National Association of College and University Attorneys
Presents:

Rewriting the Athletics Playbook: Legal and Practical Issues Arising from *Alston* and NIL Developments

Webinar

August 26, 2021

12:00 PM – 2 :00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Pamela J. Bernard
Duke University

Gabe Feldman
Tulane University

Bharath Parthasarathy
Georgia State University

Contents

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Speaker Biographies
Webinar

Rewriting the Athletics Playbook: Legal and Practical Issues Arising from *Alston* and NIL Developments

Pamela J. Bernard is Vice President & General Counsel of Duke University. Ms. Bernard is responsible for overseeing a variety of legal issues, including litigation, student and employment issues, health law, research, taxation, insurance, athletics, corporate and transactional matters and liability issues for both Duke University and Duke University Health System. Prior to coming to Duke, she was Vice President and General Counsel to the University of Florida and directed its governing board operations.

Ms. Bernard is a past President of NACUA and was awarded NACUA's Distinguished Service Award for her contributions to the field of higher education law practice. She has served on numerous national committees or task forces over the past three decades, including the Association of American Governing Boards, the American Association of Research Universities, and the National Collegiate Athletic Association. She is a frequent speaker on legal issues and has authored papers and other publications relating to higher education law including authoring the Legal Standpoint column for AGB's Trusteeship Magazine from 2007 - 2011.

Gabe Feldman, director of the Tulane Sports Law Program and Tulane University's associate provost for NCAA compliance, is one of the leading voices in the country in the growing field of sports law. Named the Paul and Abram B. Barron Associate Professor of Law in 2015, he also is co-founder and co-director of the Tulane Center for Sport.

Feldman's extensive experience in sports law includes representing a variety of sports entities while he was in private practice, and he continues to act as a consultant for a number of clients in the sports industry.

Feldman joined the Tulane Law faculty in 2005 after nearly five years as an associate with Williams & Connolly in Washington, D.C. Before that, he served as judicial clerk to Judge Susan H. Black of the U.S. Court of Appeals for the 11th Circuit in Jacksonville, Fla.

He is regularly quoted in the New York Times, Wall Street Journal, USA Today and other newspapers throughout the country, and he has made numerous appearances on national television and radio. He currently serves as the on-air legal analyst for the NFL Network.

Feldman is editor of The Sports Lawyers Journal, a law journal devoted to the study of sports law, and The Sports Lawyer, a monthly online newsletter, and was a sports law contributor to the now-defunct Grantland.com and the Sports Law Blog. He is director of publications for the Sports Lawyers Association; co-authored of one of the leading sports law casebooks in the country, Sports Law: Cases and Materials; is on the Articles Review Board for the Journal of Legal Aspects of Sport; and has been

published in a variety of journals and periodicals. Much of his writing focuses on the intersection of antitrust, labor, intellectual property law and the sports industry. He also serves as a mediator and arbitrator.

Feldman sits on the board of directors of the Sports Lawyers Association, Walk Again Athletic Warriors and Athletes for Hope, a nonprofit organization created to harness the power of sports to impact social change. He also is the director of Special Olympics in New Orleans and is a member of the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports.

He teaches Antitrust, Sports Law, Negotiation and Mediation and Contracts. In 2013, he received a President's Award for Graduate and Professional Teaching, a Tulane University recognition of excellence in teaching, learning and research

Mr. Bharath Parthasarathy is the Deputy General Counsel at Georgia State University, where he is responsible for corporate, athletics, eSports, and higher education matters. As counsel to the University's Department of Athletics, Mr. Parthasarathy is involved with all aspects of intercollegiate athletics, including coaching contracts, digital/media/tv rights, and conference realignment. In Summer 2014, Mr. Parthasarathy served as the University's Interim Director of Athletics. Additionally, Mr. Parthasarathy co-heads the University's eSports Program. Prior to Georgia State University, Mr. Parthasarathy was an Associate in the Atlanta Office of Alston & Bird LLP. Mr. Parthasarathy holds degrees from the University of North Carolina and the Emory School of Law.

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Date / Time	Session Title	Verification Code 1	Verification Code 2
8/26/2021 12:00 PM ET	Rewriting the Athletics Playbook		

Gabe Feldman, Professor of Law & Director of Sports Law Program & Associate Provost for NCAA Compliance, Tulane University

Pamela Bernard, Vice President & General Counsel, Duke University

Bharath Parthasarathy, Deputy General Counsel, Georgia State University

1

Thanks to Our Speakers

Pamela Bernard

Vice President & General Counsel

Duke University

Gabe Feldman

Professor of Law & Director of Sports Law Program & Associate Provost for NCAA Compliance

Tulane University

Bharath Parthasarathy

Deputy General Counsel

Georgia State University

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2


Agenda
Caselaw & Developments Overview
Legal & Governance Issues
Questions & Answers
Practical Issues & Takeaways
Questions & Answers
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3


Caselaw & Developments Overview
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4

Antitrust Law Basics

- Section 1 of Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."
- Every contract in restraint of trade is illegal.

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Why do we need antitrust law?

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Competition at work

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LSU
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SEC
AMERICAN
ATHLETIC CONFERENCE
ACC
MOUNTAIN WEST
CONFERENCE
PAC 12
C-USA
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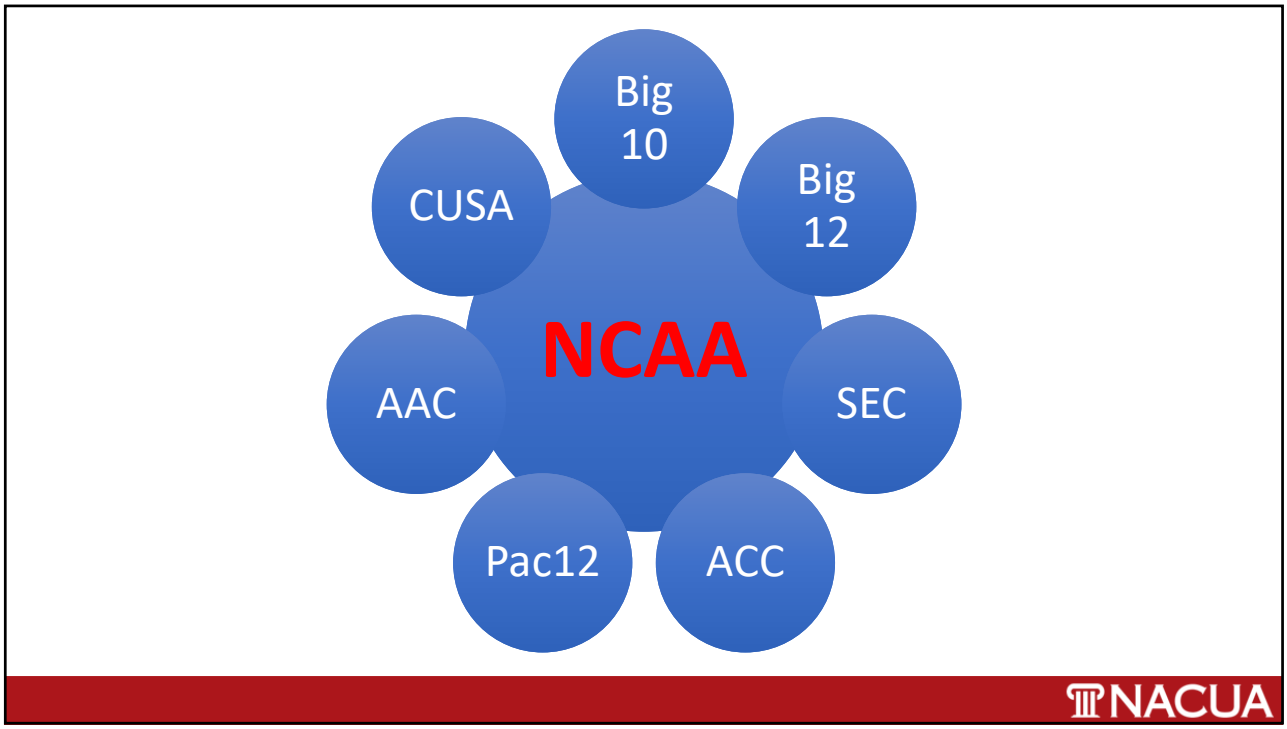
10



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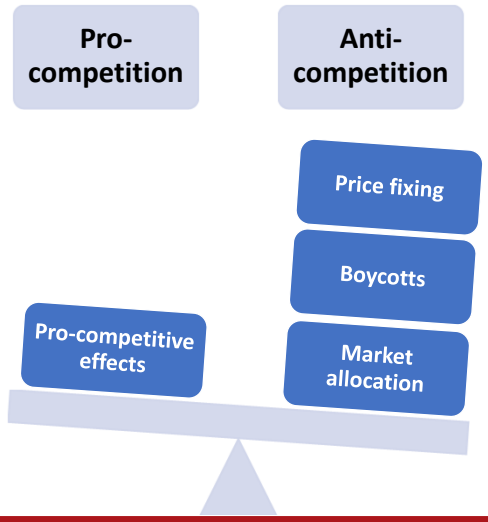
12

Per se = certain conduct is presumed to result in unreasonable restraint of trade and is per se unlawful



Because conduct is deemed to unreasonably restrain trade, the plaintiff is not required to present evidence of effects.

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The Rule of Reason

Balancing procompetitive benefits versus anticompetitive effects to determine the **net competitive effect** of the restraint

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The Rule of Reason

Procompetitive benefits

Anticompetitive effects

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15

Association Antitrust Issues

Section 1 issues can arise in a number of ways for associations:

- Meetings
- Self-regulation and codes of ethics/conduct
- Statistical reporting
- Standard-setting and certification
- Membership requirements, access to association services and activities, expulsion

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Association Meeting/Discussion: Good Practices

- Because association meetings generally involve communications between rivals, care must be taken to avoid illicit communications – agendas and presentations should be prepared and distributed in advance of meetings
- Care should be taken to keep to these materials at the meeting unless there is a good reason to depart
- Minutes of the meetings should be prepared that concisely reflect the discussions – Especially where they diverge from the preprepared materials
- There are several red flag topics where discussions could lead to illegal agreements with traditional associations:
  - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price for company's products or services
  - Whether to do business with suppliers, customers or competitors
  - Complaints about business practices of other firms
  - Confidential company plans regarding output decisions or decisions regarding future offerings

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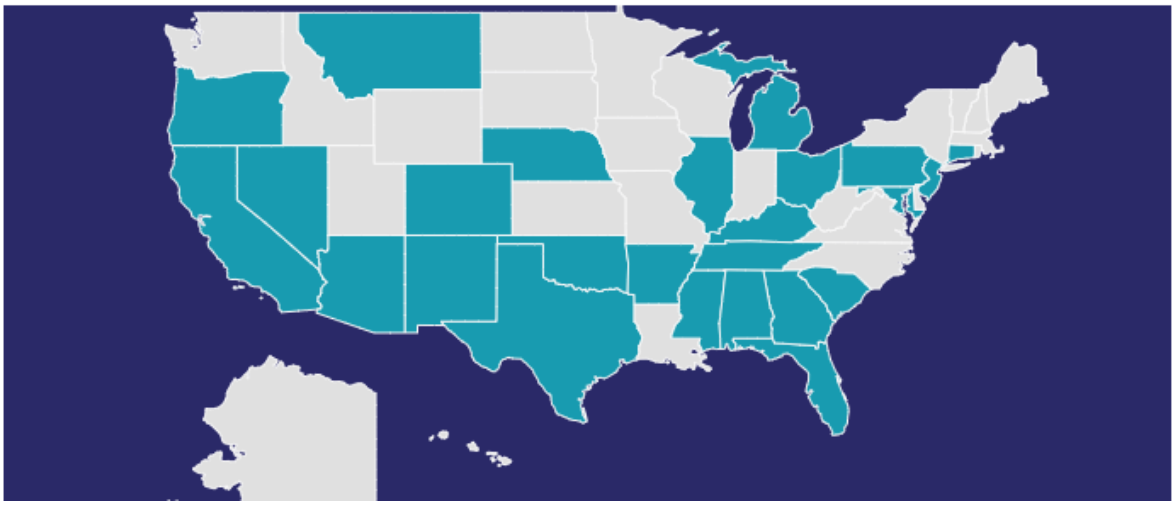
NIL Laws by State (as of 8/12/21)



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Name, Image, Likeness State Legislation Basics

- Compensation for name, image, and likeness from third party.
- Athletes may use professional representation.
- No “pay for play” or recruiting inducements.

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Inconsistencies in State Laws

- Conflicts with institution
- Use of institutional marks and logos
- Fair market value limits on compensation
- Broadcast rights
- Joint licensing
- Education requirements
- Reporting requirements
- Institutional involvement
- Official team activities

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Another Uniform Solution?

- **Uniform Law Commission College Athlete Name, Image, or Likeness Act**
- **Finalized July 2021**
- *The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.*
- *ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as 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 law where uniformity is desirable and practical.*

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NCAA NIL Interim Policy

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- Individuals can use a professional services provider for NIL activities.
- College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules related to name, image and likeness.
- State law and schools/conferences may impose reporting requirements.
- No pay for play/recruiting inducements;
- Must be quid pro quo
- Cannot provide compensation based on athletic achievements

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Federal Activity

- March 2019, U.S. Senator Chris Murphy (D-Conn.) released the first of a series of reports that examined the economics and structure of college athletics.
- March 2019, Representatives Walker (R-NC) and Richmond (D-LA) introduced the **Student-Athlete Equity Act**.
- December 2019, Representatives Shalala (D-FL) and Spano (R-FL) introduced the **Congressional Advisory Commission on Intercollegiate Athletics Act**.
- December 2019, Senators Murphy (D-CT) and Romney (R-UT) formed a bipartisan working group included Senators Booker (D-NJ), Perdue (R-GA), and Rubio (R-FL).
- May 2020,. Senators Booker (D-NJ) and Murphy (D-CT) sent a joint letter to NCAA President Mark .
- April 2020, Senator Wicker (R-MS), chairman of the Senate Committee on Commerce, Science and Transportation, sent letters to 50 college associations.

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Federal Activity

- June 18, 2020 Senator Rubio (R-FL) introduces the ***Fairness in Collegiate Athletics Act***.
- December 17, 2020 Senators Booker (D-NJ), Blumenthal (D-CT), Gillibrand (D-NY), Schatz (D-HI) introduce the ***College Athlete Bill of Rights***.
- December 10, 2020 Senator Wicker (R-MS) introduces the ***Collegiate Athlete Compensation Rights Act***.
- September 24, 2020: Representatives Gonzalez (R-OH), Cleaver (D-MO), Fudge (D-OH), Stivers (R-OH), Davis (R-IL), Duncan (R-SC), Gottheimer (D-NJ), Allred (D-TX) introduce ***The Student Athlete Level Playing Field Act***.
- February 4, 2021: Senator Murphy (D-CT) and Rep Trahan (D-MA) introduce the ***College Athlete Economic Freedom Act***.
- February 24, 2021: Senator Moran (R-KS) introduces the ***Amateur Athletes Protection and Compensation Act of 2021***.
- April 26, 2021: Representatives Gonzalez (R-OH) and Cleaver (D-MO) reintroduce the ***Student Athlete Level Playing Field Act.***

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Alston v. NCAA 9-0 decision (plus Justice Kavanaugh concurrence)

- Benefits related to education
  - In-kind (non-cash)
  - Cash
- Benefits unrelated to education

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Key Takeaways from *Alston*

- "Relaxing these [education-related benefit] restrictions would not blur the distinction between college and professional sports and thus impair demand."
- "NCAA can develop its own definition of benefits that relate to education."
- "The NCAA and its members can continue fixing education-related cash awards, too—so long as those limits are never lower than the limit" on awards for athletic performance."
- "Injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still."
- "The NCAA is free to forbid in-kind benefits unrelated to a student's actual education."

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26

27

Who Is the Client?

President/Chancellor, Athletics Director, and Board of Trustees- Differing philosophical views on NIL policy or how broadly the institution funds education related benefits?

Who Are Other Key Constituents?

How do you manage the expectations of the faculty governing body, coaches, students, student-athletes, alumni, donors, lawmakers, local community leaders/businesses, and conferences?

Counsel Penetrating the Athletics "Silo"

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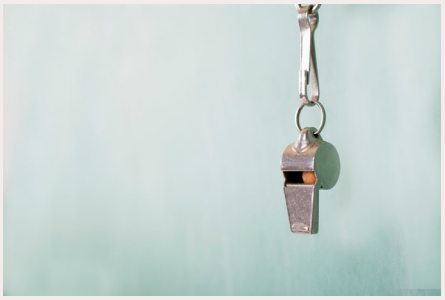
Liability Issues

Some states require institutions to provide NIL education to student athletes, or your institution may wish to do so voluntarily.

What is the potential liability for administrators or faculty members providing specific NIL advice to a student-athlete?

If you opt to use outside consultants, what is your vetting process?



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Intellectual Property/Use of Institutional Marks

Does your institution have a process to grant permission to students to use marks and other institution-owned IP?

How will you enforce violations of permission requirements when not followed?

Will the institution want to participate in group licensing arrangements with student athletes or teams and share royalty payments?

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Equity Concerns and Title IX Issues

NIL Support- Title IX will look at level of educational or school assistance provided to women's sports in comparison to men's sports. Are you equitably educating/assisting/promoting?

Education related payments- For payments such as graduation and academic achievement awards, higher payments to revenue-generating teams like football could run afoul of Title IX proportionate benefits requirements.

Budget implications- What are the institutional budget implications for funding other sports?

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Labor Organizing Implications

The National Labor Relations Board is positioned to find that student-athletes are employees.

Does institutional participation in NIL group licensing deals with a team or individual bolster that position?

Would education-related awards that are too easily achievable look like pay-for-play?

Gearing up for NLRB decision and labor unions to organize.

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32

The NCAA and Athletic Conferences

What will/can they regulate, if anything, regarding NIL and education benefits?

Will we see a massive reform of college athletics after the NCAA Constitutional Convention?

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34


Practical Issues
& Takeaways
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35


PANTHERS
FIGHT PANTHERS TO VICTORY
GEORGIA STATE
Alston + NIL // Practical Implications
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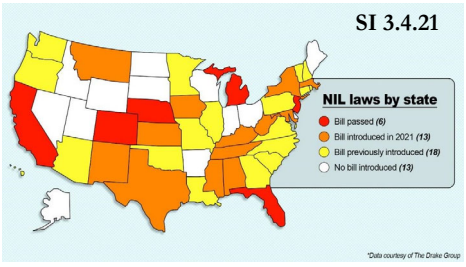
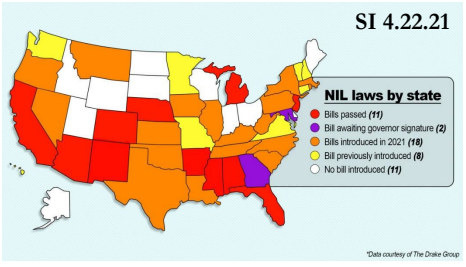
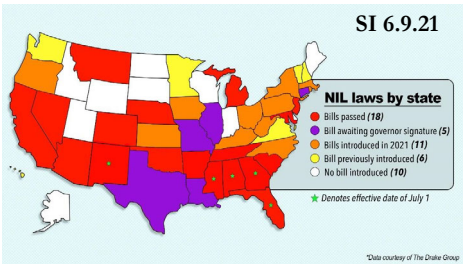
36

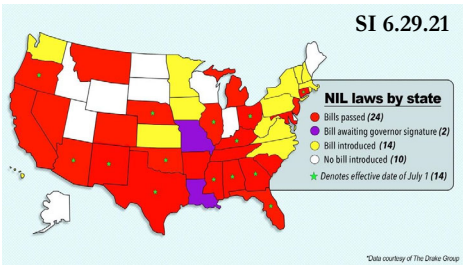
37

NIL adoption by State Legislation/Executive Order has been rapid, with the gaps filled by the NCAA Interim Policy.









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38

Despite State law differences, there are many shared principles across State Legislation + Executive Orders.

- Student-Athletes have affirmative right to earn NIL compensation.
- Student-Athletes may obtain professional representation only for NIL rights (usually from agent or attorney licensed + in good standing in the applicable State).
- NIL opportunities may not conflict with institution contracts or team rules (and potential NIL contracts must be disclosed to the institution).

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Despite State law differences, there are many shared principles across State Legislation + Executive Orders.

- Institutions have right to control their Marks + identify "off limit" endorsement categories (e.g., alcohol, tobacco, drugs, adult entertainment, etc.).
- NIL compensation cannot be used for "pay for play" or recruiting of prospective Student-Athletes by an institution.
- Institutions may provide financial + life skills training to Student-Athletes.

NOTE: NCAA Interim Policy authorized NIL activities + use of professional representation until either (a) new NCAA rules or (b) federal legislation is adopted.

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Despite headlines, NIL market is still emerging; however, it will grow once seasons begin and marketable Student-Athletes emerge.

$400 Average NIL Compensation Per Student-Athlete

Division I: $471 Average ($210,000 Max, $35 Median)

Division II: $81 Average ($750 Max, $30 Median)

Division III: $47 Average ($50 Max, $30 Median)

Where did the money come from?

46% Social Media Promotions
29% Licensing NIL Rights
10% Signing Autographs
6% Making Appearances
6% Creating Content
1% Hosting Camps
1% Selling Products

What were the most common types of activities?

88.5% Social Media Promotions
3.9% Licensing NIL Rights
2.7% Creating Content
2.0% Making Appearances
1.7% Hosting Camps
0.7% Selling Products
0.4% Signing Autographs

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Data Provided by @RossDellenger/@opendorse.

- July 2021: **1,361** NIL transactions on the INFLCR platform.
- Average Transaction Amount: **$963**.
- **802** Student-Athletes; 64 Division I Schools.
- **47%** - Football; Men's Basketball; Women's Basketball Student-Athletes.
- **53%** - All Other Sports.
- **20%** Female Student-Athletes.
- **12%** of Transactions from non-Power 5 institutions.

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Early NIL deals feature Student-Athletes with large social media followings + businesses seeking to be early adopters of NIL relationships.

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Counsel should have active discussions with Executive Cabinet + Athletic Department Staff about University/Department/Team policies.

- **NIL Policy.** Review NIL Policy to ensure compliance with State law, NCAA Bylaws, + Institution/Department/Team priorities.
- **Student-Athlete Handbooks/Team Rules.** Review policies around NIL rights, expectations, official team activities.
- **Social Media Policies/Guidelines.** Review to ensure such policies are not too restrictive and if they contain restrictions on when/where/what information can be shared.
- **Enforcement.** Have discussions with Athletics Staff + Coaches about who gets to enforce violations of NIL-related rules.

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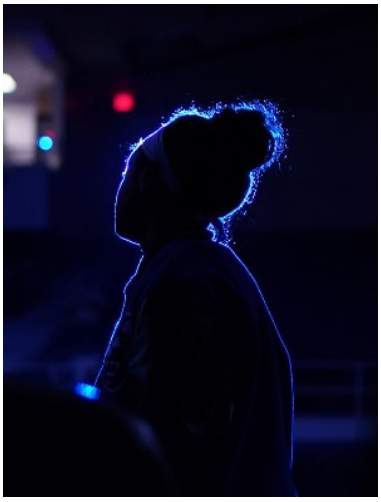
NIL legislation now authorizes professional representation to aid Student-Athletes in securing NIL contracts.



- **Agent Policy.** Counsel should review and update Department Agent policies relating to the securing of Student-Athlete NIL rights, including Agent Counseling Panels.
- **Marketing Advances.** Counsel + Compliance staff should educate Student-Athletes about Agent Marketing Advances, which could be improper inducements (esp. if tied to future professional representation).
- **Other Representatives.** Student-Athletes may use Attorneys, Tax Advisors, Brand Management Companies, etc. Rules should take all authorized parties into account.

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44

Many Student-Athletes, though, are not using Agents, but instead using third-party apps/software connecting them to NIL opportunities.

Counsel should carefully review all contracts to ensure that they meet Compliance Department needs around disclosure, notice, conflicts, NCAA compliance, etc.

#INFLCR

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YOKE

Fans Meet idols

icon source

THE PLAYERS TRUNK

DREAMFIELD

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Generally, Student-Athletes are barred from entering into NIL contracts that conflict with Institution/Department/Team contracts.

- **Off-Hours.** Counsel should provide Athletic Staff/Coaches with guidance around times/places where Student-Athletes may endorse competing brands.
- **Apparel/Pouring Rights/MMR Contracts.** Counsel should review Institution/Department obligations of major contracts (e.g., Student-Athlete apparel during travel, beverages on podiums, etc.).
- **Ambush Marketing.** Counsel should discuss with Athletic Staff about how to handle ambush marketing tactics by competing brands tied to Student-Athletes.

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46

If State law is silent, Institutions need to decide on their tolerance for authorizing the use of Institution Marks for Student-Athlete NIL deals.

Dr. Pepper/Deutsch LA

- **Official Media.** Student-Athletes have started requesting official photos, video, recordings of themselves for NIL use.
- **Mark Prohibition.** Even if Institution prohibits use of its Marks, distinctive colors or other institutional identities could still be present.
- **Licensing.** Student-Athletes have begun working through third-party licensing companies to officially license Institutional Marks.

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47

Institutions also need to determine if there are any categories that they will prohibit Student-Athletes from endorsing.

- **Prohibited Categories**. Counsel should work with the President and Athletic Director to create the institution's prohibited NIL categories – examples:
  - Firearms
  - NCAA/Conference/School banned substances and performance enhancing drugs
  - Alcohol-related enterprises (e.g., beer/wine/liquor, bars, breweries, etc.)
  - Tobacco and/or tobacco alternatives
  - Cannabis-related enterprises (e.g., dispensaries, grow suppliers, seed companies, etc.)
  - Casinos, sports wagering, or other gambling services
  - Illegal Drug and paraphernalia
  - Adult entertainment and products
  - Professional sports teams and/or organizations

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However, unless explicitly prohibited by State law, Institutions need to carefully craft prohibitions to not be overly broad or hypocritical.

University Alcohol Sponsorships

RAGIN' CAJUNS GENUINE LOUISIANA ALE.

University CBD Licenses

WINSTON PEKI (7.4.2019)

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49

Additionally, Counsel + Athletic Staff – esp. Compliance – need to decide on where to draw the line on certain NIL contracts.

BARSTOOL SPORTS

PENN NATIONAL GAMING, INC.®

sent you a message:

Dear U of L Student-Athletes,

We are advising all student-athletes to cease involvement with "Barstool Sports" in terms of NIL activity. Barstool Sports does not comply with University of Louisville policies and it does not comply with the criteria outlined in the Kentucky Governor's Executive Order. If

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50

Institutions should remind Athletics staff, boosters, + fans about continued prohibitions around recruiting/inducements.

NCAA. NCAA prohibitions regarding "pay for pay" and recruiting still apply.

Promotion. Institution (and affiliated) persons may not arrange, facilitate, or promote Student-Athlete NIL activities.

Boosters. Boosters can enter into agreements with Student-Athletes, but solely for legitimate NIL purposes.

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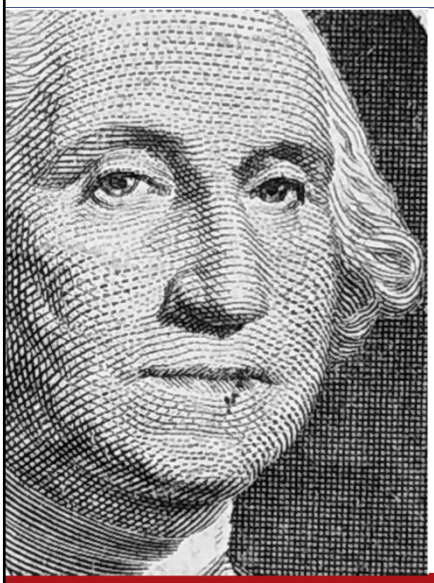
51

Many States' NIL laws require institutions to provide "financial literacy and life skills" training to Student-Athletes.



- **Life Skills Workshops.** Most Athletic Departments are already providing some form of life skills training (including financial literacy) to Student-Athletes.
- **Content.** In some instances, there are specific topics that need to be covered (or avoided) for NIL compliance – counsel should ensure authorized content is being delivered.
- **Individual Counseling.** Counsel should ensure that the Institution is not provided direct financial reviews, analysis, or legal reviews of proposed NIL deals (consider legal and entrepreneurial clinics on campus as well).

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NIL deals will break the "command and control" information relationship with Student-Athletes.

- **Sports Information.** The Media's access to Student-Athletes is highly controlled by SIDs + Coaches.
- **Content.** However, as seen through early NIL deals, there is a high desire for "content" + "insider access."
- **Sensitive Information.** Counsel should work with SIDs/Communications around Media Training for Student-Athletes to avoid Institutional data being released (injury information, playbooks, data analytics, etc.).

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53

State NIL laws + NCAA Interim Policy fail to address NIL rights for International Student-Athletes, creating a two-tiered system.

- **F-1 Visa.** Most International Student-Athletes are on F-1 Visas in the United States.
- **Compensation.** F-1 Visa Holders are authorized to perform limited work; however, may not earn "substantial income" while studying in the United States.
- **International Offices/Financial Aid.** Counsel should work with counterparts on campus to address impact on NIL deals on International Student-Athletes + risk tolerance for incidental benefits or team benefits.

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54

Counsel should also update Institution counterparts on other myriad of other issues that relate to NIL Student-Athlete NIL transactions.

- **Financial Aid.** While NIL compensation should not impact a Student-Athlete's grant-in-aid Agreement, it may impact Pell or other scholarship recipients' financial thresholds.
- **FERPA.** Counsel should not only review all FERPA waivers provided to Student-Athletes, but also train Athletics staff on handling requests for such FERPA-protected data from third-parties (e.g., current and prospective sponsors, professional representatives, etc.).
- **Title IX.** To the extent Institution is involved with NIL opportunities, efforts should be equitable for male and female Student-Athletes (e.g., showcases, deal approval criteria, etc.).

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55

Counsel should also update Institution counterparts on other myriad of other issues that relate to NIL Student-Athlete NIL transactions.

- **Facilities.** Facilities staff should be trained to determine when a Student-Athlete's promotion of a commercial product, service, camp, clinic, etc. warrants a Facilities Use Agreement.
- **Development.** There are disagreements over the impact of NIL deals on philanthropic or corporate giving to Institutions and Department of Athletics.
- **MMR/Apparel/Pouring Rights.** If NIL deals remove exclusivity for brands and sponsors, Institutions need to look for reductions in sponsorship fees + increased enforcement requirements in these types of agreements.

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56

57

Counsel should be involved in discussions around "educational benefits" if Institution elects to increase offerings.

Educational Benefits. While there is no obligation or requirements to provide education-related benefits, traditionally, Institutions have provided items like computers, musical instruments, study abroad expenses, tutoring, etc.

Reasonable Standard. Pre- and post-*Alston*, Institutions must utilize a reasonable standard for what constitutes an "education-related benefit."

Competition. However, for competitive purposes, Institutions are given latitude to decide what benefits they provide to Student-Athletes that fall into this category.

Conferences. Athletic Conferences may still discuss any impositions of limits on education-related benefits post-*Alston*.

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58

59

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60

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* ALSTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–512. Argued March 31, 2021—Decided June 21, 2021*

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on "amateur" student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. §1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court

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*Together with No. 20–520, *American Athletic Conference et al.* v. *Alston et al.,* also on certiorari to the same court.

Syllabus

"struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." 958 F. 3d 1239, 1263. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. 15–36.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are "undue." *Ohio* v. *American Express Co.*, 585 U. S. ___, ___. Whether a particular restraint is undue "presumptively" turns on an application of a "rule of reason analysis." *Texaco, Inc.* v. *Dagher*, 547 U. S. 1, 5. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ___. Pp. 15–24.

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express*, 585 U. S., at ___. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or "quick look." See *Dagher*, 547 U. S., at 7, n. 3; *Board of Regents*, 468 U. S., at 109, n. 39. But not here. Pp. 15–19.

(2) The NCAA next contends that the Court's decision in *Board of*

Regents expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely consistent with the goals of the Sherman Act." *Id.*, at 120. But that sort of passing comment on an issue not presented is not binding, nor is it dispositive here. Pp. 19–21.

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not "commercial enterprises" but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 424. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that "the special characteristics of [the NCAA's] particular industry" should exempt it from the usual operation of the antitrust laws is "properly addressed to Congress." *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 689. Pp. 21–24.

(b) The NCAA's remaining attacks on the district court's decision lack merit. Pp. 24–36.

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. Rather, only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" did the district court find the restraints unlawful. Pp. 24–29.

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." But a party cannot declare a restraint "immune from § 1 scrutiny" by relabeling it a product feature. *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 199, n. 7. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. Pp. 29–30.

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will "micromanage" its business. Judges must indeed be sensitive to the possibility that the "continuing

Syllabus

supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 415. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. Pp. 30–36.

958 F. 3d 1239, affirmed.

GORSUCH, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 20–512 and 20–520

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

20–512 *v.*

SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL., PETITIONERS

20–520 *v.*

SHAWNE ALSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 2021]

JUSTICE GORSUCH delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The

court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852–1924, pp. 15–16 (1993). He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, Unpaid Professionals 6–7 (1999) (Zimbalist); Rushin, Inside the Moat, Sports Illustrated, Mar. 3, 1997. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the "'junket'" as an experience "'as unique and irreproducible as the Rhodian colossus,'" Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree of Doctor of Laws, Yale University Commencement, June 30, 1886, in Speeches by Oliver Wendall Holmes, p. 27 (1918), but it was football that really caused

college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues." Zimbalist 7. Schools regularly had "graduate students and paid ringers" on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, The College Athlete, McClure's Magazine, June 1905, p. 124. The absence of academic residency requirements gave rise to "'tramp athletes'" who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." *Ibid.* The next week, he "was back at West Virginia's law school." *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that "'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.'" Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. *Id.*, at 8. President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that

"[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906); see also Proceedings of the Eleventh Annual Convention of the National Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. *Id.*, at 87. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." *Id.*, at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." *Id.*, at xiv–xv. One coach estimated that a rival team "spent over $200,000 a year on players." Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, 28 Stan. L. & Pol'y Rev. 181, 190 (2017). In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.'" Zimbalist 22–23. He reportedly said: "'[A] wealthy guy puts big

bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.'" *Id.,* at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. *Ibid.* And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019) (hereinafter D. Ct. Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Cu-*

riae 10. In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon* v. *National Collegiate Athletic Assn.*, 802 F. 3d 1049, 1054–1055 (CA9 2015). The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits. D. Ct. Op., at 1064.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id.*, at 1072. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id.*, at 1072, n. 15. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id.*, at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id.*, at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments "'incidental to athletics participation,'" including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id.,* at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of

$10,000 for students to attend graduate school after their athletic eligibility expires. *Id.*, at 1074. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id.*, at 1069.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id.*, at 1063. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id.,* at 1090.

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id.,* at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id.*, at 1063; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year." D. Ct. Op., at 1063. All these amounts have "increased consistently over the years." *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per

year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between $2 to $5 million. *Ibid.* College athletic directors average more than $1 million annually. *Ibid.* And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million. *Id.*, at 17–18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." D. Ct. Op., at 1062, 1065, n. 5. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. §1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce." D. Ct. Op., at 1066.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. This Court has "long recognized that in view of the common law and the law in this country when the Sherman Act was

passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.'" *Ohio* v. *American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 8) (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006); *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 60–62 (1911). That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.* (brackets and internal quotation marks omitted).

In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." D. Ct. Op., at 1097. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id.*, at 1067. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id.*, at 1067, 1070. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id.*, at 1070.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive

effects in the relevant market." *Id.*, at 1067. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." *Id.*, at 1097. In a market without the challenged restraints, the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." *Id.*, at 1068. "Student-athletes would receive offers that would more closely match the value of their athletic services." *Ibid.* And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. *Id.*, at 1067; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, D. Ct. Op., at 1070, n. 12, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. *Id.*, at 1098.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id.*, at 1063–1064, 1072–1073; see also *supra,* at 3–7. The court noted that the NCAA "nowhere define[s] the

nature of the amateurism they claim consumers insist upon." D. Ct. Op., at 1070. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, *id.*, at 1074, noting the testimony of a former SEC commissioner that he's "'never been clear on . . . what is really meant by amateurism.'" *Id.*, at 1070–1071.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." *Id.*, at 1070. The court observed, for example, that the NCAA's "only economics expert on the issue of consumer demand" did not "study any standard measures of consumer demand" but instead simply "interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel." *Id.*, at 1075. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id.*, at 1074, 1076. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would "not negatively affect consumer demand." *Id.*, at 1076. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." *Id.,* at 1082. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id.*, at 1083.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the

challenged set of rules." *Id.*, at 1104. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id.*, at 1088. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." *Id.*, at 1083. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id.*, at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to

Pet. for Cert. in No. 20–512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). *Id.,* at 168a–169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14–md–02541, ECF Doc. 1329, pp. 5–6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits "'related to education.'" App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. And the court explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id.*, at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F. 3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA 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. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, Antitrust Law ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, *e.g., Mandeville Island Farms, Inc.* v.

American Crystal Sugar Co., 334 U. S. 219, 235 (1948); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U. S. 312, 321 (2007); 2A Areeda & Hovenkamp ¶352c, pp. 288–289 (2014); 12 *id.*, ¶2011a, at 132–134.

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12. But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20–512, p. 14, or a "'quick look,'" Brief for Petitioners in No. 20–520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact

that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See *Dagher*, 547 U. S., at 7; *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 22–23 (1979).

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted).

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the "'twinkling of an eye.'" *Board of Regents*, 468 U. S., at 110, n. 39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 203 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F. 2d 210 (CADC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market."

Id., at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F. 2d 185, 191 (CA7 1985) ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher*, 547 U. S., at 7, n. 3; *California Dental Assn.* v. *FTC*, 526 U. S. 756, 770 (1999). Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886–887 (2007); Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 975 (1986) (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra*, at 26–27 (further reasons for caution).

None of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can

(and in fact do) harm competition. See D. Ct. Op., at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U. S., at 101 (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the "'twinkling of an eye.'" *American Needle*, 560 U. S., at 203.

But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are." *Id.*, at 199, n. 7. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. See, *e.g., Chicago Professional Sports Ltd. Partnership* v. *National Basketball Assn.*, 95 F. 3d 593, 600 (CA7 1996) ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players").

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division

I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U. S., at 94. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as "'illegal *per se*.'" *Id.*, at 100. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." *Id.*, at 101–102. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. *Id.*, at 109, n. 39. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a

similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.*, at 120.

See also *id.*, at 101, 102 (the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the like"). On the NCAA's telling, these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only assuming the reasonableness of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive . . . ." *Id.*, at 117 (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

Our confidence on this score is fortified by still another

factor. Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g.*, *American Express Co.*, 585 U. S., at ___–___ (slip op., at 10–12); 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. D. Ct. Op., at 1064. It has increased the size of permissible benefits "incidental to athletics participation." *Id.*, at 1066. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id.*, at 1072. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than $13.5 billion. *Ibid.* From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to $1.1 billion. D. Ct. Op., at 1077, n. 20.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because we are final," *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in result), but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and

its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." Brief for Petitioner in No. 20–512, at 31. The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." *Id.*, at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See D. Ct. Op., at 1066. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to maximize revenues." 468 U. S., at 100–101, n. 22. Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

Take two examples. In *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id.*, at 679–680. This Court rejected that appeal as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.*, at 695. The "statutory policy" of the Act is one of competition and it "precludes inquiry into the question whether competition is good or bad." *Ibid.* In *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. *Id.,* at 414. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: "The social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful." *Id.*, at 424.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. *Id.*, at 208–209. But this Court has refused to extend *Federal Baseball*'s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as "'unrealistic'" and "'inconsistent'" and "aberration[al]." *Flood* v. *Kuhn*, 407 U. S. 258, 282 (1972) (quoting *Radovich* v. *National Football League*, 352 U. S. 445, 452 (1957)); see also Brief for Advocates for Minor Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). Indeed, as we have seen, this Court has already recognized that the NCAA itself *is* subject to the Sherman

Act.

The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." *Flood*, 407 U. S., at 279. The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." *National Soc. of Professional Engineers*, 435 U. S., at 689. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, *e.g.*, 7 U. S. C. §§291–292 (agricultural cooperatives); 15 U. S. C. §§1011–1013 (insurance); 15 U. S. C. §§1801–1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy. *National Soc. of Professional Engineers*, 435 U. S., at 695.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for "'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *American Express Co.*, 585 U. S., at ___ (slip op., at 9). As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the

defendant to show a procompetitive rationale for the restraint." *Ibid.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.,* at ___–___ (slip op., at 9–10).

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at 15–19. The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U. S., at 781; see also, *e.g., Leegin Creative*, 551 U. S., at 885 ("'[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition'"); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984); 7 Areeda & Hovenkamp ¶1507a, at 442–444 (slightly different "decisional model" using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." D. Ct. Op., at 1067. This was no slight burden. According to one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen,

based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See D. Ct. Op., at 1067. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id.*, at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F. 2d, at 227; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 58, n. 29 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance

of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶1505b, at 435–436.

Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws "'can be difficult'"—and mistaken condemnations of legitimate business arrangements "'are especially costly, because they chill the very'" procompetitive conduct "'the antitrust laws are designed to protect.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 414 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to "'[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).

While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See D. Ct. Op., at 1070–1076, 1080–1083. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand." *Id.,* at 1070.

To be sure, there is a wrinkle here. While finding the

NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id.,* at 1082–1083. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." D. Ct. Op., at 1104. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive 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. See, *e.g.,* 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "'patently and inexplicably stricter than is necessary'" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. D. Ct. Op., at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. Brief for Petitioner in No. 20–512, at 35–36.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra*, at 15–19. But none of that means a party can relabel a restraint as a product feature and declare it "immune from §1 scrutiny." *American Needle*, 560 U. S., at 199, n. 7. In this suit, as in any, the district court had to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by "substantially less restrictive alternative" means. D. Ct. Op., at 1104.

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the

NCAA had not adopted any consistent definition. *Id.,* at 1070. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id.,* at 1071–1074. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," *id.*, at 1100, and that some were "not necessary to preserve consumer demand," *id.*, at 1075, 1080, 1104. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20–512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id.*, at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. See *supra*, at 15–19. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko*, 540 U. S., at 415. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra*, at 26–27. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U. S., at 408. Judges must be open to reconsideration and modification of decrees in light of changing market reali-

ties, for "what we see may vary over time." *California Dental*, 526 U. S., at 781. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U. S., at 415. Nor should any court "'impose a duty . . . that it cannot explain or adequately and reasonably supervise.'" *Ibid.* In short, judges make for poor "central planners" and should never aspire to the role. *Id.*, at 408.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. D. Ct. Op., at 1104–1105.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. D. Ct. Op., at 1104; App. to Pet. for Cert. in No. 20–512, at 168a–169a, ¶5. And the court emphasized

that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id.,* at 169a–170a, ¶¶6–7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships "at a sneaker company or auto dealership" with extravagant salaries as a "thinly disguised vehicle" for paying professional-level salaries. Brief for Petitioner in No. 20–512, at 37–38.

This argument rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits "that may be made available *from conferences or schools*." App. to Pet. for Cert. in No. 20–512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction "does not stop the NCAA from continuing to prohibit compensation from" sneaker companies, auto dealerships, boosters, "or anyone else." Brief for Respondents 47–48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only "a conference or institution" may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14–md–02541, ECF Doc. 1302–2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits

unrelated to legitimate educational activities—thus leaving the league room to police phony internships. As we've observed, the district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. *Id.,* at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *Id.,* at 168a–169a, ¶5; D. Ct. Op., at 1104. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20–512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team *achievement*" and that "[m]ost . . . are received by only a few student-athletes each year." *Ibid.* Meanwhile, the NCAA says, the district court's decree would allow a school to pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." D. Ct. Op., at 1088. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their

academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses on allowing schools to offer scholarships for "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20–512, at 167a–168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes "'luxury cars'" "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20–512, at 48–49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the

temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'" 958 F. 3d, at 1265. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 20–512 and 20–520

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER
20–512 *v.*
SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL., PETITIONERS
20–520 *v.*
SHAWNE ALSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 2021]

JUSTICE KAVANAUGH, concurring.

The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally re-

strict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined." *Ante,* at 14.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. The Court makes clear that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984), were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. *Ante,* at 21. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante,* at 23–24; see also *Radovich* v. *National Football League*, 352 U. S. 445, 449–452 (1957). As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny. See *ante,* at 18–19.

Third, there are serious questions whether the NCAA's

remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says 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.

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

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, *e.g.*,

Texaco Inc. v. *Dagher*, 547 U. S. 1, 5 (2006). Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive

compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 235–237 (1996); *Wood* v. *National Basketball Assn.*, 809 F. 2d 954, 958–963 (CA2 1987) (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

NCAA Division I, II, and III – June 30, 2021.

Interim NIL Policy.

The NCAA is committed to ensuring that its rules, and its enforcement of those rules, protect and enhance student-athlete well-being and maintain national standards for recruiting. Those goals are consistent with the NCAA's foundational prohibitions on pay-for-play and impermissible recruiting inducements, which remain essential to collegiate athletics.

As the NCAA continues to work with Congress to adopt federal legislation to support student-athlete use of NIL, it is necessary to take specific, short-term action with respect to applicable NCAA rules. Accordingly, effective July 1, 2021, and until such time that either federal legislation or new NCAA rules are adopted, member institutions and their student-athletes should adhere to the guidance below.

1. NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following:

    - **For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect**, if an individual elects to engage in an NIL activity, the individual's eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12 (Amateurism and Athletics Eligibility).

    - **For institutions in states with NIL laws or executive actions with the force of law in effect**, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.

    - Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.

2. The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.

3. Individuals should report NIL activities consistent with state law and/or institutional requirements.

Uniform College Athlete Name, Image or Likeness Act*

Drafted by the

Uniform Law Commission

and by it

Approved and Recommended for Enactment
in All the States

at its

Meeting in Its One-Hundred-and-Thirtieth Year
Madison, Wisconsin
July 9 – 15, 2021

Without Prefatory Note and Comments

July 12, 2021

**The following text is subject to revision by the Committee on Style of the National Conference of Commissioners on Uniform State Laws.*

Uniform College Athlete Name, Image or Likeness Act

Section 1. Title

This [act] may be cited as the Uniform College Athlete Name, Image or Likeness Act.

Section 2. Definitions

In this [act]:

(1) "Athletic association" means a nonprofit intercollegiate sport governance association that regulates the eligibility of players and institutions to compete.

(2) "College athlete" means an individual who attends or is eligible to attend an institution and engages in or is eligible to engage in an intercollegiate sport. The term does not include an individual participating in a sport in grades kindergarten through grade 12 or at a youth, preparatory school, recreation, or similar level, or an individual permanently ineligible to participate in a particular intercollegiate sport for that sport.

(3) "Conference" means a person, other than an athletic association, that governs the athletic programs of more than one institution.

(4) "Group license" means a name, image, or likeness agreement that includes the name, image, or likeness of more than one college athlete.

(5) "Inducement" means attempt to influence the decision of a college athlete to attend, continue attending, or transfer to an institution or conference.

(6) "Institution" means a public or private institution of higher education in this state, including a community college, junior college, college, and university.

(7) "Intercollegiate sport" means a sport played at the collegiate level for which eligibility requirements for participation by a college athlete are established by an athletic association. The term does not include a recreational, intramural, or club sport.

(8) “Name, image, or likeness” includes any symbol, word, name, design or combination thereof that readily identifies the athlete.

(9) “Name, image, or likeness activity” means licensing, transferring or other commercial use of a name, image, or likeness.

(10) “Name, image, or likeness agent” means an individual who:

(A) directly or indirectly recruits or solicits a college athlete or, if the athlete is a minor, the athlete’s parent or [guardian], to enter into an agency contract or name, image, or likeness agreement;

(B) enters into an agency contract with an athlete or, if the athlete is a minor, the athlete’s parent or [guardian]; or

(C) directly or indirectly offers, promises, attempts, or negotiates to obtain name, image, or likeness compensation or a name, image, or likeness agreement.

(11) “Name, image, or likeness agreement” means an express or implied agreement, either oral or in a record, under which a third party provides name, image, or likeness compensation.

(12) “Name, image, or likeness compensation” means money or other thing of value provided by a third party in exchange for use of a college athlete’s name, image, or likeness.

(13) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(14) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(16) "Student" means an individual enrolled at an institution under the rules of the institution.

(17) "Third party" means a person, other than an institution, that offers, solicits, or enters into a name, image, or likeness agreement or offers or provides name, image, or likeness compensation.

Legislative Note: *If a state uses a different term to describe the relationship of guardian, the bracketed term "guardian" in paragraph (10) should be changed to the term used.*

Section 3. Scope

(a) This [act] applies only to college athletes and intercollegiate sports.

[(b) This [act] does not apply to a military service academy.]

(c) This [act] does not create an employment relationship between a college athlete and the athlete's institution with respect to the athlete's participation in an intercollegiate sport. This [act] may not be used as a factor in determining whether an employment relationship exists.

Legislative Note: *Subsection (b) should be included in a state that has a military service academy.*

Section 4. Rulemaking Authority

The [agency responsible for implementing and administering the Uniform Athlete Agents Act, Revised Uniform Athlete Agents Act, or comparable law, or other appropriate agency] may adopt rules under [cite to state administrative procedure act] to implement and administer this

[act].

Section 5. Name, Image, or Likeness Activity and Compensation; Limit on Institution, Conference, and Athletic Association

(a) Except as provided in Section 6, a college athlete may engage in name, image, or likeness activity to the extent permitted under other law of this state.

(b) Except as provided in Section 6:

(1) an institution, conference, or athletic association may not prevent or restrict a college athlete from:

(A) receiving name, image, or likeness compensation, entering into a name, image, or likeness agreement, engaging in name, image, or likeness activity, or obtaining the services of a name, image, or likeness agent; or

(B) creating or participating in a group license or interfere with the formation or recognition of a collective representative to facilitate or provide representation to negotiate a group license;

(2) an athletic association may not prevent or restrict an institution or college athlete from participating in an intercollegiate sport because the athlete receives name, image, or likeness compensation, enters into a name, image, or likeness agreement, engages in name, image, or likeness activity, or obtains the services of a name, image, or likeness agent; and

(3) receipt of name, image, or likeness compensation may not affect the eligibility, duration, amount, or renewal of an athletic scholarship.

Section 6. Limit on Name, Image, or Likeness Compensation and Activity

(a) A college athlete may not include in name, image, or likeness activity an institution, conference, or athletic association name, trademark, service mark, logo, uniform design, or other

identifier of athletic performance depicted or included in a media broadcast or related game footage unless the use is permitted under intellectual property law.

(b) Name, image, or likeness compensation or an offer, promise, or solicitation of compensation:

(1) may not be an inducement;

(2) must represent only consideration for use of the athlete's name, image, or likeness; and

(3) may not include compensation for performance, participation, or service in an intercollegiate sport.

(c) A college athlete may not express or imply that an institution, conference, or athletic association endorses or is otherwise affiliated with the athlete's name, image, or likeness activity.

(d) An institution may adopt a policy to prevent a college athlete from engaging in name, image, or likeness activity that is illegal or that is determined by the institution to have an adverse impact on its reputation, if the institution complies with the same policy with respect to the institution's sponsorships and similar commercial activity and relationships. An institution that adopts a policy under this subsection shall disclose the policy and its rationale in a record to the athlete and the athlete's name, image, or likeness agent.

(e) An institution may adopt and enforce rules of conduct relating to name, image, or likeness activity that apply when the college athlete is engaged in an official team activity, including a competition, practice, supervised workout, community service, or other activity, at the direction of, or supervised by, a member of the institution's coaching or sport staff.

(f) An institution, conference, or athletic association may require a college athlete to waive a name, image, or likeness right associated with promotion, display, broadcast, or

rebroadcast of an intercollegiate sport.

Section 7. Institution, Conference, and Athletic Association Involvement

(a) An institution, conference, or athletic association may:

(1) assist a college athlete:

(A) in evaluating the permissibility of name, image, or likeness activity, including compliance with law and institution, conference, and association rules;

(B) with the disclosure requirements of Section 8; and

(C) in providing a good-faith evaluation of a name, image, or likeness agent or third party; and

(2) educate a college athlete about name, image, or likeness compensation, agreements, and activity.

(b) An institution may permit a college athlete to use the institution's facilities for name, image, or likeness activity under the same terms and conditions as other students at the institution.

(c) Except as provided in subsection (a), an institution or conference and its employees, agents, and independent contractors may not:

(1) provide compensation to a college athlete for the athlete's name, image, or likeness;

(2) assist, identify, arrange, facilitate, develop, operate, secure, or promote name, image, or likeness activity;

(3) assist with selecting, arranging, or providing payment to a name, image, or likeness agent;

(4) assist with selecting, arranging, or collecting payment from a third party;

(5) license, transfer, or otherwise convey to a college athlete the right to use the intellectual property of the institution, conference, or athletic association in name, image, or likeness activity; or

(6) use, license, or otherwise convey a college athlete's name, image, or likeness for a commercial purpose except as provided in Section 6(f) or permitted by other law.

Section 8. Required Disclosures

(a) A college athlete shall provide to the individual or office designated under subsection (b):

(1) a copy of a name, image, or likeness agreement that provides name, image, or likeness compensation in an amount more than $[300], or, if a record of the agreement does not exist, the amount of name, image, or likeness compensation provided or to be provided if the amount is more than $[300];

(2) the amount of name, image, or likeness compensation provided if the aggregate amount is more than $[2,000] in a calendar year and a copy of each name, image, or likeness agreement if a record of the agreement exists;

(3) for each agreement or amount that must be provided:

(A) the arrangement for providing compensation;

(B) the amount of compensation;

(C) the identity of and a description of the relationship with the third party;

(D) the activity required or authorized; and

(E) if the athlete is represented by a name, image, or likeness agent, the name of and a description of the agreement with the agent;

(4) a copy of each agreement entered into by the athlete with a name, image, or likeness agent; and

(5) other information required by the [agency designated in Section 4].

(b) An institution shall designate an individual or office to receive the information required by subsections (a) and (e).

(c) A college athlete shall provide:

(1) the information required by subsection (a) before the earlier of:

(A) receiving name, image, or likeness compensation required to be disclosed; or

(B) engaging in a name, image, or likeness activity required to be disclosed; and

(2) an update after a change in any of the information not later than [10] days after the earlier of the change or the next scheduled athletic event in which the athlete may participate.

(d) If an institution, conference, or athletic association voluntarily or as required by this [act] adopts a limitation affecting a college athlete's ability to engage in name, image, or likeness activity, the institution shall provide in a record a copy of the limitation to each athlete by the time an offer of admission or financial aid is made, whichever is earlier, or, if the limitation is not adopted until after the athlete is a student at the institution, as soon as practicable after adoption.

(e) When a name, image, or likeness agreement is entered into, the agreement must contain a certification from the following parties that the agreement is the sole, complete, and final agreement between the parties:

(1) the college athlete, or, if the athlete is a minor, the parent or [guardian] of the

minor:

(2) the third party; and

(3) if a name, image, or likeness agent assisted with the agreement, the agent.

Section 9. Name, Image, or Likeness Agent; Duties; Registration

(a) A name, image, or likeness agent shall register in this state as an athlete agent under [cite to Uniform Athlete Agents Act or Revised Uniform Athlete Agents Act or other comparable law] before engaging in conduct under this [act].

(b) An institution, conference, or athletic association may not prevent or restrict a college athlete from obtaining the services of a name, image, or likeness agent.

[(c) An agreement between a college athlete and a name, image, or likeness agent must have a fee arrangement consistent with the customary practice of the agent's industry and otherwise in compliance with [cite to Uniform Athlete Agents Act or Revised Uniform Athlete Agents Act or other comparable law]].

Legislative Note: *In subsections (a) and (c), cite to the state's version of the uniform act or other comparable state law.*

A state should include subsection (c) if it wants to permit oversight of fee arrangements between college athletes and name, image, or likeness agents.

[Section 10. Third Party; Registration; Voidable Contract

(a) A person shall register as a third party if in a calendar year the person provides or agrees to provide:

(1) more than $[300] for a name, image, or likeness agreement; or

(2) more than $[2,000] in the aggregate to college athletes for name, image, and likeness agreements.

(b) A third party shall provide to the individual or office designated under Section 8(b)

the name, image, or likeness compensation and agreements described in subsection (a).

(c) A college athlete or, if the athlete is a minor, the parent or [guardian] of the athlete, may void a name, image, or likeness agreement with a third party if the party fails to comply with subsection (a) or (b).]

Legislative Note: *A state should adopt Sections 10 through 15 if it decides to require registration of third parties.*

[Section 11. Registration as Third Party; Application

(a) A person applying for registration as a third party shall submit an application for registration to the [insert name of agency designated in Section 4] in a form prescribed by the [insert name of agency designated in Section 4]. The application must be signed under penalty of perjury by an authorized representative of the applicant and include:

(1) the name and contact information of the applicant, including telephone number, email address, and, if available, a website address;

(2) the address of the applicant's principal place of business;

(3) each social-media account with which the applicant is affiliated;

(4) a brief description of the type of business and business activity of the applicant;

(5) the name and address of each person that is a partner, member, officer, director, manager, associate, or entitled to share profits, income, receipts, or other funds or directly or indirectly holds an equity interest of at least [five] percent in the applicant;

(6) whether the applicant or a person named under paragraph (5) has been a defendant in a criminal proceeding or respondent in a civil proceeding and, if so, the date and a brief explanation of each proceeding;

(7) whether the applicant or a person named under paragraph (5) has been

adjudicated as bankrupt or has declared bankruptcy;

(8) whether conduct of the applicant or a person named under paragraph (5) has caused a college athlete to be sanctioned, suspended, or declared ineligible to participate in an intercollegiate sport or an institution to be sanctioned;

(9) whether an application to be a third party by the applicant or a person named under paragraph (5) has been denied, suspended, abandoned, or not renewed;

(10) each state in which the applicant is currently registered or has applied to be registered as a third party; and

(11) other information required by [insert name of agency designated in Section 4].

(b) Instead of proceeding under subsection (a), a person registered as a third party in another state may apply for registration as a third party in this state by submitting to the [insert name of agency designated in Section 4]:

(1) a copy of the application for registration in the other state;

(2) a statement that identifies any material change in the information on the application or verifies there is no material change in the information, signed under penalty of perjury; and

(3) a copy of the certificate of registration from the other state.

(c) The [insert name of agency designated under Section 4] shall issue a certificate of registration to an individual who applies for registration under subsection (b) if the [insert name of agency designated under Section 4] determines:

(1) the application and registration requirements of the other state are substantially similar to or more restrictive than this [act]; and

(2) the registration has not been revoked or suspended and no action involving the individual's conduct as a third party is pending against the person or the person's registration in any state.

(d) In implementing subsection (c), the [insert name of agency designated in Section 4] shall:

(1) cooperate with agencies in other states that register third parties to develop a common registration form;

(2) determine which states have laws that are substantially similar or more restrictive than this [act]; and

(3) exchange information, including information related to actions taken against third parties or their registrations, with those agencies.]

[Section 12. Third-Party Certificate of Registration

(a) Except as provided in subsection (b), the [insert name of agency designated in Section 4] shall issue a certificate of registration to a person that applies for registration under and complies with Section 11.

(b) The [insert name of agency designated in Section 4] may refuse to issue a certificate of registration to an applicant under Section 11 if the [insert name of agency designated in Section 4] determines that the applicant has engaged in conduct that has a significant adverse impact on the reputation of a college athlete or the athlete's institution, conference, or athletic association. In making the determination, the [insert name of agency designated in Section 4] shall consider whether the applicant has:

(1) pleaded guilty or no contest to, has been convicted of, or has charges pending for a crime that, if committed in this state, would involve moral turpitude or be a felony;

(2) made a materially false, misleading, deceptive, or fraudulent representation in the application or as a third party;

(3) engaged in conduct prohibited by Section 16;

(4) engaged in conduct resulting in imposition of a sanction on an institution or a sanction, suspension, or declaration of ineligibility to participate in an intercollegiate sport on a college athlete; or

(5) engaged in conduct that reflects adversely on the applicant's credibility, honesty, or integrity.

(c) A third party registered under subsection (a) may apply to renew the registration by submitting an application for renewal in a form prescribed by the [insert name of agency designated in Section 4]. The application must be signed by an authorized representative of the applicant under penalty of perjury and include current information on all matters required in an original application for registration.]

[Section 13. Limitation, Suspension, Revocation, or Nonrenewal of Third-Party Registration

The [insert name of agency designated in Section 4] may suspend, revoke, or refuse to renew registration of a third party registered for a reason that would justify refusal to issue a certificate of registration under Section 12(b).]

[**Section 14. Temporary Registration of Third Party**

The [insert name of agency designated in Section 4] may issue a temporary certificate of registration as a third party while an application for registration or renewal of registration is pending.]

[Section 15. Third Party Registration and Renewal Fees

(a) An application for registration or renewal of registration as a third party must be accompanied by a fee of:

(1) $[200] for an initial application for registration;

(2) $[100] for registration based on a certificate of registration issued by another state;

(3) $[50] for an application for renewal of registration; or

(4) $[25] for renewal of registration based on a renewal of registration in another state.]

(b) The [insert name of agency designated in Section 4] may establish or modify the fees under Section 4 of this [act].]

Section 16. Third Party Prohibited Conduct

A third party may not intentionally:

(1) give materially false or misleading information or make a materially false promise or representation with the intent to influence a college athlete, parent or [guardian], or another person to enter into a name, image, or likeness agreement, receive name, image, or likeness compensation, or engage in name, image, or likeness activity;

(2) provide anything of value to a college athlete or another person except as permitted under this [act], if to do so may result in loss of the athlete's eligibility to participate in the athlete's sport; [or]

(3) predate or postdate a name, image, or likeness agreement[.][;]

[(4) unless registered under this [act], initiate contact, directly or indirectly, with a college athlete or, if the athlete is a minor, a parent [or guardian] of the athlete, to recruit or solicit the athlete, parent, or [guardian] to enter a name, image, or likeness agreement, receive

name, image, or likeness compensation, or engage in name, image, or likeness activity;

(5) fail to apply for registration under Section 11; or

(6) provide materially false or misleading information in an application for registration or renewal of registration.]

Legislative Note: *A state should include the bracketed language in paragraphs (4) through (6) only if the state includes optional Sections 11 through 15 that provide for third-party registration.*

Section 17. Civil Remedy

(a) An institution or college athlete has a cause of action for damages against a name, image, or likeness agent or third party if the institution or athlete is adversely affected by an act or omission of the agent or third party in violation of this [act]. An institution or athlete is adversely affected by an act or omission of the agent or third party only if, because of the act or omission, the institution or athlete:

(1) is suspended or disqualified from participating in an intercollegiate sport; or

(2) suffers financial damage.

(b) A college athlete has a cause of action under this section only if the athlete was a student at an institution at the time of the act or omission.

(c) In an action under this section, a prevailing plaintiff may recover [actual] [treble] damages[, punitive damages,] and reasonable attorney's fees, court costs, and other reasonable litigation expenses.

[(d) A violation of this [act] is a violation of and enforceable under [cite to state consumer protection or unfair trade practice law].]

Legislative Note: *A state that permits amendment by reference and has an unfair trade practice or consumer protection law that provides for civil enforcement by a state agency or person, including a competitor, should replace the bracketed language in subsection (d) with the name of the state agency or person. A state that has an unfair trade practice or consumer protection law*

but does not permit amendment by reference should delete subsection (d) and make appropriate amendments to its unfair trade practice or consumer protection law. A state that does not have an unfair trade practice or consumer protection law should delete subsection (d) and substitute language providing for civil enforcement by a state agency, affected member of the public, or a competitor.

Section 18. Civil Penalty

The [Attorney General] [and] [insert name of the agency designated in Section 4] may assess a civil penalty against a name, image, or likeness agent or third party not to exceed $[50,000] for a violation of this [act].

Legislative Note: *A state may authorize the Attorney General or another state official, or the agency designated in Section 4, or both to enforce this section.*

Section 19. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 20. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase, "as amended". A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

[**Section 21. Severability**

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

Section 22. Effective Date

This [act] takes effect . . .

To: Committee on Scope and Program

From: Study Committee on College Athlete Name, Image, and Likeness Issues; Dale Higer, Chair, and Gabe Feldman, Reporter

Final Report and Recommendation for a Drafting Committee

June 15, 2020

Summary:

This memorandum is the report and recommendation of the Study Committee on College Athlete Name, Image, and Likeness Issues. The Study Committee was appointed to study the feasibility and appropriateness of a uniform state act governing name, image and likeness (NIL) issues in college sports and potentially high school, youth, and recreational sports. A roster of the committee membership is attached as Exhibit A.

The full committee met twice by video conference, and the chair and reporter conferred separately by video conference and email multiple times. The committee recommends that a drafting committee be appointed to develop a NIL Act, giving due consideration to the issues identified in this report. Such a drafting committee might develop provisions that address: (1) a mechanism for providing college athletes with a meaningful opportunity to receive compensation for their NIL rights; (2) parameters to protect college athletics and college athletes from misuse or abuse of NIL deals; (3) whether the act should create a right of action for college athletes if their NIL rights are violated; (4) a mechanism for certifying and regulating agents and third party professionals; and (5) whether and to what extent the act should apply to high school, youth, and recreational sports.

This memo first provides background, context, and information on the various issues, developments, and perspectives related to NIL. This memo then provides a point-by-point response to Commissioner Perlman's separate statement. This memo concludes with a recommendation that a drafting committee be appointed. This recommendation was enthusiastically and nearly-unanimously supported by the observers who participated in the Study Committee video conference on June 2, 2020 and approved by the Committee on a 10-1 vote, with Commissioner Perlman the only dissenter. As detailed in the Attachment to this report, the observers constitute a wide range of key stakeholders in these area, including representatives from the NCAA, athletic departments, professional league player unions, agents, former student-athletes, current and former athletic directors, and law professors.

Contents

Introduction[1]

Over the last year, 37 states have introduced or enacted legislation regarding NIL and several members of Congress have studied, introduced, or suggested federal NIL legislation. In April 2020, the National College Athletic Association (NCAA) Board of Governors approved a framework that would permit college athletes to receive compensation for their NIL from third parties. In May 2020, the U.S. Court of Appeals for the Ninth Circuit issued an opinion addressing the legality of the NCAA's broad restrictions on compensation for college athletes. All of these developments are potentially relevant to determining the suitability of a uniform NIL act and are discussed in this report.

NIL laws could impact all intercollegiate athletic associations as well as high school, youth, and recreational sports. This report primarily focuses on the potential impact of NIL laws on the NCAA, given that the recent federal and state legislative and litigation activity has centered on the NCAA.

1. Background on NCAA amateurism rules and NIL restrictions

With limited exception, NCAA rules do not permit college athletes to receive compensation for the use of their NIL. This section contains a very brief overview of the substance and theory underlying the NIL restrictions and the broader amateurism rules in college sports. The rules are complex and vary across different levels of college sports, so this section offers only a high-level summary of the relevant NCAA rules rather than a detailed analysis of every relevant bylaw within each organization.

One of the NCAA's earliest reforms of intercollegiate sports was a requirement that the participants be "amateurs." The NCAA has articulated the role of amateurism as follows:

> Amateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.[2]

The modern formulation of amateurism focuses, in part, on prohibiting college athletes from receiving compensation based on their athletic ability unrelated to education.[3] The NCAA has adopted a series of rules to maintain amateurism, including the following at the Division 1 level:

- The scholarship amount for college athletes cannot exceed the "cost of attendance" at their respective schools.
- College athletes are prohibited, with very limited exception, from receiving any compensation based on their athletic ability, whether from boosters, third parties, or their institutions.
- College athletes are prohibited from receiving compensation for the use of their NIL based on their athletic ability.
- With certain exceptions, college athletes may not enter into a contract with a professional sports team and may not enter a professional league's player draft.
- With certain exceptions, college athletes may not hire an agent.

The justifications used for the amateurism restrictions, including the current NIL prohibitions, include the following: (As discussed above, this is intended to summarize the justifications used to support amateurism, not to defend or evaluate these justifications.).

- Amateurism restrictions are necessary to preserve the distinctive character and product of amateur collegiate sports and to maintain a clear line of demarcation between intercollegiate athletics and professional sports. Much of the recent antitrust litigation has focused on this justification for the NCAA's amateurism model, and most courts

have accepted (at least to some extent) this as the primary rationale for upholding many restrictions on college athletes.[4]

- Amateurism restrictions are necessary to protect the educational mission of college athletics and help integrate the athletic and academic components of student-athletes' college experiences.

- A loosening of amateurism rules will lead to "over-commercialization, which transposes the collegiate model into a system that more closely resembles the professional sports approach…where athletes are used by their teams and team sponsors to brand and promote products…and threatens the integrity of college sports."[5]

- A system that permits compensation for college athletes would be abused as a recruiting tool and as a disguise for improper payments to induce a student-athlete to choose a particular school. This in turn would lead to a race-to-the-bottom of unfair recruiting and the educational piece of recruiting would be minimized and replaced by the economics of NIL and other compensation agreements.

- The elimination of restrictions on college athlete compensation would destroy competitive balance and diminish the popularity of college sports.

- Schools cannot afford to pay student athletes above and beyond their full cost of attendance, and if the rules were changed to permit compensation to college athletes (either directly or through third parties), some schools would cut sports or simply leave Division I/FBS due to financial concerns, which would diminish athletic opportunities for both athletes and fans.

- A system that permits compensation for college athletics would be difficult to monitor and oversee.

- Compensation for college athletes would interfere with fundamental notion that "participation should be motivated primarily by education and by the physical, mental and social benefits to be derived," and that college athletics should be an "avocation, not a vocation."[6]

2. Overview of NIL Market in College Athletics

There has been massive growth over the last several years in the opportunities for individuals to monetize the use of their NIL. Although the traditional models of licensing NIL through broadcast and media are still lucrative options for high-end celebrities and athletes, social media channels have created potential opportunities for a much broader set of individuals and created "social influencers" who are able to effectively reach mobile and social media audiences. Many of these influencers are college or high school students. Studies estimate that within five years—as key demographics continue to consume more of their content through social media channels rather than television—brands will spend between $5 and $10 billion globally on social influencer marketing per year.[7] Advertisers reportedly spent almost $1.6 billion on Instagram

alone in 2018. Other social media channels, including Snapchat, YouTube and TikTok provide lucrative opportunities for social influencers.[8] Advertising rates for top social media influencers have grown from hundreds of dollars and free products to thousands of dollars for a single post to significantly more for longer-term collaborations.[9] Some experts predict that more influencers will utilize a "multi-channel network model, in which athletes would hire intermediary companies that would partner with brands for endorsements and product placement along with selling ads on the athletes' social media channels."

Although the actual market for the NIL of college athletes in traditional and social media is largely speculative because of the current NIL restrictions, one estimate is that "ninety-five percent-plus of college athletes might get social media sponsorships and endorsements but zero negotiated endorsement contracts that are meaningfully large," and that college athletes with large social media followings can earn up to $670,000 per year in NIL deals and $20,710 per Instagram post.[10] One study estimated that former LSU quarterback Joe Burrow's endorsement value was $705,000 last year, while UCLA gymnast Madison Kocain's endorsement value was $466,000.[11]

3. Recent NCAA Reforms/Efforts Regarding NIL

Subject to approval by the member schools, the NCAA Board of Governors recently approved a "modernization" of NIL rules for college athletes that would permit college athletes to receive compensation for their NIL from third parties (through endorsement deals, social media appearances, etc.) as long as the institutions or conferences were not involved in the arrangement and the college athletes did not use the trademarks or logos of the institution.[12] The NCAA Federal and State Legislation Working Group explained that the modernization of NIL rules was necessary "to give student-athletes the same [NIL] opportunities that are available to nonathlete students."[13] The Board is requiring "guardrails" on any NIL activities to ensure that NIL deals are not used as a recruiting inducement or as a form of "pay for play." The Board also called for engaging Congress on the following items:

- Action to preempt various state legislation on name, image and likeness.
- Establishing a "safe harbor" for the Association to provide protection against lawsuits filed for NIL rules.
- Safeguarding the nonemployment status of student-athletes.
- Maintaining the distinction between college and pro sports.
- Upholding NCAA values, including diversity, inclusion and gender equity.[14]

4. State Legislative Efforts

As of May 2020, 37 states have considered or passed NIL legislation. This section highlights the key differences, inconsistencies, and potential conflicts in the various state legislative efforts. For a detailed summary of the state laws, please see Attachment A to the original Study Committee Report. On September 30, 2019, California Governor Gavin Newsome signed California Senate Bill 206 (SB 206) into law. This law made California the first state to give

college athletes the right to earn compensation for their NIL. Colorado (SB 123) was the second state to pass an NIL law, and both the California and Colorado laws have effective dates of January 1, 2023. Florida's NIL legislation (SB 646) was signed into law on June 12, 2020 and will take effect in July 1, 2021. 34 other states have introduced at least one NIL-related piece of legislation, although most state legislative sessions were either adjourned, suspended, or postponed from March-May 2020.

There are many variations among the state laws that have been introduced or passed, but the legislation (and proposed legislation) generally falls into two categories: "Basic NIL Legislation" or "Enhanced NIL Legislation." The primary feature of the Basic NIL Legislation, which includes California SB 206, Florida SB 646, Colorado SB 123 and a number of other states, is that it permits college athletes to receive compensation for the use of their NIL, but does not allow college athletes to receive any non-NIL related compensation.[15]

In contrast, the Enhanced NIL Legislation permits college athletes to earn money for the use of their NIL and also permits compensation above and beyond NIL. For example, NY 6722B requires each college to establish a "Sports Injury Health Savings Account" and a "Wage Fund" that "shall be funded with fifteen percent of revenue earned from such college's athletic program."[16] Pursuant to the legislation, the revenue will be divided equally and deposited into the two funds. The Sports Injury Health Savings Account will "provide a student athlete who suffers a career ending or serious injury during a game or practice with compensation upon his or her graduation. The amount of such compensation and qualifying injuries shall be determined by the department. A qualifying injury shall be verified by an independent health care provider not affiliated with the university." Additionally, "at the conclusion of each school year, each college's Wage Fund shall be divided evenly and paid to all student athletes attending the school."

Another variation of the Enhanced NIL Legislation is South Carolina SB 935,[17] which allows all college athletes to receive compensation for their NIL and provides additional forms of compensation for men's and women's basketball players and football players. Specifically, the proposed legislation permits an "institution's athletic director to use monies generated from the [men's and women's basketball and football] gross revenue to award stipends annually to each student athlete who participates in [men's and women's basketball and football] and maintains a good academic standing during the previous academic year, including the student athlete's senior year in high school." The proposed legislation includes revenue generated from, among other things, ticket sales, television, rights, and broadcast licensing agreements. And, pursuant to the proposed legislation, "[a]ll stipends awarded shall be determined by the total number of hours the student athlete spends associated with the [men's and women's basketball and football] sport multiplied by the hourly rate established by the participating institution for a work study program" and "shall be in addition to any scholarship, including the cost of attendance or financial aid." The proposed legislation also creates a "Student Athlete Trust Fund," which is funded with a percentage of the revenue from men's and women's basketball and football. Pursuant to the legislation, for each year that a football, men's basketball, or women's basketball student athlete maintains good academic standing, $5,000 will be deposited into the fund on his or her behalf. The total trust fund amount shall not exceed $25,000 per student athlete. Additionally, when the student athlete graduates and completes a state-approved financial literacy course, the university shall provide a one-time payment to the student athlete of the full amount of the trust fund. All trust fund payments are awarded regardless of additional scholarships or financial aid.

The legislation and proposed legislation—both within and across the Basic NIL Legislation and Enhanced NIL Legislation categories—has a number of other potentially significant variations and inconsistencies. Here are some of the key differences:

- Some of the legislation explicitly prohibits the institutions from providing compensation for NIL to current *and* prospective college athletes,[18] while other legislation only prohibits the institution from providing NIL compensation to prospective college athletes.[19]

- Some of the legislation only applies to public institutions that generate a prescribed minimum amount of revenue,[20] while others cover all public and private nonprofit four-year institutions.[21]

- Some of the legislation contains a "market value" limitation on compensation for NIL,[22] while most others do not explicitly mention any compensation parameters.

- Some of the legislation is limited (in part) to men's and women's basketball players and football players,[23] while most others apply to all college athletes.

- Most of the legislation prohibits college athletes from entering into an NIL deal if it conflicts with an institution's contract,[24] but some states are silent on this issue.

These differences highlight the potential problems with the application of individual state NIL laws and the potential benefit of a uniform act for the NCAA and other intercollegiate athletic associations. The potential benefits (and drawbacks) of a uniform act will be discussed in more detail below.

5. Federal Legislative Efforts

This section briefly summarizes the federal legislative efforts related to NIL. Most of this legislative activity addressed issues of college athlete welfare beyond NIL, but for purposes of this Report this section will focus on the NIL components. The key developments at the federal level include the following:

- In March 2019, U.S. Senator Chris Murphy (D-Conn.) released the first of a series of reports that examined the economics and structure of college athletics and called for, among other things, college athletes to receive compensation.
- In March 2019, U.S. Representative Mark Walker (R-N.C.) introduced the *Student-Athlete Equity Act,* legislation that would amend the definition of a qualified amateur sports organization in the tax code to remove the restriction on student-athletes using or being compensated for use of their NIL. The lead co-sponsor of the bill is U.S. Representative Cedric Richmond (D-La.).
- In December 2019, U.S. Representatives Donna Shalala (D-FL) and Ross Spano (R-FL) introduced the *Congressional Advisory Commission on Intercollegiate Athletics* (CACIA) *Act,* legislation that creates a Blue-ribbon Congressional Commission

to identify and examine issues of national concern related to the conduct of intercollegiate athletics and the NCAA, including compensation for NIL.

- In December 2019, Senators Chris Murphy (D-Conn.) and Mitt Romney (R-Utah) formed a bipartisan working group to study issues related to NIL and other forms of compensation for college athletes. The working group also includes U.S. Senators Cory Booker (D-NJ), David Perdue (R-Ga), and Marco Rubio (R-Fla).
- In February 2020, the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Manufacturing, Trade, and Consumer Protection, held a hearing on NIL-related issues with Mark Emmert, NCAA President, Bob Bowlsby, Big 12 Conference Commissioner, Dr. Douglas Girod, Chancellor of the University of Kansas, Ramogi Huma, Executive Director of the National College Players Association, and Kendall Spencer, a former student-athlete and former chair of the Division I Student-Athlete Advisory Committee and current member of the Knight Commission on Intercollegiate Athletics.
- In February 2020, U.S. Representative Anthony Gonzalez (R-Ohio), a former Division-1 wide receiver and a first round draft pick in the NFL, released a fact sheet on NIL for college athletes that included "five key pillars successful federal legislation should follow." These pillars included federal preemption of California SB 206 and other state laws to create a uniform standard for NIL.
- In May 2020, U.S. Senators Cory Booker (D-NJ) and Chris Murphy (D-Conn) sent a joint letter to NCAA President Mark Emmert to express their concern that the NCAA Board of Governor's April 2020 plan "still does not come close to providing college athletes with the rights and opportunities they deserve."
- In April 2020, U.S. Senator Roger Wicker (R-Miss.), chairman of the Senate Committee on Commerce, Science and Transportation, sent letters to 50 college associations, conferences, junior colleges, and universities requesting information related to college athlete NIL to serve as the basis for the committee's initial policy review.

6. Litigation-related Activity

This section provides a brief overview of legal decisions involving the NCAA and its amateurism and NIL-related restrictions. This is not meant as an exhaustive review of the caselaw, but is designed to provide context regarding litigation activity in this area.

The foundational case related to the NCAA's amateurism restrictions is the Supreme Court's antitrust decision in *NCAA v. Board of Regents*.[25] The Court held that the NCAA's rules should be evaluated under the "rule of reason," rather than declared per se illegal, because of the unique interdependent nature of the institutions participating in college sports. The court observed as follows:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to

> preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.[26]

The Court recognized that agreements among NCAA institutions often serve valid procompetitive goals, but held that the challenged television restrictions violated antitrust law because, among other things, they were not reasonably tailored to achieve the NCAA's otherwise legitimate objectives. The Court also concluded that:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[27]

There is very little case law directly addressing NIL restrictions in college sports.[28] The most significant case is the Ninth Circuit's decision in *O'Bannon v. NCAA*.[29.] In *O'Bannon*, a former Division I college basketball player brought a class action antitrust suit against the NCAA, challenging (in relevant part here) the set of rules that prevent student-athletes from receiving a share of revenue that the NCAA and its member institutions receive from the use of student-athletes' NILs in live game broadcasts, related footage, and video games. The District Court held that the NCAA's restrictions were more restrictive than necessary for achieving the NCAA's legitimate amateurism-related goals and therefore permanently enjoined the NCAA from prohibiting its member schools from paying up to 1) the full cost-of-attendance ("COA") and 2) $5,000 per year in deferred compensation to FBS football and Division I men's basketball players for the use of their NILs, through trust funds distributable after they leave school.[30]

The Ninth Circuit (in a 2-1 vote) affirmed the liability finding and COA portion of the remedy but reversed on the deferred payments, holding that the district court clearly erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint for preserving amateurism. The Ninth Circuit explained that the "district court ignored that not paying student-athletes is *precisely what makes them amateurs*" and that "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." The court declined, however, to "reach the thornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage."[31]

In a related case involving a right of publicity lawsuit brought by former college football quarterback Sam Keller, the Ninth Circuit held that EA Sports' use of the likenesses of college athletes in video games was not, as a matter of law, protected by the First Amendment.[32] This case eventually settled and current and former college football and men's basketball players who appeared in the EA games between 2003 and 2014 received settlement checks. This likely marks the first time current college athletes were permitted by the NCAA to receive compensation for their NIL.[33]

In the most recent decision involving the NCAA's amateurism restrictions, *In re NCAA Grant-in-Aid Cap Antitrust Litig*. (*Alston v. NCAA*),[34] the Ninth Circuit upheld the NCAA's

restrictions on payments untethered to education, but enjoined the NCAA from limiting non-cash educational benefits and placed some limits on the NCAA's ability to enjoin cash benefits related to education. The Ninth Circuit held that the "district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do."

Although the case did not involve a direct challenge to NIL rights, the Ninth Circuit asked both parties to brief the impact of California SB 206 and the NCAA's NIL working group on the merits of the case. The Ninth Circuit concluded that SB 206 and the NCAA working group did not undercut the NCAA's argument that restrictions on cash payments untethered to education are critical to preserving the distinction between college and pro sports because "[a]s it stands, the NCAA has *not* endorsed cash compensation untethered to education; instead, it has undertaken to comply with [SB 206] in a manner that is consistent with *O'Bannon*—that is, by loosening its restrictions to permit NIL benefits that are 'tethered to education.'" It is worth noting that the Ninth Circuit's decision cited the NCAA Federal and State Legislative Working Group's October 23, 2019 report, but not its more recent report from April 19, 2020. The Ninth Circuit also rejected the plaintiff's assertion that SB 206 and similar proposed legislation reflects a "consensus that student-athletes' receipt of payments unrelated to education will not dampen consumer interest in college sports," noting that SB 206's legislative history indicates that "concerns about fundamental fairness, rather than considerations regarding demand, drove its enactment."[35]

7. External Reports/Models

Influential independent organizations have formulated recommendations and plans for NIL compensation. This section briefly summarizes three of these plans/models:

- The Knight Commission on Intercollegiate Athletics (KCIA) recommended an updated NIL model "to ensure the fair treatment of college athletes and to better prioritize their education, health, safety, and success."[36] The KCIA proposes five guiding principles to protect the rights of college athletes to pursue NIL opportunities while also maintaining the foundational elements that distinguish college sports from professional sports. These principles are: 1) Fairness to Athletes as Students; 2) Education for College Athletes on NIL Rights; 3) Independent Oversight of NIL Rights; 4) Guardrails for NIL Rights; and 5) National uniformity. The guardrails prohibit conferences and institutions from arranging or providing compensation to college athletes for NIL, require NIL deals to be broadly consistent with fair market value, and forbid college athletes from using institution or conference trademarks and logos in NIL arrangements.
- The Drake Group proposed new rules to govern NIL that includes, among other things, an independent NIL Commission for setting NIL standards, a reporting structure for all NIL deals, the permissive use of agents by college athletes, a prohibition on institutions, boosters, or institution sponsors directly or indirectly initiating NIL arrangements, and a requirement that any compensation is commensurate with market rates and other standards.[37]
- The National College Players Association set forth model state legislation that would permit college athletes to receive NIL compensation.[38]

8. What are the Primary Arguments for and Against a Uniform NIL Act?

This section will first address the general arguments in favor of uniform rules in college athletics and other sports organizations and then address the specific arguments in favor of and against uniform NIL laws in college athletics.

General Benefits of Uniformity for Intercollegiate Athletic Associations and Other Sports Organizations

It is generally accepted by federal courts that organized sports entities are a unique blend of cooperation and competition (on and off the field), and that the teams and competitors in these organizations must reach some uniform agreements for the product (i.e., the underlying athletic competition) to exist. For example, at the most basic level, the teams need to agree on the rules of the game (e.g., how large is the field? How long is each game? What is the penalty for a personal foul?) and a schedule for each game. College Basketball Team A cannot play College Basketball Team B unless the two teams agree where to play, when to play, and how to play. Additionally, sports leagues and associations typically do not merely create an unrelated series of games. Rather, for example, the NCAA and its member schools cooperate to create a season of games culminating in the college basketball tournament and the national championship game. The season and the tournament cannot exist without an agreement among the schools.

The recognition that sports organizations need some level of uniformity for their product to exist differentiates them from the typical interstate non-sports businesses. While typical non-sports businesses that have operations in different states would often prefer the convenience of uniform state laws regarding employment, wages, etc., courts have held that the interdependence of sports teams requires some level of uniformity in their rules for the sports organizations to survive. As the Second Circuit has held, "[u]nlike the industrial context in which many work rules can differ from employer to employer-even though a roughly common bottom line is desirable-sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition, for example, are just a few."[39]

The Supreme Court addressed this issue in the context of college sports in the landmark *Board of Regents v. NCAA* decision, where the Court observed the following:

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.[40]

Courts have addressed the importance of uniform rules in college athletics in at least two other contexts. In a Title IX lawsuit, the Second Circuit held that uniform rules are a fundamental feature of college sports. Specifically, the court held that:

> Competitive cheerleading did not constitute a sport for purposes of Title IX because of the lack of uniform rules in competitive cheerleading competitions. The court observed that the "application of a uniform set of rules for competition is the…touchstone[] of a varsity sports program" and ensures "that play is fair in each game, that teams' performances can be compared across a season, and that teams can be distinguished in terms of quality."[41]

In the context of a dormant commerce clause challenge to a Nevada state law, the Ninth Circuit addressed the issue of uniformity in *NCAA v. Miller*.[42] In *Miller*, the Ninth Circuit held a Nevada state law that provided additional procedural due process protections in enforcement proceedings against Nevada colleges and universities violated the commerce clause. The court recognized Nevada's interest in assuring that its schools and citizens will be treated fairly, but held that:

> The authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad…. It takes no extended lucubration to discover that. If the procedures of the NCAA are to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable....[43]

The Ninth Circuit added that Nevada's statute "would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product" and emphasized that the NCAA's need for uniformity is "consistent with the Supreme Court's statement that the integrity of the NCAA's product cannot be preserved 'except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.'"[44]

This need for uniformity has also been recognized by several courts in the context of professional sports. For example, in *Partee v. San Diego Chargers*, the California Supreme Court observed the following:

> Professional football's teams are dependent upon the league playing schedule for competitive play…. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise.[45]

Multiple federal courts have similarly recognized the need of organized sports entities to create uniform rules. For example, the Second Circuit has noted the "important purpose of allowing [NFL] teams to establish and demand uniformity in the rules necessary for the proper functioning of the sport."[46] Similarly, the First Circuit has observed that "many courts have reasoned that in the sports area various agreed-upon procedures may be essential to survival."[47]

The broad argument in favor of uniformity is thus that the NCAA cannot effectively function as a national association of college sports if it is required to adopt conflicting or inconsistent rules from different states.

Arguments in Favor of a Uniform NIL Act

The general need for uniformity within sports organizations highlights the particular need for uniformity in NIL laws within intercollegiate athletics. Inconsistent state NIL laws could make it difficult for the NCAA and other governing bodies to effectively "restrain the manner in which institutions compete."[48] Specifically, part of the concern is that states with more permissive NIL laws could provide schools in that state the ability to offer greater levels of compensation than schools in states with more restrictive NIL laws. These more permissive laws would allow schools to gain a competitive advantage in recruiting and incentivize schools to use NIL deals as recruiting inducements. The NCAA has argued that this would exacerbate the competitive imbalance between schools and open the door to further corruption in the recruiting process.[49] The NCAA also argues that overly permissive NIL rules will incentivize students to focus on potential NIL opportunities, rather than academic or athletic opportunities, when choosing their schools.[50] The NCAA thus contends that differences in NIL laws would hinder the NCAA's goal of "providing a fair and level playing field—let alone the essential requirement of a common playing field."[51]

These are not merely hypothetical concerns. As discussed above, as of May 2020, 37 states have considered or passed NIL legislation. These laws (and proposed laws) have significant differences that could potentially create different recruiting advantages and opportunities and blur the distinction between college and professional sports.

For example, institutions subject to California SB 206 or other state legislation that only permits them to provide compensation to college athletes for their NIL (the Basic NIL Legislation) could be at a severe competitive disadvantage compared to institutions that are subject to South Carolina SB 935 or other state legislation that permits (or requires) them to provide compensation to college students unrelated to their NIL (the Enhanced NIL Legislation). Additionally, while most of the legislation is passive (in that it merely *prevents* institutions from prohibiting college athletes from receiving NIL compensation) some legislation, including the proposed laws in New York and South Carolina, is active (in that it *requires* states to provide college athletes with a certain amount or percentage of revenue).

There are numerous other potential significant differences in the various state NIL laws. For example, some states explicitly prohibit institutions from paying the college athletes directly for their NIL, while other legislation appears to permit this type of direct payment from institutions to the athletes. Each of these differences, which are explored in more detail above, could threaten to upend the NCAA and other intercollegiate governing bodies' attempts to provide "a common playing field" and amplify the existing competitive imbalances among schools.

Several state legislators have in fact explicitly acknowledged that they have introduced permissive NIL bills so that schools in their states can compete with schools in other states where NIL legislation has (or soon will) become law.[52] For example, Nebraska Senator Steve Lathrop has stated that NIL legislation will be used as "a recruitment tool. If other schools allowed their athletes to do this, and [Nebraska schools do not], then the players are not going to come here.

They will go to school where they can receive compensation for the…use of their name." A uniform act would eliminate the problems that might arise when an individual state law focuses on its own state interests rather than on the entirety of the collegiate sports structure.[53]

The NCAA also contends that a lack of uniformity will threaten to "wipe out the distinction between college and professional sports"[54] by allowing individual states to provide compensation that is inconsistent with the NCAA's definition of amateurism, including permitting college athletes to receive "pay for play."[55] The Ninth Circuit recently held that amateurism helps preserve consumer demand for college athletics and characterized amateurism as "not paying student-athletes unlimited payments unrelated to education, akin to salaries seen in professional sports leagues."[56] According to the Ninth Circuit, "not paying student-athletes is *precisely* what makes them amateurs" and noted that "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[57]

Again, it is not merely a hypothetical concern that states will enact laws that are inconsistent with the current (and proposed) definition of amateurism. At least 3 states are considering legislation that would permit or require institutions to compensate college athletes with a share of revenue from ticket sales and game broadcasts (among other things), while a number of states appear to permit schools to pay their college athletes directly for the use of their NIL. Both scenarios would be inconsistent with the NCAA's (and the Ninth Circuit's) current definition of amateurism.

Additionally, the likelihood that states will enact inconsistent laws regarding NIL highlights the challenges of maintaining uniformity for the NCAA and the benefit of a uniform act. Assume that State A permits college athletes to enter into NIL deals with their own institutions and with third parties, but State B only permits college athletes to enter into NIL deals with third parties (and not with their own institutions). The only way the NCAA can have a uniform NIL rule is if it adopts the most permissive state's NIL law (which, in this case, would allow college athletes to enter into NIL deals with their institutions and third parties).[58] In this scenario, the NCAA could still achieve uniformity by adopting the least restrictive state law, but the uniformity could be fleeting, as the NCAA would be at the whim of the next state that might adopt an even more permissive rule (for example, a rule that allowed college athletes to be paid for their performance).

As discussed above, the most permissive rule—and thus the only avenue to uniformity—could also be in conflict with the NCAA's definition of amateurism (or other core principles of the NCAA). For example, if the most permissive state law permits institutions to pay students directly as an inducement to attend that institution, the only way the NCAA could achieve uniformity is by permitting institutions to pay students directly, which would be in direct contravention to the NCAA's conception of amateurism.

It is also possible that the conflicts in the different state laws are so significant that they prevent the NCAA from complying with each of the laws and prevent any uniformity, further highlighting the benefit of a uniform act. For example, assume that State A enacts an NIL law requiring schools to share up to a maximum of 15% of revenues with its college athletes and State B enacts an NIL law requiring schools to share a minimum of 20% of its revenues with its college

athletes. The NCAA cannot create a uniform law that would comply with the laws of State A and State B. This type of scenario would not only permit the individual states to dictate NCAA policy (which may nor may not be advisable), but it would also render it impossible for the NCAA to implement uniform rules.[59] Instead, the NCAA would have to create different rules for schools and college athletes based on the substance of their individual state laws.

The areas of potential conflict or inconsistencies in state legislation are vast. For example, does the state law permit (or require) college athletes to earn money for use of NIL in broadcasts of games? Does the state law permit the institution to provide compensation directly to the college athlete for use of their NIL? Does the state law permit the use of agents by college athletes? Does the state law permit group licensing of NIL? Does the state law permit college athletes to use the institution's trademarks in NIL deals? Inconsistencies in some or all of these areas across state laws could heighten the concerns of the NCAA discussed above.

The proliferation of inconsistent state laws also highlights the risk of instability for the NCAA and other intercollegiate governing bodies. Even if the NCAA were to modify its rules to conform with the most permissive state law, a modification to an existing state law or the enactment of a new state law can dramatically change the NIL rules by which institutions can compete and operate. Given the interdependence of the institutions across the country, the impact of a change in one state's laws could have a ripple effect on schools in other states and the entire NCAA. A uniform law across all states would prevent this instability and ensure that schools in each state are playing under the same general rules.

Arguments against a Uniform NIL Act

There are several counterarguments to the potential benefits of a uniform act. First, significant non-uniformity already exists in various current NCAA rules.[60] For example:

- In 2014, the NCAA amended its Division-1 bylaws to grant the "Power Five" conferences the autonomy to adopt collectively legislation in certain areas, including cost-of-attendance stipends and insurance benefits for players, staff sizes, and recruiting rules.

- Institutions in most Division 1 conferences can offer their college athletes an athletic scholarship that covers the "full cost of attendance," but the Ivy League has a complete ban on athletics-related compensation or scholarships.

- While the NCAA prohibits college athletes from using their "athletics skill (directly or indirectly) for pay in any form in their sport" unrelated to education, NCAA legislation permits a wide range of payments—both related and unrelated to education. College athletes may receive: (i) awards valued at several hundred dollars for athletic performance which may take the form of Visa gift cards; (ii) disbursements from the NCAA's Student Assistance Fund and Academic Enhancement Fund for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid, health and safety expenses, clothing, travel, "personal or family expenses," loss-of-value insurance policies, car repair, personal legal services, parking tickets, and magazine

> subscriptions; (iii) cash stipends of several thousands of dollars calculated to cover costs of attendance beyond the fixed costs of tuition, room and board, and books, but used wholly at the student-athlete's discretion; (iv) mandatory medical care (available for at least two years after the athlete graduates) for an athletics-related injury; (v) unlimited meals and snacks; (vi) reimbursements for expenses incurred by student-athletes' significant others and children to attend certain athletic competitions; and (vii) a $30 per diem for "un-itemized incidental expenses during travel and practice" for championship events.[61]

Second, despite the NCAA's concerns about the impact of inconsistent NIL laws on recruiting, institutions already spend millions on recruiting student-athletes through coaches, facilities, and other amenities, and student-athletes often choose their institutions based on these factors. The NCAA's 2016 GOALS study shows that educational opportunity is not the sole driver for college choice and that some student-athletes make college choices based at least in part on athletic opportunities—and coaches—at that school. The study reported that "[a]thletics continues to play a prominent role in college choice across division. This includes quality of athletics facilities and presence of a particular coach. [Men's and women's] basketball stands out as a sport where the decision to enroll or to transfer (especially among Division I men) often depends on the coach at that college."[62] Similarly, the Seventh Circuit has also explicitly recognized that "student-athletes contemplating scholarship offers likely include economic factors in their decision-making process, such as the value of a given degree or the increased potential for entry into professional football."[63]

Third, while the NCAA fears that non-uniform NIL laws will detract from the competitive balance in college sports, as even the NCAA and its representatives have conceded, competitive balance is largely non-existent under current rules, as schools are free to compete for student-athletes based on coaches, facilities, etc., and schools with higher revenues consistently attract more highly-rated recruits. NCAA President Mark Emmert observed:

> When you go back and look at history, the financial differences have always been there, but some universities have huge competitive advantages through history and geography and decisions they've made over decades that are in some ways insurmountable. It just reinforces some of those inherent advantages that some universities have had for a century.[64]

Fourth and relatedly, a uniform act might prevent institutions or third parties from competing for college athletes and thus reduce the financial opportunities for the athletes. In the context of the loosening of restrictions on permissible meals for college athletes, President Emmert noted:

> The notion that schools might compete by offering better quality food, that's not inherently a bad thing. So let's compete over who can provide the best nutrition for a student-athlete. We compete over who can give them the best locker room. I'd rather they compete over who can give them the best nutrition. So will there be competition around that, I'm sure there will be, but I don't think that's a bad thing.[65]

Fifth, intercollegiate athletic associations can update their definition of amateurism to permit the NIL payments contemplated by the various legislative efforts. A more permissive NIL construct would be consistent with the historical evolution of the concept of amateurism in the NCAA, where yesterday's forbidden conduct (such as the granting of athletic scholarships) easily becomes a "natural" element of amateurism.

9. What is the Scope of a Potential NIL Act and What is the Potential Mechanism for Uniformity?

A uniform NIL act would need to provide college athletes with a meaningful opportunity to receive compensation for their NIL rights while also protecting college athletics and college athletes from potential misuse or abuse of these rights. There is near-universal agreement that some parameters need to be included in NIL legislation to protect against misuse or abuse of NIL deals. Every state law (or proposed state law) contains some of these "guardrails." For example, as discussed above, most of the state legislation expressly prohibits college athletes from entering into a NIL deal if it conflicts with an institution's contract. A uniform NIL act would need to consider what parameters are necessary to protect college athletics without unduly infringing on college athletes NIL rights. A uniform act would also likely need to consider the impact NIL laws would have across all levels of intercollegiate athletics, high school, youth, and recreational sports.

A uniform law can be achieved through a federal law or a uniform state act, or a hybrid of the two. A 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. A cooperative federalism regulatory model combines federal and state authority and can strike a balance between complete federal preemption (where federal law preempts all state action in a field), uncoordinated federal and state action (where separate federal and state law authority exists within a field), and state-only legislative action (where the legal authority rests within each individual state).[66] Cooperative federalism blends these models by permitting Congress to create a broad federal framework while also permitting the states to enact more detailed and nuanced laws that might have variations where necessary to meet a state's particular needs.[67] For example, states may want agents to register in their state if the agent seeks to represent a college athlete attending school in that state. Cooperative federalism laws can also permit states to implement stricter requirements than required by the operative federal law. Cooperative federalism can thus ensure both greater uniformity and flexibility through its hybrid approach.

The cooperative federalism model can encourage states to adopt a uniform state act through a conditional or reverse preemption regime, where most or all of the federal law is preempted if the state adopts the designated uniform state law. Conditional preemption incentivizes states to adopt uniform state legislation designated by Congress by essentially giving states two choices: 1) Do not adopt the uniform state law and federal legislation will preempt state law; 2) Adopt the uniform state law and the uniform state law will supersede federal legislation.

A well-known example of cooperative federalism and conditional preemption is E-Sign, which permits state law to supersede the federal E-SIGN law[68] if the states have adopted the ULC's promulgation of the Uniform Electronic Transactions Act at the state level. The ULC has also previously worked with Congress in several other areas to develop state and federal law

frameworks that operate in tandem. For example, in the area of college athletics, the ULC has worked in tandem with Congress on the Sports Agents Responsibility and Trust Act, which mirrors some of the important elements of the Uniform Athlete Agents Act.[69] This type of model could be an appropriate fit for NIL, particularly given that federal legislators (and the NCAA) are seeking or exploring a federal law that would completely preempt state law, while state lawmakers are enacting and introducing inconsistent and potentially conflicting legislation to (among other things) protect the college athletes in their states.

10. Groups Interested/Involved in Participating in a Drafting Effort

Please see Attachment B to the original Study Committee Report for a complete list of groups interested and involved in participating in a drafting effort.

11. Is there a reasonable probability that a uniform act will be adopted by a substantial number of states?

Given that 37 states have already adopted or proposed legislation in this area, and the recognized interest in providing college athletes with NIL rights while also protecting college athletics, there appears to be a reasonable probability that a uniform act may be adopted by a substantial number of states.

Response to Commissioner Perlman's Separate Statement:

This section addresses Commissioner Perlman's separate statement that explains his rationale for voting against the recommendation to proceed to a drafting committee to pursue act regarding College Athlete Name, Image, and Likeness Issues. Commissioner Perlman's full statement is attached to this report. We address each of his points below.

"As the sole vote against recommending a drafting committee to pursue a Student Athlete Name, Image, and Likeness Act, I thought it appropriate to file this separate statement of my reasons for doing so. I should acknowledge at the outset my profound opposition to granting student athletes the right to exploit the commercial value of their name and likeness during their collegiate careers. The current efforts to authorize this practice is a reaction to the uncontrolled spending of many university athletic departments—a legitimate issue but one that will not be solved by allowing more money to flow into the system. Student athletes are the best supported students on our campuses and any value in their celebrity status is created both by their talents but also by the enormous investments made by Universities in promoting athletics. Non-athlete students, graduating with significant debt, and student-athletes in less visible sports, will surely find the concern about the financial condition of fully supported student athletes ironic. And, in most institutions, these same non-student athletes through, mandatory tuition and student fee payments, are subsidizing full scholarship athletes.

But this is not why I voted against such a project."

The Study Committee has the utmost respect for Commissioner Perlman and values his wisdom, experience, and input in this area. Given that he states that his views on the merits of NIL payments are not the reason he voted against recommending a draft committee, this report will not address each of the substantive points he raises above. There are two points, however, that we wish to address. First, there is little doubt that the excessive spending by some university athletic departments is a significant factor driving the move for reform in this and other areas related to college athletics, but another significant factor is the widespread recognition (most notably by the NCAA itself within the last year) that college athletes should be entitled to receive compensation for the use of their NIL, like all other students on college campuses. The NCAA Federal and State Legislation Working Group Report and Recommendation states as follows in their April 17, 2020 Report:

> There are several broad reasons for the working group's recommendation that the divisions should consistently modernize their rules on commercial and promotional use of student-athlete NIL. a. Current rules could prevent student-athletes from pursuing opportunities available to college students generally b. The historic distinction between permitted and prohibited promotional activities should be reexamined in light of modern commercialization opportunities. c. Concerns about abuse of NIL commercialization are better addressed through proper regulation than prohibition.

Additionally, most proposals forbid the athletic departments or the institutions from having any involvement with—much less paying for – college athlete NIL rights. More permissive NIL rules therefore will not increase the spending by the schools.

Second, the basic case for allowing college athletes to receive payment for their NIL is that college athletes (like all people in this country) have a property right in their name, image, and likeness. Many college athletes have created tremendous value in their NILs and, absent NCAA restrictions, would receive significant compensation for them in an open market. These men and women—often from socio-economically disadvantaged families— are deprived of the economic benefit the market would pay for their property.

We respond to each of Commissioner Perlman's reasons for voting against the recommendation to proceed to the drafting stage below:

1. *"State legislatures, like universities, will seek to assure their athletes have a competitive if not superior opportunity for NIL payments relative to other states. There will be a tendency to compete to the top (or bottom depending on your point of view). Thus, any ULC product that restrains, even in appropriate ways, the exploitation of NIL values is unlikely to be enacted by states with more liberal provisions."*

The fact that the significant majority of the state legislation is nearly identical in substance suggests that the states are trying to level the playing field through their proposed laws, not gain a competitive advantage. There are a few outlier states, as discussed in the Study Committee Report, but if the states were truly "seek[ing] to ensure their athletes have a competitive if not superior opportunity for NIL payments relative to the other states," one would expect to see

successive state laws provide greater benefits to college athletes. Instead, we are seeing most states use the same basic template, which strongly suggests they are seeking an even playing field and that they would be amenable to a uniform law. In other words, the fact that there is already substantial uniformity in many of the proposed state laws strongly suggests that uniformity would be preferable for the states.

2. *"Currently, 37 states are considering such legislation. Once there are significant enactments, which is likely before the ULC can complete a proposal, it will be difficult to achieve uniformity."*

Only 3 states (California, Colorado, and Florida) have enacted laws, and all three have delayed effective dates. Florida's law, which was enacted on June 12, 2020, has the earliest effective date—July 1, 2021. The NIL laws in Colorado and California do not take effect until January 1, 2023. Given the pandemic and other issues facing states and the timing of their legislative sessions, it seems reasonable that enactments by other states will be delayed and it seems unlikely that there will be "significant enactments" before the ULC can complete a proposal. The ULC has an opportunity to influence the state legislators as they eventually revisit this issue and it might remove some of the urgency for the states if there is an understanding that a uniform solution is being drafted. It is also possible that Florida and other states will delay the effective dates of their laws because of the possibility of a uniform act.

3. *"Regulation of these payments, particularly any limits on these payments, will raise anti-trust issues that can be resolved only at the federal level."*

Antitrust issues can be avoided if a cooperative federalism model is used, as discussed in the Study Committee Report. Additionally, impacts on competition can be considered at the drafting stage, and a uniform NIL law (even without a cooperative federalism model) could decrease, rather than increase, any antitrust issues regarding NIL. For example, a uniform state law that eliminated all restrictions on NIL payments and created a true free market would not raise antitrust concerns, and in fact would eliminate the existing antitrust issues raised by the current NIL restrictions. The actual uniform law might be more restrictive, but antitrust concerns can be considered by the drafting committee.

4. "*There is actually some optimism that Congress may actually be able to enact an NIL bill that will provide uniformity, resolve antitrust concerns, and preempt divergent state laws. It would be my hope that the NCAA would take this opportunity to get Congressional support for other badly needed reforms, now foreclosed by antitrust concerns."*

Issues related to the pandemic, economic stimulus, and police reform, among others, coupled with the upcoming November elections, are likely to precedence over NIL reform at the federal level. There also appears to be an increased level of disagreement over this issue at the Congressional level and a reduced willingness to adopt a bipartisan federal approach, which further decreases the likelihood of timely Congressional action.

If the ULC committee can begin its drafting process quickly, it will have an opportunity to provide input and to suggest a dual federalism approach to Congress, much like occurred when Congress adopted the Sports Agent Responsibility and Trust Act and 44 states adopted the Uniform Athlete Agents Act. Several Congressional staffers have expressed interest in the ULC NIL committee and its work and attended the June 2, 2020 study committee meeting. There is optimism that Congress will strongly consider a dual federalism model. There are already more stakeholders involved with the NIL study committee than were ever involved with the UAAA drafting committee, and the stakeholders are uniformly enthusiastic about undertaking a drafting committee.

5. "*Any legislation in this area will face difficult issues of enforcement. Any limitations designed to prevent NIL opportunities from infecting recruiting, distracting SA's from their educational obligations, or providing external economic pressure for playing time, press availability, or agent representations will require regulatory authority. It is an open question whether the NCAA could enforce such limitations without raising jurisdictional or antitrust concerns. It would most certainly result in litigation."*

These concerns may be valid but should be considered when drafting a uniform law. The NCAA currently has regulations that govern nearly all conceivable aspects of recruiting, time management, agent involvement, etc. and their rules in these areas continue to evolve. For example, in the wake of the recent college basketball scandal, the Commission on College Basketball recommended, among other things, that college athletes receive earlier professional advice to determine whether it is advisable for them to declare for the NBA draft or return to college. As a result, in 2018 the NCAA created an agent certification program and new regulations permit, among other things, certain college basketball player to sign with and be represented by an NCAA-certified agent at the end of the basketball season while still maintaining eligibility.

A uniform NIL drafting committee can carefully consider what regulations are appropriate, necessary, and enforceable to address recruiting, time management, agent representation, and other issues.

6. "*Without NCAA regulations, it is difficult to envision an effective enforcement regime for any state enactment. This is not like the Athlete Agents Act where the provisions are enforced against persons outside the intercollegiate arena and the universities have an incentive to comply and to help enforce because of the potential leverage of NCAA eligibility requirements. Here, it is unclear whether this leverage can be applied, and if it cannot, who would have an incentive to enforce the provisions of any state enactment. Realistic enforcement (regardless of the terms of the legislation) depends on the assurance the act will be enforced against all competing athletic programs. There would be no way to provide such assurance. There was discussion within the study committee about a creative federalism approach similar to E-sign or the Athletic Agents Act that would provide for state adoption of uniform legislation within a federal framework. Such a process would solve much of my uneasiness. I am just not convinced that, given the visibility of the issue, Congress would politically want to delegate its resolution to the ULC. Nor do I think we would find support for this process among major intercollegiate power centers."*

Based on public reports, it appears that federal lawmakers are concerned about a federal-only approach and might welcome the benefits of a cooperative approach with the states. And, despite the wide range of interests represented by the observers during the study committee meeting, which included representatives from the NCAA and other "major intercollegiate power centers," as well as the National Federation of High Schools, agents, law professors, and former college athletes, there was near-unanimous support from for a uniform state law and interest in exploring a cooperative federalism approach.

And, given that there is "no question nor debate as to whether any rule here should be uniform," as the separate opinion asserts, it seems likely that there will be an interest in finding a creative solution to achieve uniformity.

Recommendation and Proposed Scope Drafting Committee Work:

The study committee recommends, with the enthusiastic and nearly-unanimous support of the observers who participated in the study committee meeting, that:

• A drafting committee be authorized to draft a uniform act on NIL issues;

• The act be a uniform act, not a model act.

• A 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 doing so in a timely manner

The study committee further recommends that a uniform law on NIL consider addressing the following: (1) a mechanism for providing college athletes with a meaningful opportunity to receive compensation for their NIL rights; (2) parameters to protect college athletics and college athletes from misuse or abuse of NIL deals;; (3) whether the act should create a right of action for college athletes if their NIL rights are violated; (4) a mechanism for certifying and regulating agents and third party professionals; and (5) whether and to what extent the act should apply to high school, youth, and recreational sports.

Endnotes.

[1] The Study Committee Report was written by the Study Committee Reporter, Professor Gabe Feldman. Professor Feldman is the Sher Garner Professor of Sports Law and Paul and Abram B. Barron Professor of Law at Tulane Law School, Director of the Tulane Sports Law Program, Associate Provost for NCAA Compliance at Tulane University, and Co-Director, Tulane Center for Sport.

[2] NCAA, "Amateurism," Last accessed Oct. 24, 2016, http://www.ncaa.org/amateurism.

[3] The following bylaws from the NCAA Division I Manual are illustrative of some of the key principles.

- **12.01.1 Eligibility for Intercollegiate Athletics.** Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.
- **12.01.2 Clear Line of Demarcation.** Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.
- **12.02.10 Professional Athlete.** 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 Association.
- **12.02.9 Pay.** Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.

[4] For example, in O'Bannon, the Ninth Circuit held that "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."

[5] Knight Commission on Intercollegiate Athletics Report (2010).

[6] NCAA Bylaw 2.9.

[7] https://mediakix.com/blog/influencer-marketing-industry-ad-spend-chart/

[8] *Id.*

[9] *Id.*

[10] https://fivethirtyeight.com/features/how-much-money-could-student-athletes-make-as-social-media-influencers/

[11] https://theathletic.com/1796999/2020/05/07/college-athlete-name-image-likeness-value/

[12] https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf

[13] *Id.*

[14] *Id.*

[15] Washington SB 5875 has slightly different language than the typical Basic NIL Legislation, allowing college athletes to "[r]eceive compensation for services actually provided, including, but not limited to, the use of the student's name, image, or likeness, as long as the compensation is commensurate with the market value of the services provided."

[16] https://assembly.state.ny.us/leg/?default_fld=&bn=S06722&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y

[17] https://www.scstatehouse.gov/sess123_2019-2020/bills/935.htm

[18] For example, Colorado SB 123 states: "Neither an institution nor an athletic association shall provide compensation to a current or prospective student athlete."

[19] For example, South Carolina SB 935 states: "An institution of higher learning shall not provide a prospective student athlete with compensation in relation to the prospective student athlete's name, image, or likeness."

[20] *See, e.g.,* South Carolina SB 935.

[21] *See, e.g.,* Washington SB 5875.

[22] *See* Washington SB 5875.

[23] *See* South Carolina SB 935.

[24] *See, e.g.,* Florida SB 646.

[25] *Id.* at 120. Courts have consistently relied on the above language in *Board of Regents* to reject a variety of challenges to the NCAA's amateurism restrictions. *See, e.g., Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) ("The no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college an 'pay for play' football.").

[26] *Id.*

[27] *Id.*

[28] In *Bloom v. NCAA*, *NCAA* 93 P.3d 621, 622 (Colo. App. 2004), Jeremy Bloom, a college football player, challenged the NCAA's endorsement restrictions. Bloom sought an injunction that would allow him to endorse ski equipment and model clothing while remaining eligible to play college football. The court denied the injunction, holding that the NCAA's restrictions on endorsements and media appearance were "rationally related to the legitimate purpose of retaining the "clear line of demarcation between intercollegiate athletics and professional sports."

[29] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

[30] As the Ninth Circuit later noted, "the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices." *Id.* The Ninth Circuit agreed with the District Court's conclusion that "that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers." *Id.*

[31] *O'Bannon*, 802 F.3d at 1068.

[32] In re NCAA Student Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271 (9th Cir. 2013).

[33] The Third Circuit reached a similar result in *Hart v. Elec. Arts, Inc.,*717 F.3d 141 (3d Cir. 2013).

[34] In re NCAA Grant-in-Aid Cap Antitrust Litig., No. 19-15566, 2020 WL 2519475 (9th Cir. May 18, 2020).

[35] *Id.* at *20.

[36]https://www.knightcommission.org/wp-content/uploads/2020/04/kcia-principles-new-rules-use-college-athletes-nil-040320-01.pdf. In the interests of full disclosure, the author of this report serves as a consultant for the Knight Commission on NIL issues.

[37] https://www.thedrakegroup.org/wp-content/uploads/2020/02/Final-Drake-NIL-Position-11-4-FINALb.pdf

[38] https://www.ncpanow.org/solutions-and-resources/model-legislation

[39] NBA v. Williams, 45 F.3d 684, 689 (2d Cir. 1995). The Ninth Circuit has similarly observed that "[d]ecisions in sports cases thus deal with the unique entity of the national professional sports league and have not been applied in other factual settings." Valley Bank of Nevada v. Plus Sys., Inc., 914 F.2d 1186, 1192 (9th Cir. 1990).

[40] NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 101–02, 104 S. Ct. 2948, 2960–61(1984). *See also, e.g.,* Law v. NCAA, 134 F.3d 1010, 1018-19 (10th Cir. 1998) (recognizing that "horizontal agreement are necessary for sports competition); Smith v. NCAA, 139 F.3d 180, 187 (3d Cir. 1998), vacated, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999) "We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field." The heightened need for uniformity has also been recognized in Olympic sports. See, e.g, Slaney v. The Int'l Amateur Athletic Fed'n, 244 F.3d 580, 595 (7th Cir. 2001) (recognizing the need for uniformity in determining questions of eligibility in Olympic sports).

[41] Biediger v. Quinnipiac Univ., 691 F.3d 85, 104–05 (2d Cir. 2012).

[42] NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).

[43] *Id.* at 638. Similarly, the District Court in *Miller* concluded that in order for the NCAA to accomplish its goals, the "enforcement procedures must be applied even-handedly and uniformly on a national basis" and that permitting the application of individual state laws "effectively invalidates the NCAA's system of internal governance and enforcement." *Miller I,* 795 F. Supp. at 1484. The district court added:

> The NCAA persuasively argues that its ability to accomplish its goals of scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis. In order to satisfactorily achieve these goals, the NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis.
>
> The Nevada statute, however, mandates procedures which are both substantially different from those contained in the NCAA bylaws and significantly burdensome on the NCAA's objective of maintaining a "level playing field" within intercollegiate athletics.
>
> This provision and similar provisions in other states would strip the NCAA of the authority to freely adopt its own procedural regulations. Because the NCAA enforcement proceedings would clearly be paralyzed by these procedural requirements, the NCAA would likely be reluctant to use its resources to enforce rules evenhandedly in the several venues in this country. Here, the extraterritorial effect of the Nevada statute is substantial. It severely restricts the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices associated with intercollegiate athletics.

Id. A federal court in Florida reached the same conclusion with respect to a similar Florida state law. NCAA v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585, at *1–2 (N.D. Fla. Nov. 8, 1994).

[44] *Id.* (quoting *Board of Regents of Univ. of Okla.,* 468 U.S. at 102, 104).

[45] Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 384–85, 668 P.2d 674, 678–79 (1983). This decision arose in the context of a plaintiff attempting to bring a state antitrust claim against a professional sports league and its relationship with its players. The court determined that "the burden on interstate commerce outweighs the state

interests in applying state antitrust laws to those relationships." *Id.* at 385. Similarly, in *City of Oakland v. Raiders*, the court noted that franchise relocation decisions "implicate the welfare not only of the individual team franchise, but of the entire League. The spectre of…local action...demonstrates the need for uniform, national regulation…..This is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit." City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414 (Cal. Ct. App. 1985).

[46] Clarett v. Nat'l Football League, 369 F.3d 124, 136 (2d Cir. 2004). *See also, e.g.,* Flood v. Kuhn, 316 F. Supp. 271, 279–80 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) (rejecting the application of state antitrust law to Major League Baseball given the "nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball" and the notion that "application of various and diverse state laws here would seriously interfere with league play and the operation of organized baseball.") The United States Supreme Court briefly addressed this issue, holding that the district court had "adequately dispose of the state law claims." Flood v. Kuhn, 407 U.S. 258, 284–85, 92 S. Ct. 2099, 2113, 32 L. Ed. 2d 728 (1972).

[47] M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 980 (1st Cir. 1984). *See also,* U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 789–90 (7th Cir. 1981) (same); Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003)(same). This same point has been recognized in the context of non-team sports outside of the league context. For example, in *Brenner v. World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982), the Second Circuit acknowledged the need for uniform rules in professional boxing and noted that pro boxing regulatory bodies do not "differ significantly from other sports regulatory bodies whose purpose is to insure the organized presentation of sporting events."

[48] NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 101–02, 104 S. Ct. 2948, 2960–61 (1984).

[49] *See, e.g.,* "If implemented, these laws would give some schools an unfair recruiting advantage and open the door to sponsorship arrangements being used as a recruiting inducement. This would create a huge imbalance among schools and could lead to corruption in the recruiting process." Statement from NCAA President Mark Emmert https://chicago.suntimes.com/2020/2/12/21134721/ncaa-mark-emmert-limit-compensation-college-athletes-us-senate.

[50] https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf

[51] https://247sports.com/college/kansas/Article/NCAA-president-Mark-Emmert-consistent-name-image-likeness-laws-crucial-143671899/

[52] *See, e.g.,* "Bill Allowing College Athletes to Make Money off Names Advances," Journal Star, February 20, 2020. https://journalstar.com/legislature/bill-allowing-college-athletes-to-make-money-off-names-advances/article_1c3f314e-5936-5c4f-894f-d760cd5164b7.html

[53] *See NCAA* statement ("But we cannot effectively achieve our goals if we are pulled in various and potentially inconsistent directions by state legislatures that may be focused on serving one set of constituents rather than serving the entire array of participants that the NCAA's own rulemaking processes are designed to serve.")

[54] NCAA Letter to Governor Newsom.

[55] The NCAA has also expressed concern that the state legislation would turn college athletes into employees and further erode the educational mission of college athletics.

[56] In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 2020 WL 2519475, at *10 (9th Cir. May 18, 2020) (internal quotation omitted). *See also, e.g.,* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 344 (7th Cir. 2012).

[57] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1076 (9th Cir. 2015).

[58] *See* NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993) (internal quotation omitted) ("In order to avoid liability under the Statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the Statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country."); Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 384–85, 668 P.2d 674, 678–79 (1983).

[59] See NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993) (discussing the "serious risk of inconsistent obligations wrought by" inconsistent state laws).

[60] The NCAA contemplates different NIL rules across its different divisions. https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf

[61] In re NCAA Grant-in-Aid Cap Antitrust Litig., 2020 WL 2519475, at *10 (9th Cir. May 18, 2020).

[62] *NCAA, Growth, Opportunities, Aspirations, and Learning of Students in College Study (GOALS)* (January 2016) http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final.pdf.

[63] *Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012).

[64] https://www.espn.com/dallas/story/_/id/7994476/ncaa-president-mark-emmert-proposed-playoff-spark-more-realignment?&elq=47f62483c12740f98b291799ee0c20ac&elqCampaignId=1386&altcast_code=5724561348
[65] https://abcnews.go.com/Sports/mark-emmert-food-competition/story?id=23377577
[66] William H. Henning, The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws, 2 Elon L. Rev. 39 (2011).
[67] *Id.*
[68] 15 U.S.C. § 7001 et seq.
[69] 15 U.S.C. § 7801 et seq.