at* https://www.sportico.com/personalities/executives/2023/college-athletics-players-unions-joe-moglia-1234755725/); Shehan Jeyarajah, *Notre Dame AD calls for collective bargaining rights for college athletes: 'I think it's worth considering,'* (Oct. 17, 2023) (*available at* https://www.cbssports.com/college-football/news/notre-dame-ad-calls-for-collective-bargaining-rights-for-college-athletes-i-think-its-worth-considering/); *see also* Suter, *supra* note 3 (Harbaugh: "For a long time, people say that unionizing [college athletes] would be bad. If people aren't gonna do [what's right] out of their own goodwill…that's probably the next step.")

TCA Submitted Testimony

U.S. House of Representatives Committee on Energy and Commerce
Subcommittee on Innovation, Data, and Commerce

Hunter Baddour, Chairman, The Collective Association

NIL Playbook: Proposal to Protect Student Athletes' Dealmaking Rights
January 18, 2024

The Collective Association (TCA) is pleased to share our views through submitted testimony for today's hearing. We have substantive concerns with the draft legislation being considered today and will express those concerns but did want to provide what we feel would be helpful guidance to the Committee as they consider legislative solutions to the current challenges facing college athletics.

WHO WE ARE

TCA is a newly formed association comprised of over 35—and growing—collegiate affiliated collectives from across the Power 4 landscape working to ensure **ALL** college athletes have the ability to maximize their Name, Image, and Likeness (NIL) platforms and to create a sustainable model for college athletes moving forward. The athlete rosters of our membership represent 25+ sports providing a truly diverse population of gender, ethnicity, geography, socio economic factors and opinions that enable us to stay current and impactful in this developing collegiate landscape.

TCA members are private organizations supported by fans, alumni, donors, and numerous local, regional, and national brands with a goal of empowering college athletes and supporting our affiliated schools. Collectives are not agencies and do not take a percentage of profits away from our partner athletes. We proudly assist athletes in ensuring their NIL deals are legal, compliant with NCAA and school guidelines and in market for the services athletes are being asked to perform. Our athletes trust our collectives to provide fair compensation, guidance, and navigation through a disjointed regulatory model, while adding resources and tools that help prepare them for life beyond the athletic arena.

HOW WE GOT HERE

Before we discuss the present and how to build for the future it is important to remind the Committee how we arrived at this point. The NCAA stood sentry for decades preventing athletes from capitalizing on their inalienable rights until their loss at the Supreme Court in 2021. This has produced change in the marketplace that has moved faster than anyone could have imagined and sadly traditional powerbrokers in college sports have been unable to adapt to these changing times.

To hear them tell it, if we could just go back to the good old days—when the NCAA had full control and athletes had no rights—everything would be ok in college athletics. We do not believe that the NCAA warrants the trust of the Congress to grant them an anti-trust exemption nor do we believe that the NCAA has college athletes' best interests in mind when it requests said exemption.

HOW TO FIX IT

The NCAA and other traditional powers in college sports lost power and control. Since that time, they have spent more time trying to figure out how to regain that power and control instead of working to establish a sustainable future in line with a post-Alston reality.

NIL is part of the present and future of college sports so any plan to move forward MUST start with everyone at the table. To this point, TCA members have yet to be asked to participate in conversations with the NCAA and other traditional powerbrokers. This doesn't seem to make sense given that over 80% of NIL deals are paid through our school affiliated Collectives. Any serious discussion regarding the future structure of college sports must include all major stakeholders, and that includes Collectives.

Instead of trying to discriminate between athletes and non-athletes, revenue and non-revenue sport athletes, small and big schools—let's create an orderly marketplace where 1) every athlete has the opportunity to maximize their NIL platform in line with the free market, 2) Collectives and their affiliated schools work closely to create opportunities for all their athletes who wish to participate, 3) schools and collectives have clearly defined rules around recruiting that are enforced in a clear and consistent fashion and 4) the NCAA is tasked to get back to their reason for being in the first place: promoting athlete safety and welfare.

This conversation could start with all the parties saying on the record what everyone in this room today already knows: <u>Power 4 college football is completely different than ANYTHING else in college sports</u>.

Power 4 College Football can live in a world of its own and create value for athletic departments to fund other sports while fully compensating the players on the field. This might allow traditional conferences to be put back together to the benefit of non-football athletes, athletic department budgets and fans alike—all while evolving college football to maximize its' value for everyone!

Collectives and Athletic Departments should have the ability to forge closer working relationships in service to their athletes. Collectives can continue to fill the gaps that current athletic departments are unprepared for such as 1) ensuring contracts are appropriate and compliant with both eligibility standards and in market; 2) maintain the non-employee status of college athletes that everyone seems to agree would not be

helpful to the vast majority of programs and players; 3) Lessen donor fatigue in service to a sustainable and orderly NIL Marketplace.

TCA Members are eager to align on a set of rules creating a sustainable future for every level of the college sports ecosystem. That isn't as difficult as some would try to make you believe. The most important step is an acknowledgement from traditional powerbrokers to accept new voices as part of that ecosystem and invite them to participate in creating the future. We might also point out that Congressional action might be easier if every stakeholder could align around one proposal.

To that end, Congress should at a minimum demand that the NCAA, Conference Commissioners, College Athletes and Collectives work together to develop a transparent process for: 1) revenue sharing, 2) recruiting, and 3) addressing the potential long term mental and physical health needs of college athletes.

Outlined below are a few of TCA's topline thoughts on each of these topics:

1. **Revenue Sharing**: TCA called for revenue sharing in the spirit of allowing all athletes to truly capture their marketplace value over a year ago. Any true NIL benefit should include revenue sharing because the athletes competing on TV is the real value being created. Let's come up with a formula that compensates these athletes—in every sport appropriate—for this value.

   We are heartened to see important voices like Coach Jim Harbaugh, Chip Kelly and others speaking out in favor of revenue sharing while noting that Collectives are uniquely positioned to best assist our affiliated institutions in distributing these dollars without cost to College Athletes.

2. **Recruiting:** Collectives are not interested in being part of some underground recruiting process. NIL is part of the current and future landscape of college sports. As part of official visits, recruits should be allowed to have a conversation with the school affiliated collective to get a sense as to what their value might be in a particular marketplace. These conversations should be kept confidential to protect the family's privacy but with full knowledge that they occur on official visits to promote a more transparent process. Conversations with school affiliated collectives are not appropriate unless the recruit is actively considering attending the institution and we would encourage guardrails to ensure those unaffiliated with Collectives are not offering unrealistic promises to recruits or their families.

3. **Addressing long-term physical and mental health needs:** It is no secret that college athletes sacrifice their bodies in service to their love of the game but also in service to their institution. TCA Members feel strongly that there should be investments made so that former college athletes who need medical and/or mental health care later in life can get the help they need.

There is precedent for Congress pressuring recalcitrant private parties to action. We hope these conversations can begin immediately and look forward to working with every level of the college sports ecosystem to create a better future grounded in reality for programs, players, and partners alike.

LEGISLATION

TCA is in favor of common-sense regulation that produces an orderly marketplace and a sustainable future for the entire college sports ecosystem.

The Committee today is considering a draft bill written by Chairman Bilirakis and Congresswoman Dingell. We want to underscore our offer to be a resource to any Member and this Committee in particular in the same way we've worked with Senators Cruz, Booker, Moran and Blumenthal and Congresswoman Lori Trahan to develop a workable piece of legislation that is inclusive of the current reality in college sports. Our topline concerns with the discussion draft include:

1) This bill seems to be targeted to only certain segments of the college sports ecosystem. Why does the bill leave out coaches, athletic departments, and the NCAA from their responsibilities in ensuring that rules and laws aren't broken. What happens if they break the law? Or are they viewed as above the law with the new government agency that would regulate college sports?

2) We do not see a need for a new government agency to oversee college sports and subject well intentioned programs, partners, and players to FTC rule-making authority. Bad actors, like agents and those who seek to cheat college athletes, should be prosecuted to the fullest extent of the law.

3) Thresholds on what constitutes an NIL deal should not be decided arbitrarily by the government and the FTC.

4) Athlete compensation would be limited by this bill. No other college student—or American—is limited in their ability to earn money in return for their work. Burdensome disclosure policies under the guise of transparency only limit athlete pay and put power back into the government and NCAA's unqualified and untrustworthy hands.

5) Important voices have explicitly been left out. Collectives, among other voices, are ineligible to sit on the new oversight board of the government agency and must subject themselves to a kangaroo court to appeal any infractions brought against them by the government or the NCAA.

6) The new government agency appears to be an unfunded mandate but has the ability to charge user fees. Who would pay these user fees? Would third parties and collectives

have to pay the government for the ability to work on behalf of college athletes? Do television revenues that could otherwise go to college athletes pay for this?

7) The 90-day prohibition for an athlete to begin exercising their rights is discriminatory. This prohibition particularly discriminates against fall sport athletes including Volleyball, Women's Soccer, Cross Country, Football and Basketball. This creates a two-tier system where spring sport athletes do not face any prohibition in reality. We would also note that football and basketball is predominantly played by athletes of color, and this would be incredibly harmful to their rights while not limiting the lacrosse, golf, squash, tennis, or baseball teams in the least.

8) Disclosure Provisions: Burdensome regulations on third parties, collectives, and athletes—while unjust and undue on their face—would stifle contributions and partnerships and therefore financial opportunities for all athletes. Women and non-revenue athletes would likely see an immediate negative impact on their opportunities.

CONCLUSION

Thank you again for the opportunity to submit this testimony and our thoughts on how to best position college sports for a successful present and future. TCA hopes to have the opportunity to work with the NCAA and other stakeholders to align around a commonsense solution and looks forward to presenting a product to the Congress that all of you can enthusiastically support. As with any emerging free market model, collectives have evolved and adapted to the changing landscape and now function as efficient and well-organized entities that are trusted by the athletes and universities they represent. By sitting at the crossroads of the overwhelming majority of name, image and likeness commerce, the TCA is well positioned to provide tangible and actionable feedback to all major stakeholders committed to the long-term health of collegiate athletics.

Testimony of Jon Steinbrecher
Commissioner, The Mid-American Conference (MAC)

For the U.S. House of Representatives Energy & Commerce Committee,
Subcommittee on Innovation, Data, and Commerce
Hearing Entitled "NIL Playbook: Proposal to Protect Student Athletes' Dealmaking Rights"

Thursday, January 18, 2024

Chairman Bilirakis, Ranking Member Schakowsky, and members of the Subcommittee on Innovation, Data, & Commerce, thank you for the opportunity to provide written testimony for this hearing. The Mid-American Conference would also like to thank Congresswoman Dingell for her engagement on the issues facing college athletics and for working with Subcommittee Chair Bilirakis on his draft FAIR College Sports Act bill to help advance much-needed legislation. The following four key points are central to my testimony:

- The MAC fully supports name, image, and likeness (NIL) opportunities for collegiate athletes. Many NIL endeavors provide important financial, educational, professional networking, career development, and service dimensions. However, there must be certain safeguards in place that will prevent pay-for-play and help insure more equitable opportunities for female and male student-athletes.

- There should be a national set of rules and oversight of collegiate athletics, and for that, federal legislation is needed to preempt state-level NIL regulations. Collegiate athletics is national in scope and thus its rules should be as well. Leaving regulation to the states creates confusion and unnecessary complexity and, as we are already seeing, race-to-the-bottom type of pressure that does not have the student-athlete's best interests necessarily in mind.

- The MAC does not support the designation of student-athletes as employees. Regardless of the evolution of colleges' relationships with student-athletes, the relationship must remain anchored in the concept that the student's primary purpose is to attain a degree and that each student-athlete is first and foremost, a student. While the current concept surrounding the relationship between student-athletes and their universities is changing with the addition of NIL deals, Congress should ensure that college athletes are not considered employees.

- The MAC firmly believes that the health and well-being of our student-athletes is a priority. However, efforts to ensure such must be done with all institutions and programs in mind and not be done at the expense of student-athletic opportunities. We believe that the new NCAA guidelines starting this year are a great step in the right direction in protecting our student-athletes and providing them with the best care possible.

The following is broader testimony supporting these key points. This narrative is important to fully understanding the values and guiding principles of the Mid-American Conference, and our commitment to the student-athlete experience.

The Mid-American Conference

Founded in 1946, the Mid-American Conference (MAC) is an NCAA Division I, 12-member conference that sponsors 23 championships and is one of 10 members of the Football Bowl Subdivision (FBS). With a total enrollment of nearly 300,000 students, the league represents institutions of higher learning in five states – Illinois, Indiana, Michigan, New York, and Ohio. The Mid-American Conference office is based in Cleveland, OH.

In addition to providing over 6,000 collegiate athletes with participation opportunities, the MAC provides programming and services intended to support student-athletes, coaches, administrators, and faculty, including:

- A student-athlete-centered Mental Health Program
- An Academic Leadership Development Program
- Conference Governance leadership in students' voices

The MAC also boasts high graduation rates across all of its athletic teams, with most teams regularly passing 90%. Furthermore, the MAC is one of the few FBS conference's that spends more on each student's academic success than on their athletics, including spending more on student-athlete grants-in-aid than on coaches compensation, highlighting our deep commitment to each student–athlete's education and status as a student first and foremost.

Name Image and Likeness (NIL) Opportunities

Just like all other students, MAC student-athletes can profit off their name, image, and likeness (NIL). The MAC fully supports NIL opportunities, as many provide important educational, professional networking, career development, and service dimensions, all of which assist in preparing student-athletes to make meaningful contributions to society.

That being said, safeguards are needed to protect the interests of the student-athlete and to prevent NIL arrangements from becoming incentives for recruitment and pay-for-play.

Federal Preemption

The MAC believes that regulations impacting collegiate athletics, such as those involving NIL, should be national in scope. Preemptive federal-level intervention is in the best interest of intercollegiate athletics and higher education, rather than a state-by-state legislative approach. Many states have already passed NIL laws and have created a patchwork network of different standards, rules, and regulations. This patchwork approach will lead to recruiting advantages for some schools and disadvantages for others. This system also eliminates or severely hinders the ability to conduct fair and equitable competition at the national level and within conferences. Additionally, some state laws have little or no regulations around who can represent student-athletes or the reporting of the deals struck between the parties. This leaves ample space for predatory actors to take advantage of student-athletes in the signing of NIL contracts.

Student-Athlete Employment Status

The MAC opposes policies supporting the designation of student-athletes as employees. The idea that a student-athlete, who is fully participating in the academic and co-curricular opportunities available on our campuses, would be considered an employee of that institution as a result of that engagement is incongruent with the notion that the student-athlete is first and foremost, a student. Allowing student-athletes to be deemed employees of their prospective institutions creates a plethora of unintended secondary consequences including, but not limited to, new substantial tax strains on student-athletes, complications related to hiring and firing “for cause”, a massive new financial burden for each institution, and more.

It is the MAC's firm belief that our primary relationship with our students is that of an educator and a student, not an employer and their employee, and that that relationship should be looked at holistically, across institutions and programs, rather than narrowly focused as we are seeing in current court and administrative cases.

The Health and Wellbeing of Student Athletes

The MAC is firmly committed to seeing our student-athletes receive the best care possible while they are students at our institutions and for a reasonable amount of time afterward. The MAC believes that student-athletes should not have to pay out of pocket for medical care relating to their time as athletes for the institution they attend and supports measures ensuring that each player's medical care is taken care of financially. The MAC has also been a fervent supporter of mental health care initiatives for student-athletes and has taken several substantial measures to ensure our student-athletes receive only the best mental health care when they need it. The MAC has created required annual mental health affidavits for each member, which must be filled out every year, and it has established a mental health well-being committee, with representation from each member institution to help further student-athlete well-being regarding a variety of issues, including concussions and familial issues. With this sincere concern for our student-athletes' well-being in mind, it should be noted that the MAC supports reasonable measures to ensure the health of our student-athletes, including the current NCAA guidelines allowing for institutions to cover payment of medical costs for up to 2 years after graduation.

Closing

Since 1852, collegiate athletics has been an important, vital part of the American collegiate experience. While collegiate athletics, like many institutions, needs to and continues to change, the challenges it now faces speak to the core of what collegiate athletics stands for. Due to the nature of these challenges, Congress is best situated to address them, and the solutions for these challenges must preserve the universally-considered positives of intercollegiate athletics – its connectivity to the educational mission and provision of opportunity to hundreds of thousands of students.

To accomplish this, it will take the leadership that Subcommittee Chair Bilirakis and Congresswoman Dingell have displayed. I thank the Subcommittee for having this hearing and urge all its Members and the rest of Congress to act.

Thank you for your time.

Dr. Jon A. Steinbrecher

Commissioner

Mid-American Conference

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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January 18, 2024

The Honorable Cathy McMorris Rodgers
Chair, House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone
Ranking Member, House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Gus Bilirakis
Chair, Innovation, Data and Commerce Subcommittee
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member, Innovation, Data and Commerce Subcommittee
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

RE: NIL Hearing & FAIR College Sports Act

Dear Chair Rodgers, Ranking Member Pallone, Chair Bilirakis, and Ranking Member Schakowsky:

Thank you for the opportunity to comment on the FAIR College Sports Act on behalf of the Uniform Law Commission (ULC).

The purpose of the ULC, also known as the National Conference of Commissioners on Uniform State Laws, is to promote uniformity in state law when uniformity is desirable and practicable. The ULC seeks to improve the law by providing states with non-partisan, carefully considered, and well-drafted legislation that brings clarity and stability to critical areas of the law. To accomplish this, Commissioners participate in drafting acts and endeavor to secure enactment of approved acts in the various states.

Since its organization in 1892, the ULC has drafted more than 300 uniform laws on numerous subjects and in various fields of law, including the Uniform Commercial Code, the Uniform Anatomical Gifts Act, the Uniform Interstate Family Support Act, acts on declaratory judgments and enforcement of foreign judgments, electronic transactions, real property and trust

and estate law, and on a range of other subjects. The ULC is headquartered in Chicago and is comprised of more than 350 practicing lawyers, governmental lawyers, judges, law professors and lawyer-legislators, who are appointed by each state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state laws where uniformity is desirable and practical.

With the development of interstate transportation and electronic transactions, the states have become increasingly interdependent socially and economically. Confusion or variation of laws among the several states may present, in some fields, a deterrent to the free flow of goods, credit, services, technologies, and persons among the states; restrain full economic and social development; disrupt personal planning; and generate pressures for federal intervention to compel uniformity. The ULC seeks to alleviate these problems in areas of law traditionally left to the states.

The ULC is a strong federalist organization and, as a general matter, we prefer state to federal action. However, we recognize the lack of uniformity in existing state name, image, and likeness ("NIL") laws presents significant challenges for educational institutions, athletic associations, conferences, coaches, administrators, college athletes, and high school athletes attempting to select which university to attend. Although the existing state laws share many similarities, there are significant differences among the laws that create inconsistent and conflicting NIL regulations across states. For example, some state laws expressly prohibit college athletes from using the marks and logos of their institution during NIL activity, while other states permit such use. Some state laws expressly prohibit institutional involvement in college athlete NIL activity, while other states implicitly permit institutions to arrange or facilitate NIL opportunities for college athletes. Athletes in states without NIL laws have been

able to engage in a wide variety of NIL activities that are prohibited under the laws of other states. This patchwork of state laws has thus led to disparate NIL benefits and opportunities for college athletes dictated almost entirely by the state law, if any, that governs their institution. These differences have become even more magnified as varying NIL laws have impacted the recruiting cycle and influenced the enrollment decisions of prospective college athletes and the transfer decisions of current college athletes.

The decentralized NIL system has also prevented the creation of a uniform mechanism for the oversight, monitoring, and enforcement of college athlete NIL activity, and for educating college athletes about the potential risks and opportunities presented by the new NIL landscape. This lack of enforcement and education has compounded the issues created by the inconsistent NIL laws across states and has heightened the risk that NIL activity will be used as a cover for pay-for-performance or as a recruiting inducement. Without uniform regulation of NIL, it appears increasingly likely that the NCAA and other athletic organizations will be unable to prevent illegitimate NIL activity that threatens to upend the collegiate model of sports.

The importance of having a uniform set of rules governing intercollegiate athletic competitions is well established, as is the notion that intercollegiate sports cannot effectively function with conflicting or inconsistent rules from state to state. Given the interdependence of educational institutions and collegiate athletic programs across the country, the impact of a change in one state's laws could have a ripple effect on schools and athletes in other states. A uniform law across all states would prevent this instability and ensure that schools in each state are playing under the same general rules.

In July 2021, the ULC approved the Uniform College Athlete Name, Image, or Likeness

Act ("Uniform Act").[1] The Uniform Act was drafted with the input of athlete agents, current and former college athletes, coaches, college athletic department administrators, representatives of the players associations of the National Football League, the National Hockey League, the NCAA, the National Federation of State High School Associations, the NAIA, social media companies, and other stakeholders.

When we formally approved the Uniform Act, we were hopeful that this model would serve as a unifying framework that states could adopt in order to bring stability and clarity to state law. Our goal was to level the playing field and prevent states from racing to the bottom in the absence of robust association or conference rules. Like many of the individual state laws, the Uniform Act created a set of rules and restrictions to ensure that college athletes could benefit from the use of their NIL without hurting their eligibility to compete. With the Uniform Act, we sought to strike a balance between providing more rights to college athletes while maintaining the integrity of intercollegiate sports.

Since the 117th Congress, the ULC has briefed a number of House and Senate offices and congressional committees about our efforts and discussed how the Uniform Act could complement federal NIL legislation. In our conversations, we provided an overview of how a possible cooperative federalism model for NIL legislation would provide a general federal legislative framework working in tandem with the uniform state law. This type of cooperative federalism model, where Congress and the ULC work to create federal and state NIL laws that operate in tandem, may be the optimal solution for achieving uniformity and flexibility for NIL legislation. However, we also recognize that this is a fast-moving situation in which quick coordinated action by all the states to implement a cooperative federalism model may be

[1] https://www.uniformlaws.org/committees/community-home?CommunityKey=540d3a4a-82de-4b1a-bb1f-3abd6a23b67b

impossible. To that end, the ULC supports the work of this subcommittee, in large part because the discussion draft of the FAIR College Sports Act borrows considerably from the substantial work the ULC did in our attempt to address the issue.

Both the Uniform Act and the FAIR College Sports Act prohibit educational institutions from limiting specific types of NIL activities that the institution determines has an adverse impact on its reputation *unless* the institution complies with the same policy with respect to its sponsorships and advertising deals. Some state laws list categories of NIL activity that are prohibited in all instances (i.e., alcohol, tobacco, marijuana, and gambling) while others allow the institution to ban any NIL activity that it determines has an adverse impact on its reputation. The approach used in both the Uniform Act and the FAIR College Sports Act has the effect of allowing an institution to prohibit college athletes from entering NIL deals with, for example, an alcohol distributor, *only* if the institution refrains from engaging in sponsorships or similar commercial activity with alcohol distributors. This provides greater fairness to college athletes seeking to exercise their NIL rights.

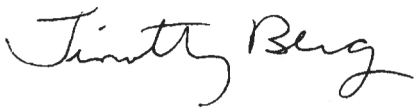
In addition, both the Uniform Act and the FAIR College Sports Act create a registration framework for third parties that mirrors the framework found in many states' existing athlete agent registration statutes. The third-party registration framework provides a mechanism for certifying and regulating third parties who provide compensation to college athletes for the use of their NIL. These third-party registration provisions, which are unique to the Uniform Act and the FAIR College Sports Act, would provide the tools necessary to oversee the booming and potentially abusive NIL industry.

We also want to note, with great appreciation, that the FAIR College Sports Act does not

preempt the work the ULC has done in regulating athlete agents.[2] The ULC's work in this space—the Uniform Athlete Agents Act (2000)[3] and the Revised Uniform Athlete Agents Act (2015) (2019)[4]—has seen widespread success with enactments in 40 states, the District of Columbia, and the U.S. Virgin Islands. By protecting state regulation of athlete agents and agency contracts, the FAIR College Sports Act will serve as a good example of cooperative federalism in action.

Thank you for the opportunity to provide input on this important topic. The ULC would welcome the opportunity to serve as a resource for this subcommittee as you work on the FAIR College Sports Act.

Sincerely,



Tim Berg
President, Uniform Law Commission

[2] https://www.uniformlaws.org/committees/community-home?CommunityKey=cef8ae71-2f7b-4404-9af5-309bb70e861e

[3] The Uniform Athlete Agents Act (2000) has been enacted in Arizona, Arkansas, Colorado, Florida, Georgia, Kansas, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Texas, the U.S. Virgin Islands, West Virginia, and Wyoming.

[4] The Revised Uniform Athlete Agents Act (2015) (2019) has been enacted in Alabama, Delaware, the District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Minnesota, Missouri, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Washington, and Wisconsin.

POLICY BRIEF

AMERICAN ECONOMIC LIBERTIES PROJECT

Playing By the Rules: Bringing Law and Order to the NCAA

Katherine Van Dyck

November 2023

Two and half years ago, the Supreme Court found in *National Collegiate Athletic Association v. Alston* that NCAA rules limiting education-related benefits—meaning scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships—were illegal restraints of trade under the Sherman Antitrust Act. The Court rejected the mythical and amorphous notion of "amateurism" the NCAA used to justify limiting athlete compensation, and the Court described the NCAA's litigation position as a request for "immunity from the normal operation of the antitrust laws."[1] The NCAA's cartel over college athletics was fractured, and it opened a path for college athletes to finally collect the fruits of their labor. The response from the NCAA, conferences, and universities has revealed a deeply broken system built on hypocrisy and exploitation.

The NCAA is an association of athletic conferences, colleges, and universities.[2] It is chiefly tasked with setting and enforcing rules governing college athletics and organizing, overseeing, and promoting championships in a wide range of college sports.[3] The NCAA

1 *Nat'l Collegiate Athletic Ass'n v. Alston,* 594 U.S. ___, 141 S. Ct. 2141, 2147, 2166 (2021).

2 The NCAA divides athletic programs into three divisions. Division I is the most elite and consists of 350 schools and over 170,000 college athletes. It is divided into the Football Bowl Subdivision (FBS), the Football Championship Subdivision (FCS), and a third subdivision that does not include football.

The FBS is even further divided into the Power Five (the SEC, ACC, Pac-12, Big 12, and Big Ten athletic conferences); the Group of Five (the AAC, Conference USA, Mid-American, Mountain West, and Sun Belt conferences); and a handful of independent schools (e.g., Notre Dame). To complicate things even further, the Power Five conference members are also known as "autonomy schools," meaning the NCAA has granted them authority to pass certain of their own rules because they have more resources than their Division I brethren.

This paper focuses on the legal and economic issues surrounding Division I sports and FBS football, which are the most lucrative and the chief target of lawsuits and congressional hearings. Division II and Division III schools present related but unique issues, particularly at Division III schools that do not offer athletic scholarships.

3 NCAA, *Mission and Priorities*.

boasts that it is "dedicated to the well-being and lifelong success of college athletes."[4] But as the *Alston* Court emphasized in its ruling against the NCAA, the organization is an admitted monopolist that uses its power over college athletics to artificially restrain and suppress college athletes' compensation, based on the notion that college athletes are students first, amateur athletes second, and never employees.[5] At the same time, the NCAA, universities, administrators, and coaches collect billions in revenue from those athletes' labor. Now, faced with the prospect of having to share the wealth, and a judiciary that has declared its conduct illegal, the NCAA and its members are turning to Congress for help.

The NCAA wants an exemption from the normal application of our antitrust and labor laws, so that it can continue to deny college athletes any compensation for their hundreds or thousands of hours of labor. Such an exemption would fly in the face of over a century of legal precedent that is steeped in the notion that consolidated economic power is inherently in conflict with the democratic ideals on which our nation is built.

By exploring how money flows through college athletics and how the NCAA has flouted our antitrust and labor laws to keep that money in the hands of a few, this report argues that the NCAA does not need or deserve such special treatment from Congress. It is the athletes—whose blood, sweat, and tears bring adoring fans to stadiums and television screens and billions of dollars to their schools—who need protection from the college athletics cartel the NCAA leads. The NCAA should be granted no such exemption.

SHOW ME THE MONEY

In the United States, college athletics have become an integral part of higher education, both in terms of admissions and the college experience. High school students compete fiercely for athletic scholarships that are both their tickets to college degrees and Olympic training programs, and the only viable path to becoming a professional athlete in leagues like the NBA or NFL. At the same time, the fandom that fosters fierce loyalty to universities is valuable to universities' alumni relations and is often a centerpiece of student life.

Division I athletic programs also generate enormous amounts of money, nearly $16 billion in 2019, collected from a number of sources, most notably television contracts.[6] More than

4 NCAA, *Overview*.
5 *Alston*, 141 S. Ct. at 2154.
6 Andrew Zimbalist, *Analysis: Who is winning in the high-revenue world of college sports?*, PBS NewsHour (Mar. 18, 2023); NCAA Research, *15-Year Trends in Division I Athletics Finances* ("NCAA Revenue Report"), at 19–20. We use the 2019 figure because 2020 and 2021 revenues were skewed by the COVID-19 pandemic.

half of Division I revenue is generated by the Power Five conferences,[7] and as of 2023, the Power Five conferences have television contracts valued at over $3 billion.[8]

The distribution of this money among those that do the work is blatantly inequitable: 35% of Division I's $15.8 billion in revenue is spent on administrators' and coaches' salaries while only 19% goes toward athletes' financial aid and medical treatments.[9] The raw data is even starker. The highest paid college football coach, Nick Saban of the University of Alabama, is paid $11 million per year while the average head college football coach's salary is $6.5 million. The highest paid men's basketball coach, Bill Self of the University of Kansas, is not far behind, with a new contract valued at over $10 million per year while the average head men's basketball coach salary is $3.5 million. The head of the Southeastern Conference is paid $3.7 million per year, the Ohio State athletic director is paid $1.5 million per year, and the former president of the NCAA received $2.99 million per year. Meanwhile, only 58% of college athletes receive any financial aid,[10] and the average athletic scholarship is approximately $18,000 per year.[11] This means college athletes are not immune from the student loan debts that saddle so many other college graduates—20% of them leave school with $40,000 or more of debt.[12] Furthermore, across sports, the NCAA's restrictions on athlete compensation broadly redistribute revenue away from sports where athletes are predominantly Black and low-income, and toward sports with predominantly White and higher-income athletes.[13]

This regime is also blatantly anti-competitive, the result of a strict set of rules promulgated by the NCAA to promote so-called "amateurism" in college athletics.[14] Broadly speaking, these rules prohibit college athletes from accepting any compensation beyond scholarships and other education-related benefits for their participation in intercollegiate athletics. Prior to the *Alston* decision in 2021, the prohibition applied to endorsement contracts, more commonly known as NIL (name, image, and likeness) deals. That rule has been lifted, albeit temporarily and only with respect to payments from third parties, such as commercial sponsorships.[15] College athletes are still prohibited from receiving any

7 ***NCAA Revenue Report***, supra note 6, at 19.
8 Steve Berkowitz, ***NCAA's Power Five conferences are cash cows***, USA Today (May 19, 2023). A significant portion of this revenue comes from the College Football Playoff (CFP), which does not fall under the NCAA umbrella and has a contract with ESPN worth $470 million per year. Ralph D. Russo, ***CFP expansion could increase annual revenue to $2 billion***, AP News (June 11, 2021). CFP revenue is expected to increase to at least $2 billion when the playoff expands from 4 teams to 12 next year. ***Id.***
9 ***NCAA Revenue Report***, supra note 6, at 19.
10 NCAA, ***NCAA Recruiting Facts***.
11 ***Average Per Athlete***, ScholarshipStats.com (2020).
12 NCAA & Gallop, ***A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes***, at 13 (2020).
13 Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo, and Nicole F. Ozminkowski, ***Who Profits From Amateurism? Rent-Sharing in Modern College Sports***, NBER Working Paper No. 27734 (Oct. 2020).
14 NCAA, ***Division I Manual*** (2022).
15 NCAA, ***Interim NIL Policy***.

payments, NIL or otherwise, from the NCAA, conferences, and schools, meaning they cannot receive any revenue from the broadcasts of games they play in, the endorsement of apparel brands the schools require them to wear, or the schools' sale of apparel bearing their jersey numbers.[16] And NIL deals cannot be used as recruiting tools or performance-based incentives, despite coaches regularly receiving six- and seven-figure bonuses for winning regular- and post-season games. In other words, the NCAA still imposes substantial limits on college athlete compensation in the name of amateurism.

THE ECONOMIC REALITY OF COLLEGE ATHLETICS

College athletes, in men's and women's sports alike,[17] are reaping benefits from the NCAA's interim NIL policy, through endorsement deals and even charitable endeavors.[18] NIL collectives, which have sprung up across the country, "generate and pool revenue raised through contributions from a wide variety of sources, including boosters, businesses, fans, and more … to create opportunities for student-athletes to leverage their NIL in exchange for compensation."[19] College athletes are also on the cusp of sharing the revenue from Division I's lucrative television contracts through state legislation.

In the face of this new economic freedom for college athletes, and the prospect that it will need to permit other forms of compensation as well, the NCAA argues that compliance with our antitrust and labor laws, and sharing revenue with athletes, will be financially unsustainable for universities and their athletic departments. It is true that most Division I athletic programs' expenses exceed their revenue. In 2019, FBS schools had a median negative net revenue of $18.8 million and only 25 athletic departments had a surplus.[20] And so the NCAA claims that universities will shutter their non-revenue generating athletic programs, that Title IX compliance will be impossible, and that college sports as we know it will end.

16 NCAA, *Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities*, at 4 (Oct. 26, 2022).
17 WNBA Commission Cathy Englebert described NIL deals as a "huge positive" for women's basketball, allowing the league to benefit from the enormous followings players already have when they join the WNBA out of college. Erik Spanberg, *Engelbert sets priorities for new season*, Sports Business Journal (May 8, 2023).
18 Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, Bleacher Report (Aug. 16, 2022); SI Staff, *The Biggest NIL Earners in Women's Sports From 2022*, SI.com (Dec. 22, 2022); David Eckert, *How an NIL initiative is making a difference for Ole Miss athletes — and Oxford families*, Mississippi Clarion Ledger (May 1, 2023).
19 *Name, Image, and Likeness (NIL) Collectives*, IRS Taxpayer Advocate Service (Apr. 10, 2023). The IRS recently advised that donations to NIL collectives do not serve a charitable purpose and are not tax exempt, an announcement that is likely to have a chilling effect on booster donations to those endeavors. Ross Dellenger, *IRS Says Donations Made to Nonprofit NIL Collectives Are Not Tax Exempt*, SI.com (June 9, 2023). Whether boosters will reroute their money to college athletes through other ventures is an open question.
20 *NCAA Revenue Report*, supra note 6, at 9.

But the truth lies in the numbers discussed above. By banning revenue sharing and forcing amateurism rules onto its athletes, the NCAA has simply allocated college sports revenue to bloated administrator and coach salaries and lavish facilities. The NCAA, the universities, and senators argue that NIL deals and collectives have made college athletics the "Wild West," but Texas A&M just fired its head football coach midseason, a decision that will cost the public university an estimated $100 million.[21] Changing NCAA rules will simply reallocate more of those resources back to college athletes. If college athletes can negotiate for better wages and working conditions, schools will be incentivized to behave more responsibly in their hiring decisions, so they can afford to bring in the best athletes. And perhaps this is why the men sitting at the top of the college sports pyramid are so upset.

Nick Saban told *Sports Illustrated* earlier this year, "[A]ll the sudden, guys are not going to school where they can create the most value for their future. Guys are going to school where they can make the most money."[22] This from a man who just signed an eight-year coaching contract worth almost $100 million.[23] The University of Arkansas's athletic director, Hunter Yurachek, confusingly carped during a visit to Capitol Hill that players are opting to stay in college to earn money from NIL deals instead of exiting prior to graduation to join professional leagues.[24] Mr. Yurachek just used an offer from Auburn University as leverage to secure an annual salary of $1.5 million from Arkansas.[25] And Big Ten Commissioner Tony Pettiti, whose predecessor received a $20 million buyout,[26] testified at a Senate Judiciary Committee hearing that college athletes shouldn't consider financial factors when making recruiting decisions.

These people also claim that paying athletes would detract from their experiences as students. However, the decisions they make for their athletic departments are driven by profit motives, not the academic needs of college athletes. Football players' graduation rate hovers at around 65%, and men's basketball players' rate is 47%, while the general student body graduates at a rate of 69%.[27] Yet their seasons grow longer and longer and require more and more travel, all in the service of more lucrative television contracts. Recent conference realignments put Stanford and UC Berkeley in the ACC (the *Atlantic Coastal* Conference) and will require basketball players to travel from the West Coast to

21 Ricky O'Donnell, *Jimbo Fisher's historic buyout at Texas A&M shatters college football record for fired coach*, SB Nation (Nov. 12, 2023).
22 Ross Dellenger, *Alabama Coach Nick Saban Weighs in on NIL, Player Safety and NCAA Rules Changes*, SI.com (Mar. 7, 2023).
23 Aaron Suttles, *Alabama approves Nick Saban contract making him highest-paid coach in football*, The Athletic (Aug. 23, 2022).
24 Stewart Mandel, *Advice to the SEC's lobbyists: Stop pretending this isn't professional sports*, The Athletic (June 7, 2023).
25 Robert Stewart, *Arkansas to extend Yurachek amid Auburn AD search*, Rivals (Oct. 31, 2022).
26 Shawn Windsor, *Jim Delany's $20 million exit prize from Big Ten is absurd. Here's why*, Detroit Free Press (Mar. 5, 2019).
27 NCAA Research, *Trends in NCAA Division I Graduation Rates*, at 24, 26 (Nov. 2022).

the East Coast four times in a five-month basketball season.[28] This places enormous time demands on college athletes, who frequently spend around 30 to 40 hours a week on their sport.[29] Finally, it bears mentioning that no earnings restrictions or "protections" apply to the general population of college students. Social media influencers thrive on campus and residential assistants are unionizing, all while participating in the full college experience of classes and campus life.[30]

The American concept of an amateur student-athlete has been erased by the demands that schools themselves place on them. Division I schools treat their athletes like employees in every way but compensation. They control the nature, degree, and manner in which the athletes perform their athletic duties; the athletic services rendered require highly particular skills; the athlete's opportunity for profit in the form of financial aid depends on their athletic skills; the schools invest heavily in athletic facilities and equipment for the athletes; and the athletes are an integral part of the school's ability to maintain an athletic program.[31] When courts have eschewed these facts in the past to hold that college athletes are not employees, they have done so based on the notion of amateurism that the Supreme Court has now rightly rejected.[32] The economic reality of college athletics has changed.

WHY WE HAVE ANTITRUST AND LABOR LAWS

The United States has laws that are meant to address the very problems that both college athletes and the NCAA face today. The Sherman Act was born in 1890 of "a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[33] It was passed at a time when trusts controlled by a handful of plutocrats had a stranglehold on commerce in the United States, and it "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[34] Thus, Section 1 of the Sherman Act outlaws agreements in restraint of trade (e.g., price-fixing, market allocation, refusals to deal, and bid-rigging), and Section

28 Brendan Marks, *ACC's Jim Phillips reinforces decision to expand, suggests basketball tournament may not include all members*, The Athletic (Oct. 25, 2023). The ACC pointed out not that the realignment was good for athletes but instead that "[t]his is a chance for (schools) to bring their programs and their brands out to different markets that are national cities and have a media presence." *Id.*

29 Brian Wakamo, *Student Athletes Are Workers — They Should Get Paid*, Institute for Policy Studies (Oct. 24, 2019).

30 Grace Kay, *College Campuses: A Hot Spot For Social Media Influencers*, Forbes (July 29, 2019); Kate Gibson, *Undergraduates across the country are unionizing college workforces*, CBS News (Apr. 15, 2022).

31 See *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen,* 835 F.2d 1529, 1535 (7th Cir. 1987) (summarizing factors used to determine if an individual is an employee).

32 *E.g. Berger v. Nat'l Collegiate Athletic Ass'n,* 843 F.3d 285, 291 (7th Cir. 2016).

33 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

34 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

2 outlaws monopolies, attempts to monopolize, and conspiracies to monopolize.[35] The agreements among universities to deny college athletes compensation, maintained by NCAA rules, are blatant violations of this law, with wealthy universities exploiting athletes from lower-income backgrounds.

Furthermore, there is no doubt that that the Sherman Act applies to labor markets like the one in which college athletes exist.[36] Senator John Sherman himself stated, "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors*."[37] And so the Supreme Court has, for almost 100 years, recognized that agreements to fix wages are violations of the Sherman Act.[38] The reason for this is obvious. Allowing anti-competitive behavior in labor markets is disastrous, leading to "excess unemployment, a permanent gap between wages and worker productivity, poor working conditions, and domination of the workers by employers."[39]

Labor laws also exist almost universally to protect employees from abuse by their overseers. The Fair Labor Standards Act sets minimum wages, maximum hours, and child labor standards;[40] the Occupational Safety and Health Act mandates safe working conditions;[41] and the National Labor Relations Act "protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation."[42] These protections are considered so critical that FLSA rights cannot be waived, even voluntarily, by employees or negotiated away by labor unions,[43] and an employee can refuse to work in the face of dangerous OSHA violations.[44]

35 15 U.S.C. §§ 1, 2.
36 In *Alston*, the relevant market was one for "athletic services in men's and women's Division I basketball and FBS football," and the Court referred to it throughout the opinion as a labor market. 141 S. Ct. at 2151–52. Indeed, the NCAA did not contest in *Alston* that it "enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor." *Id.* at 2154; cf. *Brown v. Pro Football, Inc.,* 518 U.S. 231, 252 (1996) ("a marketwide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act.").
37 21 Cong. Rec. 2455, 2457 (1890) (emphasis added).
38 *Anderson v. Shipowners' Ass'n of Pac. Coast,* 272 U.S. 359, 363–65 (1926). Much like the NCAA, the Shipowners' Association was comprised of a group of employers, namely merchant vessel owners and operators, who agreed to abide by a set of rules governing the terms of employment, including hours and wages, for a specific group, namely seamen. *Id.* at 361–62. "These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows … that the combination is in violation of the [Sherman] Anti-Trust Act." *Id.* at 365.
39 Suresh Naidu, Eric A. Posner, and Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 536, 550 (2018).
40 *Wages and the Fair Labor Standards Act*, U.S. Dep't of Labor; 29 U.S.C. § 203, *et seq.*
41 *About OSHA*, Occupational Safety & Health Admin.; 29 U.S.C. § 651, *et seq.*
42 *National Labor Relations Act*, Nat'l Labor Relations Board; 29 U.S.C. § 151, *et seq.*
43 *Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. 2010).
44 29 C.F.R. § 1977.12(2).

At the intersection of labor and antitrust, unions are exempt from the Sherman Act's prohibition of restraints in trade.[45] The exemption reflects a national labor policy grounded in "[t]he basic premise … that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be."[46] This means that employees can band together and collectively bargain for better wages and working conditions, with the express goal of "restoring equality of bargaining power between employers and employees."[47]

There is also a "judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions."[48] The non-statutory labor exemption protects agreed-upon restraints arrived at through the collective bargaining agreement, including multi-employer agreements with unions.[49] "[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."[50] This is what allows sports leagues like the NFL to collectively bargain, on behalf of all of their member teams, with their players' unions.

Nonetheless, it is important to remember that the statutory and non-statutory labor exemptions are narrow and that "'(i)mmunity from the antitrust laws is not lightly implied.' This canon of construction … reflects the [] indispensable role of antitrust policy in the maintenance of a free economy."[51] Our employers control the conditions of our livelihoods—our abilities to earn living wages, put food on our tables, and live and work in a safe and democratic world. Opportunities to abuse that power are vast and must be reined in by the law.

45 15 U.S.C. § 17; 29 U.S.C. §§ 52, 104.
46 *Brown*, 518 U.S. at 253 (Stevens, J. dissenting) (citing 29 U.S.C. § 151).
47 29 U.S.C. § 151.
48 *Brown*, 518 U.S. at 254 (Stevens, J. dissenting).
49 *Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.,* 381 U.S. 676, 691 (1965).
50 *Brown*, 518 U.S. at 237.
51 *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 348 (1963) (internal citations omitted). *See also United States v. Topco Assocs., Inc.,* 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. … Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.").

THE MYTH OF AMATEURISM

The NCAA claims its restraints on compensation exist to preserve a noble tradition of amateurism in college athletics and, by extension, consumer demand for their product.[52] But amateurism is an amorphous concept. The NCAA was, in seven years of litigation before the decision against it in *Alston*, unable to define it.[53] Nor did the NCAA bother to offer real expert testimony showing that amateurism was important to consumers in the first place,[54] probably because it isn't. In sharp contrast, the college athletes presented ample evidence that increasing athlete compensation had not reduced consumer demand in the past, nor would it affect consumer demand in the future.[55] And real-world evidence since *Alston* has proven those athletes right.[56] So when the Supreme Court considered the rules' legality, that logic was flatly and unanimously rejected.[57] As Justice Kavanaugh wrote:

> [T]raditions alone [could not] 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 principles of antitrust law, it is not evident why college sports should be any different.[58]

The NCAA's flimsy amateurism defense was compounded by the NCAA's stunning admissions "that it and its members have agreed to compensation limits on college athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits 'affect interstate commerce.'"[59] The NCAA acknowledged that it holds monopsony power over college athletes, "such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor."[60] Finally, it agreed that schools "compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer."[61] In other words, *Alston* "involve[d] admitted

52 *Alston*, 141 S. Ct. at 2152.
53 *Id.*
54 *Id.*
55 *Id.* at 2153.
56 College football viewership has risen 12% since the NCAA lifted its NIL ban. Stewart Mandel, *College football is booming, after all the hand-wringing, thanks to NIL and the transfer portal*, The Athletic (Oct. 13, 2023).
57 *Alston*, 141 S. Ct. at 2147.
58 *Id.* at 2169 (Kavanaugh, J. concurring).
59 *Id.* at 2151.
60 *Id.* at 2154.
61 *Id.*

horizontal price fixing in a market where the defendants exercise[d] monopoly control."[62] It is difficult to imagine another context where courts would give any thought to permitting such overtly illegal behavior.

In the wake of *Alston*, the remaining NCAA "amateurism" rules and other university policies are being challenged in legal proceedings across the country. In March, a group of athletes filed an antitrust suit against Ivy League schools challenging their agreed-upon policy of not offering any athletic scholarships.[63] In May, the National Labor Relations Board filed a complaint alleging that "USC, the Pac-12 conference, and the NCAA, as joint employers, deprive[d] their players of their statutory right to organize and to join together to improve their working and playing conditions."[64] In the Third Circuit Court of Appeals, college athletes are arguing that they are employees of the colleges whose teams they play on and should be paid in accordance with Fair Labor Standards Act.[65] And in the Northern District of California, a district court judge just certified three classes of athletes in a lawsuit challenging NCAA rules restricting NIL compensation, which cost athletes billions in lost revenue from television contracts and other endorsement opportunities.[66]

State legislatures have responded to *Alston* with legislation protecting the athletes' rights to compensation. In California, the legislature is considering legislation that would require universities with media revenue exceeding $10 million annually to contribute up to $25,000 per college athlete to a college degree completion fund and create a regulatory agency tasked with, among other things, setting safety standards and return-to-play protocols, providing educational programs related to sexual abuse, and making NIL deals more transparent.[67] The driving force is state universities' desire and need to compete for the best talent. Creating the best economy for college athletes will, at bottom, help with recruitment. The NCAA has, in response, taken the extraordinary step of instructing schools that, if a state law conflicts with an NCAA regulation, the school "must adhere to NCAA legislation (or policy) when it conflicts with permissive state law."[68] However, a number of these laws expressly preempt NCAA regulations, so it is unclear what the force of that proclamation will be.

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62 *Id.*
63 *Choh v. Brown University*, No. 23-cv-00305 (D. Conn.).
64 Dan Murphy, *National Labor Relations Board files complaint for unfair labor practices vs. NCAA, Pac-12, USC*, ESPN (May 18, 2023). Motions to dismiss filed by the NCAA and other respondents were denied on November 7.
65 *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 22-1223 (3rd Cir.).
66 *In re: College Athlete NIL Litig.*, No. 20-cv-03919, Order Granting Mtn. for Certification of Damages Class (Dkt. 387) (Nov. 3, 2023).
67 *The College Athlete Protection Act*, Cal. Assemb. Bill No. 252 (2023).
68 NCAA, *NIL Update Memo* (June 27, 2023).

And despite all of this, the NCAA continues to rely on the myth of amateurism to justify its rules against athlete compensation. Current NCAA bylaws mandate that (1) "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport,"[69] and (2) "[a] professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the [NCAA]."[70] The NCAA doubles down on this tautology in its opposition to the Johnson lawsuit, arguing that universities do not pay college athletes because they are not employees and college athletes are not employees because the NCAA prohibits them from being paid.[71] This is the precise argument that Justice Kavanaugh called "circular and unpersuasive"—"that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid."[72]

WHAT AN ANTITRUST EXEMPTION LOOKS LIKE

Having lost at the Supreme Court for such an obviously illegal arrangement, the NCAA now wants a substantial exemption from the antitrust laws, largely so that it can continue to limit compensation for student-athletes. To foresee the consequences of this, we need look no further than Major League Baseball (MLB), the only professional sports league in the United States that enjoys such special treatment.

The Supreme Court found the Sherman Act inapplicable to professional baseball in 1922.[73] At the time, Justice Oliver Wendell Holmes wrote that "exhibitions of baseball" were "purely state affairs" and not commerce covered by the Sherman Act.[74] In *Alston*, the Supreme Court called the decision "'unrealistic' and 'inconsistent' and 'aberration[al].'"[75] It is also the subject of multiple government investigations and private lawsuits.[76] But it remains firmly in place and has allowed the MLB to engage in a panoply of anti-competitive behavior that harms players, coaches, staff, and communities across the country.

69 *Division I Manual,* supra note 14, at Bylaw 12.01.1.
70 *Id.* at Bylaw 12.02.11.
71 *Johnson*, Appellants' Opening Br. (Dkt. 17) (May 31, 2022).
72 *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J. dissenting).
73 *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).
74 *Id.* at 208.
75 141 S. Ct. at 2141 (citations and quotations omitted).
76 Mike Scarcella, *U.S. Justice Dept jumps into pro baseball antitrust fray on appeal*, Reuters (Jan. 31, 2023); Evan Drellich, *U.S. Senate requests information on MLB's antitrust exemption from commissioner Manfred*, The Athletic (July 18, 2022).

With this antitrust exemption, MLB has been allowed, among other things, to:

- Cap the salaries of minor league players at $15,000 a year and force them to attend spring training with no compensation;[77]
- Impose a uniform contract on scouts and no-poach agreements on teams that suppress scouts' salaries to as low as $15,000 a year;[78]
- Block attempts to relocate franchises from one geographic market to another, a practice declared anti-competitive and unlawful in the NFL in 1982;[79] and
- Restrict the number of minor league teams that can affiliate with a major league team and force 40 previously thriving teams to close their doors.[80]

It has also been reported that MLB is considering imposing cost-cutting measures on its teams by placing artificial caps on the number of scouts, trainers, and analytics experts they can hire.[81]

These practices are not tolerated anywhere else in professional sports. The Supreme Court has steadfastly held that the NFL, the NBA, hockey leagues, professional golf, boxing clubs, and, yes, the NCAA must adhere to the Sherman Act's prohibitions,[82] albeit subject to the more lenient rule of reason.[83] But while it recognizes "'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important,'"[84] that interest and the rule of reason have their limits. As the Supreme Court said in *Alston*, "That some restraints are necessary to create or maintain a league sport does not mean all 'aspects of elaborate interleague cooperation are.'"[85] Yet the NCAA cannot seem to adapt to this maxim.

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77 *Concepcion v. Off. of Comm'r of Baseball,* No. 22-cv-1017, 2023 WL 4110155, at *2, 10–11 (D.P.R. May 31, 2023), *report and recommendation adopted,* 2023 WL 4109788 (D.P.R. June 21, 2023).
78 *Wyckoff v. Off. of the Comm'r of Baseball*, 211 F. Supp. 3d 615, 625–27 (S.D.N.Y. 2016), *aff'd sub nom.*, 705 F. App'x 26 (2d Cir. 2017).
79 *Compare City of San Jose v. Off. of the Com'r of Baseball,* 776 F.3d 686, 690 (9th Cir. 2015) *and Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 726 F.2d 1381, 1401 (9th Cir. 1984).
80 *Nostalgic Partners, LLC v. Off. of Comm'r of Baseball,* No. 22-2859, 2023 WL 4072836, at *1 (2d Cir. June 20, 2023). MLB settled the case for an untold sum after the plaintiffs filed a petition with the Supreme Court asking it to overturn *Federal Baseball*, an outcome that seemed likely given the Court's recent criticism of the decision in *Alston*. Alex Lawson, *MLB Avoids High Court Antitrust Scrutiny With Settlement*, Law360 (Nov. 3, 2023).
81 Evan Drellich and Ken Rosenthal, *MLB intends to curb team spending on tech; staffing limits also discussed, officials say*, The Athletic (June 13, 2023). The NCAA already has rules like this. It is being sued in yet another antitrust class action for limiting the number of football coaches that schools can hire. The rule allows them to hire one additional volunteer coach, who the schools agreed would not be paid. *Smart v. Nat'l Collegiate Athletic Ass'n,* No. 22-cv-02125 (E.D. Cal.). In antitrust parlance, the NCAA and schools conspired to artificially fix the wages of volunteer coaches at $0.
82 *Radovich v. Nat'l Football League*, 352 U.S. 445, 446–48 (1957); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205, 91 S. Ct. 672, 673, 28 L. Ed. 2d 206 (1971); *Linseman v. World Hockey Ass'n,* 439 F. Supp. 1315, 1320 (D. Conn. 1977); *Blalock v. Ladies Pro. Golf Ass'n,* 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 241–42 (1955); *Alston*, 141 S. Ct. at 2159–60.
83 *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010).
84 *Id.* at 204.
85 141 S. Ct. at 2156.

THERE IS A BETTER PATH

It is hard to overstate the positive impact that *Alston* and subsequent NCAA rule changes have had on college athletes' lives. They no longer have to choose between earning a degree and earning money. Instead, they have the freedom to negotiate contracts that realize their market value and to support themselves and their families without losing their college scholarships and eligibility to participate in intercollegiate athletics. The days when the University of Michigan collected $19 million from jersey sales when its star basketball player couldn't afford a pizza are quickly fading.[86]

But this sea change in college athletics has garnered a lot of skepticism and hand wringing. There have been ten hearings in Congress on the topic of NIL since *Alston*. At one, NCAA President Charlie Baker made several strategically worded requests to Congress that would undo most of this progress: a national NIL standard that would preempt state laws, a declaration that college athletes are not employees, and immunity from antitrust laws.[87] There are also close to 15 different bills and discussion drafts floating around the Hill. They generally enshrine college athletes' rights to NIL compensation into the U.S. Code, but many deliver some of the most insidious items on the NCAA's legislative wish list that would strip college athletes of their freedom of contract and deprive them of private rights of action.[88] Far less restrictive options exist that would protect both the athletes and the schools they play for. That is why the *Alston* Court refused to grant the NCAA antitrust immunity in the first place.[89]

To start, the NCAA should allow universities to create NIL offices that can help athletes navigate the world of NIL deals, which includes contract negotiations and complex legal issues. Lawmakers and policy advocates should also look to organizations like the College Football Players Association and the National College Players Association, which have presented well-reasoned platforms that protect college athletes and competition, both on and off the field.[90] These include guaranteed medical care and other health and safety protections, safer practice conditions like those enjoyed by NFL players, a true off-season to rest, sharing of media revenue, and improved Title IX enforcement. And they cannot

86 Alyson Hagy, ***Webber's World***, The New York Times Magazine (Feb. 23, 2003).
87 Hearing on Name, Image, and Likeness, and the Future of College Sports, ***Written Testimony of Charlie Baker***, U.S. Sen. Judiciary Cmte. (Oct. 17, 2023).
88 *Id*. Senators Tuberville and Manchin have proposed limiting players' ability to transfer schools and negotiate contracts using agents. ***Protecting Athletes, Schools, and Sports Act of 2023***, 118th Cong. (2023). That is no better than the non-compete clauses that restrict employee movement and suppress wages.
89 *See Alston*, 141 S. C.t at 2162 ("[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.").
90 ***CFBPA Platform for Change***, College Football Players Association (Jan. 2023); ***About Us***, National College Players Association.

forget international students, who cannot accept NIL money from anyone under the terms of their student visas. Lastly, they should look seriously at the option of collective bargaining, which would diffuse some of the NCAA's power, give college athletes leverage to negotiate better working conditions and pay, and allow the NCAA to bargain for uniform rules on behalf of all schools without violating antitrust laws. Notre Dame's athletic director even offered the creative solution of crafting a law that would grant athletes "the right to negotiate with the conferences in which they compete over the terms and conditions of their athletic participation" without making them employees.[91]

At the end of the day, we should not be taking away college athletes' rights and immunizing the NCAA and its members from liability. Unfortunately, that seems to be the knee-jerk reaction to progress, prompted by a fear of losing beloved college sports traditions. So remember why we have antitrust and labor laws, remember that $16 billion is flowing largely to a few elites in the upper echelons of college athletics, and remember that this is all the result of grueling work by highly disciplined athletes who also happen to be working on a college degree.

* * *

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91 Hearing on Name, Image, and Likeness, and the Future of College Sports, *Testimony of Jack Swarbrick*, U.S. Sen. Judiciary Cmte. (Oct. 17, 2023).

Inside USC, UCLA and the Big Ten's prep for realignment's toughest travel puzzle

Nicole Auerbach
Jul 31, 2023
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For UCLA athletic director Martin Jarmond, June 30, 2022, was a day of celebration coupled with exhaustion. The Bruins had gotten out of the Pac-12 and into the Big Ten alongside rival USC, securing their financial future and gaining stability in an otherwise uncertain time for college sports.

But then he woke up the next morning, and the real work began.

How were UCLA and USC going to actually pull this move off — for every varsity sport? The idea of a coast-to-coast college conference sounded great in theory, but the details would be devilish. What the two Los Angeles schools will experience almost exactly one year from now when they officially join the Big Ten on Aug. 2, 2024, will be unprecedented in major college sports.

"We have to get it right," Jarmond told *The Athletic*. "From day one, we want to be competitive at the highest level in the Big Ten. What that means is really trying to optimize everything that goes into being competitive. … When you make a move like this, there are so many moving parts that you really have to bring the focus inward and just do one thing at a time. 'OK, what's most important?' And you just go down that list."

The checklist is long. It changes. Its priorities will surely shift many times over the next 365 days and the years after. Both USC and UCLA need to figure out the logistics surrounding all their cross-country trips ahead. They need to work with the Big Ten as the league pieces together schedules for every sport. They must build out infrastructure to accommodate their new conference's network. They have to invest more in resources for academics, nutrition and mental health. They need to talk to sleep experts about body clocks and athletic performance.

Some steps have proven more difficult than anticipated. Others are less daunting than expected.

"USC has taken long trips before — it's going to be the rigor of the Big Ten and doing it repetitively that's the challenge," said former Penn State athletic director Sandy Barbour, a consultant who joined USC's leadership team in May following the departure of Trojans athletic director Mike Bohn.

That is the crux of the challenge: Travel alone isn't a new concern, but the length of the trips in the aggregate will be. Can they provide all of the support that their programs need and do it in a cost-effective manner?

These two schools say yes. But their leaders still have much to do in the lead-up to next August, as does new Big Ten commissioner Tony Petitti, who reiterated last week that his No. 1 priority is a smooth integration of USC and UCLA into the conference. One of his first trips after being hired in mid-June was to visit the L.A. schools. And one of the first decisions he made after taking the job was to hire Becky Pany as his senior vice president of sports administration, tasked with overseeing the integration of USC and UCLA with a particular focus on the league's 25 Olympic sports.

"My message to Becky when she started was like, 'Look, there's nothing sacred as far as I'm concerned. I'll call you with crazy ideas myself,'"

Petitti said. “Let’s make sure that when we’re done, we’re seeing things that we haven’t done before.”


BIG

Tony Petitti has reiterated this month that smoothing the L.A. schools' Big Ten transition, not pursuing additional expansion candidates, has been his top priority. (Robert Goddin / USA Today)

For more than a year, every decision or idea about UCLA's move to the Big Ten has run through Matt Elliott. He's the Bruins' chief strategy officer and the official point person for the move. Elliott brings more than 10 years of experience in Westwood to his discussions with a boss in Jarmond who has lived and worked at two Big Ten schools. Together, they assembled a three-phase process for 2022-2024.

"We just thought about like, let's compare this to an athletic event," Elliott said. "The first thing we're going to do is our scouting report. So, that's going to be phase one of our process. Second phase, we're going to call the gameplan, which is really how we're going to make our decisions about how we're going to attack all this. Phase three, we're going to call training camp, which is really kind of the implementation of the ideas that we've come up with and the decisions we make in phase two.

"That all leads up to game day, which we're looking at as August 2, 2024."

GO DEEPER
California is becoming Big Ten country. How will it change college football recruiting?

As part of the first phase, Jarmond solicited feedback from current UCLA athletes about the move: their concerns, what they were looking forward to and the why behind both. Jarmond met with more than 300 athletes either individually or as a team, and the majority told him they

were excited to compete at that level and to be part of a truly national conference. They also had questions and mentioned areas they wanted the athletic department to prioritize.

UCLA athletes asked for more resources devoted to their nutrition and to their mental health. “It was glaringly apparent to me that, resource-wise, we weren’t where we needed to be,” Jarmond said. The Bruins are already trying to address that by adding meals on campus and team meals on the road. By the time UCLA gets to the Big Ten, Elliott said every athlete on campus will have breakfast and lunch served to them, which he noted was a big change for the athletic department. No more cards for meal plans or trying to run back to a dining hall in between classes. It’ll be baked into the schedule. On the road, instead of per diems, there will be more team meals; nutritionists and dieticians can make sure the athletes are fueling properly.

They also plan to increase staffing for both mental health and academic support. Academic advisors will travel with teams. Additional support ideas could include noise-cancelling headphones for all athletes, and maybe Wi-Fi hotspots, too, to make it easier to do schoolwork while traveling. Elliott suggested that athletes might also want to take more summer classes, so their schedules are a bit lighter and more flexible in-season.

Barbour highlighted USC’s sports science efforts, which she said will help athletes with nutrition and sleep optimization. They’ll also help figure out best practices for air travel — how best to help athletes prepare and recover in a pressurized environment. The Trojans are trying to approach everything around the transition with a student-centered focus.

Jarmond has been in contact with professional sports teams based on the West Coast that travel across the country regularly. He talked to the Los Angeles Rams and the Chargers, and he even reached out to Brad

Stevens, the Boston Celtics' president of basketball operations, whom Jarmond got to know when he worked at Boston College. Stevens connected Jarmond with a sleep expert.

Maybe USC and UCLA will eat and sleep on West Coast hours while out east. Perhaps they won't. Maybe coaches will adjust practice times and dates so that teams aren't practicing the day after a five-hour flight. Experts will help the programs make educated guesses for athletic performance, but there will also be a great deal of adjustment based on what works and what doesn't.

"It's just really the process of connecting all of those dots," said USC - senior associate athletic director Ed Stewart. "A lot of that has to do with: What are the competition models going to ultimately look like? We know what that looks like now in football. So, that box is checked. That's the first domino to drop, if you will, and now we're going to try and see what those actual competitive models will ultimately look like, across the board in all sports."


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Ucla
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Managing cross-country trips for Big Ten teams with the best shot at national title contention, including UCLA softball, presents a complex challenge for the conference. (Brett Rojo / USA Today)

Much of Petitti's world these days is uncertain. He's trying to navigate the present and future of college sports as it is attacked on all sides. He reminds himself this as he works through the integration of USC and UCLA. Sure, it's complicated — but it's something the Big Ten can control. And things like schedules can always be tweaked.

"The football part is probably the easiest, right? It's everything else that we have to spend time on," Petitti said. "That's what we're doing every day. In every sport, it's different. Every sport's playing format in the regular season and the postseason are different."

The Big Ten unveiled its 2024 football scheduling model earlier this summer. The Flex Protect Plus, as the league is calling it, allows teams to play up to three protected rivals each year and rotates through the rest of the conference while trying to prioritize competitive balance. But football only plays once a week. It's going to take more creativity to piece together not just the soccer schedule but also the slate for field hockey, cross country and everything else that will be in-season at the same time.

For example, maybe the league can pair UCLA men's soccer with USC women's volleyball, and the two teams could charter together to play Northwestern and Illinois on the same weekend. Alternatively, they could fly commercial together and share buses. One other example of the minutiae of these travel considerations: In this scenario, the order of the L.A. teams' games should be Illinois, followed by Northwestern. That way, those teams would end up much closer to O'Hare International Airport and could fly home directly after the games.

"How do you take advantage of members that are close by each other?" Petitti said. "You can double up and alternate. We're also thinking about the size of our postseason formats. … One of the things I've tried to do

— my philosophy overall — is that playing for a Big Ten championship is incredibly meaningful. So, for those sports where we have postseason Big Ten play, what's the best way to like prioritize that? And then we have to have the regular season work.

"Ultimately, our goal is to win NCAA championships in every sport, so we've got to put ourselves in the best position. We've got to get the right regular season and the right postseason, so we have the maximum available qualifiers."

Scheduling with postseason qualification in mind was a priority when creating the new football model. The Big Ten wants challenging but balanced slates for the best teams so that multiple teams can be positioned for at-large bids in the new 12-team College Football Playoff. That same philosophy can be taken with, say, softball. Because UCLA has historically been dominant in that sport, the Big Ten could make sure the Bruins play the top half of the rest of the league more than they play the bottom half, so as not to drag down their RPI. Or, if USC and UCLA appear to have NCAA Tournament-caliber men's basketball teams, the league could avoid sequencing matchups so that those teams would have to go all the way to the Eastern time zone and back on two consecutive trips. The Big Ten has tasked scheduling guru Kevin Pauga with piecing together these puzzles.

The east-to-west flights back to L.A. will also help cap the total number of days of trips. Elliott said that in many cases there are more return trip options later in the day from airports such as Newark, Detroit and O'Hare than there have been when UCLA teams have been trying to get home from Pac-12 locales such as Pullman or Tucson. Plus, the time change allows athletes to get back from weekend action on a Sunday instead of a Monday and be able to make Monday classes.

"This is not more travel," Jarmond said. "In most instances, it will be the same number of trips that we take right now. And then a few (teams)

will have a fewer number of trips. That's one thing that I think people miss. Now the distances are farther, and that's what our focus is going to be — how best to minimize the impact of the distance."

Stewart noted that much of this will come down to the modes of transportation. Some flights — but not all flights in every sport — will be chartered. "I don't think you have to do that," Jarmond said, citing the major airports in the Big Ten footprint with direct flights to L.A. But the key will likely come down to the pairing of opponents, which means leaning into bus rides once the West Coast teams are in the area. Elliott estimated that some teams may only add two total days of travel from what they're currently doing. Others may have the same number as they do now.

"Once the competition models get finalized, you'll get a better feel for the exact number of trips that you have to take," Stewart said. "I think folks may be surprised when they see that."

GO DEEPER

The complicated logistics behind Penn State's cross-country treks to USC, UCLA

It's likely much of the planning and execution of cross-country travel will surprise fans in and out of the league. The undertaking is unlike anything else in college sports, even as other conferences have expanded across time zones and into areas less accessible by major airport. No Division I conference stretches fully from the Pacific to the Atlantic Ocean. No one else has to figure out how Rutgers and USC will play a regular-season tennis match.

For USC and UCLA, “game day” is fast approaching. With little more than a year to go, those involved in the planning remain confident they can get this right. Or that they can fix it if they need to. Failure isn’t an option.

“The overarching impetus behind all this is that we want to remain at the level we’re at — we want to continue to recruit the best student-athletes possible and compete for championships,” Elliott said. “And if you can’t offer the best nutrition, the best travel opportunities and experiences, the best mental health services, and the most academic support, student-athletes are not going to choose your school. You have to offer the best experience.”

Editor’s note: *This story is part of* The Athletic*’s Realignment Revisited series, digging into the past, present and future of conference realignment in college sports. Follow the series and find more conference realignment stories here.*

January 10, 2024

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Innovation, Data and Commerce

Dear Distinguished Members of the Subcommittee on Innovation, Data and Commerce:

We are reaching out in opposition to the FAIR College Sports Act, because it is the opposite of fair. We wish to have this letter entered into the record. This legislation will strip away rights college athletes have fought decades to obtain, while sending the NIL market back underground.

Counterparts on college campuses around the country have the ability enter contracts that use the likeness and talents of themselves every day without interference by the government. It begs the question of why college athletes need legislation that restricts their abilities to do the same. Too often people treat college athletes like they are children who need protected. Meanwhile, college athletes have the right to do such things as vote, go overseas to die in wars they might not believe in, and purchase cigarettes.

This protection is not wanted by athletes, it is wanted by universities and an organization that wants to maintain their grip on the status quo. A status quo that has existed for well over 70 years and has continued to profit and benefit off the backs of athletes who put their long-term well-being on the line for others enjoyment year-round.

Any legislation that comes forward to restrict athletes' abilities to go into a contract with another entity or person will do more harm than good and should be opposed. We hope Congress realizes this and respects their rights as much as anybody else's. For a country that praises freedom, this legislation is the opposite of that.

Signed,

/s/ Zac Lowe

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Signed, Yarden Garzon

Supportive college athletes

January 10, 2024

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Signed,

/s/ Skylar Sahatjian

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Signed,

/s/ Olivia Gee

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/s/ Morgan Snow

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Signed,

/s/ Emma Ward

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Signed,

/s/ Ella Reed

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Signed,

/s/ Cole Ruttinger

Name	Sport	Year	School
Emma Ward	Basketball	2024	Hanover College
Zac Lowe	Soccer	2024	Hanover College
Cole Ruttinger	Golf	2025	Hanover College
Ella Reed	Volleyball	2024	Hanover College
Skylar Sahatjian	Basketball	2024	Hanover College
Olivia Gee	Track and Field	2024	Indiana University
Morgan Snow	Track and Field	2024	Indiana University
Yarden Garzon	Basketball	2026	Indiana University

Women's Sports Foundation

January 17, 2024

Chairwoman Cathy McMorris Rodgers
House Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Ranking Member Frank Pallone, Jr.
House Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Sent via email

Dear Chairwoman Rodgers and Ranking Member Pallone Jr.,

I write to you today from the Women's Sports Foundation (WSF) with concerns and comments we wish for you to take into consideration in your markup of the "FAIR College Sports Act" and all proposed NIL legislation. WSF is a national non-profit organization, which, since its founding in 1974 by Billie Jean King, has been the premier protector of Title IX and advocate for gender equity in sports. Through research, advocacy, community impact, and a wide variety of partnerships, we seek to strengthen, expand, and ensure that all girls and women have equal access to opportunities in sport.

We implore you to consider the potential consequences of the quickly shifting college landscape, both intended and unintended as it relates to gender equity and broad-based sports offerings in this country. College sports are in need of reform and we must create that change on a broad Federal level while keeping gender equity and existing federal laws top of mind.

Through our vast research, we know that sports provide women and girls with increased health benefits, leadership skills, and academic outcomes. Research from EY also shows that 94% of women in C-suite positions played sports, with more than 50% of them playing at the collegiate level. The majority of these women credit their success in business in part to the skills they gained through sport participation. Sports participation is a tremendous benefit to our society, and we must ensure that more students have access to sports, not fewer.

Name, Image, Likeness (NIL), Boosters and Collectives

Recently we saw the NCAA (prompted by individual state legislation) change its policies around Name, Image and Likeness (NIL) with very few guardrails or considerations for gender equity. This haphazard approach to policy making has resulted in some positive changes but also many concerning unintended consequences.

The reality is that NIL has created many real, positive and profitable opportunities for men *and* women to monetize their NIL through *true* third-party NIL deals. However, while some individual women athletes have benefited from NIL, we are troubled by the potential for NIL to exacerbate existing gender and racial inequities in athletics, especially through the creation and proliferation of collectives. Women athletes are already receiving inequitable participation opportunities, investment and promotion at many schools. This lack of investment (and lack of compliance with Title IX) will directly hinder women from equitably profiting from their NIL. For athletes who have long been

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undervalued and for whom college sports could be the pinnacle of their athletic career, the opportunity to benefit from their NIL is even more imperative.

WSF is greatly concerned about the usage of boosters and collectives to offer NIL deals, potentially allowing institutions to circumvent their legal responsibilities under Title IX. Though data is limited because there is very little, if any, transparency required around NIL deals, the data we do have shows that collectives are benefitting men far more than they are women all while some schools appear to be involved in deals, crossing into a gray area of Title IX compliance and applicability. With the new NCAA rules (effective January 1, 2023), schools are now allowed to assist NIL entities and collectives in newly permissible ways but, concerningly, many of these entities are predominantly offering opportunities to male athletes. Schools cannot abscond their legal requirements by having a third party engage in sex discrimination.

Whether through Federal legislation, NCAA rulemaking, or a combination of both, WSF expects that policies put in place regarding NIL, including boosters and collectives, will directly address gender equity, Title IX and provide data transparency. It will not be possible to assess the level of inequities without transparent deals and data to examine. We must ensure that the progress made over the last 50 years of Title IX is not thwarted. Further, any consideration of the status of student-athletes as employees must be done with the inclusion of Title IX and Title VII in mind.

The Arms Race has Stunted Investment in Women's Sports

Despite the milestone celebration of the 50th anniversary of Title IX in 2022, we know far too many schools and institutions are out of compliance with this law. Our country's current collegiate sports model needs reform. For too long, the system has allowed unchecked growth, creating an "arms race" among many schools and an inequitable investment in football and men's basketball programs, with women's sports and men's Olympic sports often serving as an afterthought. The current arms race has done nothing to expand broad-based sports offerings. In fact, between 1988-2016, NCAA schools saw a net gain in the number of teams offered, with 594 added in Division II and 751 added in Division III, however, at the Division I level where the arms race is pervasive, schools saw a net loss of 330 men's teams in Division I (Wilson, 2017). Additionally, WSF's report, *50 Years of Title IX: We're Not Done Yet*, details that 58% of schools in the Division I Football Bowl Subdivision favor male athletes in the distribution of athletic financial aid. Additionally, EADA data show 86% of NCAA institutions across all divisions offered higher rates of athletic opportunities to male athletes disproportionate to their enrollment.

Protecting Broad-Based Sports Offerings

The current lawsuits, labor disputes, and proposed legislation we see winding their way through the court and legislative process present very real concerns about broad-based sports offerings. WSF believes in the power of sports and the lifelong benefits they provide to all who participate and, as such, we hope to see more athletes participate, not fewer. Not only does sport provide athletes with better academic results, leadership skills, and social emotional outcomes, at the collegiate level, it often provides access to an educational experience that might otherwise be unattainable. This is particularly true for students who come from under-resourced communities and disadvantaged socioeconomic backgrounds. We are eager to continue serving as a voice in support of gender equity and broad-based sports as these conversations continue to evolve. The benefit of sport does not discriminate by gender, race, or ability, and it is imperative that our educational institutions continue

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to offer opportunities in *all* sports, both for the future of our society as a whole as well as our current Olympic system.

Narratives that center the experiences of men's football and basketball student-athletes often do not address that we are only in our current reality because of the long history of investment and prioritization which has allowed them the environment to flourish and grow. The NCAA has sponsored men's championships since 1906 and only began sponsoring women's championships in 1981. Men's sports has had a 75 year head start. More often than not, the over investment in men's sports that we regularly see is likely out of compliance with Title IX but there is such little proactive enforcement of the law, it is challenging to ensure schools are in compliance. For too long, women have been taught to be thankful for the crumbs.

Throughout the history of collegiate athletics, women have been underfunded, underpromoted and underrepresented. WSF's research highlighted that:

- Women's sport programs across all divisions and subdivisions received between 18% and 38% of budget expended. Women's programs in NCAA Division I-FBS receive the smallest percentage of budget expended at 18%.
- Of the more than $241 million spent on recruiting athletes to play at the two-year, junior college, and four-year college levels in 2019-20, 31% was spent on recruiting female athlete talent (U.S. Department of Education, 2021).
- Among the 351 NCAA Division I institutions, total spending on recruiting amounted to $196,472,185. Of that amount, 29% ($57,871,962) was allocated to recruiting female athletes (U.S. Department of Education, 2021a).

Though there are many points of view on the future of college sports, we can all agree that change and evolution is needed. College sports are in need of reform, but we must create that change on a broad Federal level while keeping gender equity and existing federal laws top of mind.

We encourage you to reach out should you wish to discuss the contents of this letter more thoroughly.

Sincerely,

Danette Leighton
Chief Executive Officer, Women's Sports Foundation

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January 17, 2024
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Innovation, Data and Commerce

Dear Distinguished Members of the Subcommittee on Innovation, Data and Commerce:

The Voice in Sport Foundation (VISF) is a non-profit organization that advocates for gender equity in sports for all athletes and seeks to uplift the voices of women and girls in sports.

VISF respectfully submits this letter for the subcommittee legislative hearing on College Athlete Name, Image, and Likeness (NIL) on January 18, 2024. We request that this letter be submitted to the record.

We have spoken with the student-athletes in our "VIS Advocate Program" and learned about their perspectives on NIL to inform our opinion on NIL and the proposed FAIR College Sports Act (FAIR Act). It is the opinion of VISF that NIL has granted NCAA Athletes the rights they deserve to receive fair compensation for their work and for the use of their own name, image and likeness. NIL has opened up a plethora of opportunities for athletes who dedicate countless hours of physically demanding work to their teams and universities. While NIL can be improved to better serve all athletes, the FAIR Act does not address the issues athletes are concerned about. The FAIR Act proposes infringements on the rights of athletes and is not informed by the perspectives of the athletes it will impact. Rather, it is informed by the NCAA and the universities who stand to unfairly profit from the work and value athletes provide.

VISF contends that legislative attention given to NIL needs to focus on the areas that matter to athletes, particularly equity for women athletes. Although NIL has presented new opportunities for athletes, the opportunities are not equitable. Men receive a majority of the opportunities and investment from NIL and NIL collectives. While Congress is discussing NIL, it needs to examine how NIL adheres to Title IX and explore ways to distribute NIL access and opportunities equitably for men and women athletes in the NCAA.

As stated by VIS Advocate and Harvard Runner Victoria Bossong, "*The Name, Image, and Likeness (NIL) policy in college sports has ushered in a significant shift, particularly in women's athletics. This change has been noticeable in various sports, including track and field, where I am actively involved. One striking observation is the disparity in how men and women athletes are approached for sponsorship opportunities. On our track team, I have seen men athletes with comparable athletic abilities to their women counterparts receiving more proactive outreach from NIL representatives. In contrast, women athletes often find themselves in a position where they must take the initiative to contact and persuade the same companies for sponsorships. This situation highlights a broader issue of gender disparity in sports marketing and sponsorships.*

While NIL offers immense potential for all student-athletes, its current trajectory seems to perpetuate existing inequalities, emphasizing the need for more equitable approaches in the marketing and representation of women athletes. This disparity not only impacts the financial opportunities for women athletes but also reflects broader societal attitudes towards women's sports, underscoring the importance of advocating for greater visibility and recognition of women athletes in the NIL era."

NIL has the potential to drive American college athletics in a positive direction if the voices of all athletes are prioritized. The passage of legislation that restricts the ability of college athletes to rightfully benefit and profit from their work ignores the perspectives of athletes and will be a detriment to college athletics. We are already seeing an increase in the number of athletes who choose to forgo college in order to pursue professional athletics careers that provide better financial incentives. It is in the interest of college athletic associations and institutions to provide their athletes with the opportunity to advance athletically, professionally, and academically. VISF opposes attempts to diminish the labor rights of college athletes and encourages Congress to address instead the inequities in college athletics that exclude women athletes from accessing the same financial, athletic, academic, and career opportunities as men.

Respectfully,

The Voice in Sport Foundation

Carly Wetzel
Advocacy and Program Manager
Former NCAA Division I Athlete

P L McDonald Law LLC

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Paul L. McDonald
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January 11, 2024

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Innovation, Data and Commerce

Dear Distinguished Members of the Subcommittee on Innovation, Data and Commerce:

I am Co-Counsel for the College Athlete Plaintiffs in the pending case *Johnson v. NCAA* (Complaint, *attached*), and named by Sports Illustrated as an influential Black figure in College Football. *See* Richard Johnson, "The 20 Most Influential Black Figures in College Football," Sports Illustrated, Feb. 27, 2023.

I respectfully submit this letter for the **upcoming hearing on College Athlete Name, Image, and Likeness (NIL) on January 18** and request that this letter and attachment be entered into the record of same.

I'll be brief (understanding the many demands upon your time).

1. **In Legislation, *Equal Protection* Requires That College Athletes Enjoy the *Same* NIL Rights (and Labor Rights) As Fellow Students**

In a New York Times Guest Essay, **the President and Director of Athletics for Notre Dame affirmed**:

> **We have been vocal in our conviction that student-athletes should be allowed to capture the value of the use of their name, image and likeness (N.I.L.)** – in other words, profit from their celebrity – **for one simple reason: *Other students are allowed to …. And athletes should as far as possible have the opportunities other students enjoy.***

John I. Jenkins and Jack Swarbrick, "College Sports Are a Treasure. Don't Turn Them Into the Minor Leagues," The New York Times, Mar. 23, 2023. (emphases added)

In legislation, this principle that College Athletes should be afforded the *same* opportunities – and *same* rights – as fellow students is required by *Equal Protection* – and, as explained more fully, *below*, extends to labor rights.

If Congress considers legislation in the space of college sports at any time (and, arguably, it is *premature* without a more developed historical record of evidence rather than speculation), **it is advisable to take special care to avoid "singling out" College Athletes, *i.e.*, restricting or burdening College Athlete rights in a manner not applicable to fellow students lest such legislation be struck down in court.** This said, legislation that *facilitates* the exercise of such rights (*e.g.*, protections against fraudulent practices) is likely sound.

2. **College Athletes Are Comparable to Fellow Students Employed in Work Study-*Style* Programs and Should Enjoy the *Same* Labor Rights, *e.g.*, Hourly Wages on a Minimum Wage Scale**

During the Big Ten Football Championship media call, **Michigan football coach Jim Harbaugh stated:**

> Who could be against the players being compensated for what they do? ***At least even minimum wage.*** Who could argue against that? ….I would take less money for the players to have a share.

See Brandon Brown, "Jim Harbaugh Continues To Push For Player Compensation," Sports Illustrated Wolverine Digest, Nov. 27, 2023. (emphasis added).

In fact, for 50-plus years, fellow students (incl. on *academic* scholarship) have been college employees paid hourly, on a minimum wage scale, when they perform *non*-academic tasks that benefit a college in campus offices, dining halls, libraries – **even when taking tickets and selling hot dogs at NCAA games**.

Such student employment is part of Work Study-*style* programs that include *non*-subsidized and subsidized jobs.

Colleges describe Work Study-*style* programs as beneficial to student participants and their families. Hourly pay is fungible, "walking-around" money that can be spent on anything. By contrast, any scholarship funds can only go toward approved academic expenses. In effect, hourly pay provides, or saves, money that otherwise must come out of the pocket of students and their families.

No college complains Work Study-*style* programs are unaffordable or that related compliance is burdensome.

The *Johnson* Complaint, *attached*, sets forth in detail how College Athletes meet hourly employee criteria under the Fair Labor Standards Act (FLSA) as much as students in Work Study-*style* programs. Arguably, more so.

The real kicker:

- **under NCAA Division I Bylaw 17.1.7.3.4, College Athletes are required to maintain timesheets just like fellow students paid hourly in Work Study-*style* programs**.

The NCAA and its members have *never* answered this simple question, which I encourage you to ask during the hearing:

> **Question:** What's wrong with using NCAA-mandated timesheets to fold College Athletes into existing Work Study-*style* programs and pay them a reasonable, hourly wage – *e.g.*, $10 to $15 an hour – on par with fellow students employed by colleges?
>
> (Remember, the student selling hot dogs at an NCAA game is a student employee paid hourly.)

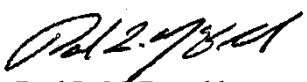
Moreover, hourly pay can assuage NIL "side effects." Because NIL compensation is based upon individual popularity rather than standardized hours of participation, NIL "side effects" include disparities – arguably, inequities – between genders, across sports, and within team locker rooms.

Any NCAA call for legislation to apply a "special status" *only* to College Athletes – to deny College Athletes the *same* employee status and labor rights enjoyed by fellow students in Work Study-*style* programs – should be a *non*-starter for practical reasons, *above*, not to mention the fact any such legislation would be struck down in court for violating *Equal Protection*.

If any legislation is considered in this space, it should instead ensure that College Athletes have the *same* rights as fellow students in Work Study-*style* programs – *perhaps along lines of draft proposed language on the following two pages.*

If you have any questions, please do not hesitate to contact me.

Respectfully,



Paul L. McDonald

Attachment

DRAFT PROPOSED AMENDMENT TO THE FAIR COLLEGE SPORTS ACT [DISCUSSION DRAFT- SUMMER 2023]

This draft language could slot in before Section (105) on Relationship to State Laws.

SEC. [###]. RELATIONSHIP TO FEDERAL LAWS GENERALLY APPLICABLE TO ALL STUDENTS ENROLLED AT INSTITUTIONS.

(a) IN GENERAL.– Student athletes shall enjoy the same federal protections and rights that are generally applicable to all students enrolled at institutions under federal laws, except as provided in this Act to protect against unfair or deceptive acts or practices specifically related to use of student athlete NIL.

(b) COMPENSATION NOT INCLUDED AS "COVERED COMPENSATION" IN SECTION 2(8) OF THIS ACT. –

1) IN GENERAL. – Student athletes shall be eligible for compensation not included as "Covered Compensation" in Section 2(8) of this Act on at least the same terms and conditions as all students enrolled at institutions as required under federal laws.

2) ACCOMMODATION FOR WORK STUDY AND SIMILAR STUDENT EMPLOYMENT OPPORTUNITIES SUPERVISED BY AN ASSOCIATION, CONFERENCE, AND/OR INSTITUTION. – To preserve the integrity of the educational programs of institutions consistent with Section 101(e)(3) of this Act, and in recognition of the substantial time constraints on student athletes related to their required participation in training sessions, practices and contests supervised by staff of an association, conference, and/or institution for the purpose of varsity intercollegiate sports competition, an association, conference, or institution –

A. shall not permit a student athlete to participate in work study or similar student employment opportunities during any applicable work week wherein that student athlete is scheduled to engage in, or has already engaged in, 20 hours of required participation in training sessions, practices and contests supervised by staff of an association, conference, and/or institution for the purpose of varsity intercollegiate sports competition; and

B. shall pay reasonable hourly wages to a student athlete for all hours of required participation in training sessions, practices and contests supervised by staff of an association, conference, and/or institution for the purpose of varsity intercollegiate sports competition –

i. on at least the same terms and conditions as work study or similar student employment opportunities generally applicable to all students enrolled at institutions as required under federal laws, except that a student athlete may not be dismissed from a sport roster during an academic year for any reason prohibited by an association or conference, for example, and by reference, corresponding prohibitions on the reduction or cancellation of institutional financial aid based in any degree on athletic ability as set forth in 2022-23 National Collegiate Athletic Association Division I Bylaws 15.3.4.3 and 15.3.5.2;

ii. at hourly rates commensurate with work study or similar student employment opportunities indexed by occupation titles and occupational profiles in the most recent U.S. Bureau of Labor Statistics publication of National Industry-Specific Occupational Employment and Wage Estimates – NAICS 611300 – Colleges, Universities, and Professional Schools; and

iii. recording payable hours either on timesheets mandated by an association or conference, for example, timesheets mandated by 2022-23 National Collegiate Athletic Association Division I Bylaw 17.1.7.3.4, or on timesheets utilized by any work study or similar student employment program.

C. HOURLY WAGES LIMITED TO ACTIVITY SUPERVISED BY STAFF OF AN ASSOCIATION, CONFERENCE, AND/OR INSTITUTION. – No association, conference or institution shall be obligated to pay hourly wages to any student athlete or student enrolled at an institution for participation in any extracurricular activity that is not supervised by staff of an association, conference, and/or institution, including any extracurricular activity that operates, or is registered, as student-led, student-organized or student-run.

January 10, 2024

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Innovation, Data and Commerce

Dear Distinguished Members of the Subcommittee on Innovation, Data and Commerce:

We are the College Basketball Players Association (CBPA), an organization that advocates for the rights of not only college basketball players, but all college-athletes.

We respectfully submit this letter for the upcoming hearing on College-Athlete Name, Image, and Likeness (NIL) on January 18, 2024, and request that this letter be entered into the record.

There are multiple reasons why we oppose this legislation, and any legislation that comes forward to impact the rights of college-athletes to monetize their NIL.

College-athletes have the same rights as any other person in this country, most relevantly as any other fellow student on campus. To pass legislation that restricts the ability of college-athletes to monetize their NIL would be unlawful and unconstitutional. *See* Equal Protection Clause and the Right to Contract. This legislation does just that.

Not only is this legislation unconstitutional on the previously stated grounds, but it also violates the Sherman Antitrust Act by attempting to restrain earning potential for college-athletes. We point to matters involving the NCAA, the Supreme Court, and the Sherman Act. (i.e. *NCAA v. Board of Regents of the University of Oklahoma, O'Bannon v. NCAA, NCAA v. Alston)*.

In conclusion, it is for these reasons, among many others, we oppose this legislation, and any other legislation that comes before this body that attempts to legislate the ability of athletes to profit off their NIL, a right athletes fought decades to secure. If this body has any further questions, we will not hesitate to answer them.

Respectfully,

The College Basketball Players Association

/s/ Michael Hsu
Co-founder
michael.hsu@cbpa.us

The New York Times https://www.nytimes.com/2023/12/23/us/college-athletes-employees-nlrb-hearing.html

At What Point Should College Athletes Be Considered Employees?

Testimony in a National Labor Relations Board hearing is challenging the amateurism model that has remained a bedrock of college athletics as it has evolved into a billion-dollar business.

By Billy Witz
Reporting from Los Angeles

Dec. 23, 2023

Brandon Outlaw sat on a witness stand for two days this week and described what it was like to play football at the University of Southern California.

His fingerprints were scanned when he arrived for meals at the athletes' dining hall to make sure he was there. He received text messages from anonymous class checkers, who on occasion asked him to send photos to verify he was indeed in class. He regularly urinated into a cup before practice and handed it to a member of the training staff, who would inform him if he was properly hydrated.

After Outlaw conducted an interview with a student journalist, a coach reminded him that he had violated team policy by not clearing the interview with a school official.

Outlaw, who graduated in December 2022 with a master's degree in entrepreneurship and innovation, detailed an existence that bore little semblance to the romantic ideal of the college athlete. Instead, he described football as occupying close to 60 hours per week during the season and requiring him — with an athletic academic counselor's assistance — to shoehorn his classes into windows that did not conflict with his countless football-related activities, which some days started at 6 a.m.

The question at the heart of Outlaw's testimony, at a National Labor Relations Board hearing, is a simple one that carries profound implications: Should college athletes be considered employees?

If the answer is yes, it could be the death knell for the amateurism model that has remained a bedrock of college athletics as it has evolved into a billion-dollar business, allowing schools to pour money that might have gone directly to players into coaches' salaries, glittering facilities and ballooning staffs.

Brandon Outlaw at the University of Southern California's N.F.L. day in March. Ric Tapia, via Associated Press

Granting athletes employee status would bolster their standing in antitrust lawsuits, and arm the highest-profile athletes, football and men's and women's basketball players, with the power to collectively bargain directly with universities for salaries and other rights.

The case threatens to "disrupt and transform more than 100 years of college athletics," said Adam Abrahms, a lawyer representing U.S.C., which, along with the Pac-12 Conference and the N.C.A.A., is a defendant.

Such disruption would be welcomed, said Ramogi Huma, the executive director of the National College Players Association, an athlete advocacy group. Earlier this year, Huma filed the complaint with the N.L.R.B. on behalf of U.S.C.'s football and men's and women's basketball players.

"The years of tradition we're trying to stop is the tradition of exploitation, the tradition of double standards and the tradition of refusing to pay fair market value to employees," Huma said Wednesday after the third day of the hearing. The proceedings are scheduled to continue in late January, when coaches and administrators may be called to testify, and conclude by the end of February. A ruling is not likely to come until later next year.

The hearing, in Los Angeles, is but one salvo in an assault against amateurism that was supercharged in 2021 by a unanimous Supreme Court decision in which Justice Brett M. Kavanaugh characterized the N.C.A.A. as a price-fixing cartel.

Players on the Dartmouth men's basketball team have also gone before the N.L.R.B. to ask that they can be considered employees, and a lawsuit, Johnson v. the N.C.A.A., seeking to have athletes considered employees is winding its way through federal court.

Then there is a raft of antitrust suits, including House v. N.C.A.A., a class-action grievance asking for $1.4 billion in damages (which the court could triple) for athletes in the top conferences. The athletes in that case argue that the N.C.A.A.'s previous restrictions on name, image and likeness rights unfairly deprived them from a share of television and social media revenue.

These challenges have prompted the N.C.A.A. to repeatedly ask for an antitrust exemption from Congress, where they have seldom found a sympathetic ear.

The lack of traction prompted Charlie Baker, the former Massachusetts governor in his first year as N.C.A.A. president, to suggest this month that the wealthiest athletic programs begin putting at least $30,000 annually into trust funds for at least half their athletes, an offering he hopes will get Congress to accede to narrow antitrust relief.

"We all know this is a big public issue and people have opinions about college sports," said Daniel Nash, the lead counsel for the Pac-12. "But this is an unfair labor practice case."

The stage in Los Angeles — far from the halls of Congress or august courtrooms with wood paneling and high ceilings — reflected that. The hearing took place in a conference room in a generic glass office building with the administrative judge, Eleanor Laws, seated in a portable box where she looked eye-to-eye across a table of more than a dozen lawyers. (About the only other people in the room were several members of the news media.)

That a case would end up before the N.L.R.B., which handles fair employment cases involving private businesses, has seemed inevitable since Jennifer Abruzzo, the board's general counsel, invited a challenge two years ago by issuing a memo saying that the law would support classifying scholarship football players in the N.C.A.A.'s top division as employees.

Earlier this year, Ramogi Huma, the executive director of the National College Players Association, filed a complaint with the N.L.R.B. on behalf of U.S.C.'s football and men's and women's basketball players. Susan Walsh/Associated Press

The N.L.R.B. accepted Huma's case, which has been broadened to include men's and women's basketball players as well as nonscholarship athletes, who are commonly referred to as walk-ons. The Pac-12 and the N.C.A.A. have been named as co-defendants so that any ruling would apply to both public and private schools that are part of those organizations.

Over the opening days, Amanda Laufer, the lead attorney for the general counsel, sought to demonstrate through the testimony of two recent former walk-on football players, Outlaw and Kohl Hollinquest, that U.S.C. exerted extraordinary control over the athletes, even ones who were not being rewarded with scholarships or earning hundreds of thousands of dollars in endorsements like Caleb Williams, the team's Heisman Trophy-winning quarterback.

(Another subpoenaed witness did not show up for the hearing Wednesday. Laufer declined to identify the athlete, but subpoenas have been issued for other athletes.)

In addition to the fingerprint monitoring of their dining hall attendance, the class monitors, the near daily hydration and weight checks, players were required to remain in the team hotel when they were on the road unless they left with the team — even if the game was many hours away.

Laufer asked Outlaw if he could meet a friend for coffee?

"No," Outlaw said.

Could he visit the Space Needle while the team was in Seattle?

"No," Outlaw said.

Both players described a point system under the current head coach, Lincoln Riley, and his predecessor, Clay Helton, in which being late or missing meetings, meals, weight lifting sessions or classes would add up to punishment from the team. Outlaw testified that on Monday mornings, Riley would stand in front of the team and read a list of the previous week's transgressions. For each one, every player would have to do one up-down, an exercise where players drop down to a push-up position then bounce back up.

Outlaw, who ran track at the University of Virginia for four years before he transferred to U.S.C. and joined the football team, said that while some workouts are considered voluntary — the N.C.A.A. has hours restrictions on team activities — players are expected to participate.

"They'd say things like, 'No, this isn't mandatory, you don't have to do it,'" Outlaw said with a smile. "'But it's also not mandatory for us to play you in the fall.'"

This contrasted with the picture that Abrahms had illustrated of football as an extracurricular activity that is part of the "institutional fabric" of the school. Athletes "don't come to U.S.C. with the intention of punching a clock," he added. Abrahms sought to make the point in his cross-examination that the players had gained skills like discipline and leadership from playing football that would benefit them long after college.

Abrahms, Nash and Rick Pins, the lead counsel for the N.C.A.A., tried to draw a connection in their questioning of Outlaw and Hollinquest between the demands of college football and those of high school football, where the players also had coaches, schedules and rules to follow.

But Laufer noted that those are also characteristics of professional football.

A version of this article appears in print on , Section A, Page 26 of the New York edition with the headline: Are Student-Athletes Exploited Employees Of Rich Universities?

For Immediate Release: 1/11/24

Contact
Ramogi Huma, NCPA Executive Director: 951-898-0985 rhuma@ncpanow.org

Some Members of Congress Seek to Strip College Athletes of Equal Rights and Outlaw Fair Pay

Senator Ben Ray Lujan (NM), Congressman Gus Bilirakis (FL) and Congresswoman Debbie Dingell (MI) have introduced a draft of federal legislation to strip college athletes of equal rights under the law and outlaw fair pay for college athletes.

Their legislative draft, labeled "The Fair College Sports Act" would:

- Permanently ban colleges, conferences, and the NCAA from sharing revenue with athletes.
- Give the NCAA an antitrust exemption to legally punish athletes for receiving pay.
- Ban athlete employee status.
- Impose NIL-stifling restrictions on college athletes.

TCU women's basketball player and college athlete advocate Sedona Prince stated, "If signed into law, this would turn college athletes into second-class citizens by excluding us from equal rights under the law. College athletes in New Mexico, Florida, Michigan, Texas, and nationwide are not university property. We are not NCAA property. We deserve equal rights and fair treatment."

College athletes' rights advocate Elisha Guidry who recently finished playing football at San Jose State after transferring from UCLA stated, "This bill would close down all avenues for athletes to receive fair compensation. Texas A&M just spent $77 million just to fire its football coach, but the A&M players generating that money only get $12k per year in room and board to live off of. This is exploitation."

Nya Harrison, a Stanford women's soccer player and President of Stanford's Black college athlete association stated, "If signed into law, this legislation would cement the racial exploitation in NCAA sports whereby Black football and basketball players who suffer the lowest graduation rates and generate the most revenue are prohibited from getting a fair share of the revenue that they generate."

The legislative draft runs opposite to public support for college athlete compensation. A Sportico/Harris poll from August 2023 found that 67% of Americans believe colleges should pay their athletes and 64% believe college athletes should have employee status. It also contradicts the advocacy of Michigan's national championship-winning football coach Jim Harbaugh who is calling for colleges to share revenue with their athletes.

NCPA Executive Director Ramogi Huma stated, “It would be unjust for Congress to refuse to protect college athletes from sports-related medical expenses, sexual abuse, serious injury, and death only to strip college athletes of equal rights and fair compensation. The NCPA is strongly opposed to this effort.”

###

Statement of the

American Federation of Labor - Congress of Industrial Organizations (AFL-CIO)

on the

"The Fair College Sports Act"

Before the Subcommittee on Innovation, Data and Commerce

Committee on Energy and Commerce

U.S. House of Representatives

Thursday, January 18, 2024

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) is a federation of 60 national and international labor organizations with a total membership of over 12.5 million working people. Our affiliated unions represent working people in every state and in every sector of the economy, including professional sports. In 2022, we formed the AFL-CIO Sports Council to help athletes join together to form unions and strengthen their lives, livelihoods, and working conditions.

The AFL-CIO strongly supports the growing call to action to address the blatant exploitation of college athletes that has put profits over people for decades. We are especially committed to securing fair pay and benefits for the workers who perform at the highest level to entertain broad audiences while meticulously honing their crafts and advancing their sports.

College athletes are workers, and they are organizing to improve their jobs. Arguments of "amateurism" in much of college athletics are a fallacy. As Justice Kavanaugh put it "[n]owhere 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."[1] The NCAA and conferences have weaponized this circular logic for decades solely to deprive these workers of their share of the billions in revenue that they generate.

Because of this commitment to improve the livelihoods of college athletes, we write this Subcommittee to express significant concerns with the "FAIR College Sports Act" as currently drafted. To be clear, the AFL-CIO supports common-sense, narrowly-tailored legislation to address Name, Image, and Likeness (NIL) issues, and endorses those ways to do so outlined in the Players Associations' Joint Statement on Legislation Affecting the Rights of College Athletes that was submitted to this Subcommittee.

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[1] *NCAA v. Alston,* 141 S.Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

However, the AFL-CIO strongly opposes any NIL legislation—such as the FAIR College Sports Act—that:

- Forbids or negatively affects college athletes' statutory rights as employees under federal or state law, including by prohibiting college athletes from being considered employees under those laws.
- Grants the NCAA, conferences, or schools any sort of antitrust exemption for its regulation of college athletes' compensation, NIL, or grant of benefits.
- Unduly restricts college athletes' NIL opportunities.
- Prohibits colleges, conferences, and the NCAA from sharing revenue with athletes.

By including such provisions, the FAIR College Sports Act places the interests of the NCAA, conferences, and college athletic departments over the athletes whose talents and skills generate the enormous revenues reaped by the NCAA, conferences, and schools.

Accordingly, the AFL-CIO urges this Subcommittee to consider NIL legislation that places athletes' interests first, complies with the principles outlined in the Players Associations' Joint Statement, and does not include provisions like those listed above. Anything else would be a disservice to the athletes such legislation is purportedly intended to benefit.

Players Associations' Joint Statement on
Legislation Affecting the Rights of College Athletes

January 18, 2024

The Major League Baseball Players Association (MLBPA), Major League Soccer Players Association (MLSPA), National Basketball Players Association (NBPA), National Football League Players Association (NFLPA), and National Hockey League Players Association (NHLPA) ("Players Associations") represent the players in the five major professional sports in the United States. We write today to express our thoughts and concerns about legislation the Committee is considering which would affect the rights of college athletes, many of whom will someday be members of our Associations.

Each Association is governed by an Executive Board of Player Representatives who are elected directly by their fellow players. Collectively, we have over 200 years of experience serving the interests of our athlete members. Our sole focus is establishing, enforcing, and advancing the rights and benefits of athletes, thousands of whom are no older than the college athletes whose rights are being discussed at this week's Subcommittee hearing.

Since the early days of the Players Associations, our work on behalf of athletes has expanded and diversified exponentially. While our core function remains to negotiate and enforce the collective bargaining agreements which set terms and conditions of employment such as wages, hours, and working conditions, for years we have also represented our athlete members at the forefront of issues that relate directly to the legislation currently under consideration by the Subcommittee on Innovation, Data, and Commerce. These issues include:

- Player Name, Image, and Likeness ("NIL")
- Rights of publicity
- Individual & group licensing agreements
- Athlete corporate sponsorships
- Collection, protection & monetization of athletes' performance data
- TV broadcasting
- Enhanced access TV programming
- Monetization of social media
- Sports betting
- Regulation of player agents & agencies

The issues now before the Subcommittee are intimately familiar to the Players Associations. We have decades of experience in protecting athletes' rights in NIL-related matters, and we write to express significant concerns with the "discussion draft" of the FAIR College Sports Act that was recently released.

Any federal intervention aimed at "Protecting Athletes' Dealmaking Rights" must actually place athletes' interests first.

It is imperative that any legislation advanced by the Subcommittee act to protect and advance athletes' rights. There are several ways that federal NIL legislation can be tailored to achieve such ends:

- **Keep It Simple:** Any legislation should simply prohibit the NCAA and other related entities from denying athletes the right to profit from their NIL, consistent with existing laws, as a condition of their athletic participation.

- **Prohibit Lifetime Contracts:** Any legislation should ensure NIL contracts signed during an athlete's college eligibility do not interfere with the athlete's NIL rights and freedom to contract after their college eligibility has expired.

- **Create Additional Safeguards from Predatory Contracts**: Any legislation should establish safeguards against predatory NIL contracts and specifically prohibit contracts that entitle third parties to receive a percentage of a college athlete's future earnings (in college or beyond).

- **Protect International Athletes:** Any legislation should establish that international college athletes receive the same protections and can utilize their NIL rights in the same manner as their teammates.

- **Reinforce, and Do Not Eliminate, Existing Protections:** Any legislation that seeks to standardize NIL rules should include the strongest possible protections against unauthorized commercial use of NIL, and any federal right of publicity should act as a baseline standard that state law is permitted to exceed. As explained in more detail below, NIL legislation purporting to protect athletes should not be used as a trojan horse to nullify athletes' legal rights or status.

Legislation that is meant to protect college athletes should under no circumstances eliminate or diminish their rights under contract, tort, antitrust, and/or labor laws.

The Players Associations have a strong interest in protecting all athletes against illegal exploitation by third parties. Our interest applies not just to the college athletes who will one day become our members, but to all collegiate athletes and indeed to athletes of all ages. For this reason, we continue to closely monitor the college NIL bills which are or will

be under consideration in both the House and Senate, including the FAIR College Sports Act. The Players Associations are deeply concerned that what was once a narrowly tailored legislative draft has recently morphed into a wide-ranging permission slip for the NCAA to continue exploiting the very individuals that the FAIR College Sports Act is meant to protect.

For months, the drafts of the FAIR College Sports Act have been silent on the NCAA's well-publicized campaign to secure legislative immunity from antitrust laws, labor laws, and other state and federal worker protections. Recently, however, provisions have been added that would appear to, in the stroke of a pen, nullify thousands of athletes' rights under important and long-standing federal and state antitrust laws, tortious interference laws, and laws prohibiting unfair competition.[1]

Equally concerning, the updated bill also prevents college athletes from being considered employees of a school, a conference, or the NCAA, thereby stripping them of a wide range of rights and benefits that arise under federal and state laws that protect workers. For the reasons explained below, the Players Associations unequivocally oppose the NCAA immunity and employee-status prohibition recently added in Sections 201 and 301 of the draft of the FAIR College Sports Act.

While no one could credibly dispute that the NCAA finds itself enmeshed in multiple high-stakes lawsuits, these and past lawsuits illustrate that it is athletes, not the NCAA, who have been improperly exploited. And it is the NCAA, not athletes, or Congress for that matter, who bears the responsibility to effect change going forward.

This is apparent from a multitude of court decisions that have attacked the NCAA's policies and practices. Consider Supreme Court Justice Kavanaugh's recent observation (in his concurring opinion in *NCAA v. Alston*) that "the NCAA's business model would be flatly illegal in almost any other industry in America."[2] It is also apparent from the words and deeds of important NCAA stakeholders. Look no further than University of Michigan Head Football Coach Jim Harbaugh, a recent national championship coach and former college athlete himself, who recently remarked of the NCAA's restrictions on athlete compensation: "the thing I would change about college football is, to let the talent share in the ever-increasing revenues…***we're all robbing the same train***."[3] To the extent that the FAIR College Sports Act's newly inserted liability carve-out might in any way enable the

[1] Steve Berkowitz, *NCAA President Charlie Baker to appear at legislative hearing addressing NIL*, USA Today (Jan. 11, 2024) (*available at* https://www.usatoday.com/story/sports/college/2024/01/11/ncaa-president-charlie-baker-congressional-hearing-on-nil/72191813007/)

[2] *NCAA v. Alston*, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J. concurring)

[3] Tara Suter, *Michigan coach Jim Harbaugh suggests college athletes unionize after championship win*, The Hill (Jan. 9, 2024) (emphasis added) (*available at* https://thehill.com/homenews/education/4393414-michigan-harbaugh-college-athletes-unionize-championship-nil/)

NCAA or other entities to "continue robbing the same train," that provision should be removed in its entirety.

So too should the Subcommittee excise any bill language that prevents college athletes from being deemed employees or that otherwise blocks their right to organize and collectively bargain.

- First, despite the NCAA's self-serving protests to the contrary, the nature scope, and economic value of the work performed by college athletes fits the definition of an employee under relevant federal and state laws.[4]

- Second, even if one accepts for argument's sake that collegiate athletics will implode without some form of antitrust immunity or limitation of liability, treating college athletes as employees with the right to unionize and collectively bargain is actually the most direct, fairest, legally recognized, and repeatedly proven way to accomplish this goal. Many, if not all, of the unilaterally implemented policies that have put the NCAA in its billion-dollar bind would be legal if they were instead negotiated via good faith collective bargaining with a Players Association, consistent with existing law.[5]

- Finally, and perhaps most importantly, Congress should not only reject all efforts to preemptively strip college athletes of employee status, it should proactively take up recently introduced legislation that moves in the opposite direction by codifying college athletes' right to organize and collectively bargain.[6] As even university officials and others associated with the NCAA are beginning to recognize, collective bargaining is the best way

[4] Joshua Hernandez, *The Largest Wave in the NCAA's Ocean of Change: the 'College Athletes are Employees' Issue Reevaluated*, 33 Marq. Sports L. Rev. 781 (2023); Marc Edelman, Michael McCann, and John Holden, *The Collegiate Employee-Athlete*, Univ. of Ill. L. Rev. (2023) (*available at* https://ssrn.com/abstract= 4360802); Robert McCormick & Amy McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 72 (2006); *see also* NLRB General Counsel Memorandum 21-08, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, (Sept. 29, 2021) (*available at* https://apps.nlrb.gov/link/ document.aspx/09031d458356ec26); Milly Harry, *A Reckoning for the Term "Student Athlete,"* Diverse (Aug. 26, 2020) (*available at* https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete)

[5] Dan Papscun, *For NCAA's Antitrust Woes, Athlete Unions Pose Ironic Solution*, Bloomberg Law (Aug. 6, 2021) (*available at* https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution)

[6] *See* Sen. Chris Murphy, Press Release (Dec. 6, 2023) (*available at* https://www.murphy.senate.gov/ newsroom/press-releases/ with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights)

to offer the athletes a true seat at the table.[7] Moreover, collective bargaining can also ensure that players' voices are heard on critical non-economic issues such as: health and safety, work hours, travel, diagnosis and treatment of work-related injuries, assessment of concussions and return to play protocols, health benefits, mental health resources, post-playing medical benefits, anti-bullying and hazing policies, and sports betting policies (to name just a few).

In sum, we implore the Subcommittee to focus on protecting college athletes' dealmaking rights, as the title of today's hearing suggests. Any bill it advances should do so with no strings attached. Enactment of even the most player-friendly NIL regulations imaginable will represent an entirely pyrrhic victory if lawmakers simultaneously nullify athletes' rights under antitrust laws, labor laws, or any other federal or state laws that protect other adults in the American workforce.

# # #

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[7] Joe Moglia, *Is College Athletics Ready to Take on Players Unions?*, Sportico (Dec. 13, 2023) (*available at* https://www.sportico.com/personalities/executives/2023/college-athletics-players-unions-joe-moglia-1234755725/); Shehan Jeyarajah, *Notre Dame AD calls for collective bargaining rights for college athletes: 'I think it's worth considering,'* (Oct. 17, 2023) (*available at* https://www.cbssports.com/college-football/news/notre-dame-ad-calls-for-collective-bargaining-rights-for-college-athletes-i-think-its-worth-considering/); *see also* Suter, *supra* note 3 (Harbaugh: "For a long time, people say that unionizing [college athletes] would be bad. If people aren't gonna do [what's right] out of their own goodwill…that's probably the next step.")

TCA Submitted Testimony

U.S. House of Representatives Committee on Energy and Commerce
Subcommittee on Innovation, Data, and Commerce

Hunter Baddour, Chairman, The Collective Association

NIL Playbook: Proposal to Protect Student Athletes' Dealmaking Rights
January 18, 2024

The Collective Association (TCA) is pleased to share our views through submitted testimony for today's hearing. We have substantive concerns with the draft legislation being considered today and will express those concerns but did want to provide what we feel would be helpful guidance to the Committee as they consider legislative solutions to the current challenges facing college athletics.

WHO WE ARE

TCA is a newly formed association comprised of over 35—and growing—collegiate affiliated collectives from across the Power 4 landscape working to ensure **ALL** college athletes have the ability to maximize their Name, Image, and Likeness (NIL) platforms and to create a sustainable model for college athletes moving forward. The athlete rosters of our membership represent 25+ sports providing a truly diverse population of gender, ethnicity, geography, socio economic factors and opinions that enable us to stay current and impactful in this developing collegiate landscape.

TCA members are private organizations supported by fans, alumni, donors, and numerous local, regional, and national brands with a goal of empowering college athletes and supporting our affiliated schools. Collectives are not agencies and do not take a percentage of profits away from our partner athletes. We proudly assist athletes in ensuring their NIL deals are legal, compliant with NCAA and school guidelines and in market for the services athletes are being asked to perform. Our athletes trust our collectives to provide fair compensation, guidance, and navigation through a disjointed regulatory model, while adding resources and tools that help prepare them for life beyond the athletic arena.

HOW WE GOT HERE

Before we discuss the present and how to build for the future it is important to remind the Committee how we arrived at this point. The NCAA stood sentry for decades preventing athletes from capitalizing on their inalienable rights until their loss at the Supreme Court in 2021. This has produced change in the marketplace that has moved faster than anyone could have imagined and sadly traditional powerbrokers in college sports have been unable to adapt to these changing times.

To hear them tell it, if we could just go back to the good old days—when the NCAA had full control and athletes had no rights—everything would be ok in college athletics. We do not believe that the NCAA warrants the trust of the Congress to grant them an anti-trust exemption nor do we believe that the NCAA has college athletes' best interests in mind when it requests said exemption.

HOW TO FIX IT

The NCAA and other traditional powers in college sports lost power and control. Since that time, they have spent more time trying to figure out how to regain that power and control instead of working to establish a sustainable future in line with a post-Alston reality.

NIL is part of the present and future of college sports so any plan to move forward MUST start with everyone at the table. To this point, TCA members have yet to be asked to participate in conversations with the NCAA and other traditional powerbrokers. This doesn't seem to make sense given that over 80% of NIL deals are paid through our school affiliated Collectives. Any serious discussion regarding the future structure of college sports must include all major stakeholders, and that includes Collectives.

Instead of trying to discriminate between athletes and non-athletes, revenue and non-revenue sport athletes, small and big schools—let's create an orderly marketplace where 1) every athlete has the opportunity to maximize their NIL platform in line with the free market, 2) Collectives and their affiliated schools work closely to create opportunities for all their athletes who wish to participate, 3) schools and collectives have clearly defined rules around recruiting that are enforced in a clear and consistent fashion and 4) the NCAA is tasked to get back to their reason for being in the first place: promoting athlete safety and welfare.

This conversation could start with all the parties saying on the record what everyone in this room today already knows: <u>Power 4 college football is completely different than ANYTHING else in college sports</u>.

Power 4 College Football can live in a world of its own and create value for athletic departments to fund other sports while fully compensating the players on the field. This might allow traditional conferences to be put back together to the benefit of non-football athletes, athletic department budgets and fans alike—all while evolving college football to maximize its' value for everyone!

Collectives and Athletic Departments should have the ability to forge closer working relationships in service to their athletes. Collectives can continue to fill the gaps that current athletic departments are unprepared for such as 1) ensuring contracts are appropriate and compliant with both eligibility standards and in market; 2) maintain the non-employee status of college athletes that everyone seems to agree would not be

helpful to the vast majority of programs and players; 3) Lessen donor fatigue in service to a sustainable and orderly NIL Marketplace.

TCA Members are eager to align on a set of rules creating a sustainable future for every level of the college sports ecosystem. That isn't as difficult as some would try to make you believe. The most important step is an acknowledgement from traditional powerbrokers to accept new voices as part of that ecosystem and invite them to participate in creating the future. We might also point out that Congressional action might be easier if every stakeholder could align around one proposal.

To that end, Congress should at a minimum demand that the NCAA, Conference Commissioners, College Athletes and Collectives work together to develop a transparent process for: 1) revenue sharing, 2) recruiting, and 3) addressing the potential long term mental and physical health needs of college athletes.

Outlined below are a few of TCA's topline thoughts on each of these topics:

1. **Revenue Sharing**: TCA called for revenue sharing in the spirit of allowing all athletes to truly capture their marketplace value over a year ago. Any true NIL benefit should include revenue sharing because the athletes competing on TV is the real value being created. Let's come up with a formula that compensates these athletes—in every sport appropriate—for this value.

   We are heartened to see important voices like Coach Jim Harbaugh, Chip Kelly and others speaking out in favor of revenue sharing while noting that Collectives are uniquely positioned to best assist our affiliated institutions in distributing these dollars without cost to College Athletes.

2. **Recruiting:** Collectives are not interested in being part of some underground recruiting process. NIL is part of the current and future landscape of college sports. As part of official visits, recruits should be allowed to have a conversation with the school affiliated collective to get a sense as to what their value might be in a particular marketplace. These conversations should be kept confidential to protect the family's privacy but with full knowledge that they occur on official visits to promote a more transparent process. Conversations with school affiliated collectives are not appropriate unless the recruit is actively considering attending the institution and we would encourage guardrails to ensure those unaffiliated with Collectives are not offering unrealistic promises to recruits or their families.

3. **Addressing long-term physical and mental health needs:** It is no secret that college athletes sacrifice their bodies in service to their love of the game but also in service to their institution. TCA Members feel strongly that there should be investments made so that former college athletes who need medical and/or mental health care later in life can get the help they need.

There is precedent for Congress pressuring recalcitrant private parties to action. We hope these conversations can begin immediately and look forward to working with every level of the college sports ecosystem to create a better future grounded in reality for programs, players, and partners alike.

LEGISLATION

TCA is in favor of common-sense regulation that produces an orderly marketplace and a sustainable future for the entire college sports ecosystem.

The Committee today is considering a draft bill written by Chairman Bilirakis and Congresswoman Dingell. We want to underscore our offer to be a resource to any Member and this Committee in particular in the same way we've worked with Senators Cruz, Booker, Moran and Blumenthal and Congresswoman Lori Trahan to develop a workable piece of legislation that is inclusive of the current reality in college sports. Our topline concerns with the discussion draft include:

1) This bill seems to be targeted to only certain segments of the college sports ecosystem. Why does the bill leave out coaches, athletic departments, and the NCAA from their responsibilities in ensuring that rules and laws aren't broken. What happens if they break the law? Or are they viewed as above the law with the new government agency that would regulate college sports?

2) We do not see a need for a new government agency to oversee college sports and subject well intentioned programs, partners, and players to FTC rule-making authority. Bad actors, like agents and those who seek to cheat college athletes, should be prosecuted to the fullest extent of the law.

3) Thresholds on what constitutes an NIL deal should not be decided arbitrarily by the government and the FTC.

4) Athlete compensation would be limited by this bill. No other college student—or American—is limited in their ability to earn money in return for their work. Burdensome disclosure policies under the guise of transparency only limit athlete pay and put power back into the government and NCAA's unqualified and untrustworthy hands.

5) Important voices have explicitly been left out. Collectives, among other voices, are ineligible to sit on the new oversight board of the government agency and must subject themselves to a kangaroo court to appeal any infractions brought against them by the government or the NCAA.

6) The new government agency appears to be an unfunded mandate but has the ability to charge user fees. Who would pay these user fees? Would third parties and collectives

have to pay the government for the ability to work on behalf of college athletes? Do television revenues that could otherwise go to college athletes pay for this?

7) The 90-day prohibition for an athlete to begin exercising their rights is discriminatory. This prohibition particularly discriminates against fall sport athletes including Volleyball, Women's Soccer, Cross Country, Football and Basketball. This creates a two-tier system where spring sport athletes do not face any prohibition in reality. We would also note that football and basketball is predominantly played by athletes of color, and this would be incredibly harmful to their rights while not limiting the lacrosse, golf, squash, tennis, or baseball teams in the least.

8) Disclosure Provisions: Burdensome regulations on third parties, collectives, and athletes—while unjust and undue on their face—would stifle contributions and partnerships and therefore financial opportunities for all athletes. Women and non-revenue athletes would likely see an immediate negative impact on their opportunities.

CONCLUSION

Thank you again for the opportunity to submit this testimony and our thoughts on how to best position college sports for a successful present and future. TCA hopes to have the opportunity to work with the NCAA and other stakeholders to align around a commonsense solution and looks forward to presenting a product to the Congress that all of you can enthusiastically support. As with any emerging free market model, collectives have evolved and adapted to the changing landscape and now function as efficient and well-organized entities that are trusted by the athletes and universities they represent. By sitting at the crossroads of the overwhelming majority of name, image and likeness commerce, the TCA is well positioned to provide tangible and actionable feedback to all major stakeholders committed to the long-term health of collegiate athletics.

Why Does the NCAA Exist?

Why does an organization formed when the idea of paying money to attend a sporting event was in its infancy still operate under the same (now completely out-of-context) model?

By Dan Treadway, Contributor

Writer

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"The NCAA was founded in 1906 to protect young people from the dangerous and exploitive athletics practices of the time," so states the National Collegiate Athletic Association on its official website.

The NCAA often likes to harp on tradition and the sanctity of the term "student-athlete," but it fails to recognize its true roots.

The association in fact got its start because, at the time of its creation, football was in danger of being abolished as a result of being deemed too dangerous a sport. During the 1905 season alone, 18 college and amateur players died during games. In response to public outcry, Theodore Roosevelt, an unabashed fan of the sport, gathered 13 football representatives at the White House for two meetings at which those in attendance agreed on reforms to improve safety. What would later become known as the NCAA was formed shortly after on the heels of this unifying safety agreement.

As this *New York Times* article, published January 3, 1909, indicates, the NCAA was hardly founded by a bunch of people who thought maintaining the arbitrary notion of amateurism was paramount.

Debating the topic of allowing athletes to play "Summer ball," referring to professional baseball leagues that competed during the summer, Professor Judson P. Welch of Penn State University, argued in favor.

"I believe that the man who needs money to go through college should be allowed to play Summer ball, in just the same manner as he would do anything else for a living."

W.C. Riddick of North Carolina Agricultural College agreed:

"He advised a strict enforcement of the scholarship rule and a time limit of work from five months to one year in the college. If any man could live up to this standard, let him be recognized as a student in good standing and play Summer ball for money if he desired."

Even before the NCAA became arguably one of the most controversial tax-exempt organizations in existence (the association accrued $814 million in revenue in 2011), people were able to see through the absurdity of insisting that athletes not be able earn their own money as they see fit.

And so the question arises, how did the NCAA go from being an agreement to promote safety standards so as to prevent death on the playing field, to a multi-million dollar enterprise that seems most concerned with ensuring that "student-athletes" do not receive any compensation (pardon me, "impermissible benefits") for their in-demand talents?

Why does an organization formed when the idea of paying money to attend a sporting event was in its infancy still operate under the same (now completely out-of-context) model?

In short, why does the NCAA still exist?

It can't be to police college athletics to ensure nobody violates the arbitrary rules that they've dreamt up. After all, this is an organization that at once, denied the University of Iowa's request to wear jersey's honoring the death of a teammate, while at the same time, was unable to conduct a non-corrupt investigation into allegations that a rich booster had bought University of Miami football and basketball players jewelry, prostitutes and had even paid for an abortion.

It can't be because they've created a tremendous revenue stream for all of their members. Under NCAA supervision, the majority of athletic programs in fact lose money and are subsidized by funds from their respective university.

And it surely, surely can't be to encourage academic integrity in college sports. The latest in numerous examples of academic dishonesty and/or flat-out cheating involves the University of North Carolina, where a former reading specialist with the athletic department alleges the school offered athletes credit for "no show" classes that never actually convened.

This year the NCAA will rake in more than $702 million in TV revenue from the men's basketball tournament alone, which is three and a half times as much money as it would cost to implement a work-study program for student-athletes.

Admittedly, the association is a nice guise to help athletic programs maintain tax-exempt by "furthering the educational mission of universities." I mean, just look at how shiny and educational Oregon's brand new, state of the art $68 million football operations facility is:

College sports could most definitely continue to exist outside of the confines of the NCAA. There's no law stating that the governing body has to be in place for schools to compete against one another, and athletic departments are already in charge of scheduling many games.

The concern naturally is that, without the NCAA in place, schools would be welcome to pay players, which would be a disadvantage to schools that don't have profitable athletic programs. This could be solved in multiple manners, the most obvious one being: If a school can't afford to support a college sports team, they probably shouldn't have a college sports team.

The slope isn't as slippery as it's often made out to be: People will pay money to watch certain college sports, so why shouldn't the athletes who participate in these sports and drive the popularity of them get a cut?

Heisman trophy winner Johnny Manziel generated $37 million worth of exposure for Texas A&M last season, and NCAA officials are hard at work trying to hold him to the same outdated standards that existed when their main problem was "Summer baseball."

Many schools can afford to support a few teams, but being financially responsible for many unprofitable sports simply isn't sustainable.

The NCAA could perhaps remain as the governing body for these non-revenue generating sports such as gymnastics and lacrosse, but even if the organization ceased to exist, it wouldn't result in the end of these sports being played at the collegiate level. If there was enough interest, these sports could still have teams that compete intercollegiately at the club level, at a fraction or even no-cost to the university. In addition, these club sports teams are arguably the most pure form of inter-collegiate competition as they're populated by regular students at the university, as opposed to recruited athletes.

BCS schools reportedly spend roughly $100,000 a year *per scholarship athlete*.

While there's certainly merit in offering a soccer player a partial college scholarship, there's a much more reasonable argument for that money going to a budding engineer.

If the NCAA truly wants to respect its roots, it will invest less time cracking down on sideshows like Johnny Manziel, and more time perhaps addressing the dangerous nature of football, which is the real reason the organization was created in the first place.

But that hardly seems to be a priority, as was detailed by The Big Lead:

In a survey done in 2010, almost half of the trainers surveyed said they would return an athlete to a game on the same day as suffering a concussion. The NCAA put in requirements that schools put in a concussion plan and have it on file, but this was not enforced or given any teeth. In an October 2010 email, director of enforcement Chris Strobel detailed how it would not be appropriate to suspend or penalize a coach who put an athlete back into a game, in violation of the concussion plan in place. The only punishment would be to have a secondary violation for schools that did not file the plan in the first place.

The NCAA, however, did not even enforce the filing of the concussion plans.

So, NCAA, to quote a certain cinematic classic, "What would you say, *ya do here*?"