

**THE PATH TO NAME, IMAGE, AND LIKENESS RIGHTS FOR COLLEGE ATHLETES AND ITS POTENTIAL EFFECTS ON STUDENT ATHLETES, THE NCAA, AND ATHLETIC PROGRAMS**

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*This paper addresses the recent change to the National Collegiate Athletic Association’s (NCAA) policy on amateurism in college sports in allowing student athletes the opportunity to use their name, image, and likeness to obtain compensation. First, this paper will generally introduce the NCAA, its member schools, and relevant financial information about college sports. Second, this article will discuss the creation of the NCAA and its approach to college sports, namely its amateur status requirement for student athletes. Next, this paper discusses the external pressures that led to the adoption of an interim name, image, and likeness policy. The three external pressures discussed are state legislation, the lack of federal legislation, and significant legal challenges to the NCAA’s compliance with antitrust laws. Further, this note considers the concerns of the NCAA, member schools, and student athletes in name, image, and likeness rights, as well as student athlete compensation more broadly. Additionally, this paper acknowledges critiques to student athlete compensation. Finally, this paper discusses the practical implications of name, image, and likeness rights on various student athletes. In particular, it examines discrepancies based on gender, revenue-generation of a program, and the socioeconomic status of student athletes. This paper also highlights the “Power 5 Conference” dynamic and college athlete recruiting.*

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INTRODUCTION

In order to competitively play a sport at a four-year college or university in the United States after high school, a student athlete will likely be subject to the rules and eligibility requirements of the NCAA.<sup>1</sup> The NCAA’s membership consists of 1098 colleges and universities across three divisions, or “levels,” of athletic participation.<sup>2</sup> There are nearly half a million student athletes participating in intercollegiate athletics at NCAA member institutions.<sup>3</sup> The various NCAA committees, made up of member representatives, propose and decide the rules that regulate everything from recruitment and compliance to academics and championships.<sup>4</sup> Historically, the NCAA has largely focused on

1. *See generally Want to Play College Sports?*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2021/2/8/student-athletes-future.aspx> [<https://perma.cc/VGC6-CLKQ>] (last visited May 21, 2022); *accord Why Choose the NAIA?*, NAT’L ASS’N INTERCOLLEGIATE ATHLETICS, <https://www.naia.org/why-naia/index> [<https://perma.cc/M3QL-GYP6>] (NAIA is a separate, smaller athletic association from the NCAA that focuses on “the business of small college athletics”).

2. *What is the NCAA?*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/9GQ3-JAQN>] (last visited May 20, 2022).

3. *Id.*

4. *Id.*

ensuring that all student athletes who participate in NCAA sanctioned events are amateurs, not professionals.<sup>5</sup> In defining amateurism, the NCAA has essentially prohibited its student athletes from receiving any compensation, monetary or otherwise, in relation to their athletic participation.<sup>6</sup> Over time, the NCAA has created an exception for scholarships and other financial aid that can cover certain academic and educational expenses.<sup>7</sup> As such, student athletes do not directly benefit from any contributions they make to an athletic department's revenues. Further, receiving any such compensation would make student athletes ineligible for competition and could subject an athletic program to penalties for violations.<sup>8</sup>

College and university athletic departments are classified as non-profit organizations.<sup>9</sup> The athletic departments at 227 NCAA member colleges and universities are required to publicly release the revenue and expense reports for the academic year, but some institutions have certain exemptions or are otherwise able to keep information private.<sup>10</sup> There is a standardized reporting mechanism which creates and defines certain categories of revenues and expenses.<sup>11</sup> Most institutions claim little-to-no profit from college sports.<sup>12</sup> Some speculate this is due to how athletic programs are able to categorize and report expenses, suggesting some athletic departments are generating profits but report

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5. See generally *Amateurism*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes/future/amateurism> [https://perma.cc/PWC4-NTG6] (last visited May 23, 2022).

6. *Payments from Sports Team*, NAT'L COLLEGIATE ATHLETIC ASS'N, [http://fs.ncaa.org/Docs/eligibility\\_center/ECMIP/Amateurism\\_Certification/Payment\\_from\\_team.pdf](http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Payment_from_team.pdf) [https://perma.cc/C9TS-EP2V].

7. *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/student-athletes/future/scholarships> [https://perma.cc/H2FJ-M9FD]; see *infra* pp. 5–7.

8. See *What Could Cause College Athletes to Lose Amateur Status?*, Scarini & Hollenbeck, <https://scarinichollenbeck.com/law-firm-insights/cause-college-athletes-lose-amateur-status> [https://perma.cc/98ZC-68M2].

9. Kevin Blue, *Rising Expenses in College Athletics and the Non-Profit Paradox*, ATHLETIC DIR. U., <https://www.athleticdirector.uconn.edu/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox/> [https://perma.cc/4B6V-QVEZ].

10. *Methodology for 2019 NCAA Athletic Department Revenue Database*, USA TODAY (Aug. 4, 2021, 11:19 AM), <https://sports.usatoday.com/2020/07/05/methodology-for-2019-ncaa-athletic-department-revenue-database/> [https://perma.cc/M2DD-H3FD] [hereinafter *Methodology for 2019 Revenue Database*].

11. *Id.*

12. See Blue, *supra* note 9 (discussing the relationship between increased revenue and increased spending).

expenses higher than the actual cost.<sup>13</sup> Expense reporting aside, it is no secret that athletic programs at some institutions bring in massive revenues and function more like businesses.<sup>14</sup> In 2019, the University of Texas reported the most revenues at \$200,772,813.<sup>15</sup> 37 universities reported revenues of over \$100 million for the 2019-2020 year.<sup>16</sup> The revenue categories consist of ticket sales, contributions from individuals and other organizations, rights and licensing, student fees, school funds and others.<sup>17</sup> The rights and licensing category is defined as follows:

Includes revenue for athletics from radio and television broadcasts, Internet and e-commerce rights received from institution-negotiated contracts, the NCAA and conference revenue-sharing arrangements; and revenue from corporate sponsorships, licensing, sales of advertisements, trademarks and royalties. Includes the value of in-kind products and services provided as part of a corporate sponsorship (e.g., equipment, apparel, soft drinks, water and isotonic products). Also includes revenue from food, concessions and parking.<sup>18</sup>

The rights and licensing revenue category includes the type of endorsement deals that student athletes have been prohibited from seeking under the NCAA's amateurism policy. As of July 1, 2021, student athletes can seek out sponsorships that do not contradict

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13. Matt Brown & Jason Kirk, *Be Skeptical when Big College Athletic Departments Act Broke*, BANNER SOCIETY (Aug. 12, 2019, 10:22 AM), <https://www.bannersociety.com/2019/8/12/20704195/college-football-athletic-budgets> [<https://perma.cc/7WT8-5DTJ>].

14. See Alan Blinder, *Big Contracts, Big Buyouts, Big Pressure: College Football Coaches Hit the Jackpot*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/sports/ncaafotball/college-football-coaching-changes.html> [<https://perma.cc/XK63-VLVQ>] (discussing multi-million-dollar contracts for college football coaches, the "value" football programs provide to the schools and introducing disproportionate benefits for athletes).

15. Steve Berkowitz & Kaitlyn Radde, *NCAA Finances: Revenue and Expenses by School*, USA TODAY (Oct. 13, 2021, 1:43 PM), <https://sports.usatoday.com/ncaa/finances/> [<https://perma.cc/HH3Q-3AUA>] (data from 2019–2020 fiscal year).

16. *Id.*

17. See *Methodology for 2019 Revenue Database*, *supra* note 10. But not all revenue has to be reported. See Kristi Dosh, *The Biggest Misconceptions About the Finances of College Sports*, FORBES (June 12, 2017, 11:00 AM), <https://www.forbes.com/sites/kristidosh/2017/06/12/the-biggest-misconceptions-about-the-finances-of-college-sports/?sh=290e6d54366f> [<https://perma.cc/52HS-F5JJ>] (explaining that "athletic departments are not supposed to report revenue that is generated outside of the sports it sponsors" such as if a department owned a golf course open to the public).

18. *Methodology for 2019 Revenue Database*, *supra* note 10.

the institutions' own endorsements and sponsorships.<sup>19</sup> Some athletes may have the opportunity to receive revenue from certain uses of their names and images on merchandise as well.<sup>20</sup> This paper will discuss how this shift in policy came to be and its effects on student athletes, the institutions they attend, and the NCAA.

## I. THE HISTORY OF THE NCAA'S AMATEURISM POLICY

The NCAA historically required its member institutions to certify that its student-athletes that participate in intercollegiate athletics are amateurs.<sup>21</sup> The NCAA views athletic participation as a part of the student's "educational experience" and seeks to maintain a "line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model."<sup>22</sup> The Collegiate Model required student-athletes to be "amateurs" in an intercollegiate sport and that "their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived."<sup>23</sup> The NCAA's amateurism policy further stated that intercollegiate athletic participation should be a hobby and that college athletes should be protected from commercial and professional enterprises attempting to exploit them.<sup>24</sup> Even before the recent changes to its amateurism policy, the NCAA allowed student athletes to receive funding for their athletic abilities from athletic departments

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19. Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021, 4:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/2GFB-P7UR>].

20. *E.g.*, Debbie Holmes, *Ohio State Will Allow Student-Athletes to Profit from Jersey Sales*, WKSU 89.7 (Aug. 4, 2021, 2:54 PM), <https://www.wksu.org/sports/2021-08-04/ohio-state-will-allow-student-athletes-to-profit-from-jersey-sales> [<https://perma.cc/2LNF-DVY6>].

21. NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL Art. 2 §2.9 (2020), <https://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx> [<https://perma.cc/5EP7-E4PF>] ("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.") [hereinafter 2021 NCAA MANUAL]; see also *Amateurism*, *supra* note 5.

22. 2021 NCAA MANUAL, *supra* note 21, at xiii.

23. *Id.* at 3.

24. *Id.*; *But see* David G. Savage, *Supreme Court Justices See 'Exploitation' of College Athletes in NCAA Case*, L.A. TIMES (Mar. 31, 2021, 10:34 AM), <https://www.latimes.com/politics/story/2021-03-31/supreme-court-ncaa-case> [<https://perma.cc/Q3XU-X83C>] (discussing how the NCAA's amateurism policy often exploits student athletes and was a fundamental argument for opening the door to name, image, and likeness rights for student athletes).

through athletic scholarships that can be used for educational expenses such as tuition, room and board, books, and meals. However, this was not always the case.

At the NCAA's inception in 1906 (then the Intercollegiate Athletic Association), college sports were not heavily regulated, and the students and some faculty oversaw the majority of athletic competition.<sup>25</sup> The NCAA played a minor role by establishing rules for football and creating championships.<sup>26</sup> As public interest and the intensity of college athletics continued to grow, so did the need for central rules that regulated participation. There was a concern for the safety of college students participating in athletics, especially with the rapidly increasing commercialization of intercollegiate athletics.<sup>27</sup> It was established early on that students would not get any compensation based on athletic performance.<sup>28</sup> Initially, there was no true distinction between student-athletes and other students because all enrolled students could apply for financial aid from the school, and there was not any separate funding available for athletic departments to use for financing the athletes' education.<sup>29</sup> College athletic programs were treated much like intramural sports programs today.

The end of World War II led to a drastic increase in attendance at post-secondary educational institutions, and therefore, athletic participation increased significantly.<sup>30</sup> Technological developments in broadcasting abilities through radio and television further increased the commercialization of college athletics.<sup>31</sup> These developments coupled with the increasing desire to win led to a more intense focus on recruiting athletes to specific schools rather than creating teams from students already enrolled.<sup>32</sup> The increase in competition inevitably led to various recruiting scandals

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25. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 13 (2000).

<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1393&context=sportslaw> [https://perma.cc/Z3QQ-UUPR].

26. *Id.*

27. *Id.* at 12.

28. See *National Collegiate Athletic Association: Overview*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [https://perma.cc/M827-96BB] (last visited May 6, 2022) [hereinafter NCAA].

29. See *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2014/10/6/scholarships.aspx> [https://perma.cc/WTP8-LPC4] (last visited May 6, 2022).

30. Smith, *supra* note 25, at 14.

31. *Id.*

32. *Id.*

involving gifts, money, and other methods used to attract players to a particular team or school.<sup>33</sup> The NCAA then began to expand its authority over college athletics as more schools began to expand their athletic programs and recruit talented athletes to fill their teams. In doing so during the late '40s to the late '50s, student athletes started to become distinguishable from other students as the NCAA began to slowly reduce restrictions on the type of "compensation" that student-athletes could receive. In 1948, the NCAA unanimously passed the "Sanity Code"<sup>34</sup> which limited financial aid to a need-basis that could not exceed the cost of tuition and one free "training-table meal" per day only during the athlete's season.<sup>35</sup> It was introduced to alleviate exploitative practices in the recruitment of student athletes, but the only mechanism of enforcement was to remove the non-compliant school from the NCAA.<sup>36</sup> Three years later, the NCAA repealed the Sanity Code and created the Committee on Infractions to better implement and enforce its rules through various penalties.<sup>37</sup>

The NCAA's authority over collegiate athletics continued to grow as it sought to balance the commercialization and increased profitability of intercollegiate athletics, administrative investment in the success of the institution's athletic programs, as well as accusations of unfair enforcement against the institutions and their athletic departments.<sup>38</sup> Eventually the NCAA allowed student athletes to receive financial support for "educational expenses" which also included fees, room and board, books, and laundry.<sup>39</sup> In allowing athletes to receive financial aid for educational expenses and other "commonly accepted expenses,"<sup>40</sup> the NCAA had to create

33. *Id.*

34. *Id.*; See also Jake Grant, *Rearview Mirror: The Sanity Code*, SBINATION (Oct. 31, 2019, 9:00 AM), <https://www.fromtherumbleseat.com/2019/10/31/20941243/rearview-mirror-the-sanity-code-georgia-tech-ncaa-image-and-likeness-players-scholarship-athletics> [<https://perma.cc/X8H2-49E6>] (discussing the implementation of the Sanity Code as a mechanism to "prevent things from spiraling from out of control" when the concept of athletic scholarships did not exist).

35. Brian Ewart, *History: The Sinful Seven*, SBINATION (Aug. 22, 2011, 3:16 AM), <https://www.vuhoops.com/2011/08/22/history-the-sinful-seven> [<https://perma.cc/73L9-F4N8>].

36. However, expelling the school from athletic competition punished the student far more than the school engaging in exploitative practices. *Id.*

37. Smith, *supra* note 25, at 14–15.

38. *Id.* at 16.

39. GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 13 (2017), [https://www.brookings.edu/wp-content/uploads/2016/10/chapter-one\\_-unwinding-madness-9780815730026.pdf](https://www.brookings.edu/wp-content/uploads/2016/10/chapter-one_-unwinding-madness-9780815730026.pdf) [<https://perma.cc/8FRE-C5ET>].

40. *Id.*

rules to distinguish acceptable education-related aid from unacceptable aid based on athletic performance.<sup>41</sup> Meanwhile, the growth of college athletics led to increased revenues for individual universities and colleges through ticket sales, brand sponsorship and endorsement deals, television and media, sizeable donations, etc., as well increased expenses for supporting the programs.<sup>42</sup> While salaries for college football coaches grew significantly<sup>43</sup> and multi-million dollar athletic facilities were constructed,<sup>44</sup> the NCAA continued to limit the benefits for student athletes to educational expenses and the student athlete experience through its amateurism policy.<sup>45</sup>

II. PRESSURE FROM LEGISLATORS ON NAME, IMAGE, AND LIKENESS POLICY

A. State Legislation

Increasing power and financial disparities between athletic departments at NCAA membership schools and student athletes inspired some state legislators to propose legislation opposing the NCAA’s longstanding policy on amateurism.

On September 30, 2019, California Governor Gavin Newsom signed into law Senate Bill 206, known as the Fair Pay to Play Act (the “Act”).<sup>46</sup> The Act becomes effective January 2023.<sup>47</sup> The bill allows student athletes at California public colleges and universities to potentially profit from the use of their individual likenesses and popularity without disqualifying them from

41. 2020-21 NCAA Division I Manual, NAT’L COLLEGIATE ATHLETIC ASS’N § 12.01.4 (Aug. 1, 2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/7AC9-H4QQ>].

42. See Patrick Rische, *For Division I Athletics, Greater Collegiate Commercialization Enhances Student Experiences*, FORBES (Dec. 9, 2015, 8:18 PM), <https://www.forbes.com/sites/prishe/2015/12/09/for-division-i-athletics-greater-collegiate-commercialization-enhances-student-experiences/?sh=67a8e72852b7> [<https://perma.cc/Z2U6-HCHA>].

43. See Blinder, *supra* note 14.

44. See Will Hobson & Steven Rich, *Colleges spend fortunes on lavish athletic facilities*, CHI. TRIB. (Dec. 23, 2015, 6:40 AM), <https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html> [<https://perma.cc/MKV9-LAGL>].

45. See 2021 NCAA MANUAL, *supra* note 21, at 3 (showing the “physical, mental and social benefits” from college athletics).

46. Cal. S.B. 206 (Sept. 30, 2019), Cal. Educ. Code §67456 (also known as the “FPP Act”).

47. *Id.* at 2.



intercollegiate athletic competition.<sup>48</sup> Specifically, Section 2 of the Act provides that:

(1) A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness. Earning compensation from the use of a student's name, image, or likeness shall not affect the student's scholarship eligibility.

(2) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness.

(3) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a postsecondary educational institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness.<sup>49</sup>

The Act prohibits any "postsecondary educational institution" as well as any athletic association (such as the NCAA), conference, or other related organization from preventing or restricting a student athlete's ability to profit from the use of the student's name, image, and likeness.<sup>50</sup> Additionally, the Act prohibits retaliation against athletes that seek compensation and institutions with student athletes being compensated for the use of their name, image, and likeness.<sup>51</sup> The Act also prohibits universities, colleges, the NCAA, athletic conferences, and other institutions from preventing an athlete from obtaining professional representation from agents or attorneys for endorsement opportunities.<sup>52</sup>

California's passing of the Fair Pay to Play Act inspired a surge amongst other states to introduce and pass similar legislation

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48. *Id.* at 1.

49. *Id.* at §2.

50. *Id.* at 1.

51. *Id.*

52. *Id.* at §2(c)1.

granting name, image, and likeness rights and protections to college athletes.<sup>53</sup> The NCAA’s initial response was to form a Federal and State Working Group that recommended calling on Congress to preempt states from enacting name, image, and likeness legislation to uphold the distinction between college and professional sports.<sup>54</sup> The NCAA formed multiple working groups for each of its divisions (I, II and III) consisting of Conference Commissioners, athletic directors, and student athletes to recommend solutions to the NCAA President and the Board of Directors.<sup>55</sup> The NCAA Council is a group of forty people responsible for day-to-day decision-making in Division I athletics.<sup>56</sup> Any recommendation on name, image, and likeness legislation from the Council would have to be approved by the NCAA Board of Governors.<sup>57</sup> The NCAA’s Board of Governors emphasized, “at no point should a school pay student-athletes for name, image and likeness activities.”<sup>58</sup> It also sent a letter to Governor Newsom

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53. Twenty states have passed name, image, and likeness legislation – eight take effect July 2021 with the other twelve set to go in effect within the next four years. *Name, image and likeness (NIL): What it means, why it matters and how it will impact the NCAA and college sports*, ATHLETIC (Jul. 1, 2021), <https://theathletic.com/2580642/2021/06/28/name-image-and-likeness-nil-what-it-means-why-it-matters-and-how-it-will-impact-college-sports/> [<https://perma.cc/XSF6-ARGK>].

Tres York, *Congress Takes Another Look at the Rights of College Athletes*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 14, 2020), <https://www.ncsl.org/blog/2020/08/14/congress-takes-another-look-at-the-rights-of-college-athletes.aspx> [<https://perma.cc/6SX2-4GPH>] (showing states like Colorado, Florida, Nebraska, and New Jersey have passed name, image, and likeness legislation and thirty-three other states have introduced similar bills).

54. See generally *Questions and Answers on Name, Image and Likeness*, NAT’L COLLEGIATE ATHLETIC ASS’N <http://www.ncaa.org/questions-and-answers-name-image-and-likeness> [<https://perma.cc/23G5-KG26>] (last visited May 5, 2022) [hereinafter NCAA, *Questions and Answers*].

55. *Membership Resources on Name, Image and Likeness*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/governance/membership-resources-name-image-and-likeness> [<https://perma.cc/33GT-DLRC>] (last visited May 5, 2022) [hereinafter NCAA, *Membership Resources*].

56. See *Division I Council*, NAT’L COLLEGIATE ATHLETIC ASS’N [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1COUNCIL](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COUNCIL) [<https://perma.cc/4NGJ-H9G7>] (last visited May 6, 2022).

57. Adam Silverstein & Dennis Dodd, *NCAA Council recommends interim name, image and likeness policy; Board of Directors to meet Wednesday*, CBS SPORTS (Jun. 28, 2021, 4:30 PM), <https://www.cbssports.com/college-football/news/ncaa-council-recommends-interim-name-image-and-likeness-policy-board-of-directors-to-meet-wednesday/> [<https://perma.cc/L62K-HEZH>].

58. NCAA, *Questions and Answers*, *supra* note 54 (showing the Board proposed changes to rules that would allow compensation for third-party endorsements without school or conference involvement and other opportunities such as social media without the use of trademarks or logos).

alleging that the Fair Pay to Play Act is unconstitutional and that California institutions would be prohibited from participating in NCAA competitions.<sup>59</sup> However, the letter proved to be an empty threat as enacted state laws, a key Supreme Court decision on NCAA antitrust violations, and Congress' inaction pressured the NCAA to relax their outright ban on name, image and likeness compensation for student athletes.<sup>60</sup>

### B. Federal Legislation

As various states continued to pass name, image and likeness legislation creating a patchwork of rules dependent on the location of a student athlete's school, the world of college athletics looked to the federal government. In March of 2019, two now-former U.S. Congressman, Mark Walker (Republican-NC) and Cedric Richmond (Democrat-LA), introduced the first federal bill that sought to prevent amateur sports organizations from prohibiting or "substantially restricting" the use of an athlete's name, image, or likeness.<sup>61</sup> The outbreak of the COVID-19 pandemic temporarily brought name, image, and likeness legislative developments to a halt in the spring of 2020. However, shortly thereafter, more federal bills were introduced. The "Student Athlete Level Playing Field Act," a bill co-introduced by Congressmen Anthony Gonzalez (Republican-OH) and Emanuel Cleaver (Democrat-MO), received initial bipartisan support from its co-sponsors.<sup>62</sup> Further, the "The Fairness in Collegiate Athletics Act," introduced by Senator Marco Rubio (Republican-FL) in the summer of 2020, required the NCAA to implement rules that would allow college athletes to be compensated for their name, image, and likeness by June 30, 2021.<sup>63</sup> Senator Rubio's bill gained support from multiple athletic

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59. Chris Bumbaca & Steve Berkowitz, *NCAA sends California governor letter calling name, likeness bill 'unconstitutional'*, USA TODAY (Sept. 11, 2019, 7:31 PM), <https://www.usatoday.com/story/sports/ncaaf/2019/09/11/ncaa-sends-letter-calling-california-likeness-bill-unconstitutional/2284789001/> [<https://perma.cc/Y34X-VDJD>].

60. Dennis Dodd, *Legal concerns have impeded NCAA's effort to enact name, image and likeness legislation by July 1*, CBS SPORTS (May 20, 2021, 1:23 PM), <https://www.cbssports.com/college-football/news/legal-concerns-have-impeded-ncaas-effort-to-enact-name-image-and-likeness-legislation-by-july-1/> [<https://perma.cc/PVK7-QXDY>].

61. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

62. Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong., 2d Sess. § 2(a) (2020); see also Gregg E. Clifton, *Bipartisan Name, Image, Likeness Bill Introduced In Congress*, NAT'L L. REV. (Sept. 25, 2020), <https://www.natlawreview.com/article/bipartisan-name-image-likeness-bill-introduced-congress> [<https://perma.cc/U9F7-TCBM>].

63. Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. 1, § 2 (2020).

conferences, university presidents, and athletic directors.<sup>64</sup> Six different federal bills were introduced by members of Congress since summer of 2020, proposing varying levels of protections and restrictions for student athletes compensation.<sup>65</sup> Both party lines agree on baseline protections for student athletes: preventing institutions, conferences, and athletic associations (e.g. the NCAA) from prohibiting student athletes from receiving compensation for their name, image, and likeness from third parties, creating a right to an agent or other representative, and dissociating payments from tuition and other academic-related expenses.<sup>66</sup> However, some bills are more expansive and favorable to student athletes—proposing additional benefits to athletes such as unrestricted endorsements and capabilities for revenue sharing.<sup>67</sup> Other narrower bills implement the concerns of the NCAA and academic institutions creating greater disclosure requirements and prohibitions on sponsorships that conflict with those of the institution.<sup>68</sup> Ultimately, not one federal name, image, and likeness bill moved past committee or received a vote allowing a number of state laws to go into effect without any direction from the federal government.<sup>69</sup>

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64. *Rubio Introduces Legislation to Address Name, Image, Likeness in College Sports*, MARCO RUBIO (June 18, 2020), <https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-introduces-legislation-to-address-name-image-likeness-in-college-sports> [https://perma.cc/9AJL-7836].

65. Nicholas A. Plinio & Gregg E. Clifton, *UPDATE: Sixth Federal NIL Bill Proposed by Kansas Senator Jerry Moran; Senator Booker Comments on Status of College Athlete Bill of Rights*, JACKSON LEWIS PC (Mar. 1, 2021), <https://www.lexology.com/library/detail.aspx?g=09941261-db4b-49aa-be31-4707474c474f> [https://perma.cc/354W-8PZT] (comparing the more restrictive Rubio bill to Senator Moran’s (R-KS) that proposes expanded medical coverage and lifetime scholarships for former athletes).

66. Braly Keller, *Comparing Introduced Federal NIL Bills*, OPENDORSE (Apr. 12, 2021), <https://opendorse.com/blog/comparing-introduced-federal-nil-bills/> [https://perma.cc/E3YQ-VTJC]; see also Ross Dellenger, *As July 1 Nears, Congress Making Critical Progress on NIL and College Athletes’ Rights*, SPORTS ILLUSTRATED (May 18, 2021), <https://www.si.com/college/2021/05/18/ncaa-athletes-rights-profit-congress-nil-bill> [https://perma.cc/9LAB-FKAG].

67. Keller, Dellenger *supra* note 66; *E.g.*, *College Athletes’ Bill of Rights*, S. 5062, 116th Cong., 2d Sess. §3 (2020).

68. Keller, *supra* note 66; Dellenger *supra* note 66.

69. Michael McCann, *Federal NIL Bill Stalls in Congress, Setting Table for July Chaos*, SPORTICO (June 17, 2021, 5:21 PM), <https://www.yahoo.com/video/federal-nil-bill-stalls-congress-212108976.html> [https://perma.cc/PR7B-JG6L].

### III. ANTITRUST LAWS AND THE NCAA

In addition to the state legislation discussed above, an important Supreme Court decision regarding NCAA compliance with antitrust laws pressured the NCAA to relax its name, image and likeness prohibitions. The case, *NCAA v. Alston*, and its impact are discussed below, but first, it is worth discussing the framework of antitrust law and previous challenges to the NCAA’s rules.

United States antitrust laws, specifically the Sherman Antitrust Act, aim to ensure fair competition in the free market by prohibiting unreasonable restraints on trade and unlawful monopolization.<sup>70</sup> The main objective is to make consumers better off by incentivizing businesses to operate efficiently, keep prices down, and produce quality goods and services through fair competition.<sup>71</sup> The NCAA is a nonprofit organization that regulates essentially all college athletes participating in intercollegiate competition at four-year colleges and universities.<sup>72</sup> The NCAA undoubtedly has a monopoly on the market of college sports. For athletes hoping to compete after high school, in many sports, there is no option other than college athletics. Some professional sports leagues require college participation before they are eligible, practically forcing top caliber athletes into an NCAA program.<sup>73</sup> In theory, some athletes could play professionally overseas, but it is a stretch to argue that this is a reasonable substitute for college participation in the United States.<sup>74</sup> Additionally, a very small number of college athletes (2%) play professional sports after college.<sup>75</sup> Therefore, professional sports are not a reasonable substitute for most athletes playing collegiately, especially sports that do not have a large professional base. Athletes that do not

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70. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/C677-SPA8].

71. *Id.*

72. See NCAA, *supra* note 28.

73. See Brandon Ribak, *What the NBA Should Do About the One-and-Done Rule*, BLEACHER REPORT (June 12, 2009), <https://bleacherreport.com/articles/197898-what-should-the-nba-do-about-the-one-and-done-rule> [https://perma.cc/QL36-HZ5C] (reporting that the NBA implements the “one and done rule” requiring prospects to play at least one year of college basketball before they are eligible to play in the NBA).

74. See Zachary Stauffer, *Does the NCAA Rule College Sports Like a “Cartel”?*, FRONTLINE (June 11, 2014), <https://www.pbs.org/wgbh/frontline/article/does-the-ncaa-rule-college-sports-like-a-cartel/> [https://perma.cc/3K47-X4MZ].

75. *NCAA Recruiting Facts*, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 2014), <https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf> [https://perma.cc/443X-HXD9] (estimating 2% for athletes participating in six different, mostly male, sports).

ultimately “go pro” can still gain wide popularity and ultimately contribute to the revenues received by the athletic departments of their schools. Name, image, and likeness rights allow these athletes to benefit from their popularity and receive compensation during their college athletic careers, which for many is likely their only opportunity to earn a profit from athletic participation. Despite the NCAA’s monopoly power, the NCAA has been able to continue to exercise broad control over college athletics. Courts have given sports leagues more room under antitrust laws since sports are “unique” and require some collusion in order to regulate large numbers of teams and to, ultimately, exist.<sup>76</sup> Not all monopolies nor all business agreements to restrain trade violate antitrust laws.<sup>77</sup>

Arguments that the NCAA unreasonably restrains trade have been more successful legal challenges. Courts have not gone so far as to find that the NCAA engages in price fixing or other *per se* unreasonable agreements to restrain trade.<sup>78</sup> Courts have also implemented a disputed antitrust principle called the “Rule of Reason” that “calls for anticompetitive activity to be overturned only if there is a different system that could provide the positive benefits of the anticompetitive system without suppressing competition as much.”<sup>79</sup> Various NCAA rules have been challenged under the antitrust law framework, including the prohibition of compensation derived from name, image, or likeness.<sup>80</sup>

For example, the Supreme Court held that the NCAA did unreasonably restrain trade when it raised prices and reduced the output of televised college football.<sup>81</sup> The conduct was found anticompetitive under the Rule of Reason burden-shifting framework because the restrictive conduct was not justified.<sup>82</sup> In

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76. Marc Tracy, *The N.C.A.A. Lost in Court, but Athletes Didn't Win, Either*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/ncaa-court-ruling-antitrust.html> [<https://perma.cc/9G2A-YTSE>].

77. *The Antitrust Laws*, *supra* note 70.

78. Economist Robert Noll argues that the NCAA behaves like a cartel because “it creates a price fixing agreement among the member schools and among the student athletes.” The price for name, image, and likeness has been set at zero by all member schools in order to comply with NCAA amateurism rules. *See* Stauffer, *supra* note 74.

79. Tracy, *supra* note 76.

80. *See id.*

81. *See* Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

82. *See* O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1057–61 (9th Cir. 2015) (applying the three step framework where (1) a plaintiff must prove that a restraint produces significant anticompetitive effects within a market; (2) then the defendant must show evidence of the restraint’s pro-competitive effects; and (3) the plaintiff must show that any legitimate objective can be achieved in a substantially less

*O'Bannon v. NCAA*, the Ninth Circuit held that the NCAA's amateur rules are subject to antitrust analysis and that rules prohibiting schools from giving student athletes scholarships up to the full cost of attendance violate antitrust laws because they unlawfully restrict trade.<sup>83</sup> The Court also found that student athlete compensation violates the NCAA amateurism rules since the cash payments were not tethered to education.<sup>84</sup> This holding, while finding that the NCAA is not shielded from antitrust regulation, kept the NCAA's stance on amateurism and prohibition on name, image, and likeness rights in place.<sup>85</sup> The decision did create an opportunity for California legislators to push on the NCAA's compliance with antitrust law.<sup>86</sup>

Most recently, the Supreme Court issued an opinion on a case concerning the NCAA and antitrust laws, but this time more favorable to student athletes. In *NCAA v. Alston*, the Court did not directly address name, image, and likeness rules or legislation in holding that the NCAA's rules restricting educated related expenses were a violation of antitrust law.<sup>87</sup> The Court affirmed injunctions ordered by the District Court that enjoined the NCAA from restricting educated related benefits such as scholarships for graduate or vocational school, payments for computers or tutoring, and paid internships, but noted that the NCAA has considerable leeway in enforcing and defining these types of benefits.<sup>88</sup> While the Court did not analyze other forms of student athlete compensation, such as the use of one's name, image, and likeness, the opinion made it clear that the NCAA was not exempt from a detailed evaluation of its compliance with anti-trust laws and that its "procompetitive" college athletics model itself is not a sufficient justification for any and every restriction it seeks to impose.<sup>89</sup> Further, the opinion (specifically Justice Kavanaugh in his concurrence) left the door open for future challenges around college

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restrictive manner); *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2165–66 (2021).

83. *O'Bannon*, 802 F.3d 1049, 1078–79.

84. *Id.* at 1076–79.

85. *Id.* at 1053.

86. *See* Tracy, *supra* note 76.

87. *Alston*, 141 S. Ct. 2141 (2021) (holding that the NCAA's restrictions on educated-related benefits offered by schools and conferences was a violation of antitrust law); for a summary on *NCAA v. Alston* *see* Andrea Cheek, et al. *NCAA Rules Limiting Education-Related Benefits Violate Antitrust Laws*, KNOBBE MARTENS (June 25, 2021), <https://www.jdsupra.com/legalnews/ncaa-rules-limiting-education-related-9892879/> [<https://perma.cc/98Z8-C9RA>].

88. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2163–66 (2021).

89. *Id.* at 2168–70.

athletics in recognizing that the NCAA may no longer be able to shield its compensation rules from ordinary antitrust scrutiny under the *Alston* decision, and stated that “the NCAA is not above the law.”<sup>90</sup> The Court’s decision came down just weeks before several state name, image, and likeness laws were set to go into effect, further pressuring the NCAA to lift its outright ban on all student athlete compensation to prevent geographical inconsistencies.<sup>91</sup>

#### IV. THE NCAA’S CONCERNS SURROUNDING STUDENT ATHLETE COMPENSATION

There are many rationales for recognizing name, image, and likeness rights for college athletes such as preventing the exploitation of student athletes for profit and promoting one’s individual freedom to enter into contracts.<sup>92</sup> However, the institutions supporting collegiate athletics have their own financial concerns about sponsorship and endorsement deals, and the NCAA has historically taken a firm stance on the importance of limiting participation to amateur athletes.<sup>93</sup> However, the recent attention given to these issues in collegiate athletics by state legislators, coupled with the NCAA’s temporary suspension of name, image, and likeness restrictions, suggests that college athletes will be able to be compensated, but the specific details appear far from being ironed out.<sup>94</sup>

When the Fair Pay to Play Act was introduced, the NCAA’s initial response was to fight the law. The President of the NCAA, Mark Emmert, wrote a letter to two State Committee members in

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90. *Id.* at 2166-69 (Kavanaugh, J., concurring) (raising and emphasizing three potential issues with the NCAA’s remaining compensation rules under antitrust laws).

91. McCann, *supra* note 69.

92. See Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/9NEZ-6R9D>] (suggesting support for name, image and likeness rights under economic freedom and civil rights rationales) [hereinafter McCann, *What’s Next*].

93. *Amateurism*, *supra* note 5; see also Wendell Barnhouse, *NCAA rulings on amateurism called ‘absurd,’ ‘inconsistent’*, GLOBAL SPORT MATTERS (May 22, 2018), <https://globalsportmatters.com/business/2018/05/22/ncaa-rulings-amateurism-absurd-inconsistent/> [<https://perma.cc/87LP-92GH>] (discussing the inconsistencies of the NCAA’s enforcement of its amateur rules).

94. Jeff Farauo, *The NCAA Eliminates NIL Restrictions, Allowing Athletes to Earn Money*, SPORTS ILLUSTRATED (June 30, 2021), <https://www.si.com/college/cal/news/ncaa-eliminates-nil-rules> [<https://perma.cc/J7P3-J5R2>] (“we can expect continued legal assaults on the status quo of college sports” since this current step does not require the NCAA or its member institutions to provide any additional benefits).



California implying that the NCAA may ban California schools from participating in its championships if the bill was passed.<sup>95</sup> As mentioned above, the NCAA also claimed it would attempt to invalidate the law as a violation of the Commerce Clause.<sup>96</sup> Once other states began to introduce and pass similar legislation, the NCAA realized that the demand for name, image, and likeness rights for college student athletes was not going away anytime soon and that it would not be in the NCAA's best interest to prohibit member schools from participation based on the state enacted legislation. Emmert continued to criticize the law, stating that it effectively turned students into employees for the schools and created a new form of professional athletics.<sup>97</sup> The NCAA is concerned with college athletics turning into a pseudo-professional sports league that will shift the focus from education and amateurism to the commercialization and profitability of college athletics.<sup>98</sup>

Arguably, college sports already function as profitable pseudo-professional leagues without the obligation to compensate the players.<sup>99</sup> Schools host athletic events and charge admission; charging steep prices for popular events such as March Madness.<sup>100</sup> Schools dedicate significant resources to facility upgrades, coaches, staff, and player recruitment, and apparel and merchandising.<sup>101</sup> Media and broadcasting rights are also a huge market, with the total viewership and media revenue of major college athletic championships surpassing that of the Super Bowl and the NFL.<sup>102</sup>

95. Steve Berkowitz, *NCAA says California schools could be banned from championships if the bill isn't dropped*, USA TODAY (June 24, 2019, 8:56 AM), <https://www.usatoday.com/story/sports/2019/06/24/ncaa-california-schools-could-banned-championships-over-bill/1542632001/> [https://perma.cc/8RJZ-FFKF].

96. See Bumbaca & Berkowitz, *supra* note 59.

97. Kyle Newport, *NCAA President Mark Emmert: Fair Pay to Play Law Would Make Athletes Employees*, BLEACHER REP. (Oct. 3, 2019), <https://bleacherreport.com/articles/2856545-ncaa-president-mark-emmert-fair-pay-to-play-law-would-make-athletes-employees> [https://perma.cc/UE5S-9KJ3].

98. *Id.*

99. See CHRIS MURPHY, MADNESS, INC. HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS – EXCEPT THE PLAYERS [https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report\\_FINAL.pdf](https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf) [https://perma.cc/4TCD-JWK4] (last visited May 6, 2022).

100. *Id.* at 1 (During the 2018–2019 Men's Basketball season, Duke University charged \$4,000 per ticket for admission to the Duke versus University of North Carolina rivalry matchup featuring freshman standout Zion Williamson).

101. *Id.* at 6 (Comparing the \$936m spent on student aid compared to \$1.2b spent on coaches' salaries).

102. *Id.* at 2 (showing the annual NCAA basketball tournament had 100 million viewers and earned \$1.2b in media revenue).

Yet, student athletes have not had the opportunity to reap the benefits or share profits from their athletic participation under the amateur rules created by the NCAA. College athletics were not always massive markets. As the money invested and revenues earned by college athletic programs continue to grow, the types of protections needed for student athletes and the NCAA's role in creating these protections is due for a shift.<sup>103</sup>

The NCAA recognizes the need for additional protections for student athletes but must consider the concerns and needs of its membership schools and its own interest in maintaining its Collegiate Model, in addition to the interests of the student athletes. Therefore, the NCAA is reluctant to just throw away its compensation rules without first limiting the types of agreements student athletes can enter into and the processes used to do so. First, the NCAA and athletic departments within membership schools want to maintain their commitments to educational values and secure a "clear distinction" between college and professional sports.<sup>104</sup> In doing so, the NCAA wants to ensure that compensation does not turn into any form of "pay to play" or classifying student athletes as employees.<sup>105</sup> Second, the NCAA wants to ensure that the process of student athletes obtaining endorsement and sponsorship deals do not involve the membership schools, thereby making them employers of the student athletes.<sup>106</sup> If membership schools were considered employers of student athletes, then the relationship would resemble an agency relationship likely increasing liability for schools and creating additional duties owed to its student athletes.<sup>107</sup> This could also impose other employee rights such as the ability to form unions.<sup>108</sup> Further, NCAA membership schools have an interest in limiting the types of endorsements student athletes are able to obtain. Individual schools have their own brand deals, partnerships, marketing and promotion interests, and other contracts that benefit the athletic

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103. *Id.* at 4 (Total revenue generated by college sports programs has grown from \$4b in 2003 to \$14.1b in 2017).

104. Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), <https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis> [<https://perma.cc/7ATW-DT5Z>] [hereinafter McCann, *Legal Challenges*].

105. *Id.*

106. Newport, *supra* note 97.

107. See *Business Law: The Principal-Agent Relationship*, L. SHELF EDUC. MEDIA, <https://lawshelf.com/shortvideoscontentview/business-law-the-principal-agent-relationship/> [<https://perma.cc/45C4-LZWK>].

108. McCann, *Legal Challenges*, *supra* note 104.

departments and the schools more broadly.<sup>109</sup> Allowing student athletes to freely promote themselves and enter into endorsements without any barriers could lead to agreements that directly contradict the corporate contracts entered into by the schools. Third, both the membership schools and the NCAA have an interest in preserving their image and goodwill to the public and want to prevent student athletes from entering into endorsements and sponsorships that draw negative attention and associations to the school, NCAA, or college athletics more broadly.

#### V. THE NCAA'S INTERIM POLICY AND POTENTIAL FUTURE RULE CHANGES ON COMPENSATION

The NCAA, like many sports associations and entities, operates primarily through traditional self-governance and opts to regulate sports with minimal government oversight and regulation.<sup>110</sup> Initially, the NCAA was hoping that Congress would step in and enact federal name, image, and likeness laws that preempt state laws.<sup>111</sup> Congress did not bail out the NCAA before the first name, image, and likeness state laws went into effect.<sup>112</sup> This forced the NCAA to act in order to avoid possible chaos among student athletes and membership institutions trying to comply with various state laws while violating NCAA rules.<sup>113</sup>

On June 30, 2021, the day before a few state laws took effect, the NCAA announced an interim policy suspending name, image, and likeness restrictions for incoming and current student athletes across all three NCAA divisions.<sup>114</sup> The policy applies to all NCAA student athletes, regardless of the school's location, and allows student athletes to use "professional service providers" in obtaining endorsements, but prohibits them from entering into any "pay-for-

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109. See Carly Benjamin, *The 65 Most Valuable College Sports Apparel Deals*, FORBES (July 12, 2016, 3:34 PM), <https://www.forbes.com/sites/carlybenjamin/2016/07/12/the-65-most-valuable-college-sports-apparel-deals/?sh=4a8e5629308f> [<https://perma.cc/BQ59-UCUY>].

110. For self-governance in sports see Ravi Mehta, *The Future of Sports Governance: Will Sport Sustain its Traditional Model of Autonomy?*, LAWINSPOUR (Nov. 15, 2016), <https://www.lawinsport.com/topics/item/the-future-of-sports-governance-will-sport-sustain-its-traditional-model-of-autonomy> [<https://perma.cc/DS88-QSDW>].

111. McCann, *What's Next*, *supra* note 92.

112. Gregory A. Marino, *The NCAA Declares Independence from NIL Restrictions*, FOLEY (Aug. 20, 2021); <https://www.foley.com/en/insights/publications/2021/08/ncaa-declares-independence-nil-restrictions>.

113. *Id.*

114. Hosick, *supra* note 19.

play” agreements.<sup>115</sup> The policy will remain in place until federal legislation or new NCAA rules are implemented (likely in response to federal legislation).<sup>116</sup> While name, image, and likeness rights exist for student athletes, litigation is not off the table. It is unclear whether Congress will propose legislation that makes it out of the committee and to a vote.<sup>117</sup> The NCAA has successfully invalidated state laws before,<sup>118</sup> but given the Court’s recognition of the NCAA’s evolved position in college sports<sup>119</sup> and the national attention to the issue, it appears unlikely that the NCAA would invalidate name, image and likeness rights for athletes altogether. However, the NCAA will likely still attempt to reduce the scope of any student athlete compensation rules in order to prevent student athletes from being classified as employees or otherwise turning college athletics into a professional sports model.<sup>120</sup> Further, legal challenges to other aspects of the NCAA’s rules on compensation are possible with the Court’s criticism of the NCAA in *Alston*.<sup>121</sup>

In October 2020, the Division 1 Council of the NCAA did introduce proposed changes to its name, image, and likeness rules that were scheduled to be voted on in January 2021, but the vote continued to be pushed back.<sup>122</sup> The Council proposed student athletes could profit from their name, image, and likeness through autographs, personal appearances, promotion of their own products and services, as well as commercial products and services.<sup>123</sup> The proposed rules also provided that student athletes could seek “professional representation in contract negotiations related to

115. *Id.*

116. *Id.*

117. McCann, *What’s Next*, *supra* note 92.

118. *See* Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633 (Ninth Cir. 1993) (holding that the Nevada law unduly burdened interstate commerce).

119. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2160–62 (2021).

120. Alex Ursino, *Everything You Need to Know About NIL*, THE 33<sup>RD</sup> TEAM (July 1, 2021), <https://www.the33rdteam.com/everything-you-need-to-know-about-nil/> [<https://perma.cc/SYK8-MRZL>].

121. *Id.*

122. *DI Council introduces name, image and likeness concepts into legislative cycle*, NAT’L COLLEGIATE ATHLETIC ASSOC. (Oct. 14, 2020, 3:05 PM), <https://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle> [<https://perma.cc/P5U5-JSMG>]; *see also* Dan Murphy and Adam Rittenberg, *NCAA delays vote to change college athlete compensation rules*, ESPN (Jan. 11, 2021), [https://www.espn.com/college-sports/story/\\_id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules](https://www.espn.com/college-sports/story/_id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules) [<https://perma.cc/KQ7X-YW72>] (reporting that the Council has decided to postpone the vote on the proposed rule after determining it needed more information to vote) [hereinafter *DI Council*].

123. *DI Council*, *supra* note 121.

name, image and likeness activities, with some restrictions,” and professional marketing assistance and advice for those activities.<sup>124</sup> The proposals sought to prevent the use of “Group Licensing” that would consist of student athletes assigning their name, image, and likeness to a trade association that would then negotiate on the behalf of all athletes.<sup>125</sup> The proposals also addressed the concerns of membership schools by “prohibit[ing] schools from being involved in the development, operation or promotion of a student-athlete’s business activity” and “prohibit[s] schools from arranging or securing endorsement opportunities for student-athletes.”<sup>126</sup> Similarly, the proposals prohibit student athletes from using their “school’s marks in any advertisements, endorsements, personal appearances or promotions.”<sup>127</sup> Further, the proposed changes prevent student athletes from participating in any activities involving commercial products and services that conflict with NCAA rules to preserve its public image and authority.<sup>128</sup> Additionally, membership schools would have similar authority to prohibit activities that conflict with its own values or existing sponsorship arrangements.<sup>129</sup> Finally, both prospective and current student athletes would be required to provide detailed reports of all of their name, image, and likeness activities, including compensation and the parties and relationships involved.<sup>130</sup> These activities would be maintained by a third party administrator that oversees the disclosure process and monitors the name, image, and likeness activities of the student athletes.<sup>131</sup> The Council’s proposals were never voted on, and the scope of future federal legislation will likely determine whether the Council, and the NCAA more broadly, will attempt to introduce similar rules as those proposed in October.<sup>132</sup> For now, the NCAA has only issued its interim policy allowing athletes to enter into third party

124. *Id.*

125. See McCann, *Legal Challenges*, *supra* note 104.

126. See *DI Council*, *supra* note 121.

127. *Id.*

128. *Id.* (such as sports betting or banned substances).

129. *Id.*

130. *Id.*

131. *Id.*

132. See Alexis Gravely, *Future of College Athletics Is in Congress’s Hands*, INSIDE HIGHER ED (June 10, 2021), <https://www.insidehighered.com/news/2021/06/10/senate-committee-heats-discussions-federal-law-college-athletes> [https://perma.cc/T97S-HZMX].

endorsement deals while prohibiting any compensation paid by the school directly to the athlete.<sup>133</sup>

VI. CRITIQUES FOR GRANTING STUDENT ATHLETES NAME, IMAGE, AND LIKENESS RIGHTS

Even with a broad recognition that college student athletes should have some rights over their own name, image, and likeness, some are of the opinion that allowing compensation for student athletes would effectively “ruin” college sports and turn it into a “bidding war” that only a few programs could be successful in.<sup>134</sup> Most Division I college athletic programs report losses due to the expenses they incur in covering operating costs such as travel, facilities, maintenance, salaries of coaches and staff, as well as education expenses in the form of athletic scholarships.<sup>135</sup> In fact, only a handful of schools, mostly those in the top 5 athletic conferences, report a profit.<sup>136</sup> Since most Division 1 athletic programs do not record any profits, with many even “struggling,” there is a fear that only the top programs will be able to effectively compensate its student athletes while other programs will lose out on talented players due to their inability to pay.<sup>137</sup> However, this argument assumes that membership schools and its athletic departments will be required to pay student athletes for their performance (i.e. “pay to play”) which the NCAA directly opposes and is not currently allowed under the interim policy. But, the exposure, finances, success, and status of a “top” program will likely influence a prospective student athlete’s decision to attend a particular program even more now if they must also consider their potential earnings from their name, image, and likeness.<sup>138</sup> The severe differences in the revenues earned by certain players of

133. Hosick, *supra* note 19.

134. Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?fbclid=IwAR3OwRlgmtkVYvNRZJtX-l1XiZGrtIY6EeDlNRpqzujuar-cDIKDYJNpclg> [<https://perma.cc/MJY7-CPZH>].

135. *Id.*

136. *Id.* (stating that only 24 schools have reported more revenue than expenses that past few years and that the top five conferences made more than \$6b in 2015, which was billions more than all other conferences combined); *see also* Murphy, *supra* note 99, at 4–5 (reporting that 3% of schools competing in the NCAA bring in 54% of all of the money with most of it coming from college football programs).

137. McDavis, *supra* note 133.

138. *See e.g., Student-Athletes: Choosing a College*, COLL. BOARD, <https://professionals.collegeboard.org/guidance/prepare/athletes/college> [<https://perma.cc/VM96-9UVQ>].

sports, namely football and men’s basketball, name, image, and likeness rules may affect different athletes based on a variety of factors not addressed through enacted legislation or the NCAA’s interim policy. Some coaches of non-revenue generating sports fear changes in student athlete compensation would cause athletic departments to entirely focus on revenue generating sports, adversely affecting many student athletes.<sup>139</sup>

VII. CONSIDERING THE PRACTICAL EFFECT OF NAME, IMAGE, AND LIKENESS DEPENDING ON THE IDENTITY, SPORT, AND SCHOOL OF THE STUDENT ATHLETE

In recognizing name, image, and likeness rights for all NCAA college athletes, it is hard to imagine that there will not be practical discrepancies among athletes in its application. Most discussion on the need for name, image, and likeness legislation is centered on the potential gains and benefits for athletes participating in football and men’s basketball; specifically those in Division I programs within the Power 5 Conferences.<sup>140</sup> Broadly speaking, these athletes have the biggest potential to benefit from name, image, and likeness legislation due to the size and resources of the athletic programs, national media coverage of the sports and their specific matchups, promotion of the schools and sports, etc.<sup>141</sup> Athletes in other sports and/or at non-Power 5 universities and colleges may have a harder time gaining the attention and popularity required for name, image, and likeness sponsorships and endorsements due to the lack of resources, as well as media broadcasting and accessibility. Even within one team at any given school, the opportunities for exposure and endorsements will vary greatly.<sup>142</sup> As mentioned above, the Power 5 conferences earn significantly more money than the remainder of other Division I conferences, but

139. *Coaches of non-revenue sports fret over athlete NIL compensation*, ESPN (June 1, 2020), [https://www.espn.com/college-sports/story/\\_/id/29251627/non-revenue-sports-fret-athlete-nil-compensation](https://www.espn.com/college-sports/story/_/id/29251627/non-revenue-sports-fret-athlete-nil-compensation) [<https://perma.cc/UP2H-WHH7>].

140. David Kenyon, *Ranking Every Power Five Conference in 2021 College Football Season*, BLEACHER REPORT (Nov. 23, 2021), <https://bleacherreport.com/articles/2950600-ranking-every-power-five-conference-in-2021-college-football-season> [<https://perma.cc/W84X-NT96>] (explaining the “Power 5” Conferences consist of the Pac-12, Big Ten, Big 12, Southeastern Conference (SEC) and the Atlantic Coast Conference (ACC)).

141. See Murphy, *supra* note 99, at 5.

142. Zach Braziller, *NCAA changes college sports forever: ‘An entirely new landscape’*, NY POST (June 30, 2021, 8:56 PM), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/> [<https://perma.cc/F7BJ-PURQ>] (quoting an anonymous men’s basketball coach, “[e]veryone will think they should get something, and most guys won’t get anything”).

even within the Power 5, the earnings are not equal.<sup>143</sup> Similarly, most sports do not earn anywhere close to the revenues reported by college football programs, with football programs receiving the most money and resources fed into them due to the earnings potential.<sup>144</sup> This also calls into question how name, image, and likeness will impact women’s athletic programs given the historical discrimination, bias, underpromotion, and the lack of resources put into women’s athletics.<sup>145</sup>

A. *Women’s Athletic Programs*

In releasing its press statement, the NCAA said that its new name, image, and likeness policy will “enhance principles of diversity, inclusion and gender,” leading some to be hopeful that this “sex-neutral” policy will enhance opportunities for women’s athletics.<sup>146</sup> Although popular sports (football and men’s basketball) will likely produce more branding opportunities for men, some argue that women will benefit from the fact that the NCAA is the “highest level of exposure” for many female athletes and women’s sports due to the lack of opportunity and diminished broadcasting of women’s professional sports.<sup>147</sup> The hope is that since there is potential for bigger fanbases and exposure through college athletic programs, women will be compensated for their athletic abilities in ways they have not been able to take advantage of before.<sup>148</sup> This exposure could potentially benefit women in

143. Steve Berkowitz, *Power Five conferences had over \$2.9 billion in revenue in fiscal 2019, new tax records show*, USA TODAY (July 10, 2020, 2:00 PM), <https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002/> (showing how much revenues conferences reported for 2019: Big Ten (\$781.5m), SEC (\$720.6m), PAC-12 (\$530.4m), ACC (\$455.4m) and Big 12 (\$439m)).

144. Murphy, *supra* note 99, at 5 (displaying a graphic of average revenue by sport from 127 FBS Schools; Football had close to \$32m, followed by Men’s Basketball with \$8m and Men’s Ice Hockey with \$2.8m. Softball reported the lowest with just under \$700k); Cf. Thomas Baker, *5 Issues to Keep an Eye on with the NCAA’s New NIL Policy*, FORBES (Nov. 1, 2019, 11:40 AM), <https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/?sh=77c722237591> [<https://perma.cc/GJG5-7YRD>] [hereinafter Baker] (noting that Alabama’s football team has a waterfall in the locker room and LSU spent \$28m on its new locker room furnished with “first class” sleep pods).

145. See Carly Muller, *Women still playing catch-up in sports*, MORNING CALL (June 21, 2012), <https://www.mcall.com/news/local/mc-xpm-2012-06-21-mc-womens-sports-muller—think-20120621-story.html> [<https://perma.cc/G5XY-653N>].

146. Baker, *supra* note 143.

147. *Id.*

148. *Id.*



careers such as coaching or other opportunities even after they have stopped playing.<sup>149</sup> However, women will probably have to work much harder to obtain endorsement and sponsorship deals compared to their male counterparts.<sup>150</sup> The proposed changes offered by the NCAA seem to strongly suggest that membership schools will be “hands-off” when it comes to its athletes securing endorsement deals; however, some question if name, image, and likeness opportunities could impose some Title IX obligations on schools to ensure there are equal opportunities for female athletes.<sup>151</sup> Time will tell how name, image, and likeness rights impact women’s athletics, but on its face it appears that women’s sports, unfortunately, will still be on the backburner in the grand scheme of collegiate athletics. Absent a few large name female athletes,<sup>152</sup> most female college athletes and their athletic programs do not receive the same exposure or promotion to secure such lucrative endorsement deals. Even being a star athlete at a Power 5 school might not be enough to reduce the focus on male athletic programs.<sup>153</sup> Hopefully, new opportunities to seek compensation and greater public scrutiny of the NCAA’s treatment of female athletes will lead to positive changes in the growth and exposure of women’s athletic programs.<sup>154</sup>

149. *Id.*

150. Paul Steinbach, *What Title IX Fallout Might NIL Legislation Pose?*, ATHLETIC BUS. (Jan. 2020), <https://www.athleticbusiness.com/college/how-might-nil-legislation-be-impacted-by-title-ix.html> [<https://perma.cc/U8TH-G6KL>].

151. *Id.*

152. See Krysten Peek, *UConn’s Paige Bueckers signs another major NIL deal, joins Gatorade*, YAHOO! SPORTS (Nov. 29, 2021), <https://sports.yahoo.com/uconn-paige-bueckers-signs-another-major-nil-deal-joins-gatorade-184611436.html> [<https://perma.cc/4T3E-W6HT>] (discussing Paige Bueckers’ endorsement deals with Gatorade, StockX, and her “Paige Buckets” trademark).

153. See Jackie Powell, *Paige Bueckers’ Major NIL Deal Only Leads to More Questions*, BLEACHER REP. (Nov. 30, 2021), <https://bleacherreport.com/articles/2950930-paige-bueckers-major-nil-deal-only-leads-to-more-questions> [<https://perma.cc/Q48U-PLGU>] (comparing NIL endorsement deals between female basketball players at UConn and South Carolina to players at Kentucky and Baylor, arguing that athletes at schools with established women’s basketball programs (former) may be more likely to secure deals compared to female players at schools with more established men’s basketball programs (latter) regardless of individual “star” status or popularity of the particular athlete).

154. Paul Myerberg, *NCAA will use March Madness branding for women’s basketball tournament*, USA TODAY (Sept. 29, 2021), <https://www.usatoday.com/story/sports/college/2021/09/29/ncaa-assigns-march-madness-branding-womens-basketball-tournament/5914857001/> [<https://perma.cc/5MWX-QBVW>] (discussing recent changes to branding and budgeting of the men and women’s college basketball tournaments after social media posts exposed gender disparities and inequity in the NCAA’s treatment of athletes during the 2021 NCAA tournament).

### *B. Athletes from Lower Income Backgrounds*

Another concern of the name, image, and likeness legislation and rule proposals is the potential impact on the ability of student athletes coming from lower income backgrounds to obtain endorsement deals and sponsorships. As discussed above, the NCAA's proposed rule changes promote a "hands-off" approach by its membership schools in order to distinguish college sports from professional ones.<sup>155</sup> Pursuant to this, student athletes will have to seek out their own professional representation to negotiate name, image, and likeness deals and activities.<sup>156</sup> This creates concern that student athletes coming from lower income families will not have the means or the ability to hire professionals to negotiate deals to generate compensation or to protect them from commercial entities that may try to exploit or undervalue young, college athletes. Poor people are significantly disadvantaged in their access to "justice" through their legal system.<sup>157</sup> This is true for all legal representation, but especially in non-criminal representation where there is no right to an attorney and affordable legal service resources are stretched thin.<sup>158</sup> Further, name, image, and likeness negotiations and deals are not the type of legal representation that pro-bono or low-income services would take on due to the need for criminal, civil rights, housing, family, and other more serious and necessary issues.<sup>159</sup> For a number of student athletes, college athletics are an opportunity for them to attend college, escape poverty, become professional athletes or otherwise remove themselves from hard upbringings and difficult circumstances.<sup>160</sup> It is obvious that student athletes from these circumstances and their families could greatly benefit from name, image, and likeness rules that would allow them to receive money other than scholarships and financial aid. However, access to representation in these types of beneficial agreements could come at a premium price that they might not be able to afford. Current legislation and

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155. See generally *DI Council*, *supra* note 121.

156. *Id.*

157. See *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/9JVN-PNSM>] (last visited May 6, 2022).

158. *Id.*

159. See generally *What is Legal Aid?*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid> [<https://perma.cc/BC9Y-2KDL>] (last visited May 6, 2022).

160. Devon Greene, *It's time to pay college athletes*, WESTERN COURIER (Mar. 7, 2018), <https://westerncourier.com/40606/sports/its-time-to-pay-college-athletes/> [<https://perma.cc/2CHL-SLDE>].

proposals do not address these discrepancies in the ability to acquire representation, and the current framework places the entire burden on the student athletes in securing representation and endorsement deals.

C. *Recruiting*

Another concern for name, image, and likeness legislation is its potential effect on the recruitment of prospective student athletes. College recruiting is already a highly competitive and contentious process and there have been numerous recruiting scandals with schools and coaches trying to elicit top players to their programs over others.<sup>161</sup> The NCAA has extensive rules governing the recruitment of prospective athletes, limiting contact with college coaches, the number of “official visits” athletes can take, and more.<sup>162</sup> Even with these strict rules on recruiting, there are still violations stemming from the competitive nature of recruitment and the potential money in college athletics (especially college football and men’s basketball).<sup>163</sup> Some anticipate that membership schools with a lot of resources will use the name, image, and likeness legislation as another recruiting tool to motivate top prospects to join their programs.<sup>164</sup> The potential exposure, financial resources, and success of athletic programs will therefore be even more important to prospective athletes considering which school can provide them the most gain. Some sports, such as profitable football programs, might even attempt to elicit the help of “brand managers” or staff that could help student athletes manage their social media presence, appearances, and endorsements and sponsorships. While, neither the proposed

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161. See generally Sipan Mathevosian, *NCAA Recruiting Scandal: The Big Business of College Sports*, BLEACHER REP. (Oct. 14, 2010), <https://bleacherreport.com/articles/490572-ncaa-recruiting-scandal-the-big-business-of-college-sports> [https://perma.cc/LQ9M-QQSN].

162. See *Recruiting*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/student-athletes/future/recruiting> [https://perma.cc/CT2B-4NRG].

163. Meghan Durham, *Florida football program violated NCAA recruiting rules*, NAT’L COLLEGIATE ATHLETIC ASS’N (Dec. 22, 2020), <https://www.ncaa.org/about/resources/media-center/news/florida-football-program-violated-ncaa-recruiting-rules> [https://perma.cc/GL54-BJAC]; see also Meghan Durham, *Notre Dame football program violated NCAA recruiting contact rules*, NAT’L COLLEGIATE ATHLETIC ASS’N (Jan. 21, 2021), <https://www.ncaa.org/about/resources/media-center/news/notre-dame-football-program-violated-ncaa-recruiting-contact-rules> [https://perma.cc/E4PG-LP53]; see generally Kerianne Lawson, *The Lasting Impact of NCAA Sanctions: SMU and the Death Penalty*, 22 J. OF SPORTS ECON. 946, 946 (2021) (describing the most serious NCAA recruitment violations).

164. Baker, *supra* note 143.

changes or enacted legislation directly address recruitment considerations, it seems likely that the ability to profit from one's name, image, and likeness will lead to new recruitment considerations and issues that were not originally considered when the NCAA promulgated its current and extensive recruitment rules and procedures.

#### CONCLUSION

In conclusion, all college athletes are currently able to seek opportunities to obtain compensation from their name, image, and likeness and many are doing so. For now, this largely consists of third-party endorsement and sponsorship deals, with the opportunity for revenue sharing for apparel sales by parties other than the student athletes' schools. As discussed above, these recent developments are a huge shift from the NCAA's historical approach to amateurism in college sports and the NCAA has yet to release any specific rules in regulating compensation for name, image, and likeness. Time will tell if Congress decides to legislate on the matter or leaves the NCAA (and other athletic associations) to figure it out for themselves and if additional legal battles will arise given the Supreme Court's acknowledgement of the historical exploitation of student athletes. Even with this major win for student athletes, there will likely be large discrepancies in opportunities for athletes depending on their gender, sport, school, and income status. Changes surrounding name, image, and likeness rights for student athletes, amateurism, and compensation is likely just beginning and time will reveal how governing authorities choose to get involved, or not, in shaping these novel concepts in the area of college athletics.