
LET'S MAKE A WAGER: NCAA'S PROCOMPETITIVE JUSTIFICATION
WILL NOT SURVIVE THE AFTERMATH OF ALSTON AND CONGRESSIONAL
LEGISLATION

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I. Introduction

At a glance, the outside world might associate college athletes with fame, wealth, and the promise to become a professional athlete; in reality, these achievements are only obtainable by a select few.¹ The real winners involved in college sports are the National Collegiate Athletic Association (“NCAA”), school administrators, and coaches who receive copious amounts of profits, benefitting from the athletic ability of the players.² Because most college athletes will not make it

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¹ See Angela Farmer, *Let's get real with college athletes about their chances of going pro*, THE CONVERSATION (Apr. 26, 2019), archived at <https://perma.cc/EPP7-WQBB> (noting that “[F]ewer than 2% of college student-athletes ever play professional sports at any level for any amount of time.”). See Dalton Thacker, *Amateurism vs. Capitalism: A Practical Approach to Paying College Athletes*, 16 SEATTLE J. SOC. JUST. 183, 187 (2017) (finding that “[o]f the 18,684 NCAA men’s basketball players, only 44 are drafted into the National Basketball Association; of the 73,660 NCAA football players, only 251 are drafted into the National Football League.”). Additionally, the NCAA tries to circumvent around these statistics to provide college athletes with false hope in order to exploit their athletic ability to reap the benefits of multibillion-dollar television deals. *Id.*

² See Chris Murphy, *Madness, Inc. How everyone is getting rich off college sports-except the players*, MURPHY SENATE (Mar. 29, 2019), archived at <https://perma.cc/A8ML-XSU7> (highlighting that “[I]ast year, the Department of Education reported \$14 billion in total revenue collected by college sports programs, up from \$4 billion in 2003.”). Further, tax-exempt non-profit institutions condone and endorse broadcasting and apparel contracts that exceed \$250 million, while

to professional leagues, they should be given a chance to be compensated for the time and work they put in on a daily basis in order to provide for themselves and their families.³ A central legal issue in collegiate sports is the movement towards athlete compensation.⁴

The original Olympians in 600 B.C. were rewarded over 500 drachmae for winning an athletic competition which they could theoretically live off of for the rest of their lives.⁵ Despite some athletes being known as amateurs to their sport, Olympic athletes were rewarded for their athletic abilities and could profit off their name, image, and likeness.⁶ For years, the NCAA has prohibited compensation for college athletes beyond the payment of their

“amateurism” bars college athletes from benefitting off their own name, image, and likeness. *Id.* See Thacker, *supra* note 1, at 188 (describing how “many of the athletes that are responsible for this revenue live in tremendous poverty . . . 86 percent of college athletes live below the poverty line.”).

³ See Murphy, *supra* note 2 (purporting the vast amount of compensation school administrators, coaches, and the NCAA make off of the abilities of student-athletes). If most college athletes do not get the opportunity to play their sport professionally, there is no reason that they should not be compensated for their athletic ability that they bring to their school program. *Id.*

⁴ See Ramogi Huma, *NCPA Calls on US DOJ to Investigate NCAA Antitrust Violations*, NAT'L COLL. PLAYERS ASS'N (Sept. 23, 2019), archived at <https://perma.cc/C99Z-U6HK> (depicting public awareness of injustices that exist for current college athletes). “A recent poll found that 84% of regular college students and 89% of college athletes feel that NCAA sports exploit college athletes.” *Id.* The poll also reported that college athlete name, image, and likeness compensation was favored by 77% of regular students and 81% of college athletes. *Id.*

⁵ See Brandon Viall, *Why Allowing College Athletes to Profit Off Their Name, Image and Likeness Is the Right Call*, FISHDUCK OR. FOOTBALL ANALYSIS (Sept. 9, 2020), archived at <https://perma.cc/PR67-6SY2> (stating that “[t]he original Olympians were handsomely rewarded for their time and effort — to the tune of 500 drachma for winning an athletic competition.”); see also Brian Cronin, *Were the Ancient Greek Olympic athletes really amateurs?*, L.A. TIMES (Mar. 21, 2012), archived at <https://perma.cc/PV5L-ZHP8> (depicting that “[u]ntil the 1970s, competition in the Olympic Games was reserved for amateur athletes, which in this sense is defined strictly as ‘athletes who do not get paid to perform their sport.’”).

⁶ See Gregory R. Crane, *Frequently Asked Questions about the Ancient Olympic Games*, PERSEUS PROJECT (Apr. 24, 2019), archived at <https://perma.cc/F4F9-S7XP> (describing how “[a] victor received a crown made from olive leaves, and was entitled to have a statue of himself set up in Olympia.”). Additionally, victors were treated as celebrities in their communities which resulted in increased fame, benefits, and events named after them. *Id.*

education based on the concept of amateurism.⁷ However, in September of 2019, a spokesman for the National College Players Association (“NCPA”), reached out to the US Department of Justice outlining the various NCAA antitrust violations.⁸ Due to outside pressure and states taking their own initiative to construct laws to compensate athletes, the NCAA has begun to change its policies to allow student-athletes to receive compensation from third-party endorsements, a step in the right direction for college athletics.⁹

⁷ See SCHOOLED: THE PRICE OF COLLEGE SPORTS (Makuhari Media 2013) (discussing the profits top schools such as UCLA reels in a year off its football and basketball programs). Further, in 2012, UCLA basketball and football pulled in revenue of \$71 million dollars, administrators on average were paid \$700,000, and head coaches were paid \$1.9 million dollars juxtaposed to a student-athletes education which costed \$28,000. *Id.* See Viall, *supra* note 5 (discussing adoption of amateurism by Walter Byers in 1951 in order to avoid workers’ compensation claims). Amateurism wanted to avoid “claims like the one filed by former TCU running back Kent Waldrep in 1974 after he was paralyzed from the waist down,” and Waldrep lost his athletic scholarship. *Id.* See Jasmine Harris, *In the name of ‘amateurism,’ college athletes make money for everyone except themselves*, THE CONVERSATION (Apr. 5, 2019), archived at <https://perma.cc/HM7R-T53J> (highlighting that “\$986 million is spent annually on student-athlete scholarships at these schools to support 45,000 student athletes . . . [b]y comparison, approximately \$1.2 billion is spent annually on coaches’ salaries to pay just 4,400 coaches.”). See NCAA 2020-21 DIVISION I MANUAL 7–8 (Nov. 15, 2020), archived at <https://perma.cc/YDZ3-HQJJ> (defining rule 2.9 The Principle of Amateurism [*]: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.”). Moreover, student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises. *Id.*

⁸ See Huma, *supra* note 4 (stating that NCAA’s price fixing rules, prevention of player transfers, and forbidding legal representation e.g., sports agents—all violate antitrust law).

⁹ See Sarah Traynor, *California Says Checkmate: Exploring the Nation’s First Fair Pay to Play Act and What it Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. REV. 203, 204 (2020) (stating “[o]n September 30, 2019 in the presence of NBA superstar LeBron James and internet-sensation Katelyn Ohashi, California Governor Gavin Newsom signed Senate Bill 206 into law—the first bill in the nation to allow college student-athletes to profit from their name, image and likeness (“NIL”).”). Further, the NCAA must amend its bylaws and reconstruct their use of amateurism as a bar to student-athlete compensation in order to meet the needs of student-athletes now being able to be compensated for their name, image, and likeness. *Id.* at 215–16. The NCAA has no choice but to address these competing interests “if it intends to maintain its current monopoly over the college sports market.” *Id.* at 216. See Jim Turner, *Athlete pay*

Compensation for a college athlete's name, image, and likeness ("NIL") should be the less restrictive alternative to defer the NCAA's procompetitive justification of limiting student-athletes compensation to keep a distinction between college and professional sports.¹⁰ The use of strict guidelines and limitations by the NCAA against college athletes to regulate NIL rights infringes upon the antitrust anti-competitive rule of reason, and therefore, entitles student-athletes to compensation by the NCAA.¹¹ Part II of this note provides an overview of how the NCAA came to power and outlines the history of antitrust law in the United States concerning the allowance of NIL compensation and how Electronic Arts Sports Inc. ("EA Sports") fits into the depiction of a valid right of publicity claim.¹² Part III

remains issue in Florida after NCAA takes action, TALLAHASSEE DEMOCRAT (Oct. 29, 2019), archived at <https://perma.cc/8VSB-XGX2> (discussing how Senator Debbie Mayfield of Florida said in an email that she plans to continue to move forward with her legislation towards athletes being compensated for their name, image, and likeness despite the NCAA's unanimous vote to move towards letting student-athletes profit off their name, image, and likeness).

¹⁰ See Traynor, *supra* note 9, at 215–16 (explaining that the NCAA has no choice but to amend its bylaws to meet the interests of NIL compensation); Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and the Likeness and Colleges Maintain the Primacy of Academics*, 11 HARV. J. OF SPORTS & ENT. L. 247, 278–79 (2020) (indicating that this "[e]ffective reform, including the payment for NILs, will move the system along the spectrum toward professionalism."). Further, "these antitrust cases show the instability of the scope of amateurism and its relationship to consumer demand. Intercollegiate athletics, as discussed above, are increasingly commercial but still a hybrid model, containing elements of both professionalism and amateurism." Meyer & Zimbalist, *supra*.

¹¹ See *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1243–44 (9th Cir. 2020) ("conclud[ing] that the district court properly applied the Rule of Reason analysis in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1."). "To the contrary, it is the result of a cartel of buyers acting in concert to artificially depress the price that sellers could otherwise receive for their services. Our antitrust laws were originally meant to prohibit exactly this sort of distortion." *Id.* at 1267.

¹² See 15 U.S.C.A. § 1 (2020) (stating "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is [hereby] declared to be illegal."). See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 119 (1984) (holding that the role of the NCAA must be to preserve a tradition that might otherwise die and rules that restrict output of other institutions are hardly consistent with that role). "Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of

examines how courts have been reluctant to uphold the NCAA's amateurism model despite the adoption of NIL compensation and discusses the efforts taken by state legislatures to form their own athlete compensation rules before Congress establishes a universal rule.¹³ Part IV identifies current efforts being made by the NCAA and Congress in the development of NIL compensation and how amidst the Supreme Court's decision of *Alston v. NCAA* ("*Alston*"),¹⁴ EA Sports has announced its return of the NCAA college football videogame.¹⁵

intercollegiate athletics in the Nation's life." *Id.* See also Ellen Zavian, *The NCAA whiffed on esports. It's paying a price but can still learn a lesson*, THE WASH. POST (Aug. 6, 2020), archived at <https://perma.cc/LS5H-6HC2> (suggesting that "the NCAA might be kicking itself these days over a decision that its Board of Governors made a little over a year ago, on April 30, 2019. That was the day the NCAA declined to move esports under its governance umbrella.").

¹³ See Ben Kercheval, *Florida Gov. Ron DeSantis signs bill allowing college athletes to be paid for name, image and likeness*, CBS (June 12, 2020), archived at <https://perma.cc/P4CM-CZFE> (noting that Florida Governor Ron DeSantis signed a bill into action allowing college athletes to be compensated for their name, image, and likeness). The bill will go into effect on July 1, 2021, going into effect for the 2021–22 season. *Id.* DeSantis decided to take action because he wanted to put pressure on the NCAA to move forward. *Id.* See Jack Kelly, *Newly Passed California Fair Pay To Play Act Will Allow Student Athletes To Receive Compensation*, FORBES (Oct. 1, 2019), archived at <https://perma.cc/K76N-R47W> (discussing California Governor Gavin Newsom signing the Fair Pay to Play Act into law). The Act going into effect allows college athlete's to be compensated for their university's use of their name, image, and likeness. *Id.* See REPORT OF THE NCAABOARD OF GOVERNORS October 29, 2019, MEETING, NCAA (Oct. 29, 2019) [hereinafter NCAA REPORT], archived at <https://perma.cc/J8UZ-STVB> (outlining recommendations proposed by the NCAA for college athletes to be compensated for their name, image, and likeness).

¹⁴ *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

¹⁵ See Ross Dellenger & Pat Forde, *NCAA's Name, Image Likeness Legislation Proposal Revealed in Documents*, SPORTS ILLUSTRATED (Oct. 12, 2020), archived at <https://perma.cc/63LU-VEAM> [hereinafter Dellenger, *Legislation Proposal*] (outlining the recent proposal guidelines set out by the NCAA that student-athletes must abide by). Also, "an institution can prohibit an athlete's involvement in name, image and likeness activities that conflict with existing institutional sponsorship arrangements or other school values." *Id.* See also NCAA Slates "NIL" Proposal for Vote, ROPES & GRAY (Oct. 20, 2020), archived at <https://perma.cc/J8RZ-9CVK> (disclosing the 2020–21 legislative proposal introduced by the NCAA and its set guidelines and limitations); Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED (Sept. 24, 2020), archived at <https://perma.cc/TZ8L-87NT> [hereinafter Dellenger, *Bipartisan Bill*] (explaining that "[t]he bill assigns the Federal Trade Commission to oversee

II. History

A. Timeline of the NCAA

In the early twentieth century, public acknowledgment sparked the debate around the dangerousness of college football and called for its abolishment.¹⁶ Subsequently, the NCAA was created out of necessity in 1905 to help combat cheating scandals, lack of rule enforcement, and serious injuries which resulted from intercollegiate sports.¹⁷ Initially, the NCAA was solely a discussion group and rule-making body, but in 1921 it conducted its first national championship event, the National College Track and Field Championship, which extended its jurisdiction over other intercollegiate sports and their college associations.¹⁸

Between 1921 and the end of World War II, exploitative practices in the recruitment of student-athletes were at an all-time high.¹⁹ An example is James Hogan, the captain of the Yale football

and enforce NIL while also creating a commission that will continue studying the issue and report to Congress on an annual basis.”).

¹⁶ See Cailyn M. Reilly, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 270–72 (2012) (outlining the development of the NCAA, and how the public outcry called for an association to help deal with the probative effects that college football athletes suffered from injuries). The purpose of the NCAA was to help “accomplish governance and legislative reform in the future,” in order to structure a system that protects student-athletes even though that has not been the case. *Id.* at 271.

¹⁷ See Gregory Sconzo, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737, 740 (2013) (outlining the dire need for the NCAA to step in to save the future of intercollegiate sports).

¹⁸ See The Editors of Encyclopedia Britannica, *National Collegiate Athletic Association*, BRITANNICA (Sept. 14, 2020), *archived at* <https://perma.cc/2GZ6-VSM9> (depicting the creation of the NCAA and how it came to prominence in the early 21st century); Sconzo, *supra* note 17, at 740 (discussing the initial role of the NCAA in its creation and how it started to gain more power, and that the NCAA never anticipated the exposure and growth of the organization).

¹⁹ See Sconzo, *supra* note 17, at 741 (providing for the creation of the Sanity Code by the NCAA, which was regulated by the Constitutional Compliance Committee, but lacked proper enforcement methods). “In fact, the only enforcement power that the Constitutional Compliance Committee had was expulsion[;] [t]his penalty was so severe and so reluctantly used that it essentially left the Constitutional Compliance Committee powerless.” *Id.* See Ken Pendleton, *The Sanity Code*, SPORTS CONFLICT INST. (Oct. 11, 2020), *archived at* <https://perma.cc/C4TN-EAAK> (discussing prior college athletes that benefitted off pay and how illegal recruitment went against the purpose of intercollegiate athletics according to the NCAA).

team who in 1904 received free tuition, his own suite, a ten-day paid vacation in Cuba, and had a significant monopoly on the sale of American Tobacco Company products at Yale.²⁰ To address these instances of unfair athlete compensation, the NCAA developed a standard code of conduct for student-athletes and universities known as the Sanity Code in 1948.²¹ From the codes principles amateurism was born, and so was the NCAA's goal of controlling financial aid, recruitment, and academic standards for college athletes.²² A fair amount of criticism was raised around the new code which led to the 1951 convention to repeal the Sanity Code.²³

After World War II, college attendance significantly increased, leading to more televised events that put pressure on the NCAA to broadcast any events possible.²⁴ The Sanity Code was thus replaced

²⁰ See *id.* (illustrating the corruption that went on with certain players and coaches in college football before the NCAA implemented the Sanity Code); Andy Schwarz, *The NCAA Has Always Paid Players; Now It's Just Harder To Pretend They Don't*, DEADSPIN (Aug. 29, 2015), archived at <https://perma.cc/BS87-6SGQ> (acknowledging the need for the Sanity Code to help control colleges from paying their athletes compensation). "By 1951, the NCAA had identified seven schools—BC, The Citadel, Maryland, Villanova, Virginia, Virginia Tech, and VMI—that were, apparently insanely, paying football players through athletic scholarships." Schwarz, *supra*.

²¹ See Ryan Appel, *Breaking Bad: An Examination of the NCAA's Investigation Practices Over the Last Forty Years*, 22 U. MIAMI BUS. L. REV. 83, 85 (2014) (outlining the emergence of the NCAA's power through the Sanity Code and how the Code was unsuccessful sparking the creation of the Committee of Infractions). "The NCAA first addressed amateurism and eligibility issues in the 1920's with the development of the Amateur Committee." *Id.* at 84. The committee issues that were addressed at the time were subsidization and recruitment issues which helped in the formation of the Sanity Code in 1948. *Id.* at 85.

²² See JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 31 (2006) (noting that the Sanity Code was not like any other code established in the past; "[t]his one had teeth."). "The Executive Committee created by regulation a three-person Constitutional Compliance Committee with authority to interpret the constitution and to determine whether stated practices, actual or contemplated, are forbidden by, or are consistent with its provisions." *Id.*

²³ See *id.* at 40 (providing that "[t]he combination of anxiety over these provisions, concern about the severity of the expulsion punishment and the failure to gain the required two-thirds vote in 1950 led the 1951 Convention to repeal the Sanity Code."); Appel, *supra* note 21, at 85 (noting that under the Sanity Code, there was only one penalty for violations which was the expulsion through the NCAA through a 2/3 vote of its members).

²⁴ See Sconzo, *supra* note 17, at 742–43 (outlining the progression of the NCAA in its methods of enforcement against student-athletes); CROWLEY, *supra* note 22, at 31

in 1951 with the Committee of Infractions (“COI”), and was given much broader authority to hold student-athletes accountable rather than just holding institutions accountable.²⁵ In 1973, the NCAA had grown exponentially, which prompted the development of the Enforcement Staff which was created to deal with investigations while the COI conducted hearings.²⁶ In August 1973, a special convention was held creating the assemblage of the three division alignment: Division I, II, and III, that still serve as the NCAA’s organizational framework today.²⁷ The three division federation sparked the conflict between the NCAA and institutions fighting over football television rights.²⁸ The NCAA felt that if it did not take over television contracts, Division I conferences would because of their increase of power and

(stating that “no one could have envisioned the huge role electronic media would play in intercollegiate athletics when the NCAA sponsored the first men’s national basketball championship in 1939.”).

²⁵ See Sconzo, *supra* note 17, at 745 (discussing how the COI was given much greater sanction authority and became far more willing to exercise that authority).

²⁶ See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 185–86 (4th ed. 2010) (articulating Rule 5.3.2 of the NCAA Enforcement Procedure); CROWLEY, *supra* note 22, at 42 (stating “[t]he basis for such separation was the greater number of sponsored sports in Division I and a major emphasis in at least two of these sports, one of which had to be football or basketball.”); Appel, *supra* note 21, at 85 (noting “[The Enforcement Staff] is responsible for investigating a member institution’s failure to comply with NCAA legislation or to meet the conditions and obligations of membership.”). Whereas the COI imposes penalties against institutions or individuals that violate NCAA bylaws and overlooks the Enforcement Staff’s procedures. Appel, *supra* note 21, at 86.

²⁷ See CROWLEY, *supra* note 22, at 42 (noting the creation of the three-division system we know of today in college sports). “The Association now had a federated structure, with each division empowered to establish its own membership criteria.” *Id.* Moreover, guarantees were provided for championships at all levels, and changes were made in the key governance entities—the Council and Executive Committee—to reflect the new framework. *Id.* This was created by the NCAA in order to shrink down the size of Division I schools so they would not gain too much power that would be out of the NCAA’s hands. *Id.* At the 1978 convention, a proposal was made by the NCAA with CFA support to subdivide Division I athletics for football-playing institutions. *Id.* at 43. The I-A/I-AA legislation was approved but only resulted in a small reduction of I-A members-only dropping to 137, not to the 80 the NCAA had hoped for. *Id.*

²⁸ See CROWLEY, *supra* note 22, at 43 (showing how the NCAA was concerned with a competing TV contract). There was a lot of money on the line for the NCAA to secure rights fee doubling and tripling for major networks such as ABC and NBC. *Id.* at 44.

influence, thus resulting in the NCAA losing control of the networks.²⁹ The likely consequence of losing NCAA control would put the major networks in charge and the college institutions in financial peril.³⁰ Moreover, the NCAA feared that if the College Football Association (“CFA”) were to gain television dominance it would break the NCAA’s control resulting in substantial rewards for its members.³¹ In anticipation of these concerns, the NCAA called a Special Convention in 1981 in order to curtail the CFA’s attempted ascendancy over television football.³² In 1982, the NCAA continued to control all forms of telecasting and cablecasting and would hold the CFA accountable if they tried to solicit contract deals with the networks.³³ The competing interests between the NCAA and the CFA in the race

²⁹ See *id.* (displaying that the NCAA and the Executive Director Walter Byers made their best attempt to satisfy the football elite). Byers wrote later about his hopes for these changes: “If we satisfied [their] complaints and gave the football powerhouses more control, perhaps they would reject the lure and illusions of the CFA.” *Id.* It did not work out in the NCAA’s best interest, and the restrictions the NCAA put on the CFA in not allowing them their freedom of contract resulted in litigation *in NCAA v. Bd. of Regents of the University of Oklahoma*. *Id.*

³⁰ See *id.* at 43 (establishing the major concerns by the NCAA with the CFA trying to assert power in the 1979 convention). The CFA was working on a television initiative hoping to bring power to the two conferences: the Big 10 and Pacific-10. CROWLEY, *supra* note 22, at 43.

³¹ See *id.* (acknowledging that total broadcast rights return exceeded the projection by the NCAA). The NCAA “saw this as a bonanza for all members, including the major football institutions.” *Id.* at 44.

³² See *id.* (stating that “[t]he other bit of balancing the Association was prepared to undertake was support for further federation that could substantially reduce the number of I-A members.”). “To accomplish that purpose, with litigation looming and the CFA at a serious stage of negotiations with NBC, the NCAA called a Special Convention for December 1981.” *Id.* See Gordon S. White Jr., *N.C.A.A. Calls Convention on TV Policy*, THE N.Y. TIMES (Sept. 9, 1981), archived at <https://perma.cc/EBA9-57SC> (illustrating how the NCAA had threatened expulsion for colleges that intended to follow the CFA over the NCAA for television contracts). The CFA tried to fight for every university’s property rights in their own athletic program, but the NCAA continued to coerce universities from following in the CFA’s footsteps. *Id.*

³³ See CROWLEY, *supra* note 22, at 44 (noting “[t]hat pronouncement was reinforced by a motion passed at the January 1982 Convention that the NCAA would continue to ‘control all forms of . . . telecasting [and] cablecasting.’”). “These actions severely hampered the CFA’s ability to rally its members in support of a proposed agreement with NBC.” *Id.* The NCAA tried to impose infractions on the CFA for even trying to engage in television contracts that would be averse to their interests. *Id.* Eventually, in *NCAA v. Bd. of Regents of the University of Oklahoma*, the NCAA lost its case due to restricting the CFA’s right to compete violating antitrust precedent. *Id.* at 71–72.

to obtain network contracts was the primary issue sparking litigation between the two associations.³⁴ These actions hurt the CFA's ability to rally its members in support of a proposed agreement with broadcasting companies, resulting in the NCAA having sole leverage over future contracts with major broadcasting companies.³⁵

1. Amateurism in College Athletics

In 1916, a definition of amateurism was set forth in NCAA bylaws.³⁶ The principles of amateur status set forth by the NCAA

³⁴ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (holding that the role of the NCAA must be to preserve a tradition that might otherwise die and rules that restrict output of other institutions are hardly consistent with that role). "Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." *Id.* The Court also found, however, that the NCAA does play "a critical role" of maintaining amateurism as a core concept in college sports. *Id.* See Paul Anderson, *Recent Employment Law Issues in Sports and Entertainment*, MARQ. UNIV. L. SCH. (May 16, 2016), archived at <https://perma.cc/WKR7-K3QT> (outlining the issues of student-athlete compensation through an understanding of amateurism depicted through employment and antitrust law).

The NCAA seeks to market a particular brand of football—college football . . . In order to preserve the character and quality of the "product," *athletes must not be paid*, must be required to attend classes, and the like . . . the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id.

³⁵ See Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 291–92 (2018) (indicating that the NCAA has grown to where it is today with the 1985 convention recognizing all athletic programs on a national level as one collective unit). The Board of Governors is the highest governing NCAA body today, consisting of sixteen members who are presidents of various colleges throughout the country. *Id.* at 293. "Thus, the NCAA is simply a conduit by which the universities regulate themselves - a central location where the university presidents and chancellors can meet to discuss, and agree on, binding legislation." *Id.* at 293. See also CROWLEY, *supra* note 22, at 44 (representing the grotesque inflation in television contracts). "The total broadcast rights return exceeded \$281 million. For the first year (1982), the rights fee was \$64.8 million, more than doubling the \$31 million ABC paid for 1981. The 1983 total was \$74.2 million." *Id.*

³⁶ See *id.* at 168 (defining the original source and definition of amateurism coined by the NCAA).

stated more generally the prohibition of inducements to players to enter colleges and receive compensation due to their athletic abilities either directly or indirectly.³⁷ In other words, an amateur is someone who does not have a written or verbal agreement with an agent, has not profited above her actual and necessary expenses, or gained a competitive advantage in her sport.³⁸ When President Roosevelt called the White House meeting that led to the creation of the NCAA, he expressly acknowledged the concept of amateurism and how it should be a fundamental preservation for student-athletes in order to achieve fair competition.³⁹ The concept of amateurism developed over the

The first NCAA constitution contained a statement of the “Principles of Amateur Sport.” The statement forbade: Proselytizing, the offering of inducements to players to enter colleges or universities because of their athletics abilities and of supporting or maintaining players while students on account of their athletics abilities, either by athletics organizations, individual alumni, or otherwise, indirectly or directly; singling out prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular college or university; the playing of those ineligible as amateurs; the playing of those who are not bona fide students in good and regular standing; and improper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches, their assistants or the student body.

Id.

³⁷ See *id.* (describing the initial hold amateurism had on its institutions, where compliance was voluntary, until the Amateur Sports Act passed in 1978). Despite amateurism being a voluntary concept to abide by, it still served “through a lengthy battle with the AAU—and along the way, the U.S. Olympic Committee—over the control of athletics competition in which college students were involved.” *Id.* After the passage of the 1978 Amateur Sports Act, the number of sanctioned sports increased, and bylaw provisions multiplied. CROWLEY, *supra* note 22, at 168.

³⁸ See *WHAT IS AMATEURISM? AND WHY DOES THE NCAA CARE ABOUT IT?*, BREAKOUT SPORTS (Jan. 29, 2019), archived at <https://perma.cc/W4GS-2PFX> (depicting the NCAA’s importance in defining what a student-athlete is and that being an amateur is not optional if you choose to be a student-athlete). Essentially, this translates to zero participation in professional sports or special treatment based on the prospective student’s athletic talent or achievements. *Id.*

³⁹ See McDavis *supra* note 35, at 294 (indicating that “President Roosevelt expressly acknowledged the issue of amateurism preservation when he called the White House meetings that led to the formation of the NCAA.”); see also Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 257 (2003) (acknowledging that when Roosevelt called a White House meeting with representatives from Yale, Harvard, and Princeton, it was unlikely that he considered the future legal and philosophical issues that the NCAA

years in order to prevent athletes from accepting inducements due to either their athletic ability or recognition as a student having influence on their university campus.⁴⁰ It was not until the 1950's with the creation of the Committee of Infractions that the concept of amateurism started to be strictly enforced as a primary importance in the make-up of a student-athlete, focusing on education as an integral element that separated students from being considered professionals.⁴¹

would face); Karen Given, *Tracing the Origins of College Sports Amateurism*, WBUR (Oct. 13, 2017), *archived at* <https://perma.cc/R97H-8QCW> (stating that Roosevelt wanted to build leaders, and he was part of a movement that wanted to build leaders to be strong both mentally and physically through football—and football was only for amateurs).

⁴⁰ See Sconzo, *supra* note 17, at 742–43 (analyzing the initial amateurism bylaws set out in 1906). These principles required officials to enforce these measures including:

a. Proselyting [sic]

1. The offering of inducements to players to enter Colleges or Universities because of their athletic abilities, and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly.

2. The singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University.

b. The playing of those ineligible as amateurs.

c. The playing of those who are not bona-fide students in good and regular standing.

d. Improper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches, their assistants, or the student body.

Id. at 743. See Anderson, *supra* note 34, at 8 (defining the current principal rule of amateurism enforced by the NCAA). “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.* See Pendleton, *supra* note 19 (discussing how the NCAA created the Sanity Code in order to provide some sense of enforcement due to athletes such as James Hogan receiving substantial benefits from being a captain of the Yale football team and owning a monopoly over all the cigarettes sold at the university).

⁴¹ See McDavis, *supra* note 35, at 295 (distinguishing the differences between the NCAA structure of amateurism as to professionalism).

A professional in athletics is one who enters or takes part in any athletic contest from any other motive than the satisfaction of pure play impulses, or for the exercise, training, or social pleasures derived, or one who desires and secures from his skill or who

The model of amateurism was firmly grounded in the education of students who participated in athletics and was the target of how the NCAA would conduct intercollegiate athletics.⁴² The NCAA's rationale was to ensure heightened emphasis on educational objectives and the opportunity for academic success, specifically the graduation of student-athletes.⁴³ This justification of amateurism resulted in a cap on athletic scholarships which made it difficult for student-athletes to focus on their education because they needed to work a job in order to provide basic needs for themselves.⁴⁴ The NCAA made the decision to change its treatment of amateurism to provide college athletes with more benefits in response to concerns of athlete exploitation and an increasing amount of litigation brought under antitrust law.⁴⁵ With

accepts of spectators, partisans, or other interests, any material or economic advantage or reward.

Id. See Sconzo, *supra* note 17, at 743 (stating that the NCAA's concept of amateurism did not gain its muster until the formation of the COI in the 1950s—it was then that amateurism started to be enforced).

⁴² See CROWLEY, *supra* note 22, at 165 (elaborating on what the concept of amateurism holds and its central focus towards education of student-athletes).

⁴³ See NCAA 2020-21 DIVISION I MANUAL, *supra* note 7, at 1 (stating the NCAA's commitment to sound academic standards in hopes that it will help student-athletes succeed beyond college).

⁴⁴ See Chaz J. Gross, *MODIFYING AMATEURISM: A PERFORMANCE-BASED SOLUTION TO COMPENSATING STUDENT-ATHLETES FOR LICENSING THEIR NAMES, IMAGES, AND LIKENESSES*, 16 CHI. KENT J. INTELL. PROP. 259, 272–74 (2017) (discussing the important change in the NCAA's rule after the Sanity Code was adopted). “The court stated that with the current restrictions on student-athlete compensation, it is difficult for the NCAA to use amateurism as a legal justification because the cap that is placed on athletic-based financial aid does not support a focus towards higher education for student-athletes.” *Id.* See Thacker, *supra* note 1, at 201 (explaining the sad reality that most student-athletes cannot even afford basic necessities).

⁴⁵ See Meyer & Zimbalist, *supra* note 10, at 254 (depicting the drastic changes the NCAA had to invoke in order to give college athletes the benefits they deserved).

In 2012, for example, the NCAA approved a new rule giving Division I schools the option to award multiyear scholarships. In 2014, the Association started allowing expanded food services for athletes, beyond that available to non-athlete students. More significantly, in 2015, for Division I, the NCAA began allowing four-year scholarships and cost of attendance (“COA”) stipends to the traditional grant-in-aid that covered only the cost of tuition, room and board fees, and required books.

Id. See Kevin Allen, *Here are some benefits NCAA athletes already are eligible for that you might not know about*, USA TODAY (Oct. 1, 2019), *archived at*

alterations such as the awarding of multiyear scholarships, expanded food service for athletes, four-year scholarships, and cost of attendance (“COA”) stipends, college’s sought to provide additional benefits to student-athletes as long as they were tied to educational-related expenses, disallowing cash-based compensation.⁴⁶ In *Alston v. NCAA*, the U.S. Court of Appeals for the Ninth Circuit ruled that student-athletes could receive compensation beyond COA.⁴⁷ Subsequently, the NCAA appealed the decision, and in June of 2021, The Supreme Court determined that student-athletes could receive compensation

<https://perma.cc/L2CP-4ZYG> (explaining the increased benefits college athletes have received in recent years). Federal Pell Grants have been increased to \$6,195 for the upcoming 2019-20 season, a student assistance fund to help athletes with emergency situations and childcare if needed, ticket allotment, less restrictive medical coverage, and more help in earning a degree. *Id.*

⁴⁶ See Stacey Osburn, *Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions*, NCAA (Apr. 29, 2020), archived at <https://perma.cc/MQ9K-86ZN> (laying out the NCAA recent regulations in allowing student-athletes to receive third-party endorsements off their name, image, and likeness).

We must continue to engage with Congress in order to secure the appropriate legal and legislative framework to modernize our rules around name, image and likeness. We will do so in a way that underscores the Association’s mission to oversee and protect college athletics and college athletes on a national scale.

Id. See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), archived at <https://perma.cc/H6UG-85X5> (outlining recent recognition from the public that the NCAA is hiding behind their concept of amateurism as a bar for athlete compensation).

. . . [T]he real scandal is not that students are getting illegally paid or recruited, it’s that two of the noble principles on which the NCAA justifies its existence—“amateurism” and the “student-athlete”—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes.

Id. See Michael Rueda, *NCAA Suffers Another Blow to Current Amateurism Model*, FORBES (May 21, 2020), archived at <https://perma.cc/X2X8-6FKJ> (depicting how the recent legislation proposed in California, known as the “Fair Pay to Play Act,” forced the NCAA to address the name, image, and likeness issue seriously).

⁴⁷ See Rueda, *supra* note 46 (discussing the importance of the *Alston* decision on federal antitrust law and what the decision means for the NCAA going forward). Judge Milan D. Smith issued a passionate concurring opinion. *Id.* Smith explained, “that his court and prior courts have broadened applicable antitrust law and, as a result, permitted the NCAA to justify its anti-competitive behavior and restriction on compensation with the concept of consumer demand for college sports.” *Id.*

beyond COA, as long as the compensation was tied to education-related expenses.⁴⁸

B. Overview of Antitrust Law

Congress passed the first antitrust law, the Sherman Act, in 1890 which was defined as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”⁴⁹ Starting in the late 1880s, the federal government, as well as particular states, developed antitrust legislation in order to promote competition and prevent the formation of monopolies due to public agitation against large businesses such as the Standard Oil Company and the American Tobacco trust.⁵⁰ In 1890, the Sherman Act was passed through Congress in order to end monopolization and to promote free and open market competition, but the discussion on how

⁴⁸ See *Alston v. NCAA* (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1253–55 (9th Cir. 2020) (quoting *O’Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015)) (reaffirming “NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason . . . [T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules.”). Further, the Court stated that the NCAA’s amateurism standards were more restrictive than necessary violating the Sherman Act. *Id.* at 1254. See also Bobby Chen, *Antitrust Law and the Future of the NCAA’s Amateurism Rules*, THE REGULATORY REV. (Feb. 21, 2019), archived at <https://perma.cc/S3NZ-4JUV> (concluding that in *Ohio v. American Express*, “the NCAA violated the Sherman Act—because it keeps the price of its ‘labor’ artificially low by banning colleges from paying their players.”).

⁴⁹ See *The Antitrust Laws*, FED. TRADE COMM’N (Oct. 17, 2020), archived at <https://perma.cc/GL27-KWUW> (indicating that Congress passed the first antitrust law, the Sherman Act, in 1890 as a comprehensive “charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”). “The Sherman Act outlaws ‘every contract, combination, or conspiracy in restraint of trade,’ and any ‘monopolization, attempted monopolization, or conspiracy or combination to monopolize.’” *Id.*

⁵⁰ See WONG, *supra* note 26, at 452–53 (depicting the history of antitrust law, and the federal standard against anticompetitive monopolies both on the federal and state levels). “In 1890, the Sherman Act was passed by Congress to put an end to unfair monopolization and to protect U.S. consumers by promoting free and open market competition.” *Id.* at 453. See also Ann M. Mayo & Richard J. Hunter Jr., *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L. J. 69, 70 (1999) (explaining the purpose of the creation of antitrust law in the United States and how major monopolies such as Standard Oil fixed prices in order to control supply and demand in the market resulting in an unreasonable restraint of trade).

to interpret the statute was up for debate in subsequent years.⁵¹ Early cases dealing with antitrust violations struck out any contract that placed a restraint on trade.⁵² As antitrust law developed, courts started to carve out exceptions to restraints of trade including the formation of corporations, legally attenuated contracts, and covenants not to compete.⁵³ It was not until the decision in *United States v. Trans-Missouri Freight Association*⁵⁴ in 1897, that the Supreme Court developed the *per se* rule which was a conclusive presumption of illegality for all forms of price-fixing.⁵⁵ This case stood for the

⁵¹ See WONG, *supra* note 26, at 453 (outlining the history of the Sherman Act and why it was enacted, as well as the history of the NCAA's successful defense and how in recent years the antitrust laws do not afford the NCAA the same protection). The NCAA did have successes using antitrust law as a bar. *Id.* at 510. In *Jones v. NCAA*, the plaintiff had received compensation for playing hockey in Canada prior to joining Northeastern University. *Id.* See also *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that, with respect to antitrust allegations, the Sherman Act does not apply to the NCAA or its members in the setting of eligibility standards for intercollegiate athletics).

⁵² See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 345–46 (1897) (White, J., dissenting) (claiming that the Sherman Act applies to every contract in restraint of trade regardless of whether they were reasonable under the common law). Further, Justice White poses an issue with this line of reasoning. *Id.* at 344. Justice White states that Justice Peckham's majority outlaws a reasonableness standard which is the end of corporate business law as we know it. *Id.* Justice White would rather a Rule of Reason analysis because the Court will not know what factors to consider when concluding whether a restraint exists. *Id.*

⁵³ See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 245 (1899) (holding that to be lawful, a contract must be one which there is a main purpose, to which the covenant in restraint of trade is merely ancillary). No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. *Id.* See also *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898) (stating that an agreement entered into for the purpose of promoting a legitimate business interest of an individual or corporation is not covered by the Sherman Act).

⁵⁴ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

⁵⁵ See *Trans-Missouri Freight Ass'n*, 166 U.S. at 346 (White, J., dissenting) (establishing that there are certain types of contracts that were never intended to be in violation of the Sherman Act). "When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress." *Id.* at 328. See also

proposition that if a determination was made by the court that two firms conspired together to fix prices in a particular industry, it would be considered illegal without inquiring into whether the proposed restraint was reasonable.⁵⁶

The Sherman Act applied to athletic teams due to their consistent travel in interstate commerce.⁵⁷ Section 1 of the Sherman

Standard Oil Co. v. United States, 221 U.S. 1, 22 (1911) (considering the need for a per se rule in Antitrust). Justice White, in creating the per se rule, reasoned that the earlier cases held only that:

considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases that decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

Id. at 65.

⁵⁶ See *id.* at 23 (defining the reasoning of the per se rule that is now used in current antitrust analysis). See also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (explaining that a firm does not have to actually have the power to fix prices and that a showing of conspiracy in itself is a violation of the Sherman Act and is per se illegal). Moreover, raising, lowering, or stabilizing are all considered a form of price fixing in some aspect. *Id.*

⁵⁷ See WONG, *supra* note 26, at 453 (noting that “[w]ith regard to the sports industry, it is usually the Sherman Act that is applicable, not the state antitrust acts, due to the interstate travel by teams and television and radio broadcasting across state lines.”). However, state antitrust law is applicable if a sport or athletic team operates within that particular state’s borders, as well as the federal rule. *Id.* There was a change of the Court when determining whether sports teams were a business involved in interstate commerce. *Id.* at 458. “[B]eginning in the 1950s and peaking in the 1970s and 1980s, players began to use the antitrust laws again to challenge restrictive league rules that prevented players from earning market value, or even having the choice of where to play.” *Id.* See *Legal Information Institute*, CORNELL L. SCH. (Nov. 10, 2020), archived at <https://perma.cc/KDB5-H98B> (noting that interstate commerce is defined by “[t]he buying, selling, or moving of products, services, or money across state borders.”). See also WONG, *supra* note 26, at 458 (citing *United States v. Shubert*, 348 U.S. 222, 233–34 (1955)) (holding that “the Supreme Court found that the antitrust laws extended to both the production and the operation of theatrical productions across the United States.”). Further, in *United States v. Int’l Boxing Club*, the Court held that the defendant’s promotion of boxing across state lines constituted trade or commerce among several states, as outlined in the Sherman

Antitrust Act provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or within foreign nations, is hereby declared to be illegal.”⁵⁸ The letter of the law indicates that all contracts that bind parties constitute some form of a restraint of trade; however, the Supreme Court has interpreted the statute to bar only “unreasonable restraints of trade.”⁵⁹ The analysis that courts uses to examine unreasonable restraints of trade is known as the Rule of Reason.⁶⁰ Antitrust’s Rule of Reason analysis requires a determination of anticompetitive effects.⁶¹ Traditionally, there must be a showing that the defendant has requisite market power to profit by holding output below the competitive level, and the burden is on the plaintiff to show that the contract has a “substantially adverse effect on competition.”⁶²

Act. *Id.* “The Court ruled against the defendant and opened up the possibility that antitrust laws could indeed apply to the sports industry, contrary to the rulings involving professional baseball.” *Id.*

⁵⁸ See Sconzo, *supra* note 17, at 748 (stating the elements of a Sherman Antitrust Act Claim for Rule of Reason analysis). See 15 U.S.C.A. § 1 (2004) (“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 declared to be illegal.”).

⁵⁹ See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 119 (1984) (ruling that the NCAA’s actions were a restraint of trade, violating federal antitrust laws); see also Sconzo, *supra* note 17, at 747 (stating that since the Sherman Antitrust Act is so broad, the Supreme Court had to limit the restrictions contained in section 1 to unreasonable restraints of trade).

⁶⁰ See Sconzo, *supra* note 17, at 747–48 (discussing the differences in the claims brought through per se analysis as juxtaposed to Rule of Reason analysis). “Per se violations occur when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.” *Id.* at 747.

⁶¹ See Herbert J. Hovenkamp, *The NCAA and the Rule of Reason*, FACULTY OF SCHOLARSHIP AT PENN L. 1, 2 (2017) (asserting the Rule of Reason analysis under the Sherman Act and how the Rule of Reason claim in court has been a sufficient recourse of petitioners against the NCAA’s amateurism defense). The Antitrust’s Rule of Reason analysis requires a determination of anticompetitive effects, requiring a showing that the defendants have market power, as well as a showing of the defendants’ market share, and then a showing of an impact on competition. *Id.*

⁶² See WONG, *supra* note 26, at 455 (stating that “[t]o prove that a monopoly exists, two elements must be present: the possession of monopoly market power and the use of unacceptable means to acquire, entrench, or maintain that market power.”). A simple test of antitrust legislation, as it pertains to monopolization, is to make sure that companies that do have a monopoly over a particular market do not prevent the rise of similar products in that market. *Id.* at 456. See McDavis, *supra* note 35, at

1. Rule of Reason Analysis and College Athletics

Rule of Reason analysis, as applied to the NCAA, was used as tensions grew between amateur athletes and the NCAA over profits.⁶³ The Rule of Reason framework involves three burden shifting steps to determine whether the restraint being challenged is to promote competition or impede it.⁶⁴ These steps include: (1) Whether restraint of trade creates anti-competitive effects; (2) if so, the burden shifts to the defendant to prove pro-competitive benefits flowing from the restraint; and (3) if the defendant is successful, the burden shifts back to the plaintiff to show that the challenged conduct is not reasonably necessary to achieve the legitimate benefits or that comparable procompetitive benefits could be achieved through a less restrictive

300–02 (demonstrating the multiple burden shifting analysis necessary under a Rule of Reason analysis). “If the plaintiff can satisfy this burden, the defendant must then come forward with evidence of the restraint’s legitimate procompetitive justifications . . . the defendant can demonstrate such a justification, the burden will shift back to plaintiff to demonstrate that the defendant’s justification can be achieved by substantially less restrictive means.” *Id.* at 301.

⁶³ See WONG, *supra* note 26, at 504 (stating that “[i]n the past, amateur athletic organizations have not been subject to the type of antitrust litigation faced by the professional sports industry). “However, with the increased prominence of amateur athletics and the money now involved, organizations such as the NCAA are increasingly subject to antitrust litigation.” *Id.* See also SCHOOLED: THE PRICE OF COLLEGE SPORTS, *supra* note 7 (noting that “In 2012, UCLA basketball and football pulled in revenue of \$71 million dollars, administrators on average were paid \$700,000, and head coaches were paid \$1.9 million dollars juxtaposed to a student-athletes education which costed \$28,000.”).

⁶⁴ See Meyer & Zimbalist, *supra* note 10, at 268 (discussing the three-step analysis to determine whether the conduct at question is unreasonably anticompetitive).

The judicially created rule of reason framework involves three burden-shifting steps. First, the plaintiff has the burden of proving that the restraint creates anti-competitive effects. If the plaintiff successfully argues this point, the analysis moves to the second step, in which the burden shifts to the defendant to prove pro-competitive benefits flowing from the restraint. If the defendant’s justifications are “sufficient,” the burden shifts back to the plaintiff, in the third step, to show that the challenged conduct is not reasonably necessary to achieve the legitimate benefits or that comparable procompetitive benefits could be achieved through a less restrictive alternative (“LRA”) that is virtually as effective and as economically efficient.

Id.

alternative.⁶⁵ Courts will try to examine the anti-competitive effects and the least restrictive alternative and will come to a conclusion on whether the anti-competitive conduct by the defendant give grounds for the disadvantageous impact.⁶⁶

The Supreme Court's decision in *NCAA v. Board of Regents*⁶⁷ ("Board of Regents"), was the first case in which the court decided to apply the Rule of Reason analysis to college sports.⁶⁸ The Court decided that they could not apply a per se conclusive presumption of illegality because the NCAA involves an industry in which restraints on competition are essential if the product is to be available at all.⁶⁹ The NCAA controlled how many games a college could broadcast on national TV and the prices for such broadcasts.⁷⁰ In applying the Rule of Reason analysis, The Court held that "by curtailing output and blunting the ability of member institutions to respond to consumer

⁶⁵ See *id.* at 268–69 (reiterating the burden shifting effects in determining whether the conduct in question is unreasonably anticompetitive).

⁶⁶ See *id.* (outlining the steps the court will take to determine whether the defendant's anti-competitive conduct has a less restrictive alternative).

⁶⁷ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

⁶⁸ See *Bd. of Regents*, 468 U.S. at 102 (finding that although the Court found that the NCAA establish an anti-competitive effect against the petitioners, it did not find a less restrictive alternative appropriate and therefore upheld the NCAA's action through the procompetitive stance of amateurism in college sports). See also Meyer & Zimbalist, *supra* note 10, at 269 (discussing *Bd. of Regents* as the first case to apply the Rule of Reason analysis to a case involving the NCAA). At the time, the Court decided not to address whether college athletes should be paid and chose to only address whether TV contracts secured by the NCAA were an unreasonable anti-competitive bar on the petitioners. *Id.* at 270. "Yet each of these regulations represents a desirable and legitimate attempt to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Id.* This conclusion by the Court has proven to be dicta today. *Id.*

⁶⁹ See *Bd. of Regents*, 468 U.S. at 102–03 (noting that the Court decided that it would be inappropriate to apply a per se rule to this case). "This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a non-profit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *Id.* 100–01. Moreover, the Court concluded that horizontal restraints on competition are essential to whether the NCAA can be available at all. *Id.*

⁷⁰ See *id.* 88–89 (explaining that "[t]he University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games."). The current plan "limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan." *Id.* at 94.

preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."⁷¹ Even though The Court found that the NCAA's television plan was a restraint of trade under a Rule of Reason analysis, they agreed with the district court's conclusion that the NCAA's other restrictions designed to preserve amateurism were clearly sufficient to preserve a competitive balance.⁷² In other words, the NCAA's procompetitive justification through a Rule of Reason analysis to uphold its amateurism guidelines were a sufficient justification for why student-athletes could not be compensated for anything beyond COA.⁷³ Because antitrust favored the NCAA's amateurism rules, student-athletes were not paid in any aspect, even Kent Waldrep, who was paralyzed from the waist down while playing football, lost his scholarship.⁷⁴ The decision, opened the doors for Rule of Reason analysis for future petitioners challenging the NCAA's authority.⁷⁵

⁷¹ See *id.* at 120 (holding that "consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role."). "Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan." *Bd. of Regents*, 468 U.S. at 119.

⁷² See *id.* at 120–21 (finding that the NCAA imposes a variety of restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance). Further, this competitive balance is more justified than the television plan, and which "are clearly sufficient to preserve competitive balance to the extent it is within the NCAA's power to do so." *Id.*

⁷³ See Hovenkamp, *supra* note 61, at 5 (stating that according to antitrust law, student-athletes are considered amateurs which limits their individual right to be compensated for athletic pay). Moreover, "[t]he Supreme Court even recognized the need for regulations that represent 'a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'" *Id.* at 6.

⁷⁴ See Viall, *supra* note 5 (discussing adoption of amateurism by Walter Byers in 1951 in order to avoid workers' compensation claims). Amateurism wanted to avoid "claims like the one filed by former TCU running back Kent Waldrep in 1974 after he was paralyzed from the waist down," and Waldrep lost his athletic scholarship. *Id.*

⁷⁵ See *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) (attesting that the NCAA is subject to antitrust scrutiny and must be applied under the Rule of Reason analysis). "In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes." *Id.*

C. *Intellectual Property Law and Right of Privacy*

Intellectual property refers to ownership interests derived from creations of the human mind or intellect, “such inventions; literacy and artistic works; designs; and symbols, names and images used in commerce.”⁷⁶ Legal protections under intellectual property law are provided for under copyrights, patents, trade secrets, and trademarks.⁷⁷ The laws of intellectual property give property owners “the right to exclude others from the subject matter of protection” and encourages innovation, while concurrently limiting competition.⁷⁸ These characteristics of intellectual property law reward the inventor and creator with exclusive rights in exchange for their creative efforts.⁷⁹

⁷⁶ See Tanyon Boston, *Plot Diagram: Intellectual Property v. NCAA Amateurism, Et Al.- Part I*, 15 VA. SPORTS & ENT. L. J. 39, 42 (2015) (depicting the exposition of intellectual property law and its sole rights that protect constituents from being exploited for their creativity). Intellectual property law sparks innovation, affording protection when necessary. *Id.* “Early U.S. concepts of IP were heavily influenced by John Locke’s ‘sweat of the brow’ theory of property which, in summary, states that property rights are based on the labor that one expends in creating the property in question.” *Id.* at 41. “According to Locke, ‘every man has a property in his own person, that nobody has any right to but himself.’” *Id.* “The labour of his body and the work of his hands, we may say, are strictly his.” *Id.* Accordingly, most forms of IP protection in the United States are designed to encourage investments of time, energy, and resources in IP creation. *Id.*

⁷⁷ See Boston, *supra* note 76, at 48 (laying out the legal protections provided for under IP). Copyright law protects original works of authorship fixed in a tangible medium of expression; trademark law allows trademark owners to prevent others from using a mark if the use is likely to conduce or deceive consumers about the source, sponsorship, or affiliation of the goods; right of publicity protects a person use of name, image, and likeness. *Id.* at 43.

⁷⁸ See *id.* at 44 (defining the purpose of intellectual property law and setting up the protection as it relates to NIL under right of publicity). “Using student-athletes’ NILs in commercial broadcasts of NCAA championship games and in game-related materials clearly raises publicity rights issues.” *Id.* at 45. To account for this, the NCAA used to require student-athletes to sign the former Part IV of the Student-Athlete Statement (“Publicity Rights Release”), which purported to serve as consent for the NCAA to use student-athlete NILs. *Id.* Similarly, schools have required that student-athletes assign their NILs to both the school and the school’s conference. *Id.*

⁷⁹ See Boston, *supra* note 76, at 42 (establishing that the basis of intellectual property law is to protect the inventor or creator with exclusive rights and its connection with antitrust protection). “When IP and antitrust law collide, the courts are charged with the unenviable task of balancing IP law’s goal of creating incentives to innovate with antitrust law’s goal of ensuring robust competition.” *Id.* Subsequently, the right of publicity and antitrust laws applicable to student-athletes compensation are examined through the *O’Bannon* litigation. *Id.*

Although the right of publicity has been juxtaposed to copyright and trademark law, it is generally taught as a subset of entertainment law and is distinguishable from the two.⁸⁰

1. Right of Publicity: Name, Image and Likeness

In most states, you can be sued for using someone else's NIL if you do not have the permission to do so.⁸¹ Derived from the right of

⁸⁰ See Marc Greenberg & Michael L. Lovitz, *Right of Publicity and the Intersection of Copyright and Trademark Law*, 484 GOLDEN GATE UNIVERSITY SCHOOL OF LAW 1, 2 (2012) (establishing that the right of publicity is generally taught in law schools as a subset of entertainment law and is distinguished from the major intellectual property rights sources of copyright and trademark). The right of publicity has little to do with copyright, and federal copyright laws generally will not preempt a state-based right of publicity claim. *Id.* at 485. There are, however, some noteworthy comparisons to be made between right of publicity and trademark law. *Id.* "Theoretically, the Right of Publicity is of the same genus as unfair competition and, more precisely, the doctrine of misappropriation—two hallmarks of trademark law, as reflected in the Lanham Act." *Id.* "[P]roprietors of both trademark and publicity rights seek to prevent others from reaping unjust rewards by appropriation of the mark or celebrity's fame." *Id.* See also BARTON BEEBE & JOHN M. DESMARAIS, *TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK*, 606–18 (8th ed. 2021) (quoting *Brown v. Electronic Arts*, 724 F.3d 1235 (9th Cir. 2013)) (finding insignificant recourse from trademark law's Expressive Use Test under the Lanham Act when NIL compensation cannot be achieved by the plaintiff).

For example, in [Brown], the case involving the video game maker's use of Jim Brown's likeness, the Ninth Circuit explained that even persuasive survey evidence showing consumer confusion would not be enough to satisfy the prong: The test requires that the use be *explicitly* misleading to consumers. To be relevant, evidence must relate to the nature of the behavior of the identifying material's user, not the impact of the use. Even if Brown could offer a survey demonstrating that consumers of the Madden NFL series believed that Brown endorsed the game, that would not support the claim that the use was explicitly misleading to consumers.

Id. at 618.

⁸¹ See *Using the Name or Likeness of Another*, DIGITAL MEDIA L. PROJECT (Nov. 14, 2020) [hereinafter *Name or Likeness*], archived at <https://perma.cc/4YEM-D3W4> (defining invasion of privacy through misappropriation of name, image, and likeness and the violation of the right of publicity).

A plaintiff must establish three elements to hold someone liable for unlawful use of name or likeness:

1. Use of a Protected Attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by

privacy, the right of publicity recognizes and protects an individual's economic interest in their NIL and gives individuals the right to be "to be left alone."⁸² Publicity rights protect against unauthorized appropriations of the commercial value of a person's identity where the person's NIL are used for commercial uses without consent.⁸³ The right of publicity is rooted in state common law and is now recognized as an independent right.⁸⁴

The right of publicity concerns the right to control the commercial use of one's identity.⁸⁵ The Supreme Court of the United

the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.

2. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.

3. No Consent: The plaintiff must establish that he or she did not give permission for the offending use.

Id.

⁸² See James Landry & Thomas A. Baker III, *CHANGE OR BE CHANGED: A PROPOSAL FOR THE NCAA TO COMBAT CORRUPTION AND UNFAIRNESS BY PROACTIVELY REFORMING ITS REGULATION OF ATHLETE PUBLICITY RIGHTS*, 9 N.Y.U. J. OF INTELL. PROP. & ENT. L. 1, 33–34 (2020) (discussing the origins of college athlete publicity rights and its relation to name, image, and likeness of college athlete compensation); Greenberg & Lovitz, *supra* note 80, at 484 (enunciating the right of privacy that is based in four categories of protection). These categories coined by William Prosser include: "1) Protection against intrusion into one's private affairs; 2) Avoidance of disclosure of one's embarrassing private facts; 3) Protection against publicity placing one in a false light in the public eye; and 4) Remedies for appropriation, usually for commercial advantage, of one's name or likeness." Greenberg and Lovitz *supra* note 80, at 484.

⁸³ See Boston, *supra* note 76, at 63 (elaborating on the right of publicity and that after *O'Bannon*, it was replete with references to the allowance of compensation for student-athletes through the use of their NILs).

⁸⁴ See *id.* (reiterating the right of protection of publicity and privacy in an individual's name, image, and likeness). See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953) (holding that one has value in their photograph and without a right of publicity over their image, they are deprived of that value); see also Landry & Baker III, *supra* note 82, at 56 (describing how a player should be granted the right of publicity over their image, and thus have the exclusive right to determine the use of their picture). *Id.*

⁸⁵ See Jonathan Faber, *A Brief History of the Right of Publicity*, RES GESTAE (July 31, 2015), archived at <https://perma.cc/A43S-NSR3> (portraying the right of

States first dealt with the right of publicity in the case of *Zacchini v. Scripps-Howard Broadcasting Co.* (“Zacchini”).⁸⁶ The plaintiff, Hugo Zacchini, was known for his human cannon ball act which he performed publicly in 1972.⁸⁷ The act was captured by a reporter who broadcasted the video on the local news in Ohio.⁸⁸ Zacchini argued that the television station had used the video of his act without consent and that his performance depended on being viewed for compensation.⁸⁹ The Court found that the freedom of expression was limited in a case such as this because a performer has a right to be compensated for the effort put into the performance.⁹⁰ Zacchini set the

publicity as a property interest vested in the usage of one’s name, image, and likeness). The right of publicity has little to do with copyright, but both copyright and right of publicity exist simultaneously and can be implicated in a single usage. *Id.*

There are, however, some noteworthy similarities between the Right of Publicity and trademark law. Theoretically, the Right of Publicity is of the same genus as unfair competition and, more precisely, the doctrine of misappropriation—two hallmarks of trademark law, as reflected in the Lanham Act. Like a trademark, the Right of Publicity can function as a quality assurance to a consumer, especially if a celebrity, or his or her estate, maintains self-imposed quality standards and exercises discretion in licensing publicity rights.

Id.

⁸⁶ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 567 (1977) (emphasizing that the broadcast of an entire act was categorically different from reporting on an event, in that it posed a substantial threat to the economic value of the petitioner’s performance).

⁸⁷ See *id.* (establishing that the petitioner’s 15-second “human cannonball act, in which he is shot from a cannon into a net some 200 feet away, was, without his consent, videotaped in its entirety at a county fair in Ohio by a reporter for respondent broadcasting company and shown on a television news program later the same day.”).

⁸⁸ See *id.* (depicting the first case where petitioner challenged his right to publicity based on a reporter filming him in the act); see also Joseph Gutmann, *IT’S IN THE GAME: REDEFINING THE TRANSFORMATIVE TEST FOR THE VIDEO GAME ARENA*, 31 *CARDOZO ARTS & ENT. L. J.* 215, 218–19 (2012) (discussing Hugo Zacchini’s cannonball act that was caught on camera by a local news reporter).

⁸⁹ See *Zacchini*, 433 U.S. at 562 (asserting that the act he performs is one “‘invented by his father and . . . performed only by his family for the last fifty years,’ that respondent ‘showed and commercialized the film of his act without his consent,’ and that such conduct was an ‘unlawful appropriation of plaintiff’s professional property.’”).

⁹⁰ See *id.* (holding that an entertainer such as Zacchini usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such

groundwork for the modern right of publicity which established the factors that should be examined when balancing the right of publicity with First Amendment rights.⁹¹ *Zacchini* deals with the exact copy of a performance resulting in an easy balancing, but the difficulty comes in trying to differentiate between reality and imagination, which is applicable to modern cases where defendants infringe through the use of videogames.⁹²

Since *Zacchini*, courts have applied a number of tests, the most successful being the Transformative Use Test.⁹³ Created by Judge Pierre Leval in 1990, the Transformative Use Test depicts a transformative use as one that “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”⁹⁴ In other words, taking someone else’s work or performance and reshaping or repackaging them into something other

publication); *see also* Gutmann, *supra* note 88, at 218 (acknowledging that when it comes to the right of publicity, courts must draw the line which cannot be crossed, and beyond which the First Amendment no longer provides protection).

⁹¹ *See* Gutmann, *supra* note 88, at 219 (establishing that the Court allowed a celebrity to maintain control over the value of his reputation in the form of his act which set the precedent for First Amendment limitations for defendants).

⁹² *See id.* (recognizing that the simple balancing in the *Zacchini* case is not as applicable to technology and rights of publicity issues today). “Thus, it follows that a test in this area should be narrowly tailored to differentiate between reality and imagination.” *Id.* None of the tests currently used by the court are successful in dealing with the technological difficulties of videogames *per se.* *Id.*

⁹³ *See id.* at 220 (discussing the various balancing tests courts have used over the years to determine the difference between reality and imagination when deciding whether use is an infringement on the creator’s personal privacy rights). The Rogers Test considered whether: (1) that the title of the work is unprotected if it has no artistic relevance to the original work; and (2) even if there is relevance, there is still not protection if the work in question “explicitly misleads as to the source or the content of the work.” *Id.* The Predominant Use Test states when “the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.” Gutmann, *supra* note 88, at 221.

⁹⁴ *See id.* (stating the creation of the Transformative Test which derived from fair use in copyright); *see also* *More Information on Fair Use*, COPYRIGHT.GOV (Mar. 28, 2021) [hereinafter *Fair Use*], archived at <https://perma.cc/9L3V-6TJ7> (defining the copyright fair use doctrine that promotes “freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”). Further, section 107 of the Copyright Act provides “the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use.” *Fair Use, supra.*

than the original would be an infringement on the original creator.⁹⁵ The Transformative Use Test has been useful in solving right of publicity claims in most types of media such as balancing the defendant's First Amendment rights against the infringement of the creator's performance.⁹⁶ However, some instances that involve videogames amidst technological advances have not been as easy to interpret.⁹⁷ The difficulty resides in applying the Transformative Use Test to modern cases dealing with individual's infringement of NIL for commercial activities such as video games created by EA.

⁹⁵ See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)) (defining the Transformative Use Test and its application to celebrity likeness); see also Gutmann, *supra* note 88, at 221–22 (defining the Transformative Use Test and its application to works or performances that look like an infringement of the original creator's work). Additionally, in applying the Transformative Use Test, the Ninth Circuit has held that in judging transformativeness, a court must inquire into:

[W]hether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word “expression,” we mean expression of something other than the likeness of the celebrity.

Gutmann, *supra* note 88, at 222.

⁹⁶ See *id.* at 222–23 (reiterating the need to alter the Transformative Use Test in order for it to be applicable to instances involving videogames). Moreover, “[t]he [T]ransformative [T]est needs to be changed in a way which draws a line between videogames intended to be played in an ‘Altered Reality’ and those which are an ‘Imitation of Life.’” *Id.*

⁹⁷ See *Comedy III Prods., Inc.*, 21 P.3d at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)) (stating that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”). “[B]oth the First Amendment and copyright law have a common goal of encouragement from expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.” *Id.* The defense consists of a “balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* at 799.

D. *Electronic Arts Inc. (EA)*

EA is a public corporation that develops and manufactures videogames.⁹⁸ Founded in 1982, EA gained its success from the creation of various sports related video games such as Madden NFL and FIFA soccer, and from 1997 to 2013 developed and sold NCAA college football videogames.⁹⁹ Consumers, the NCAA, and EA want to get involved in videogames because it is a \$120 billion industry.¹⁰⁰ When creating its games, EA entered into licensing agreements in which it paid the NCAA, the Collegiate Licensing Company (“CLC”), and its member schools for permission to use their intellectual

⁹⁸ See Boston, *supra* note 76, at 49 (referencing the creation of Electronic Arts and how its primary source of revenue was created from its success on college and professional sports video games). See Amber Jorgensen, *WHY COLLEGIATE ATHLETES COULD HAVE THE NCAA, ET AL. SINGING A DIFFERENT TUNE*, CARDOZO ARTS & ENT. L. J. 367, 391 (2015) (stating that “even if College Athletes may be deemed employees under the applicable laws, a royalty-based system may be preferable to a wage-based system with respect to compensating college athletes.”).

⁹⁹ See *id.* at 402 (alluding to the creation of NCAA videogames which was successful in the gaming industry, with NCAA football reaping the most success). See Jennifer Hinds, *THE ONE-SIDED GAMES OF THE NCAA: HOW IN RE NCAA STUDENT-ATHLETE LEVELS THE PLAYING FIELD*, 35 LOY. L.A. ENT. L. REV. 95, 105 (2014/2015) (illustrating that the creation of EA Sports in 1991 was for the sole purpose of marketing its own sports videogames). Additionally, EA had a licensing agreement with the College Licensing Company (“CLC”), “the NCAA’s licensing agent, to use member school names, team names, uniforms, logos, stadium fight songs, and other game elements.” *Id.*

¹⁰⁰ See Jon Miltimore, *Why Esports Are Poised to Overtake the Entertainment World*, FEE (Jan. 27, 2020), *archived at* <https://perma.cc/N4LB-GVCR> (depicting the amount of money esports brings in as juxtaposed to other college sports and why esports will take over the market). “Today the total number of esports leagues and tournaments worldwide is 69; roughly half of these were launched within the last five years.” *Id.* See John T. Holden, Marc Edelman & Thomas A. Baker III, *A SHORT TREATISE ON ESPORTS AND THE LAW: HOW AMERICA REGULATES ITS NEXT NATIONAL PASTIME*, 20 U. ILL. L. REV. 509, 578 (2020) [hereinafter *Baker III*] (noting that “[t]he rapid development of collegiate esports is expected to continue over the next decade as the organizational and regulatory frameworks for this emerging intercollegiate sport are erected.”). Further, esports must be careful on allowing the membership and regulation by the NACE because it increases the chance that the NCAA’s amateurism model can shine through to esports athletes. *Id.* at 579.

property.¹⁰¹ However, due to the subsequent O'Bannon litigation which resulted in a clear right of publicity infringement upon petitioners, EA's contract with the NCAA expired and was not renewed in June of 2014.¹⁰²

III. Facts

The Big Ten's decision to play football amidst the ongoing COVID-19 pandemic was to return competition between student-athletes so they can realize their dreams of competing in the sports they love.¹⁰³ However, part of the NCAA's goal was to save revenue it had received in previous seasons.¹⁰⁴ In the NCAA's 2019 financial year they generated more than 800 million dollars in revenue primarily from television and marketing rights fees alone.¹⁰⁵ Additionally, the

¹⁰¹ See Boston, *supra* note 76, at 48 (alluding to the standard form of negotiation for rights to IP by EA Sports with the NCAA and CLC). The CLC was founded in 1981 and is the official licensing representative of the NCAA. *Id.* “[The] CLC also licenses trademarks for approximately 200 colleges, universities, bowl games, and athletic conferences [, and also] represent[s] almost eighty percent of the retail market for collegiate licensed merchandise.” *Id.*

¹⁰² See *id.* at 50 (expressing the early settlement of EA and the CLC against right of publicity plaintiff). EA was aware of the antitrust violations by the NCAA and knew that it was best to settle, leaving the NCAA as the sole antitrust defendant. *Id.* at 51.

¹⁰³ See Joe Nocera, *Opinion: The pandemic has proved that college athletes should get paid*, CRAIN'S CLEV. BUS. (Sept. 23, 2020), archived at <https://perma.cc/43EZ-RRYH> (depicting that the only reason the NCAA profits so much money is because of the athletic ability of student-athletes). Further, the COVID-19 pandemic has resulted in the realization that without the student-athletes playing their sport, the NCAA would not make any money without their cooperation. *Id.*

¹⁰⁴ See *id.* (determining that despite the ongoing pandemic, the NCAA felt the need to bring college football back and did not sanction certain conferences for making the decision to do so).

Wouldn't that destroy, once and for all, any remaining argument that athletes were merely ordinary students who played football for the love of the game—which is the rationale for not paying them. I thought that the major conferences wouldn't have the nerve to field teams when the rest of the student body was away or locked down—not even with all that TV money at stake.

Id. Nevertheless, the Big 10 announced they would bring back football after all, and college athletes are being asked to assume more risk than the rest of the student body merely to provide entertainment. *Id.*

¹⁰⁵ See Christina Gough, *College Sports (NCAA) – Statistics & Facts*, STATISTA (Oct. 16, 2020), archived at <https://perma.cc/5NLQ-3JKZ> (depicting the revenue the NCAA makes in its fiscal year and how a large portion of that revenue can be

Department of Education reported 14 billion in revenue from college sports last year as juxtaposed to merely 4 billion in 2003.¹⁰⁶ The push to bring back college football during the COVID-19 pandemic has led numerous athletes to believe that it's because both their university and the NCAA are losing money resulting in student-athletes being exploited by the NCAA's amateurism rules once again.¹⁰⁷ However, following the O'Bannon decision, state legislatures have been given a great deal of recourse to construct their own legislation in compensating student-athletes due to the weakening of the NCAA's amateurism rules in *Alston*, which opened the door for third party name, image, and likeness compensation.¹⁰⁸

afforded to the men's basketball March Madness tournament). Further, most of the NCAA's revenue generates from television and marketing rights. *Id.* "In 2019, the tournament had an average TV viewership of 10.5 million viewers [and] [d]uring the same year, the championship final game between Virginia and Texas Tech was watched by an average of 19.6 million viewers." *Id.* The cancellation of the 2020 March Madness tournament resulted in a significant loss for both the NCAA and the host city, Atlanta, GA. *Id.* See also Silvia Woolard, *How Much Money does the NCAA Make in a year?*, CHARLOTTE STORIES NEWSLETTER (Oct. 7, 2019), archived at <https://perma.cc/MDQ2-FFJD> (establishing that "[t]he NCAA made a huge milestone in 2017 after earning \$1.06 billion in revenue for the first time in its existence."). "More than two-thirds of the money (\$761 million) came from men's college basketball tournaments. That figure would later rise to over \$869 in the 2017/18 season." *Id.* Turner Broadcasting and CBS sports paid the NCAA nearly \$10.8 billion to broadcast college sports events for 14 years. *Id.*

¹⁰⁶ See Murphy, *supra* note 2 (noting that "Last year, the Department of Education reported \$14 billion in total revenue collected by college sports programs, up from \$4 billion in 2003."). Further, tax-exempt non-profit institutions condone and endorse broadcasting and apparel contracts that exceed \$250 million, while "amateurism" bars college athletes from benefitting off their own name, image, and likeness. *Id.*

¹⁰⁷ See Andrew McGregor, *Mythic, Misguided View of College Football*, INSIDE HIGHER ED (Sept. 27, 2020), archived at <https://perma.cc/2XXG-HG9S> (asserting that college football is not a vehicle to heal our nation and political strife, and is in fact a symptom of the deep-seeded issues that have resulted in political partisanship, racial injustice, and a prolonged desolation of the pandemic). Further, "[i]f football represented a 'functioning democracy,' then the voices of the players and lives of these players would matter. The truth is, however, the NCAA and its members not democratic [sic]; they value athletes for their bodies, not their minds." *Id.*

¹⁰⁸ See Jared Anderson, *NCAA PETITIONS SUPREME COURT TO REVIEW AMATEURISM CASE*, SWIMSWAM (Oct. 21, 2020), archived at <https://perma.cc/M2GX-7QEC> (issuing that "while the NCAA is currently making moves to loosen its name-image-likeness (NIL) rules, it is also working to legally oppose the *Alston* injunction."). "[T]he injunction the NCAA opposes could allow schools to compensate athletes even further as long as payments can be related to

A. *The Antitrust Complications of O'Bannon and Alston*

1. O'Bannon v. NCAA

*O'Bannon v. NCAA*¹⁰⁹ (“*O'Bannon*”), illustrates the legal use of NIL and opened the door for college athlete compensation.¹¹⁰ In 2013, Ed O'Bannon, the antitrust petitioner and a former NCAA basketball All-American, brought a class-action suit against the NCAA's rules that barred schools from compensating athletes for using their NIL.¹¹¹ Concurrently, Sam Keller, the right of publicity petitioner and former starting quarterback of Arizona State University separately brought suit against the NCAA, CLC, and EA alleging that EA had impermissibly used student-athletes' NILs in its videogames and that the NCAA and CLC had wrongfully turned a blind eye.¹¹² The two cases were consolidated during pretrial proceedings, and defendants CLC and EA settled with Keller leaving O'Bannon's antitrust claim against the NCAA as the sole issue before the district

education. That can include things like internships or postgraduate scholarships.” *Id.* The NCAA would rather allow student-athletes to be compensated by third parties for NIL rather than getting payments from their institution by trying to tie payments to education-related compensation. *Id.* Athlete compensation through their institution would turn college student-athletes from amateurs to professionals. *Id.*

¹⁰⁹ *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

¹¹⁰ *See O'Bannon*, 802 F.3d 1049, 1079 (holding that “the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.”).

¹¹¹ *See id.* at 1055 (noting, “[i]n 2009, O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC), the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use, in federal court.”). Further, O'Bannon contested that the NCAA's amateurism rules which prevented student-athletes from benefitting off their name, image, and likeness violated Section 1 of the Sherman Act. *Id.* *See also* *No Doubt v. Activision Pub'g, Inc.*, 192 Cal. App. 4th 1018, 1032 (2011) (holding that the Court added that the alterations that game players could make to the avatars did not add enough transformative expression to qualify for First Amendment protection).

¹¹² *See O'Bannon*, 802 F.3d at 1055 (stating Keller's complaint under Indiana's and California's right of publicity statutes, as well as a number of common-law claims). Further, Keller's claim fell under right of publicity, whereas O'Bannon asserted relief under current antitrust law. *Id.*

court.¹¹³ O'Bannon argued that athletic scholarships were capped at a price significantly lower than the cost of full tuition and because of this limitation, college athletes were receiving less than what a competitive market would provide thus making the NCAA's cap on scholarships anticompetitive.¹¹⁴ The Court held that "the NCAA had violated the Sherman Act by capping athletic scholarships below the full cost of tuition, but had not violated the Act by banning all compensation beyond educational expenses."¹¹⁵ In other words, the NCAA had a right to limit excessive compensation from third-parties, but erred by not letting the student's school compensate them fully for cost of attendance.¹¹⁶

O'Bannon resulted in the lingering question of whether student-athletes would be able to profit off the use of their NIL.¹¹⁷ Subsequently, in the case of *Alston*, the Ninth Circuit sided with the

¹¹³ See *id.* at 1056 (outlining the procedural matters between *Keller* and *O'Bannon* before going to bench trial before the district court). "*O'Bannon* and *Keller* were deconsolidated, and in June 2014, the antitrust claims against the NCAA at issue in *O'Bannon* went to a bench trial before the district court." *Id.*

¹¹⁴ See *id.* at 1064 (discussing petitioner's argument that the NCAA had capped scholarships significantly below the COA which in itself is an antitrust violation). See Thacker, *supra* note 1, at 194 (discussing O'Bannon's argument in the rule of reason analysis that the Court determined the NCAA violated in putting a cap on student-athlete scholarships). Further,

[t]he NCAA argued that the amateur nature of college sports is what attracts consumers in the first place. The Ninth Circuit agreed that amateurism was a legitimate and important procompetitive effect, but it would not hold that any limit on athlete compensation was automatically lawful, as the NCAA attempted to argue.

Id.

¹¹⁵ See *id.* at 195 (summarizing the conclusion that the Court came to on whether the cap on college athletic scholarships violated the Sherman Act). "However, neither *Board* nor *O'Bannon* present an insurmountable hurdle for future litigation or congressional action. The O'Bannon case did not implement an outright ban of compensation beyond a full scholarship, and it misapplied the Rule of Reason balancing test." *Id.* See *O'Bannon*, 802 F.3d at 1078–80 (acknowledging that they expect future litigation brought on NIL claims, which is a drastic leap that would alter the NCAA's amateurism rules as we know them).

¹¹⁶ See Thacker, *supra* note 1, at 195 (reiterating the conclusion of the Court in *O'Bannon*).

¹¹⁷ See Christian Dennie, *O'Bannon v. NCAA: Summarizing the Court's Opinion*, BG&S (Aug. 25, 2014), archived at <https://perma.cc/P6XV-J4V5> (explaining "the Court ultimately concluded 'sweeping' restrictions on student-athlete compensation do not justify the prohibition on licensing revenue derived from the sale of student-athletes' names, images, and likenesses.").

plaintiffs, stripping the NCAA's ability to limit athlete compensation at COA leaving it up to the respected athletic conferences to provide their own regulations.¹¹⁸ On the state level, states such as California and Florida have passed legislation allowing college athletes to profit off their NIL, requiring the NCAA to alter its guiding principles and allow endorsements and promotions for student-athletes.¹¹⁹

¹¹⁸ See *Alston v. NCAA* (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.) 958 F.3d 1239, 1244 (9th Cir. 2020) (“conclud[ing] that the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1.”). See *Baker III*, *supra* note 100, at 576 (outlining the impact *Alston* has on NIL claims by athletes going forward, and how the NCAA's armor of amateurism is losing its strength). Additionally, the Ninth Circuit decision in *Alston* opened up the gate for third-party sponsors to advocate and compensate college athletes. *Id.*

¹¹⁹ See *Osburn*, *supra* note 46, at 4 (laying out the NCAA recent regulations in allowing student-athletes to receive third-party endorsements off their name, image, and likeness). See *Kercheval*, *supra* note 13, at 1 (noting that Florida Governor Ron DeSantis signed a bill into action allowing college athletes to be compensated for their name, image, and likeness). The bill will go into effect on July 1, 2021, for the 2021–22 season. *Id.* DeSantis decided to take action because he wanted to put pressure on the NCAA to move forward. *Id.* See Jack Kelly, *Newly Passed California Fair Pay To Play Act Will Allow Student Athletes To Receive Compensation*, FORBES (Oct. 1, 2019), archived at <https://perma.cc/K76N-R47W> (discussing California Governor Gavin Newsom signing the Fair Pay to Play Act into law). The Act going into effect allows college athletes to be compensated for their university's use of their name, image, and likeness. *Id.* See NCAA REPORT, *supra* note 13, at 1 (outlining recommendations proposed by the NCAA for college athletes to be compensated for their name, image, and likeness). These recommendations include but are not limited to:

Authorize change in policy and bylaws to permit name, image and likeness benefits consistent with NCAA values and principles as well as with legal precedent . . . Reject any approach that would make student-athletes employees or use likeness as a substitute for compensation related to athletic participation and performance . . . Reaffirm the integrity of the student-athlete recruitment process, which is unique to college sports. Changes to NCAA name, image and likeness rules should support this principle and not result in undue influence on a student's choice of college . . . Extend the timeframe of this working group through April 2020 to continue to gather feedback and work with the membership on the development and adoption of new NCAA legislation . . . Endorse the regulatory framework described in this report as appropriate guardrails for future conversations and possible NCAA legislation . . . Instruct NCAA leadership on engagement with state and federal lawmakers.

Id. at 2.

2. *Alston v. NCAA*: Opening the Gates for College-Athlete Compensation

Alston was the most recent case where the Supreme Court affirmatively agreed with the Ninth Circuit's applicability of the law, allowing student-athletes to be compensated beyond cost of attendance resulting in state legislation for the allowance of third-party NIL compensation for college athletes.¹²⁰ *Alston* involved an antitrust action that was brought by current and former student-athletes from both Division I football and men and women's basketball against the NCAA and eleven of its conferences.¹²¹ The claims brought by petitioners alleged that the defendants violated the Sherman Act

¹²⁰ See *NCAA v. Alston*, 141 S. Ct. 2141, 2162 (2021) (holding that the district court did not err in finding that the NCAA violated the Sherman Act by limiting the education-related benefits schools could offer student-athletes). The district court properly applied a rule of reason analysis. *Id.* It was only after finding that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits that the district court declared a violation of the Sherman Act. *Id.* See Mohammad Agha, *NCAA Suffers Blow in Alston v NCAA Scholarship Cost of Attendance Case*, UNAFRAID SHOW (June 8, 2020), archived at <https://perma.cc/7QJT-R3TW> (alluding to the NCAA's violation of federal antitrust law for implementing a restriction on education-related benefits for student-athletes). See Alex Blutman, *The State of College Sports, Part 2: NIL and Alston*, HARV. J. OF SPORTS AND ENT. L. (Sept. 11, 2020), archived at <https://perma.cc/WH42-ZEF7> (outlining that the *Alston* decision has two major implications).

First, it expands the benefits available to student-athletes, a result that should not be overlooked. Second, the decision, like *O'Bannon* before it, again finds that NCAA compensation limits violate antitrust laws, but fails to reach a result far-reaching enough to approach pay-for-play or an open market for college athlete services.

Id.

¹²¹ See Landry & Baker III, *supra* note 82, at 28 (explaining the abundance of petitioners involved in the *Grant-In-Aid* case—making up eleven conferences, both former and current student-athletes). “Additionally, Judge Wilken found that the caps on athlete compensation did not integrate student-athletes into their educational communities” as the NCAA so justified. *Id.* at 29. See *Alston v. NCAA* (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1253–54 (9th Cir. 2020) (reaffirming the *O'Bannon* decision “that the NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of Rule of Reason . . . [T]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act rules.”). Further, the Court stated that the NCAA's amateurism standards were more restrictive than necessary violating the Sherman Act. *Id.* at 1254.

through the imposition of a cap on student-athlete compensation.¹²² The Court held that the NCAA's rules capping the amount of compensation that student-athletes can receive in exchange for their athletic contributions violated the Sherman Act.¹²³ The Court, agreeing with Judge Wilken of the Ninth Circuit, also found that the NCAA's rules were commercial, had anticompetitive effects, and were subject to the rule of reason analysis.¹²⁴ The Supreme Court's decision

¹²² See Landry & Baker III, *supra* note 82, at 29 (establishing that “[i]n their complaint, the plaintiffs alleged that the cap on their compensation was set well below what they would otherwise receive in exchange for their athletic participation from an unrestrained market.”). “Similarly, the NCAA’s defense in *Grant-in-Aid* also tracked the findings in *O’Bannon* by asserting that the caps on athlete compensation served the procompetitive purposes of preserving consumer interest in amateurism and promoting athletes’ integration into their educational communities.” *Id.*

¹²³ See *Alston*, 141 S. Ct. at 2166 (stating that reviewing the district court’s findings persuades the Court that the district court acted within the law’s bounds). See Meyer & Zimbalist, *supra* note 10, at 275 (explaining that the restriction the NCAA held against student-athletes violated the Sherman Act). Judge Wilken stated, “that the defendants failed to offer ‘an affirmative definition of amateurism’ and that ‘no link appears’ between the ‘Principle of Amateurism’ described in the NCAA’s Division I Constitution and the challenged compensation limits: ‘the principle does not mention or address compensation; nor does it prohibit or even discourage compensation.’” *Id.* at 275–76.

¹²⁴ See *Alston*, 141 S. Ct. at 2162 (acknowledging that the Court sees nothing wrong about the district court’s analysis that offends the legal principles the NCAA invokes). Further, “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.” *Id.* See Meyer & Zimbalist, *supra* note 10, at 275–76 (discussing the importance of the *Alston* decision in limiting the NCAA’s ability to regulate athlete compensation). “The defendants relied only on the two justifications that the Ninth Circuit in *O’Bannon* had upheld: the compensation rules promote (1) amateurism because it is a key part of demand for college sports and (2) integration of student-athletes with their academic communities because it improves the college education student-athletes receive.” *Id.* at 276. Judge Wilken “permitted virtually every conceivable type of non-cash benefit as long as it was in some form or manner incidental or related to education but capped cash benefits for achievement in academics up to the value of those currently provided for team-based performance (commonly viewed to be up to \$ 5,600 over COA).” *Id.* at 277. Judge Wilken also “left in place the NCAA’s rules that prohibit non-education-related cash compensation for individual athletic achievement. The injunction also allowed any NCAA member conference to impose stricter limits.” *Id.* See Timothy Davis, *A THIRTY-YEAR RESTROSPECTIVE OF LEGAL DEVELOPMENTS IMPACTING COLLEGE ATHLETICS*, 30 MARQ. SPORTS L. REV. 309, 322 (2020) (depicting the

effectively stripped the NCAA of its power to limit education related student-athlete compensation, which left the question open for how the NCAA would be able to restrict athlete compensation from those willing to sponsor athletes for the use of their NIL.¹²⁵ The NCAA had anticipated that the U.S. Supreme Court would address NIL compensation in their favor, but Justice Kavanaugh in his concurrence

victory for student-athletes through the *Alston* litigation which expanded the scope of permissible educational benefits and removed any cap on the educational benefits provided by college institutions).

While Defendants have shown that limiting student-athlete compensation has some effect in preserving consumer demand for Division I basketball and FBS football as compared with no limit, Plaintiffs have shown that not all of the challenged rules are necessary to achieve this effect and that a less restrictive alternative set of rules would be virtually as effective as the set of challenged rules, without requiring significant costs to implement. The less restrictive alternative would remove limitations on most education-related benefits provided on top of a grant-in-aid, while allowing the NCAA to limit cash or cash-equivalent awards or incentives for academic achievement or graduation to the same extent it limits athletics awards. Limits on compensation and benefits not related to education and a limit on the grant-in-aid at not less than the cost of attendance would remain.

Id. at 321.

¹²⁵ See *Alston*, 141 S. Ct. at 2167–69 (Kavanaugh, J., concurring) (asserting Justice Kavanaugh’s opinion on future student-athlete litigation for use of their NILs). Moreover, “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.” *Id.* at 2168. “And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.” *Id.* See also *Landry & Baker III*, *supra* note 82, at 30 (articulating that “[w]hile there was nothing in the *Grant-in-Aid* decision that directly speaks to the NCAA’s ability to restrict athlete NIL use, the decision serves as another in a series of serious paper cuts that have hurt the NCAA’s ability to restrict athlete compensation.”). Further, “Judge Wilken held that the goals of protecting amateurism and academic integration could be done through less restrictive means.” *Id.* The Court terminated the NCAA’s capability to limit athlete compensation and left it up to the respected conferences to make their own guidelines and limitations. *Id.* See also *Davis*, *supra* note 124, at 322 (approving a \$208.7 million settlement to plaintiffs paid by the NCAA). “[M]ore than 43,000 Division I men’s and women’s basketball players and Football Bowl Subdivision football players who played during from [sic] March 2010 through the 2016–17 seasons, began receiving their payments averaging approximately \$3,800.” *Id.*

was emphatic about his distaste for the NCAA's reluctance to pay its student-athletes.¹²⁶

B. Post-Alston: State Legislature's Putting Pressure on the NCAA

1. California's Fair Pay to Play Act

On September 30, 2019, California governor, Gavin Newsom, signed SB 206, better known as the Fair Pay for Play Act, which will go into effect January 1, 2023.¹²⁷ The NCAA, at first, denounced the

¹²⁶ See *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring) (discussing Justice Kavanaugh's disagreement with the NCAA's actions in their treatment of student-athletes). Subsequently, "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate." *Id.* Moreover, "[a]nd under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law." *Id.* See Donald M. Remy, *NCAA statement regarding Supreme Court petition for Alston case*, NCAA (Oct. 15, 2020), archived at <https://perma.cc/S4U6-4T5X> (noting, "Today, the NCAA asked the U.S. Supreme Court to grant review of the Alston/Grant-in-Aid case.").

The [Ninth] U.S. Circuit Court of Appeals is applying antitrust laws to NCAA student-athlete rules inconsistently with other federal circuits and indeed the Supreme Court itself. The ruling blurs the line between student-athletes and professionals, conflicts with prior appellate court decisions, appoints a single court to micromanage collegiate sports, and encourages never-ending litigation following every rule change. The decision extends beyond the NCAA's ability to govern college sports throughout the country, affecting how other joint ventures operate. It is critical for the Supreme Court to address the consequential legal errors in this case so that college sports can be governed, not by the courts, but by those who interact with and lead students every day. Together with our conferences that were individually sued in this matter, we will continue to defend the line between professional sports and college sports.

Id.

¹²⁷ See Brandon Beyer, *FEDERAL LEGISLATION STILL HAS A ROLE TO PLAY IN THE FIGHT FOR STUDENT-ATHLETE COMPENSATION*, 46 J. LEGIS. 303, 303 (2020) (establishing the need for federal legislation to assure that the NCAA properly implements its proposed guidelines to be consonant with public demand). Advocates of the Fair Pay to Play Act hope that its scope reaches beyond California's legislature to form a federal standard commending student-athletes for their substantial role in their university's revenue. *Id.* See Steven A. Bank, *THE OLYMPIC-SIZED LOOPHOLE IN CALIFORNIA'S FAIR PAY TO PLAY ACT*, 120

bill and asked Governor Newsom to reconsider the fine line being crossed from amateurism to professionalism.¹²⁸ However, to avoid school institution leverage, the NCAA created the Board of Governors Legislative Working Group to propose its own set of guidelines in hopes that the state legislatures would follow in its footsteps.¹²⁹ The

COLUM. L. REV. FORUM 109, 109–10 (2020) (iterating the limitations of California's Fair Pay to Play Act and illustrating what the NCAA would look like with college athletes being paid). Additionally,

[T]he Fair Pay to Play Act will allow student-athletes enrolled in California colleges and universities to be compensated for the use of their name, images, and likenesses just like non-athletes. Many observers hope that this Act, which would contravene the current NCAA rules on student-athlete compensation, will enable student-athletes to share in the huge revenues generated annually by college athletics through apparel deals with large manufacturers like Nike, Adidas, and Under Armour.

Id. at 109. However, the Fair Pay to Play Act prohibits athletes from entering into contracts that would be at odds with university apparel contracts. *Id.*

¹²⁸ See David G. Bayard, *AFTER FURTHER REVIEW: HOW THE N.C.A.A.'S DIVISION I SHOULD IMPLEMENT NAME, IMAGE, AND LIKENESS RIGHTS TO SAVE THEMSELVES AND BEST PRESERVE THE INTEGRITY OF COLLEGE ATHLETICS*, 47 S. U. L. REV. 229, 230 (2020) (discussing the initial pushback by the NCAA in allowing NIL compensation for college athletes, and how the Fair Pay to Play Act forced the NCAA to implement guidelines to regulate student-athlete compensation). “In response to the introduction of the bill, the NCAA Board of Governors established the Board of Governors Federal and State Legislation Working Group to ‘examine issues highlighted in recently proposed federal and state legislation related to student-athlete name, image, and likeness (“NIL”).” *Id.* See Beyer, *supra* note 127, at 303 (noting that the Fair Pay to Play Act directly contradicts the NCAA's long-standing amateurism rules which will spark litigation).

¹²⁹ See Allen, *supra* note 45 (explaining that “The NCAA had asked Newsom, in a letter, not to sign the bill into the law, arguing that it would ‘erase the critical distinction between college and professional athletics.”). See NCAA REPORT, *supra* note 13, at 6 (laying out the responsibilities of the Board of Governors in relation to NIL compensation). Additionally,

[t]he working group spent many hours studying, considering extensive feedback, discussing and deliberating challenges and opportunities related to student-athlete engagement in activities that use a student-athlete's name, image or likeness in return for some form of compensation. As part of this process, the working group engaged a diverse group of stakeholders through in-person interviews, written feedback and formal presentations.

Id. See Paul Sarker, *NCAA Explores Revised Rules Governing Student-Athletes' Name, Image and Likeness Rights*, GT ALERT (June 12, 2020), archived at <https://perma.cc/JZ9J-JYJZ> (stating that “[o]n April 28, 2020, the NCAA Board of Governors established a framework of revisions to the NCAA's rules that would

enactment of SB 206 cultivated similar legislation in states such as Florida, Illinois, Colorado, New York, and Oklahoma and was created in order to compensate student-athletes for the use of their NIL.¹³⁰

C. *The Current Landscape of NIL Compensation*

1. The NCAA's Proposal

As part of its continuing effort to address student-athletes compensations issues, the NCAA Division I Council, in October of 2020, approved and introduced its 2020-21 proposal that would allow

allow student-athletes to receive compensation for the use of their name, image and likeness (NIL) under certain circumstances.”). During the April 28, 2020 meeting, the Board of Governors adopted the following framework:

Student-athletes will be able to earn compensation from the use of their NIL rights from third-party endorsements related to athletics (that do not involve any schools or conferences), social media opportunities, personal appearances, and new businesses . . . Endorsement agreements may not contain any school or NCAA logos or marks . . . Schools and conferences may not enter into endorsement deals with student-athletes . . . Schools and their boosters may not provide compensation or enter into NIL endorsement deals for purposes of influencing recruiting . . . Creating a review board to review the amount of compensation paid in individual deals to determine that such compensation is not deemed to be excessive . . . Regulating agents and other advisors, such as attorneys, who represent these student-athletes in NIL endorsement agreements.

Id.

See Bayard, *supra* note 128, at 241 (stating that another principle of the working group is to “[e]nsure rules are transparent, focused, and enforceable and facilitate fair and balanced competition.”).

¹³⁰ *See* Landry & Baker III, *supra* note 82 at 6 (acknowledging that “similar legislation has been proposed in states that include Washington, South Carolina, and New York.”). *See* Meyer & Zimbalist, *supra* note 10, at 247 (depicting that “[t]he bills introduced in the South Carolina and New York state legislatures allow for schools to pay athletes directly, while SB 206 allows schools to make NIL payments to current students (not prospective students) and for payments from third parties.”). Further, “[t]he New York bill also stipulates that fifteen percent of a school’s athletic department revenues go to pay for its student athletes. Florida’s NIL bill would go into effect on July 1, 2021, much earlier than other states.” *Id.* *See* Davis, *supra* note 124, at 327 (showing that “[o]ther states in which similar measures are in various stages of the legislative process include Colorado, Florida, Illinois, Kentucky, Minnesota, Mississippi, Nevada, New York, Oklahoma, Pennsylvania, and South Carolina.”).

student-athletes to profit off of their past ill-treatment of their NIL's.¹³¹ In the proposal, the NCAA suggested the following types of activities that would be permitted for student-athletes: (1) use of NIL to promote their own third-party products and services; (2) Use of NIL to promote and operate their own camps, clinics, and private lessons; (3) Accepting compensation for autographs and personal appearances; and (4) The soliciting of funds through non-profits, charities, unexpected events, family hardship, or educational experiences not covered by tuition.¹³² However, the NCAA's proposal has multifarious limitations such as restricting what products an athlete can endorse and prohibiting the engagement of commercial products or services that include sports wagering and banned substances.¹³³

¹³¹ See Ray Katz, *Sponsorship Accountability Pt 9: Name, Image, Likeness AND Influence*, MASB (Aug. 27, 2020), archived at <https://perma.cc/A33G-7KMA> (realizing that “[s]avvy marketers are learning that the true value in engaging with student-athletes comes from their offline and online influence.”). The real element of NIL that is not recognized is the second I of Influence that student-athletes will now be able to be compensated for. *Id.*

¹³² See Dellenger, *Legislation Proposal*, *supra* note 15 (outlining the recent proposal guidelines set out by the NCAA that student-athletes must abide by). “Also, an institution can prohibit an athlete’s involvement in name, image and likeness activities that conflict with existing institutional sponsorship arrangements or other school ‘values’.” *Id.* See also NCAA Slates “NIL” Proposal for Vote, ROPES & GRAY (Oct. 20, 2020), archived at <https://perma.cc/J8RZ-9CVK> (disclosing the 2020–21 legislative proposal introduced by the NCAA and its set guidelines and limitations). Moreover, “[u]nder the Proposal, schools also would be prohibited from taking certain actions, including participating in any development, operation or promotion of a student-athlete’s business activities, unless those activities were part of the student-athlete’s coursework or academic program.” *Id.*

Additionally, schools would not be permitted to arrange or secure any endorsement opportunities for their student-athletes, [and] the Proposal would require certain disclosure obligations: both prospective and current student-athletes would be required to disclose any NIL activities, the compensation arrangements involved, and the details of any relevant relationships developed through the process.

Id.

¹³³ See Dellenger, *Legislation Proposal*, *supra* note 15 (highlighting the vast number of restrictions that the NCAA has proposed in order to regulate the compensation that student-athletes will receive).

Athletes would be allowed to enter deals with agents but for only three specific reasons: to give advice for NIL ventures, assist in contract negotiations and help market an athlete’s NIL ventures. Athletes must disclose their NIL ventures and their relationships

Among the most notable, the NCAA still restricts college athletes from partnering with their respected schools for NIL ventures, using school logos in their endeavors, and from entering into group licensing deals.¹³⁴ However, the NCAA's legislation may become insignificant due to the anticipation of Congress passing its own NIL legislation at the NCAA's own request.¹³⁵ With Florida's NIL law going into effect July of 2021, Florida will be able to operate by its own rules without having to follow a universal athlete compensation rule.¹³⁶

2. Congressional Legislation

A bipartisan bill introduced by Rep. Anthony Gonzalez (R-Ohio) and Rep. Emanuel Cleaver (D-Mo.), if passed, would open the door for college athletes to make money from a wide range of endorsement deals and would provide a universal rule for colleges to abide by.¹³⁷ Gonzalez and Cleaver sought to create a balanced bill by

and contracts with agents to the schools and a third-party administrator yet to be named.

Id.

¹³⁴ See Ross Dellenger, *Group Licensing is the Key to the Return of NCAA Video Games—So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020) [hereinafter Dellenger, *Holdup*], archived at <https://perma.cc/P4XM-BVMT> (insinuating that the NCAA is still trying to hold on to its amateurism guidelines that have not been successful being both a violation of antitrust and right of publicity). Contrast Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020) [hereinafter Dellenger, *BOR*], archived at <https://perma.cc/4SEC-32W8> (indicating that Congressman Booker plans to grant athletes permission to access group licensing, which would in turn could result in the NCAA videogame comeback).

¹³⁵ See Dellenger, *Legislation Proposal*, *supra* note 15 (purporting that “Congressional members are seeking more reform within the association beyond NIL, something raised in the latest and third NIL hearing on Capitol Hill on June 22.”).

¹³⁶ See *id.* (stating that Florida's own legislation was the first to establish guidelines that go into effect as early as 2021). See Kercheval, *supra* note 13, at 1 (noting that Florida governor Ron DeSantis signed a bill into action allowing college athletes to be compensated for their name, image, and likeness). The bill will go into effect on July 1, 2021, for the 2021–22 season. *Id.* DeSantis decided to take action because he wanted to put pressure on the NCAA to move forward. *Id.*

¹³⁷ See Dan Murphy, *Bipartisan federal NIL bill introduced for college sports*, ESPN (Sept. 24, 2020) [hereinafter Dan Murphy], archived at <https://perma.cc/C2QC-MWXG> (acknowledging recent legislation by bipartisan congressmen to adopt a federal NIL standard for universities to abide by); Ross Dellenger, *Two Democrat Senators Spar With NCAA Over NIL, College Athletes' Rights*, SPORTS ILLUSTRATED

supporting only some of the guidelines in the NCAA's purported proposal and incorporating protections for athletes as well.¹³⁸ Under the proposed bill, athletes would not be allowed to sign contracts with companies that promote alcohol, tobacco, marijuana, gambling or adult entertainment.¹³⁹ The law would also give schools the right to prohibit athletes from promoting their endorsers in any school related event such as if an athlete was sponsored by Nike, but the school promoted Under Armour, that athlete would not be able to wear Nike during a collegiate game or pep rally.¹⁴⁰ However, Gonzalez's bill is only one of what could be a half-dozen versions of federal NIL

(Jan. 21, 2021) [hereinafter Dellenger, *NIL*], archived at <https://perma.cc/3CLK-M3PK> (reiterating Blumenthal and Booker's proposed Athletes' Bill of Rights that will guarantee college-athletes "monetary compensation, long-term healthcare, lifetime educational scholarships and even revenue sharing.").

¹³⁸ See Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED (Sept. 24, 2020) [hereinafter Dellenger, *Congress*], archived at <https://perma.cc/TZ8L-87NT> (outlining that "[t]he bill assigns the Federal Trade Commission to oversee and enforce NIL while also creating a commission that will continue studying the issue and report to Congress on an annual basis."). Gonzalez stated that "the endorsement restrictions on athletes are 'modest' and mirror those on the professional level." *Id.*

For far too long college athletes across the country—many of whom are people of color—have been denied the basic right to control their name, image and likeness. What we wanted to do from the outset was come to a bipartisan consensus that puts forth a national framework that gives college athletes the same rights every other American in the country is already afforded.

Id. See Ross Dellenger, *As Congressional Power Shifts, NCAA Reform and Athletes' Rights Are Firmly in the Crosshairs*, SPORTS ILLUSTRATED (Jan. 20, 2021) [hereinafter Dellenger, *Crosshairs*], archived at <https://perma.cc/2W5P-EE5B> (stating that "[t]he NCAA is losing its grip on a year-long fight in the nation's capital over athlete compensation.").

¹³⁹ See Dan Murphy, *supra* note 137 (discussing the federal proposal's limitations in reference to athlete endorsements).

¹⁴⁰ See *id.* (notwithstanding "[t]he proposed law does not include any restrictions about athletes signing deals with the competitors of companies that sponsor their school, which is a provision that some college sports leaders wanted."). Additionally, "Gonzalez said they debated including a provision that would address concerns about athletes endorsing companies that compete with brands who sponsor their school, but ultimately decided any such rule would be unfair to the athletes." *Id.*

legislation.¹⁴¹ Congress will have to agree on a solution in order for federal law to preempt state laws that have already been enacted.¹⁴²

C. *Right of Publicity Landscape: Keller v. Electronic Arts, Inc.*

Concurrently, during O'Bannon's antitrust case against the NCAA for barring its member schools from compensating its athletes alluded to above, Samuel Keller brought a right of publicity suit against EA for utilizing the likeness of individual student-athletes in its NCAA basketball and football videogames to increase sales and profit in *Keller v. Electronic Arts, Inc.* ("Keller").¹⁴³ In applying the Transformative Use Test, the District Court in California denied EA and the CLC's motion to dismiss and ruled that the game's version of Keller was not sufficiently transformative under the test to overcome the right of publicity.¹⁴⁴ The court found that because Keller's

¹⁴¹ See Dellenger, *Congress, supra* note 138 (establishing that several lawmakers are in various stages of drafting their own law, which is expected to begin the legislative process in the Senate Commerce Committee). "Meanwhile, the NCAA is hurriedly crafting its own legislation that it expects to finalize by the end of October and then pass officially in January." *Id.* See also Dan Murphy, *supra* note 137 (discussing Senator Booker's proposed NIL bill that will most likely be passed due to recent democratic Senate control due to recent election).

¹⁴² See *id.* (illustrating that a partisan Senate is imperative in order to find unity in a proposed NIL bill). Right now, there are multiple legislative attempts by Congress to form an NIL bill. For example, Sens. Cory Booker and Richard Blumenthal have proposed a "'College Athlete Bill of Rights' that more broadly addresses some of the practices in college sports that they say are unfair to athletes." *Id.*

¹⁴³ See *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1 (9th Cir. 2013) (holding that use of a player's likeness does not qualify for First Amendment protection because it literally recreated the player in the very setting in which he achieved renown"). See Hinds, *supra* note 99, at 108 (asserting Keller's claim of misappropriation of student-athletes' images that were used in the NCAA Football and Basketball series). Additionally, Keller also claimed that EA and the NCAA violated his right of publicity under California Civil Code § 3344 and California common law. *Id.*

¹⁴⁴ See *O'Bannon v. NCAA*, 802 F.3d 1049, 1056 (9th Cir. 2015) (depicting the pre-trial procedural matter in regard to EA Sports and the CLC). See also Hinds, *supra* note 99, at 111 (explaining EA's four affirmative defenses under the anti-SLAPP motion that would have immunized them from any liability against student-athletes on appeal). *Id.* "EA also argued that even if their First Amendment defenses failed, NCAA student-athletes have no right of publicity because, pursuant to NCAA Bylaws, they contractually assigned their right of publicity to the NCAA and its member schools, and thus, the Bylaws prohibited them from receiving

characteristics in the game mirrored those of the real life Keller there was no transformation, resulting in an infringement of Keller's NIL.¹⁴⁵

O'Bannon's antitrust claims were consolidated with Keller's right of publicity claims in *In re Student-Athlete Name & Likeness Licensing Litigation*.¹⁴⁶ Ultimately, in September of 2013, EA and the CLC settled its claims with the right of publicity plaintiffs for \$40 million, leaving the NCAA as the sole antitrust defendant.¹⁴⁷ Chief Justice Thomas strongly disagreed with the Ninth Circuit's holding and asserted that the NCAA was extraordinarily circumscribing college athletes' right of publicity.¹⁴⁸ According to Justice Thomas,

compensation." *Id.* See also Gutmann, *supra* note 88, at 223 (exemplifying why the Transformative Use Test, as currently defined, is nearly impossible to apply in the videogame arena).

¹⁴⁵ See *Keller*, 724 F.3d at 1284 (holding that under California's Transformative Use defense, EA's use of likeness of college athletes like Keller in its video games is not protected by the First Amendment); see also Gutmann, *supra* note 88, at 224 (holding that the court in *Keller* found that Keller's characteristics in the game, including height, weight, and hometown, matched those of the real-life Keller and there was no transformation of the person himself).

¹⁴⁶ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 Supp. 2d 996, 996 (N.D. Cal. 2013) (holding that the outcome of *NCAA v. Bd. of Regents* did not bar future student-athlete compensation; California Civ. Code § 3344(d) did not bar athletes' claim to their right of publicity; the First Amendment did not bar claims because some alleged broadcasts were used commercially; and the Copyright Act, 17 U.S.C.S. § 101 did not apply to petitioners). See Landry & Baker III, *supra* note 82, at 76 (stating that the NCAA should consider several proposals for modifying NIL compensation for its student-athletes). "The NCAA and its members use college athlete NILs to attract consumers to their events[,] [t]hus, any assertion that the NCAA's NIL rules are needed to preserve consumer interest is intellectually dishonest." *Id.* at 58.

¹⁴⁷ See *Boston*, *supra* note 76, at 51 (indicating that the CLC and EA settled its claims with the right of publicity plaintiffs for \$40 million in September of 2013). "[T]he most obvious benefit that flows from the ruling to student-athletes is the ability of universities to offer, if they so choose, increased financial benefits to student-athletes in the form of NIL incentives." *Id.* at 54.

¹⁴⁸ See *Hinds*, *supra* note 99, at 112–13 (interpreting the dissent by Justice Thomas in *O'Bannon*). Justice Thomas felt that NCAA waivers restricting athletes' rights to their publicity was a prohibition on athletes' intellectual property rights. *Id.* But see *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 59 (2006) (holding that Ulala is more than a mere likeness or literal depiction of Kirby and taken together these differences demonstrate that Ulala is transformative meaning that respondents' added creative elements to create a new expression); *Winter v. DC Comics*, 30 Cal. 4th 881, 892 (2003) (holding that there was transformative application by defendants, the comic book characters depicted were "fanciful, creative characters, not [merely] pictures of the Winter brothers."). See *Hart v. Elec. Arts, Inc.*, 717 F.3d

student-athletes correctly recognized that the NCAA's procompetitive justification's do not substantially outweigh their rights to NIL compensation.¹⁴⁹ Prior to the Supreme Court review of *Alston*, EA had partnered with the CLC in anticipation of releasing its NCAA college football videogame.¹⁵⁰ Despite public support for the return of NCAA football, certain universities have already opted out of involvement with the game.¹⁵¹ Northwestern for example, has opted out because

141, 167 (3d Cir. 2013) (holding that the incorporation of college athlete NILs into EA's NCAA SVGs was transformative enough for First Amendment protection). "If the mere presence of the feature were enough, video game companies could commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likenesses." *Id.* See also *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (holding that the Transformative Use Test is straightforward: "[T]he inquiry is whether a celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.").

¹⁴⁹ See *O'Bannon*, 802 F.3d at 1079 (rejecting the district court's opinion that student-athletes are entitled to their respective NIL rights when the NCAA has sufficient procompetitive justifications under antitrust scrutiny). In contrast, Justice Thomas "respectfully disagree[d] with the majority's conclusion that the district court clearly erred in ordering the NCAA to permit up to \$5,000 in deferred compensation above student-athletes' full cost of attendance." *Id.* See also Hinds, *supra* note 99, at 116 (stating that the NCAA cannot contractually restrict student-athletes from their rights of publicity). "The dissent stated that even if student-athletes have a right of publicity, their rights are incredibly restricted because they are banned from receiving compensation and because they contractually surrendered their rights of publicity to the NCAA." *Id.* at 118.

¹⁵⁰ See Michael Rothstein, *EA Sports to do college football video game*, ESPN (Feb. 2, 2021), archived at <https://perma.cc/9JG5-93W3> (stating, "[f]or now, EA Sports is planning to move forward without rosters that include the names, images or likenesses of real college players."); Taylor Lyles, *EA is bringing back college football games without college players*, THE VERGE (Feb. 2, 2021), archived at <https://perma.cc/ZA3P-A8UH> (asserting the course of action by EA Sports to partner with the CLC to secure the use of over 100 teams including the stadiums, mascots, and uniforms used by the respected college institutions); Alex Galbraith, *Here Are the Details on EA Sports' College Football Series Comeback*, COMPLEX (Feb. 2, 2021), archived at <https://perma.cc/LH9U-UHRY> (following EA Sports executive vice president Cam Weber's statement that "we're at a point in time where the schools and conferences are comfortable partnering and building a college football game again and . . . a lot of that is excluding name, image, likeness of players.").

¹⁵¹ See Timothy Geigner, *EA College Sports Is Back, But Some Schools Are Opting Out Until Name, Image, Likeness Rules Are Created To Compensate Athletes*, TECHDIRT (Mar. 5, 2021), archived at <https://perma.cc/WTG7-D7UL> (acknowledging that even though EA Sports has announced its previous prize NCAA football to return, certain universities have already opted out from the game).

the school wants NIL rules to be created and finalized before players can take part in the highly-anticipated video game.¹⁵² Due to inconsistencies in the application of the Transformative Use Test, universities want set NIL guidelines so students do not find themselves claiming an infringement through their right of publicity.¹⁵³ However, EA and the CLC speculate that this partnership will be successful amongst the recognition of publicity rights for student-athletes under a royalty based system such as group licensing with the Supreme Court's view of *Alston* being precedent for their claim.¹⁵⁴

IV. Analysis

Despite the NCAA's claim that its new NIL guidelines are sufficient, they still result in an anti-competitive effect under the Rule of Reason analysis because they limit what student-athletes can be compensated for.¹⁵⁵ The court in *O'Bannon*, and most recently in

¹⁵² See *id.* (recognizing that “Northwestern is the second known school to opt-out of the game with Notre Dame being the first.”). Further, “[i]t was also reported by Northwestern made the decision in January before EA announced college football is coming back.” *Id.*

¹⁵³ See *id.* (stating that Notre Dame had already indicated they were pulling out of the game for the lack of NIL rules being established). See Gutmann, *supra* note 88, at 225–26 (establishing the inconsistencies between courts in defining what the Transformative Use Test should cover). Additionally, “[t]he same test should not be yielding definitions that are polar opposites which both, [Hart and Keller] on their faces, could be seen as correct.” *Id.* “There is simply nothing in the test that discusses the role of changeability, interactivity, and environment—all of which are central to the modern video game.” *Id.*

¹⁵⁴ See Jorgensen, *supra* note 98, at 380 (discussing the various forms of licensing-based systems that would be successful for student-athletes to be compensated while serving as a less restrictive alternative to the NCAA's procompetitive justification of keeping a distinction between professional and college sports e.g., amateurism). “A potential model for compensating college athletes on a royalty basis would involve a hybrid of group licensing agreements, as commonly relied upon by professional sports leagues and licensing arrangements, as prescribed by Congress . . .” *Id.* See Dellenger, *BOR*, *supra* note 134 (reiterating Senator Booker's hope to create a group licensing arrangement for athletes so they can be compensated for their NILs).

¹⁵⁵ See Dellenger, *Holdup*, *supra* note 134 (stating that the NCAA had opened up a dozen NIL doors while keeping closed a half-dozen). See Landry & Baker, *supra* note 82, at 17 (asserting that “[t]he court in *Grant-in-Aid* did recognize the role of amateurism in protecting the distinction between college and professional athletics. Yet the court did not accept the caps imposed by the NCAA were necessary.”). Alternatively, Judge Wilken held that the “goals of protecting amateurism and academic integration” could have been done through a less restrictive alternative. *Id.*

Alston, acknowledged the commercial value of a college-athletes' right of publicity and that any legitimate objective carried out by the NCAA could be achieved in a substantially less restrictive matter other than price-fixing.¹⁵⁶ State legislatures have now passed their own NIL laws in order to force Congress to propose a bill recognizing that the least restrictive alternative to circumvent the NCAA amateurism rules can be found through their right of publicity.¹⁵⁷ The NCAA's

See Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1244 (9th Cir. 2020) (concluding "that the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1."); *Blutman*, *supra* note 120 (explaining that the NCAA's adopted set of NIL rules for the 2021–22 academic year acknowledge that "payments untethered to education are not critical to preserving the distinction between college and professional sports," therefore, weakening their stance for amateurism); *see also Sconzo*, *supra* note 17, at 755 (acknowledging that the NCAA should realize that the distinction does not lie between college sports and professional sports but rather maintaining demarcation between amateurism and professional sports).

¹⁵⁶ *See O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA's rules have been more restrictive than necessary to protect its set of amateurism rules in the college sports market). The Court also concluded that plaintiffs had shown an injury "in fact as a result of the NCAA's rules having foreclosed the market for their NILs in videogames." *Id.* at 1067. "The rules prohibiting compensation for the use of student-athletes' NILs are thus a price-fixing agreement: recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the 'sellers' of these bundles—the colleges—collectively 'agree to value [NILs] at zero.'" *Id.* at 1057–58. The procompetitive purposes of the NCAA's rules could be achieved by a less restrictive alternative, making the current rules unlawful. *Id.* at 1057. *See Alston*, 958 F.3d at 1246 (holding that the NCAA's procompetitive benefit did not justify the NCAA's "sweeping prohibition" on NIL compensation). After identifying the less restrictive alternatives imposed by the plaintiffs, the district court through an injunction required the NCAA to permit its schools to "(i) 'use the licensing revenue generated from the use of their student-athletes' [NILs] to fund stipends covering the [COA]'; and (ii) to make deferred, post-eligibility cash payments in NIL revenue, not to exceed \$5,000, to student-athletes . . . (finding no evidence that 'such a modest payment' would 'undermine[]' NCAA's 'legitimate procompetitive goals')." *Id.* The Ninth Circuit concluded that the district court's decision was largely correct. *Id.*

¹⁵⁷ *See Dan Murphy*, *supra* note 137 (discussing recent legislation by bipartisan congressmen to adopt a federal NIL bill to govern the NCAA and colleges). *See Dellenger, NIL*, *supra* note 137 (quoting Senator Murphy: "I'm working on legislation to fix this issue by granting athletes the broad ability to make money off of their likeness, and collectively bargain for additional reforms to the system, and am hopeful it will move in this new Congress."). Subsequently, there is an uncertainty for the implementation of the bill due to three primary issues: "the

solicitation of a proposed bill from Congress signaled a trend towards the NCAA recognizing student-athletes intellectual property rights as well as the fear that group licensing may be forthcoming.¹⁵⁸ Therefore, student-athletes should argue for group licensing as the less restrictive alternative because the nature of licensing would be managed more efficiently and would help to enforce licensing agreements for the collective group of NCAA athletes.¹⁵⁹ In order to achieve this result, Congress' proposed solution should be to allow student-athlete compensation through their right of publicity.¹⁶⁰

Department of Justice's threat of potential antitrust violations; the Supreme Court's ruling on NCAA litigation in the Alston case; and the power shift, from Republican- to Democrat-controlled, in the U.S. Senate." *Id.*

¹⁵⁸ See Dellenger, *NIL*, *supra* note 137 (explaining the proposed bill introduced by Senator Booker to allow student-athletes the right to be compensated for use of their NILs). See Dellenger, *Holdup*, *supra* note 134 (indicating that the "employee debate is at the center of the NCAA's resistance to grant group licenses. A group license contract may push the NCAA too close to the employee-employer relationship with its athletes . . ."). Moreover, while the NCAA is increasing athlete compensation rights, it is making it more difficult to defend its overall amateurism model by expanding its NIL rights. *Id.* See Dellenger, *Crosshairs*, *supra* note 138 (representing the NCAA's approach to Congress more than a year ago requesting the creation of uniform legislation that would avoid the chaos of differing state laws and would give the NCAA control, as well as protection from legal entanglements).

¹⁵⁹ See Jorgensen, *supra* note 98, at 392 (asserting the need for a licensing formation to provide uniformity for college-athletes compensation).

CALA would thereby negotiate or establish rates for the licensing of publicity rights, based on the scope of rights requested by the licensee. In addition to individual or direct licensing, there are three licensing arrangements common among professional team sports and the music industry include the blanket license, the compulsory (or mechanical license) and the group license

Id.

¹⁶⁰ See Boston, *supra* note 76, at 63 (holding that "the district court's ruling in *O'Bannon* is replete with references to allowing student-athletes to receive compensation for the use of their NILs. These references, together with the court's injunction, signal that, in the court's view, student-athletes have a cognizable property interest in their NILs."). See also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding that the incorporation of college athlete NILs into EA's NCAA SVGs was transformative enough for First Amendment protection). Moreover, in *Hart* it was established that college athletes do have a right of publicity when it comes to their image being transformed into a videogame. *Id.*

A. *College-Athlete Compensation and the Future of Antitrust*

The NCAA has tried to withhold payments to student-athletes by claiming that its procompetitive justification of keeping a distinction between college and professional sports is significant to preserve amateurism.¹⁶¹ However, the NCAA's amateurism rules have been weakened due to The Supreme Court's finding that the NCAA's procompetitive justification can be accomplished through less restrictive alternatives under antitrust law.¹⁶² The NCAA rules fixing athletes' compensation at the cost of attendance results in a restraint of trade in violation of current antitrust law.¹⁶³ The Supreme

¹⁶¹ See NCAA 2020-21 DIVISION I MANUAL, *supra* note 7, at 60 (asserting that “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”). See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101–02 (1984) (indicating that the NCAA seeks to market college football differentiating it from professional football). “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.” *Id.* See Meyer & Zimbalist, *supra* note 10, at 257 (indicating that the NCAA still “views its amateurism principles as integral to its educationally focused mission.”). Additionally, the NCAA states that it seeks to “provid[e] student-athletes with exemplary educational and intercollegiate-athletics experiences in an environment that recognizes and supports the primacy of the academic mission of its member institutions, while enhancing the ability of male and female student-athletes to earn a four-year degree.” *Id.* “Amateurism in college sports is whatever the NCAA dictates it to be at the time.” *Id.* at 259.

¹⁶² See NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (stating that although the Court only reviewed compensation tied to education related expenses, there are serious flaws in the NCAA's standing argument). Moreover, “[i]n 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.” *Id.* See McDavis, *supra* note 35, at 317 (reiterating the importance of the *O'Bannon* decision in weakening the NCAA's amateurism power). “The court delivered a ‘resounding rebuke’ to the amateurism foundation of the NCAA, becoming the first of any federal court to find any aspect of the NCAA's amateurism rules as violative of antitrust law.” *Id.* See Traynor, *supra* note 9, at 209–10 (identifying the less restrictive alternatives that could still accomplish the NCAA's procompetitive purposes). “The first alternative allowed NCAA member schools to pay student-athletes small amounts of deferred cash compensation for the use of their NIL . . . [the] second proffered alternative to allow schools to increase student-athletes' scholarships to cover the full cost of attendance.” *Id.*

¹⁶³ See Chen, *supra* note 48 (analyzing the NCAA's historic infringement on college-athletes' restraint of trade, violating the Sherman Act). If the NCAA's amateurism

Court's decision in *Alston* paved the way for college-athlete compensation beyond the COA and Congress' proposed bill tailored towards student-athletes will reflect that the NCAA's last procompetitive justification will not survive even its own NIL guidelines.¹⁶⁴

In *Alston*, defendant NCAA produced only one procompetitive justification that explains their deviation from the operations of a free market.¹⁶⁵ The NCAA proposed that the challenged rules preserve

rules were no longer necessary or had a procompetitive purpose, then they would be illegal under antitrust law. *Id.* See *Alston v. NCAA* (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.) 958 F.3d 1239, 1251 (9th Cir. 2020) (depicting certain less restrictive alternatives that may exceed the cost of attendance that are admissible).

The court enumerated specific education-related benefits that the NCAA would be unable to prohibit or limit under the LRA: "computers, science equipment, musical instruments and other items not currently included in the [COA] but nonetheless related to the pursuit of various academic studies"; post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school; tutoring; study-abroad expenses; and paid post-eligibility internships.

Id. See Meyer & Zimbalist, *supra* note 10, at 275 (acknowledging the importance of the *Grant-in-Aid* litigation). Further, the Court held that the NCAA's rules "capping the amount of compensation that student-athletes can receive in exchange for their athletic services violated the Sherman Act." *Id.*

¹⁶⁴ See *Alston*, 141 S. Ct. at 2165–66 (acknowledging an ambiguity in the NCAA's scope of authority and whether they can build off of their flawed concept of amateurism). See Jorgensen, *supra* note 98, at 387 (alleging that college athletes "may elect to manage the licensing of their personal attributes either directly or via a third-party agent."). Further, "in the absence of a labor union, current and former college athletes could join an organization to negotiate, manage, administer and enforce their group licensing rights specifically with respect to the NCAA and their college teams." *Id.* See *Alston*, 958 F.3d at 1265 (outlining the appellate judges' task, which is not to resolve the national debate about amateurism but is to review the district court's judgment); Dellenger, *BOR*, *supra* note 134 (discussing Congressman Booker's plan to grant athletes permission to access group licensing, which would in turn could result in the NCAA videogame comeback); Dellenger, *Legislation Proposal*, *supra* note 15 (purporting that "Congressional members are seeking more reform within the association beyond NIL, something raised in the latest and third NIL hearing on Capitol Hill on June 22."); Dellenger, *Crosshairs*, *supra* note 138 (insinuating that the NCAA is still trying to hold on to its amateurism guidelines that have not been successful being a violation of antitrust that the NCAA will soon have to confront).

¹⁶⁵ See McDavis, *supra* note 35, at 300 (summarizing that the proposition of only one procompetitive justification survived prior litigation from *Bd. of Regents, O'Bannon*, and now *Alston*). Further, the second procompetitive justification that the NCAA

“amateurism, which in turn widens consumer choice by maintaining a distinction between college and professional sports.”¹⁶⁶ The court found that the challenged rules “do not follow any coherent definition of amateurism or even pay,” meaning that the rules of amateurism give no explanation for why student-athletes shouldn’t be afforded compensation beyond the COA.¹⁶⁷ However, the court also found that some NCAA rules including the COA limit on grant-in-aid, limits on compensation unrelated to education, and limits on cash awards, serve the NCAA’s procompetitive purpose by precluding unlimited payments unrelated to education that would closely resemble the professional sports landscape.¹⁶⁸ Despite the district court finding

proffered before *Alston* in *O’Bannon* was that its current amateurism rules protect and in fact, increase consumer interest making it procompetitive. *Id.* at 324. The Court disagreed, stating that the NCAA failed to offer evidence on “how consumers would actually behave if NCAA’s restrictions on student-athlete compensation were lifted.” *Id.* at 313. Ultimately, the Court determined that amateurism is not the driving force behind consumer interest after considering expert testimony. *Id.* See *O’Bannon v. NCAA*, 802 F.3d 1049, 1059 (9th Cir. 2015) (discussing the various procompetitive justifications proffered by the NCAA). The NCAA’s third previously successful procompetitive justification was through curtailing competition between member schools if athletes were to be compensated. *Id.* See *Bank*, *supra* note 127, at 109 (stating that many observers hope that this Act, which would contravene the current NCAA rules on student-athlete compensation, will enable student-athletes to share in the huge revenue). This justification was valid until recent state legislation, such as the California Fair Pay to Play Act, was introduced. *Id.*

¹⁶⁶ See *Alston*, 958 F.3d at 1257 (discussing the NCAA’s proposed procompetitive justification on appeal). The district court held that only some of the rules satisfy the NCAA’s procompetitive purpose: limits on cost of attendance payments unrelated to education. *Id.*

¹⁶⁷ See *id.* at 1249–51 (concluding that the student-athletes argument more compelling than the NCAA’s). Further, “in the battle of economic experts, the district court found the NCAA’s only demand expert, Dr. Kenneth Elzinga, unreliable because he failed to study ‘standard measures of consumer demand, such as revenues, ticket sales, or ratings,’ but instead relied on interviews with NCAA affiliates introduced to him by defense counsel.” *Id.* at 1249–50. “The district court further found his analysis irrelevant as he refused to study consumer response to historical changes in compensation levels based on the false premise that the NCAA’s amateurism rules have not materially changed over time.” *Id.* at 1250. In contrast, student-athletes experts compared consumer demand before and after the August 2015 increase to the grant-in-aid limit, which resulted in “‘thousands of class members receiving significant’” cost of attendance compensation, which demonstrated “‘no negative impact on consumer demand.’” *Id.*

¹⁶⁸ See *Alston*, 958 F.3d at 1250–51 (emphasizing the importance of meeting the NCAA’s procompetitive justification in keeping the distinction between college and

value in the NCAA's justification of keeping a distinction between college and professional sports, they still enjoined the NCAA from limiting enumerated compensation and benefits related to education.¹⁶⁹ Although the court failed to accept the plaintiff's less restrictive alternative as viable, the plaintiff's contended that NCAA limits on compensation unrelated to education unreasonably restrain trade.¹⁷⁰ The Supreme Court agreed with the Ninth Circuit's findings, but concluded that the argument was premature because the NCAA had not endorsed cash compensation untethered to education yet.¹⁷¹

professional sports by keeping compensation tethered to educational related expenses). Additionally, "the court concluded that limits on 'non-cash education-related benefits', such as post eligibility graduate scholarships or tutoring, do not have that effect; it reasoned that such benefits 'could not be confused with a professional athlete's salary' and would only 'emphasize that the recipients are students.'" *Id.*

¹⁶⁹ See *id.* at 1263–64 (addressing the district court's opinion at which the appeals court agreed was a valid opinion and should be upheld). The district court left it to the institutions to determine the types of benefits that qualify as relating to education. *Id.*

¹⁷⁰ See Jorgensen, *supra* note 98, at 380 (alluding to examples from uncapped compensation not related to education that did not have an adverse effect on demand). For instance, "despite public opinion polls to the contrary, demand for the Olympics increased after allowing professionals to participate, as did demand for professional sports, including Major League Baseball, when salaries increased." *Id.* at 381–82. "Furthermore, an analysis of Major League Baseball teams shows a positive correlation between the amount of money a team spends on its player payroll and the overall attendance at its games." *Id.* at 382.

¹⁷¹ See *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (stating that some will think the district court did not go far enough while some will think the district court went too far).

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 are not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law."

Id. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (explaining the importance of recognizing a valid restraint of trade which should be substituted with a less restrictive alternative). See *Alston*, 958 F.3d at 1265 (reiterating the district court's decision and the NCAA's course of action before allowing cash compensation untethered to education). "Indeed, *O'Bannon II* holds otherwise: 'Where, as here, a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a [viable LRA].'" *Id.*

Finally, Student-Athletes argue that the NCAA may no longer rely on *O'Bannon II*'s conclusion that NCAA limits on cash payments

At the conclusion of *Alston*, The Court held that the preservation of amateurism is a weak justification that will not survive the muster of procompetitive reasoning for future litigation.¹⁷² However, since the NCAA released NIL guidelines in October of 2020, the Supreme Court will eventually have to reexamine these challenged rules on whether there is a valid restraint of trade against student-athletes.¹⁷³ The NCAA has recognized in both *O'Bannon* and

untethered to education are critical to preserving the distinction between college and professional sports now that it has “endorse[d]” the very “same NIL benefits” at issue there. This argument is premature. As it stands, the NCAA has *not* endorsed cash compensation untethered to education; instead, it has undertaken to comply with the FPP Act in a manner that is consistent with *O'Bannon II*—that is, by loosening its restrictions to permit NIL benefits that are “tethered to education.”

Id.

¹⁷² See *Alston*, 141 S. Ct. 2141, 2168 (Kavanaugh, J., concurring) (explaining that it is highly questionable how the NCAA can justify not paying its student-athletes and its not clear how the NCAA can legally defend its remaining procompetitive justification of amateurism). See *Alston*, 958 F.3d at 1257 (acknowledging that the NCAA advanced its single procompetitive justification: That the challenged rules preserve amateurism, upholding the distinction between college and professional sports). Further, the district court concluded that only some of the procompetitive justification provided had purpose. *Id.* “In short, the district court fairly found that NCAA compensation limits preserve demand to the extent they preserve unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.” *Id.* at 1260.

¹⁷³ See Dellenger, *Holdup*, *supra* note 134 (indicating that “the restrictions in the NCAA report are stark signs that it is still clinging to shreds of a dying governance structure.”). Additionally,

These regulations could prove costly . . . They make it tougher for the NCAA to both gain Congressional assistance and defend itself in antitrust lawsuits, the latter of which holds truly remarkable irony: While it is increasing athlete compensation rights, the NCAA is making it more difficult to defend its overall amateurism model in a courtroom, multiple law experts say.

Id. See *NCAA Slates “NIL” Proposal for Vote*, *supra* note 15 (disclosing the 2020–21 legislative proposal introduced by the NCAA and its set guidelines and limitations). Moreover, “[u]nder the Proposal, schools also would be prohibited from taking certain actions, including participating in any development, operation or promotion of a student-athlete’s business activities, unless those activities were part of the student-athlete’s coursework or academic program.” *Id.* See Dellenger, *Crosshairs*, *supra* note 138 (explaining that “antitrust and guardrails on student athletes have no shot, says Tom McMillen, himself a former congressional lawmaker who now presides over Lead1, which represents the athletic directors of the Football Bowl Subdivision.”).

Alston that the proper inquiry under the Rule of Reason analysis is: “What procompetitive benefits are served by the NCAA’s challenged rules?”¹⁷⁴ The NCAA’s procompetitive stance aimed to uphold amateurism and keep a distinction between college and professional sports, but after the decision in *Alston*, this reasoning has become a deteriorating argument that will not survive future litigation according to Justice Kavanaugh.¹⁷⁵

B. *Leveraging Rights of Publicity Through Group Licensing*

1. Group Licensing as the Less Restrictive Alternative

The *Alston* decision ultimately left open the question of whether college-athletes can be compensated for their NIL.¹⁷⁶ *Alston*

¹⁷⁴ See *Alston*, 958 F.3d at 1259 (analyzing the procompetitive reasoning set forth by the NCAA and whether they prove to have a legitimate purpose). See also *O’Bannon*, 802 F.3d at 1079 (depicting the NCAA’s procompetitive justifications as more restrictive than necessary to achieve its ultimate goal of keeping a distinction between college and professional sports—which could be accomplished through a less restrictive alternative). Price fixing, by capping college athlete’s compensation below the COA, is an unreasonable restraint of trade. *Id.*

¹⁷⁵ See *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring) (posing an array of questions that will have to ensue if the NCAA’s amateurism rules are challenged in the near future). For example:

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?

Id. at 2168. See *Alston*, 958 F.3d at 1260 (interpreting the last procompetitive justification that survived muster as a legitimate justification for unlimited compensation for student-athletes). See Dellenger, *Holdup*, *supra* note 134 (pondering the decision by the NCAA to submit its own NIL guidelines, opening itself up to antitrust scrutiny by weakening its own amateurism rules).

¹⁷⁶ See *Alston*, 141 S. Ct. at 2168 (discussing the Court’s decision to only make a determination on the correct applicability of antitrust law). See *Alston*, 958 F.3d at 1265 (concluding that student-athletes’ argument that compensation can be given beyond education-related is premature). “As it stands, the NCAA has *not* endorsed

has signified a growing trend by state legislatures to take initiative in order to mitigate the amount of control the NCAA has in relation to compensation of student-athletes.¹⁷⁷ In *O'Bannon*, the court acknowledged that student-athletes have rights under intellectual property and personal property theories.¹⁷⁸ The recognition of these rights by Governor Newsom of California was a catalyst that pushed the NCAA to reconsider its NIL guidelines in allowing student-athletes to be compensated.¹⁷⁹ In *Alston*, student-athletes argued that the NCAA could no longer rely on the conclusion in *O'Bannon* that “NCAA limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports” because the NCAA has now endorsed the very same NIL benefits that were at issue.¹⁸⁰ Congress has come to the realization that student-athletes do have intellectual property rights in their NIL, and due to the recent party change in the Senate, Booker’s athlete bill of rights could become a reality.¹⁸¹ Booker’s proposed bill consists of granting

cash compensation untethered to education; instead, it has undertaken to comply with the FPP Act in a manner that is consistent with *O'Bannon II*—that is, by loosening its restrictions to permit NIL benefits that are ‘tethered to education.’” *Id.*

¹⁷⁷ See Dan Murphy, *supra* note 137 (acknowledging recent legislation by bipartisan congressmen to adopt a federal NIL standard for universities to abide by); Dellenger, *NIL*, *supra* note 137 (reiterating Blumenthal and Booker’s proposed Athletes Bill of Rights that will guarantee college-athletes “monetary compensation, long-term healthcare, lifetime educational scholarships and even revenue sharing.”).

¹⁷⁸ See Jorgensen, *supra* note 98, at 388 (reiterating Judge Wilken’s opinion in *O'Bannon* that recognized student-athletes rights under intellectual property law). Judge Wilken “rejected the NCAA’s argument that college athletes have no rights under intellectual and personal property theories, and further determined that college athletes had an interest in television revenues, despite the NCAA’s First Amendment argument and recognition that certain states prohibit college athletes from receiving any such compensation by statute.” *Id.*

¹⁷⁹ See Allen, *supra* note 45 (explaining that “The NCAA had asked Newsom, in a letter, not to sign the bill into the law, arguing that it would ‘erase the critical distinction between college and professional athletics.’”); Sarker, *supra* note 129 (stating that “On April 28, 2020, the NCAA Board of Governors established a framework of revisions to the NCAA’s rules that would allow student-athletes to receive compensation for the use of their name, image and likeness (NIL) under certain circumstances.”).

¹⁸⁰ See *Alston*, 958 F.3d at 1265 (voicing the opinion of plaintiffs amidst the NCAA’s allowance of NIL compensation for student-athletes). The appellate court refused to answer on this issue. *Id.*

¹⁸¹ See Dellenger, *NIL*, *supra* note 137 (outlining Senator Booker’s athlete bill of rights that could change college athletics forever). The athlete bill of rights proposed by Booker expands on NIL compensation greatly. *Id.* See Dellenger, *BOR*, *supra*

athletes rights to earn NIL compensation and also requires schools to share 50% of their profit with athletes from revenue generating sports, after accounting for cost of scholarships.¹⁸² State legislatures enacting their own NIL laws and Congress proposing its own bill, reiterates that college athletes should be afforded the right to their NIL under the law.¹⁸³

Rather than student-athletes receiving uncapped compensation for commercial use of their NIL, Congress and other experts should adopt group licensing to be put in place as a less restrictive alternative to the NCAA's procompetitive concern of compensation untethered to education.¹⁸⁴ Under group licensing, each union, (also known as players associations), would manage the group licensing of its respected members which would allow oversight for potential

note 134 (noting, "It not only grants athletes the right to earn NIL compensation, but also requires schools to share 50% of their profit with athletes from revenue-generating sports, after accounting for cost of scholarships."). "Sharing revenue with athletes is one of the most aggressive proposals in the bill, a move that the NCAA and its members firmly stand against and something that will in all likelihood create Republican rebuke." *Id.*

¹⁸² See Dellenger, *BOR*, *supra* note 134 (discussing the various rights Booker hopes to grant student-athletes). These rights also include: "[S]cholarship[s] for as many years as it takes for them to receive an undergraduate degree, and it also bans coaches and administrators from influencing or retaliating against a college athlete for their choice of academic major or course." *Id.* Booker also intends to implement a medical trust fund that would be created for "athletes to use to cover the costs of any out-of-pocket medical expenses while in college and for five years after their eligibility expires, if used to treat a sport-related injury." *Id.*

¹⁸³ See Dan Murphy, *supra* note 137 (acknowledging recent legislation by bipartisan congressmen to adopt a federal NIL standard for universities to abide by); Bank, *supra* note 127, at 110 (iterating the limitations of California's Fair Pay to Play Act and illustrating what the NCAA would look like with college athletes being paid). Additionally, "the Fair Pay to Play Act will allow student-athletes enrolled in California colleges and universities to be compensated for the use of their name, images, and likenesses just like non-athletes." Bank, *supra* note 127, at 109.

¹⁸⁴ See *Alston*, 958 F.3d at 1265 (observing student-athletes' argument that the NCAA's procompetitive justification on limiting cash payments unrelated to education is not integral to upholding the distinction between college and professional sports). See Dellenger, *Holdup*, *supra* note 134 (suggesting that group licensing provides a pathway for the return of the NCAA video game). Further, many experts have suggested that group licensing should be the first step in the NCAA's NIL guidelines to allow athletes incremental payments across the board as opposed to solitary income opportunities. *Id.* See also Jorgensen, *supra* note 98, at 391 (warranting a potential model for compensating college athletes on a royalty system which would involve a hybrid group of licensing agreements).

athletes.¹⁸⁵ Subsequently, a potential licensor could enter a group licensing agreement rather than contract with athletes on an individual basis.¹⁸⁶ Under this form of unionization, the NCAA's procompetitive argument of keeping a distinction between students and professionals could still be met because the alternative, denying college-athletes compensation entirely, is stricter than necessary to accomplish its procompetitive objectives.¹⁸⁷ One way to accomplish this, as exemplified in the context of the district court's ruling in *Alston*, is to use existing university policies as a guideline for sharing NIL revenues with student-athletes.¹⁸⁸ A university, athletic conference, or the CLC could enter group licensing agreements directly with current collegiate athletes.¹⁸⁹ According to Amber Jorgensen, "The parties could agree

¹⁸⁵ See *id.* at 392 (describing the costly transactional costs of individual licensing agreements as juxtaposed to group licensing amongst student-athletes as a whole). Further,

The number of college athletes and the nature of licensing would be managed more efficiently by an organization, like CALA, that would administer, collect, and enforce the licensing agreements of college athletes'. CALA would thereby negotiate or establish rates for the licensing of publicity rights, based on the scope of rights requested by the licensee.

Id.

¹⁸⁶ See *id.* at 393 (establishing that a collegiate athletes licensing association could take the place of unionization which would manage the group licensing of its current and former players).

¹⁸⁷ See *Alston*, 958 F.3d at 1265 (recognizing that a valid less restrictive alternative could be offered to meet the NCAA's surviving procompetitive justification). The Court concluded that where "a restraint is patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a [viable LRA]." *Id.* The Court was unable to examine an LRA since the NCAA had not endorsed NIL benefits that were not tethered to education. *Id.* See Osburn, *supra* note 46 (acknowledging how the board of governors expressed its support for the rule changes and directed all three divisions to consider appropriate rule changes based on the recommendations from its Federal and State Legislation working group).

¹⁸⁸ See *Boston*, *supra* note 76, at 70 (discussing the NCAA's primary reason for its procompetitive justification: the integration of student-athletes into their respected academic communities). Moreover, "[t]o facilitate the integration of student-athletes into university academic communities, student-athletes should for the most part be treated the same as other, similarly-situated students." *Id.* "One way to accomplish this within the context of the district court's ruling is to use existing university policies as a guideline for sharing NIL revenues with student-athletes." *Id.*

¹⁸⁹ See *id.* (reiterating the importance of a collegiate athletes licensing association to provide structure for compensation for student-athletes). Although the *O'Bannon*

that certain categories of merchandising would be exclusive to the university (e.g., jerseys), athletic conference (e.g., trading cards), and CLC (e.g., video games), which would simultaneously allow the NCAA and its member institutions to advance their mutually beneficial economic interests.¹⁹⁰

2. EA's Contingencies

This line of reasoning could be foreshadowing why EA has chosen to bring back NCAA College Football.¹⁹¹ Although EA executive vice president plans to stay out of players NIL, the delay of the release date for 2-3 years suggests that EA Sports is waiting for the NCAA to challenge NIL compensation by third-party's, or subsequently wait for another class of student-athletes to enjoin the NCAA's guidelines on NIL compensation.¹⁹² EA's decision to hold off on the game can also be attributed to certain universities opting out of the videogame.¹⁹³ Northwestern and Notre Dame have already opted out due to the lack of NIL guidelines and the subsequent

Court asserted that all current college athletes in the same class should receive equal compensation arising from use of their publicity rights, as previously discussed, the procompetitive justifications provided by the NCAA do not support the Court's conclusion. *Id.* at 62. *See also* Landry & Baker III, *supra* note 82, at 44-46 (suggesting that the NCAA should implement a NIL agreement contemporaneous with a group licensing agreement). "[O]versight might include reasonable restrictions in the form of a 'singing [sic] period' for NIL agreements and for requirements that third parties register with the NCAA prior to engaging with college athletes for the use of their NILs." *Id.* Moreover, "the NCAA should allow college athletes to hire an agent to handle the fundamentals that come along with pursuing, evaluating, and negotiating the NIL agreements." *Id.*

¹⁹⁰ *See* Jorgensen, *supra* note 98, at 394 (analyzing what a group licensing structure could look like for not only student-athletes but for the NCAA and its member organizations).

¹⁹¹ *See* Rothstein, *supra* note 150 (discussing the return of the EA Sports college football video game even before litigation has been settled); *see also* Lyles, *supra* note 150 (reiterating the timely decision by EA Sports to announce its return of its College Football videogame).

¹⁹² *See* Galbraith, *supra* note 150 (holding that EA Sports is eager for the Supreme Court outcome on whether student-athletes will be able to profit off their NIL). Further, "[s]hould Alston prevail, the door would be open for players to profit off their likenesses and new deals would likely be struck with EA." *Id.* "The developer says it's preparing for that outcome, building the game in such a way that players could be incorporated at a later date." *Id.*

¹⁹³ *See* Geigner, *supra* note 151 (reiterating that certain colleges have already opted out before EA has even released the game).

litigation that could follow if student-athletes claim a right of publicity infringement through an unstable Transformative Use Test.¹⁹⁴ EA will need a definitive answer by The Supreme Court before even considering using athletes' NIL's in its videogames.¹⁹⁵

EA has also partnered with the CLC once again to create its own partnership that would not be tied in with the subsequent antitrust violations of the NCAA.¹⁹⁶ In effect, EA is anticipating Congress's proposed Athletes Bill of Rights which will afford student-athletes the rights to their NIL while concurrently waiting for subsequent challenges to the NCAA's limitations on NIL compensation.¹⁹⁷ EA's successful release of the game is solely contingent on the fact that the

¹⁹⁴ See *id.* (discussing the need for a solid NIL foundation for both Northwestern and Notre Dame so that they can join EA's new NCAA football videogame). See Gutmann, *supra* note 88, at 225–26 (stating that without clear factors of any sort of consistency between jurisdictions, the Transformative Test has become essentially impossible to predict with any accuracy whatsoever). In addition, “the Court would have to deal with the many alternative tests that have been introduced to resolve the conflict between the right of publicity and the First Amendment.” *Id.* at 226. See also Dan Murphy, *supra* note 137 (establishing the need for a federal NIL bill to provide clarity in the field of rights of publicity with student-athlete compensation).

¹⁹⁵ See Geigner, *supra* note 151 (explaining that certain universities refuse to be a part of the game due to concerns about liability to their student-athletes and due to a lack of concrete NIL guidelines). The reality is that most universities will most likely wait for a federal law to pass before risking being a part of NCAA football videogames. *Id.* See also Rothstein, *supra* note 150 (concerning whether the return of the college videogame by EA is a smart move due to looming litigation upon appeal of *Alston*).

¹⁹⁶ See *O'Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (assessing the important procedural history, where EA Sports and the CLC settled its claims with the right of publicity plaintiffs leaving the NCAA as the sole antitrust defendant). See Hinds, *supra* note 99 (asserting Keller's claim of misappropriation of student-athletes' images that were used in the NCAA Football and Basketball series). Additionally, Keller also claimed that EA and the NCAA violated his right of publicity under California Civil Code § 3344 and California common law. *Id.*

¹⁹⁷ See *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)* 958 F.3d 1239, 1265 (9th Cir. 2020) (recognizing that the NIL argument as a less restrictive alternative is premature due to the fact that the NCAA has not acknowledged it under its set amateurism rules yet); *O'Bannon*, 802 F.3d at 1079 (depicting the NCAA's procompetitive justifications as more restrictive than necessary to achieve its ultimate goal of keeping a distinction between college and professional sports); Dan Murphy, *supra* note 137 (acknowledging recent legislation by bipartisan congressmen to adopt a federal NIL standard for universities to abide by); Dellenger, *NIL*, *supra* note 137 (quoting Senator Murphy: “I'm working on legislation to fix this issue by granting athletes the broad ability to make money off of their likeness, and collectively bargain for additional reforms to the system, and am hopeful it will move in this new Congress.”).

Supreme Court and Congress affords student-athletes uncapped compensation upon use of their NIL's.¹⁹⁸ The inverse being that all universities will opt out of the videogame in order to avoid litigation by its student-athletes for infringing on their right of publicity.¹⁹⁹

V. Conclusion

The current landscape of the NCAA's procompetitive justification to keep a distinction between college and professional sports signifies an infringement on antitrust law. Due to the NCAA proffering their own NIL guidelines, the argument that compensation be tethered to educational-related expenses is flawed and the NCAA's procompetitive justification can be accomplished through a less restrictive alternative for student-athletes. This less restrictive alternative can be accomplished through college athletes right of publicity which is apparent in the NCAA's NIL guidelines and through proposed state and federal bills. State action by Governor Newsom of California forced the NCAA, and currently Congress, to address the current NIL challenges. Congressional support will afford student-athletes rights in their NILs as well as compensation upon commercial use of their NIL. In addition, Senator Booker has suggested group licensing as the primary unionization for college-athletes to receive compensation.

The Supreme Court's decision in *Alston* set the landscape for future litigants to challenge the remaining NCAA amateurism rules which Justice Kavanaugh alluded to as ungrounded and legally

¹⁹⁸ See Hinds, *supra* note 99, at 108 (asserting Keller's claim of misappropriation of student-athletes' images that were used in the NCAA Football and Basketball series). Additionally, Keller also claimed that EA and the NCAA violated his right of publicity, this is due to the NCAA using his NIL in a videogame. *Id.* See *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1284 (9th Cir. 2013) (holding that under California's Transformative Use defense, EA's use of likeness of college athletes like Keller in its video games is not protected by the First Amendment but can be asserted through the Transformative Use Test). See also Gutmann, *supra* note 88, at 223 (exemplifying why the Transformative Use Test, as currently defined, is nearly impossible to apply in the videogame arena). Since the Transformative Use Test is difficult to apply, a great deal of deference could be given towards plaintiffs. *Id.*

¹⁹⁹ See Geigner, *supra* note 151 (realizing that certain universities refuse to be a part of the game due to concerns about liability to their student-athletes' and due to a lack of concrete NIL guidelines); see also Rothstein, *supra* note 150 (concerning whether the return of the college videogame by EA is a smart move due to looming litigation upon appeal of *Alston*).

unjustifiable. EA has already anticipated the recognition of college-athletes' being compensated for the commercial use of their NILs due to its recent announcement to bring back its NCAA football video game. The end goal is to have Congress pass a federal NIL bill to provide uniformity going forward for the NCAA and state legislatures to abide by that will recognize both the antitrust law and right of publicity rights of college-athletes. This will result in just compensation for student-athletes beyond the scope of educational-related benefits that history has denied.