

2022

Playing for Keeps: The Need for Name, Image, and Likeness Legislation to Ensure Representation for College Athletes

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Recommended Citation

Flaherty, Campbell (2022) "Playing for Keeps: The Need for Name, Image, and Likeness Legislation to Ensure Representation for College Athletes," *UNH Sports Law Review*. Vol. 1: Iss. 1, Article 6.
Available at: <https://scholars.unh.edu/unhslr/vol1/iss1/6>

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The University of New Hampshire Sports Law Review

Volume 1 | Number 1

Article 6

8-5-2022

Playing for Keeps: The Need for Name, Image, and Likeness Legislation to Ensure Representation for College Athletes

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PLAYING FOR KEEPS: THE NEED FOR NAME, IMAGE, AND LIKENESS LEGISLATION TO ENSURE REPRESENTATION FOR COLLEGE ATHLETES

1 U.N.H. Sports L. Rev. 52 (2022)

ABSTRACT. In the wake of the National Collegiate Athletic Association (“NCAA”) suspending its name, image, and likeness (“NIL”) rules that prevented college athletes from entering paid endorsements and other sponsorship deals, ensuring access to legal representation and sports agents when making NIL deals is vital to protecting college athletes, as well as their universities and conferences. Given that nearly thirty states have enacted their own NIL legislation, the need for federal legislation is ever-mounting. Not only can it provide relief in establishing a national framework, but it can also guarantee representation to college athletes, thereby protecting their rights and obligations and being paid a fair market rate, while complying with state laws. Although access to representation could be provided through NCAA bylaws or perhaps constituting college athletes as university employees, these means prove inadequate. In analyzing current proposed bills, this article argues that they will fail to garner bipartisan support but borrows their framework to recommend a feasible way to provide access to representation.

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INTRODUCTION

"I'm so happy to be done with the [National Collegiate Athletic Association ("NCAA")] and their rules & regulation[s]. They do any & everything to exploit[] collegiate athletes," tweeted former Ohio State University quarterback Cardale Jones.¹ He continued, "It's deeper than athletes thinking we should get paid. The [NCAA] control our lives with insane and unfair rules."² Seattle Seahawks defensive end and former University of Texas A&M athlete Michael Bennett separately expressed, "I think the NCAA is one of the biggest scams in America."³ Bennett continued, "These kids put so much on the line. . . . I think there are very few schools that actually care about the players."⁴

The NCAA has ingrained itself so deeply within intercollegiate athletics, it has ostensibly become an American staple. In 2021, 16.9 million viewers tuned into the NCAA March Madness championship game.⁵ Football teams at schools like the universities of Texas, Florida, Georgia, Michigan, and Pennsylvania State University have earned profits between \$40 million and \$80 million annually, while paying their coaches multimillion-dollar salaries.⁶ Despite the rising commercialization within intercollegiate athletics that has increasingly developed intercollegiate competitions to mirror their professional counterparts, the NCAA justifies enforcing a comprehensive regulatory scheme on its college athletes through the concept of "amateurism."⁷ The NCAA argues that intercollegiate athletics must preserve a level of amateurism, and failure to do that would destroy the integrity and appeal of college sports.⁸ This preservation historically included a prohibition on students from commercializing their athlete status while in school, all while the NCAA

¹ Cardale Jones (@CJ1two), TWITTER (Apr. 11, 2016, 12:57 PM), <https://twitter.com/CJ1two/status/719569962134847488> [<https://perma.cc/398X-644G>].

² *Cardale Jones Explains Tweets, Problems with NCAA Rules*, ESPN (Apr. 12, 2016), https://www.espn.com/college-football/story/_/id/15190171/cardale-jones-calling-ncaa-players-cannot [<https://perma.cc/T966-YNT3>].

³ Terry Blount, *Seahawks Stars Rant Against NCAA*, ESPN (Jan. 29, 2015), https://www.espn.com/nfl/playoffs/2014/story/_/id/12249290/richard-sherman-michael-bennett-seattle-seahawks-bash-ncaa [<https://perma.cc/X3F6-CXTS>].

⁴ *Id.*

⁵ Christina Gough, *NCAA March Madness Basketball Tournament Championship Game Viewers from 2013 to 2021*, STATISTA (Sept. 21, 2021), <https://www.statista.com/statistics/244249/ncaa-basketball-march-madness-average-audience-per-game/> [<https://perma.cc/H6RB-NBJB>].

⁶ Taylor Branch, *The Shame of College Sports*, ATL. (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/6DAE-B5C4>].

⁷ *Id.*

⁸ *Id.*

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continues to exploit the skills and fame of its young athletes.⁹

Following mounting public pressure, however, the NCAA began to loosen its rigid restrictions to maintain a level of amateurism by relaxing rules preventing athletes from commercializing their name, image, and likeness (“NIL”) rights.¹⁰ In 2021, the NCAA suspended its prohibition on college athletes entering paid endorsements and other sponsorship deals.¹¹ This regulatory shift further permits these athletes the ability to use agents to manage their publicity.¹² Following this change in policy, college athletes began rushing into NIL deals, flocking to reap financial rewards that had been previously unattainable.¹³ Yet, many athletes failed to consider the significant legal implications created by these NIL deals, such as each athlete’s ongoing contractual obligations, tax implications, and any state law and NCAA policy that may apply.¹⁴

In light of this newfound ability to earn compensation and the novel legal concerns implicated by such dealings, equity calls for college athletes to be required access to appropriate legal representation. Due to the NCAA’s inability to adapt, states forced open the floodgates to allow for college athletes to engage in NIL deals.¹⁵ Thus, the NCAA was left without any enforcement procedures, leaving behind a market that is virtually unpoliced and unregulated.¹⁶ This entry point has enabled predatory enterprises to negotiate unfair contracts with unsophisticated and unrepresented college athletes. By granting proper access to representation, college athletes can become informed of their rights and obligations by entering a contract and save significant time, energy, and money down the road. For example, YOKE gaming, which allows users to play video games with participating athletes, offered to pay college athletes approximately \$20 in exchange for an endorsement on social media.¹⁷ In failing to recognize the legal ramifications of YOKE’s contract

⁹ *Id.*

¹⁰ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/VX57-GW4N>].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Leah Vann, *One Week into NIL, Lawyers Caution Athletes on Barstool, YOKE Gaming and Misinformation that Could Affect Iowa Athletes*, GAZETTE (July 11, 2021, 6:00 AM), <https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/> [<https://perma.cc/UW5V-9MP7>].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Aaron R. Klein et al., *NIL Update – Should Student Athletes Seek Professional Advice?*, STITES & HARBISON PLLC (Aug. 27, 2021), <https://www.stites.com/resources/client-alerts/nil-update-should-student-athletes-seek-professional-advice> [<https://perma.cc/A85X-9JCY>].

provisions, several members of the University of Iowa football team agreed to the contract, unaware they were signing away their rights to the provided content via a perpetual, royalty-free, and irrevocable grant.¹⁸ Therefore, YOKE was granted free use of their NIL-bearing content forever.¹⁹ Had there been a representative present when negotiating the deal, however, these athletes would have been made aware of this conflict and guided to ensure the appropriate market value for their images.

Payment itself resulting from NIL contracts can pose material risks to college athletes. NCAA policy still bans athletes from contracts that contain pay-to-play and performance-based payments.²⁰ Thus, athletes are responsible for ensuring their new deals cannot be tied directly to their performance as an athlete. Further, any financial aid recipients should be aware that income from NIL deals could impact their need-based aid.²¹ In addition, in the case of the YOKE contract, athletes must navigate the fairness of any contract they enter, including retention of rights, fair market value, and other considerations present when negotiating against a sophisticated party. These concerns can be addressed by competent agents representing college athletes.

Universities, although possessing sufficient concern, cannot represent college athletes in NIL negotiations. Universities may provide platforms to advise college athletes,²² but they cannot provide direct guidance in negotiating and drafting contracts.²³ In large part, this is the result of state laws prohibiting universities from directly negotiating or representing college athletes in NIL deals given their inherent conflict of interest.²⁴ For example, the University of Louisville recently advised its college athletes to cease all relationships with Barstool Sports.²⁵ This can be attributed to Penn National, a company that owns and operates casinos

¹⁸ Vann, *supra* note 14.

¹⁹ *Id.*

²⁰ Noah Hock, *Navigating the Uncertain Terrain of NIL Deals for Student Athletes*, BROOKS PIERCE (Dec. 12, 2021), <https://www.brookspierce.com/publication-navigating-the-uncertain-terrain-of-nil-deals-for-student-athletes> [<https://perma.cc/5C6P-NER3>].

²¹ *Id.*

²² *Name, Image, Likeness*, OHIO STATE UNIVERSITY, <https://ohiostatebuckeyes.com/nil> [<https://perma.cc/U5R9-5BXE>].

²³ Klein, *supra* note 17.

²⁴ *Id.*; see also *Laws for College Athlete Name, Image, and Likeness Rights: 50-State Survey*, JUSTIA (Oct. 2021), <https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey/> [<https://perma.cc/4MFN-VSJ9>].

²⁵ Vann, *supra* note 14; see also Ransom Campbell, *Louisville Tells Student-Athletes to Cease NIL Involvement with Barstool Sports*, TALKING POINTS SPORTS (Aug. 11, 2021), <https://talkingpointssports.com/college-football/college-sports/louisville-tells-student-athletes-to-cease-nil-involvement-with-barstool-sports/> [<https://perma.cc/K675-995U>].

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and advertises tobacco and alcohol products, owning a 36 percent stake in Barstool Sports.²⁶ Thus, the university found that Barstool does not comply with the university's policies or Kentucky's executive order allowing college athletes to profit from NIL deals.²⁷ Tensions like these illustrate the basic conflict of interest that precludes universities from being able to adequately represent their athletes in contract negotiations.

The NCAA has long held the opportunity to act as an advocate for its athletes. By controlling the landscape of collegiate sports, it is natural to believe that they are in the best position to be able to protect the interests of their students. However, their history of inaction has proven that they will instead leave college athletes to fend for themselves. As such, the NCAA cannot be relied upon to provide adequate resources or representation to its athletes and their interests.

This Note explains the numerous legal issues that surround the NCAA following the redevelopment of its NIL regulations. Part I provides a brief history of the NCAA. Part II discusses issues regarding college athletes that must be resolved through federal legislation. Part III argues that, at minimum, congressional action is necessary to ensure access to adequate legal representation to collegiate athletes.

I. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION LANDSCAPE

A. NCAA Formation

The National Collegiate Athletic Association was born as a means to promote safer practices in men's college football.²⁸ In 1905 alone, the sport saw eighteen deaths and hundreds of injuries.²⁹ That year, President Theodore Roosevelt called for a review of sports safety procedures in football, calling upon its sixty-two original member universities to establish the Intercollegiate Athletic Association ("IAA").³⁰ The IAA was officially established as a rule-making body to promote safety in sports, and took its present name, the National Collegiate Athletic Association, in 1910.³¹

In its early years, the NCAA's role was largely confined to rulemaking and

²⁶ Vann, *supra* note 14.

²⁷ *Id.*

²⁸ *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/5SSS-V9B4>].

²⁹ *Id.*; see, e.g., Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

³⁰ NCAA, *supra* note 28.

³¹ *Id.*

tournament scheduling.³² A spike in college enrollment from returning military personnel following World War II, coupled with the mass adoption of personal televisions, resulted in greater public interest in intercollegiate athletics.³³ As such, the commercialization of intercollegiate athletics also grew.³⁴ In 1948, the NCAA responded by adopting the Sanity Code, to “alleviate the proliferation of exploitive practices in the recruitment of student-athletes.”³⁵ These rules signaled a move by the NCAA to instill a notion of amateurism into college sports, by enforcing regulations controlling everything from financial aid to recruitment, and academic standards. Essentially, the adoption of the Sanity Code thereby granted NCAA executives a de-facto authority over managing the burgeoning collegiate athletic industry.³⁶

In facing unprecedented legal and social challenges threatening to alter the landscape of intercollegiate athletics, the NCAA was handed a major loss in the case of *O’Bannon v. NCAA*.³⁷ In 2009, former UCLA basketball star, Ed O’Bannon, filed a lawsuit against the NCAA and Collegiate Licensing Company alleging the NCAA’s amateurism rules constituted illegal restraints on trade under the Sherman Act and their actions deprived him of his right to publicity, after seeing himself in a video game.³⁸ O’Bannon argued that the NCAA profited from students’ name and image because they prevented college athletes from exploiting those same rights.³⁹ The U.S. Court of Appeals for the Ninth Circuit agreed and found that the NCAA’s rules barring payments to college athletes were in violation of antitrust laws.⁴⁰ In doing so, the court issued an injunction against the enforcement of rules that prohibited athletes from earning money from the use of their names and images in video games and television broadcasts.⁴¹ The Supreme Court denied the NCAA’s appeal,⁴² and

³² Smith, *supra* note 29, at 13.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 14.

³⁶ NCAA, *supra* note 28.

³⁷ 802 F.3d 1049 (9th Cir. 2015).

³⁸ *The NCAA Lawsuit*, PBS, <https://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/> [<https://perma.cc/6M8P-DBQA>].

³⁹ *Id.*

⁴⁰ Ben Strauss & Marc Tracy, *N.C.A.A. Must Allow Colleges to Pay Athletes, Judge Rules*, N.Y. TIMES (Aug. 8, 2014), <https://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html> [<https://perma.cc/78BA-PAL8>].

⁴¹ *Id.*

⁴² Marc Edelman, *By Denying Certiorari in O’Bannon v. NCAA, The Supreme Court Aids Future*

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the NCAA was ordered to pay the plaintiffs \$42.4 million in fees and costs.⁴³

Today, the NCAA defines itself as “a member-led organization focused on cultivating an environment that emphasizes academics, fairness and well-being across college sports.”⁴⁴ In boasting 1,100 member schools and more than 500,000 college athletes,⁴⁵ they are involved in regulating “everything from recruiting and compliance to academics and championships,”⁴⁶ a far cry from its initial charge of promoting safety.

B. Name, Image, and Likeness

Although the NCAA publicly champions the idea that college athletes are scholars first, athletes second,⁴⁷ it has long feared that adding compensation to the equation will jeopardize the innocence and honesty associated with this ideal, and ultimately blur the line between professional and collegiate athletics.⁴⁸ Thus, it has steadfastly committed to its notion of “amateurism” in repeatedly declining to allow compensation for its college athletes. However, given the lack of persuasive justification for such denial of compensation to continue, the California legislature unanimously passed the Fair Pay to Play Act in 2019 to allow athletes to pursue endorsement deals and hire agents to advise on those deals.⁴⁹ Since its passage,

Reform to College Sports, FORBES (Oct. 7, 2016, 10:30 AM), <https://www.forbes.com/sites/marcedelman/2016/10/07/by-denying-certiorari-in-obannon-v-ncaa-the-supreme-court-aids-future-reform-to-college-sports/?sh=2e3cdf3b270f> [<https://perma.cc/Z4SF-RANT>].

⁴³ See Memorandum, *O’Bannon v. National Collegiate Athletic Association*, 739 Fed. Appx. 890 (9th Cir. 2018), <https://cdn.ca9.uscourts.gov/datastore/memoranda/2018/06/29/16-15803.pdf> [<https://perma.cc/3EWW-S7K9>].

⁴⁴ *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/98NE-VQSA>].

⁴⁵ *Id.*

⁴⁶ *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/LUV4-EKB8>].

⁴⁷ National Collegiate Athletic Association, *DIVISION I 2021-22 MANUAL 1* (Aug. 1, 2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/KJ2L-BQQC>].

⁴⁸ Andy Staples, *Delaney: Big Ten Could De-emphasize Athletics if O’Bannon Plaintiffs Win*, SPORTS ILLUSTRATED (Mar. 18, 2013), <https://www.si.com/college/2013/03/19/big-ten-jim-delaney-ncaa-obannon> [<https://perma.cc/HZ72-A4Z3>].

⁴⁹ Dean Golembeski, *NCAA Struggles to Keep Its Hold on College Sports*, BEST COLLS.

(Sept. 22, 2021), <https://www.bestcolleges.com/news/analysis/2021/09/22/ncaa-college-sports-nil-supreme-court-lobbying/> [<https://perma.cc/JS9K-ZFXU>]; *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (Mar. 12, 2022), <https://businessofcollegesports.com>

nearly thirty other state legislatures followed by enacting nearly identical laws, allowing college athletes to profit off NIL.⁵⁰

In a noteworthy shift away from their steadfast dedication to “amateurism,” the NCAA suspended NIL rules that prevented college athletes from entering paid endorsements and other sponsorship deals, and from using agents to manage their publicity on July 1, 2021.⁵¹ However, this newfound freedom to engage in athletics-related business results in downstream concerns surrounding employment and fairness.

II. MEANS UNABLE TO SECURE REPRESENTATION

Action by individual states that allow college athletes to profit from their NIL rights certainly advance the narrative. Yet, with these newfound rights comes a host of challenges for college athletes—challenges that both the NCAA and their member universities are ill-equipped to handle. Thus, no matter what direction the NCAA and other government agencies take for developing their NIL policies, adequate legal representation for athletes must be ensured in order to allow for the success of both the athletes and their institutions alike.

A. *The NCAA*

Despite possessing the power to establish a nationwide NIL standard, including the ability to provide access to legal representation and sports agents to athletes, the NCAA has chosen not to address this issue in any responsible way. Historically, they have opposed the opportunity to incorporate such changes by insisting that “amateurism” is entirely contrary to the practice of compensating athletes.⁵² Because amateurism is essential to the product it sells, the NCAA does not appear to be able to position itself in a way to serve as an advocate for athletes in any meaningful way. Given the NCAA’s outspoken scrutiny against any advancements for college athletes including state legislation permitting paid

/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/Y5TH-FRRW]; Dan Murphy, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/JZ26-7BMC].

⁵⁰ Reid Wilson, *NCAA Surprise Leaves States Rethinking College Athlete Pay Rules*, HILL (Feb. 2, 2022, 12:21 PM), <https://thehill.com/homenews/state-watch/592477-ncaa-surprise-leaves-states-rethinking-college-athlete-pay-rules?rl=1> [https://perma.cc/UYK9-TNYZ].

⁵¹ Hosick, *supra* note 10.

⁵² Eric Carlson, *Unsportsmanlike Conduct: Why the NCAA Should Lose Its Tax-Exempt Status if Scholarship Athletes are Considered Employees of Their Universities*, 66 SYRACUSE L. REV. 157, 158 (2016).

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endorsements, it seems unlikely that the organization would properly regulate related issues without undermining NIL rights whatsoever.

Although the NCAA and their major athletic conferences produce tens of billions of dollars in annual revenue,⁵³ that revenue does not flow to the college athletes who generate it, “many of whom are African American and from lower-income backgrounds.”⁵⁴ Instead, coaches like University of Alabama’s Nick Saban and University of Kentucky’s John Calipari, reap the benefits, with salaries of roughly \$10 million a year.⁵⁵ Considering the NCAA is securing the benefits of low-cost labor, there is little incentive for these officials to enact any changes that may divert revenue away from themselves.

The interim NIL policy was hardly designed to be a long-term solution by the NCAA. NCAA officials have warned that universities in states with more permissive NIL regulations can offer better benefits to recruits, as opposed to universities in states with more restrictive NIL rules, unfairly advantaging some schools over others.⁵⁶ Moreover, athletic conferences that span several states will have similar difficulty in enacting and enforcing regulations across state lines.⁵⁷ Despite the interim policy, states have shifted the power away from the NCAA in enacting their own laws. Federal legislation will unify these varying standards and limit the advantage schools are currently benefitting from, purely because of their locale.⁵⁸

⁵³ Sandeep Vaheesan, *Antitrust Law is the Key to Making the NCAA Pay Student-Athletes*, WASH. POST (Apr. 1, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/04/01/ncaa-pay-athletes-supreme-court/> [<https://perma.cc/TW2D-X2ZD>].

⁵⁴ NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

⁵⁵ Branch, *supra* note 6.

⁵⁶ Alan Blinder, *How Blowing Up College Sports Became a Rallying Cry for Some in Washington*, N.Y. TIMES (Mar. 30, 2021, 5:00 AM), <https://www.nytimes.com/2021/03/30/sports/ncaabasketball/ncaa-college-sports-laws.html> [<https://perma.cc/BDV5-YZKZ>].

⁵⁷ Gregory Marino, *The NCAA Declares Independence from NIL Restrictions*, JD SUPRA (Aug. 23, 2021), <https://www.jdsupra.com/legalnews/the-ncaa-declares-independence-from-nil-4713672/> [<https://perma.cc/R5MX-5H8F>].

⁵⁸ Instead, the NCAA has shifted its focus toward Washington, further bolstering its potential conflict of interest in the present issue. In the first six months of 2021, the NCAA spent \$250,000 on lobbying, and spent \$480,000 in 2020, according to federal records published by OpenSecrets. Golembeski, *supra* note 49. In hopes of carving out an antitrust exemption, the NCAA has “pledged to continue to work with Congress to adopt federal legislation to support student-athletes.” Blinder, *supra* note 56; Molly Hensley-Clancy, *Senators Hide NCAA for Not Solving Athlete-Pay Issue as Fast Federal Help Looks Unlikely*, WASH. POST (June 9, 2021, 2:18 PM), <https://www.washingtonpost.com/sports/2021/06/09/ncaa-congress-nil-hearing/>

B. Employee Status

In turning away from the possibility of making these changes through the NCAA, a common consideration has been classifying college athletes as employees and paying them through employment compensation. The full ramifications of treating college athletes as employees are yet to be fully realized, however, such reclassification likely poses many important issues to both the college athletes and their respective institutions. Though, this very consideration has recently gained traction under the National Labor Relations Board (“NLRB”).⁵⁹

i. The National Labor Relations Board

The NLRB, an independent federal agency charged with safeguarding employees’ ability to collectively bargain and ensuring fair labor practices,⁶⁰ has witnessed earlier efforts attempting to classify college athletes as employees.⁶¹ More recently, however, NLRB general counsel, Jennifer Abruzzo, has left many questioning whether the NLRB’s position has begun to shift.⁶² In 2021, Abruzzo released memorandum GC 21-08, arguing that some college athletes should be treated as employees under § 2(3) of the National Labor Relations Act (“NLRA”) and common law definition of employees, affording them all rights and protections under federal labor laws.⁶³ Essentially, this would extend § 7 rights and protections to college athletes and opens the door for athletes to start or resume organizing

[<https://perma.cc/XCP2-6SXJ>]; Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html> [<https://perma.cc/D68X-D7CL>].

⁵⁹ Memorandum GC 21-08 from Jennifer A. Abruzzo, *Statutory Rts. Players Acad. Inst. (Student-Athletes) Under the National Labor Relations Act*, N.L.R.B. OFF. OF GEN. COUNS. (Sept. 29, 2021) [hereinafter N.L.R.B. Memorandum].

⁶⁰ Ross Dellenger, *The Next Frontier in College Sports: The Unionization of College Athletes*, SPORTS ILLUSTRATED (Sept. 29, 2021), <https://www.si.com/college/2021/09/30/nlr-b-advisory-opens-next-21frontier-college-sports-unionization/> [<https://perma.cc/96LE-FXBB>].

⁶¹ Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University, and Potential Next Steps in the College Athletes Rights Movement*, 38 CARDOZO L. REV. 1627, 1649 (2017).

⁶² N.L.R.B. Memorandum, *supra* note 59.

⁶³ *Id.* GC 21-08 proscribes the use of the term “student-athlete” as an inherent misclassification. *Id.* Use of this label is a standalone violation of the NLRA, as it prevents the athlete at college or university from pursuing protection under federal law, in violation of Section 8(a)(1) of the NLRA. *Id.* Additionally, GC 21-08 expands NLRA protections to actions related to general political stances, like racial justice issues and concerns regarding health and safety, which have not consistently been considered protected concerted activity. *Id.* Such activity directly concerns terms and conditions of employment and engaging in such activities to improve working conditions is protected from retaliation. *Id.*

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efforts, labor protects, walkouts, strikes, and other protected concerted activity.⁶⁴ Section 152(3) of the NLRA defines an ‘employee’ broadly, subject to few exceptions.⁶⁵ Notably, these exceptions do not include any exceptions that suggest the inclusion of university employees, football players, or students.⁶⁶ Meanwhile, the common law defines an employee as a person “who perform[s] services for another and subject to the other’s control or right of control.”⁶⁷ In determining which players at academic institutions are employees, a persuasive factor is the amount of revenue that the sport brings to the institution, its conference, and the NCAA.⁶⁸ Importantly, this fact-specific analysis will likely yield disparate results when evaluating college athletes across conferences and sport size.⁶⁹ Thus, even if the NLRB were to step in, it would be unclear which students would therefore qualify as an employee. This result would only further muddy the waters for determining how college athletes are compensated for use of their NIL rights.

Of additional importance, GC 21-08 declares a joint employer theory of liability because players at academic institutions perform services for and are subject to the control of the NCAA and their athletic conference, in addition to their college or university.⁷⁰ Without a joint employer framework, the NLRB have lacked the authority to assert jurisdiction over the entire Big Ten Conference because all the Big Ten schools were public, state schools.⁷¹ Thus, they were outside of the

⁶⁴ *Id.*

⁶⁵ “The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.” 29 U.S.C. § 152 (2022).

⁶⁶ N.L.R.B. Memorandum, *supra* note 59.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing Boston Medical Center, 330 NLRB at 160).

⁶⁹ N.L.R.B. Memorandum, *supra* note 59.

⁷⁰ *Id.*

⁷¹ Marc Edelman, *The Future of College Athlete Players Unions Lies in an NLRB Memo Footnote*, FORBES (Oct. 4, 2021, 9:00 AM), [https://www.forbes.com/sites/marcedelman/2021/10/04/the-future-of-college-athlete-players-unions-lies-in-an-nlr-memo-footnote/?sh=74d9766a18ce/\[https://perma.cc/9B2A-4C3E\]](https://www.forbes.com/sites/marcedelman/2021/10/04/the-future-of-college-athlete-players-unions-lies-in-an-nlr-memo-footnote/?sh=74d9766a18ce/[https://perma.cc/9B2A-4C3E]).

NLRB's jurisdiction and under the jurisdiction of state labor laws.⁷² By treating the NCAA and athletic conferences as a joint employer, the NLRB thereby extends its jurisdiction over an entire conference, including its public schools.⁷³

The extent of treating athletes as employees is yet to be known, but this heightened status poses numerous issues. Deeming college athletes as employees may result in both universities and the NCAA losing their § 501(c)(3) non-profit designations.⁷⁴ This could have potentially far-reaching consequences, as such status exempts the NCAA and universities from federal income tax. Under § 501(c)(3), the NCAA is tax-exempt because it is "organized and operated exclusively . . . to foster . . . amateur sports competition."⁷⁵ Universities, on the other hand, are considered a non-profit due to their educational mission.⁷⁶ Thus, if players are compensated through NIL deals and considered employees, the NCAA and its member organizations risk losing its tax-exempt status.⁷⁷ Employee status can also impact college athletes' eligibility for federal financial aid and leave their scholarships susceptible to federal taxation.⁷⁸ Students on international visas may be placed in a situation where NIL deals violate the terms of their student visa, complicating their ability to participate in NCAA athletics.⁷⁹ This status, in accordance with GC21-08, also places athletes at risk of termination by their new employer, the school and conference.⁸⁰ Should college athletes be reclassified as employees of their academic institution to earn compensation, which can be used for representation, legislation will still be required to restructure the system the NCAA and universities are predicated upon. Instead, to avoid the intricacies of federal taxation and tax-exempt status, it is more efficient to enact legislation that achieves the goals employee-status is attempting to achieve, such as representation, rather than enact legislation to work around the issues posed with this status.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Carlson, *supra* note 52.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *NLRB General Counsel Memo that Announces Initiative to Treat College Athletes as Employees*, MCGUIRE WOODS (Oct. 7, 2021), <https://www.mcguirewoods.com/client-resources/Alerts/2021/10/nlr-general-counsel-memo-college-athletes-employees> [<https://perma.cc/5MZ9-M89Z>].

⁷⁹ *Id.*

⁸⁰ *Id.*

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ii. Antitrust’s Non-Statutory Exemption

Perhaps the furthest reaching issue in categorizing college athletes as employees is one at the center of the clash between federal antitrust and labor laws. GC 21-08 extends NLRA protections to players at academic institutions. Where these players were previously subject to the control of their universities and the NCAA, § 7 of the NLRA provides the opportunity to collectively bargain, like the NFL, NHL, and MLB. In the context of professional sports, collective bargaining agreements set forth agreed-upon rules between management and employees to include “the split of league revenues between the teams and players, the level of salary caps imposed to teams, player transfers restrictions, player safety issues, player drafting provisions, free agency requirements, disciplinary rules, etc.”⁸¹ GC 21-08 does not address collective bargaining specifically, but it opens the door for college athletes to unionize through the proper NLRB procedures. In doing so, the unionizing of college athletes could open the gates by surrendering their antitrust rights and allowing the NCAA to defend its concerted conduct based upon the non-statutory labor exemption.⁸² The non-statutory labor exemption was fashioned by the Supreme Court in an effort to reconcile the clash between federal antitrust and labor law.⁸³ The non-statutory exemption was created to exempt the actual agreements spawned from collective bargaining between and among employers and unions from antitrust liability.⁸⁴ The Court observed that “a proper accommodation between the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions.”⁸⁵ Therefore, when a union or employer seeks “to attain goals not specifically permitted by any statute but sanctioned by the policy in favor of collective bargaining under the NLRA, the courts

⁸¹ *Collective Bargaining Agreements in Sports: How do They Work in the United States vs Europe*, SPORTS FIN. LITERACY ACAD. (Aug. 29, 2018), <https://moneysmartathlete.com/2018/08/29/collective-bargaining-agreements-in-sports-how-do-they-work-in-the-united-states-vs-europe/> [https://perma.cc/CSV9-4Y4Y].

⁸² Edelman, *supra* note 61.

⁸³ *Id.* at 1655.

⁸⁴ *What are the Statutory and Non-Statutory Labor Exemptions to Antitrust Liability?*, BONA L., <https://www.bonalaw.com/insights/legal-resources/what-are-the-statutory-and-non-statutory-labor-exemptions-to-antitrust-liability/> [https://perma.cc/5KBZ-SAX5].

⁸⁵ Cynthia E. Richman & Daniel G. Swanson, *Balancing the Interests of Antitrust and Labor Laws*, L.A. & S.F. DAILY J. (July 9, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/07/Richman-Swanson-Balancing-the-Interests-of-Antitrust-and-Labor-Laws-Daily-Journal-7-9-2019.pdf> (quoting *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)) [https://perma.cc/R6YR-WFBX].

have exempted the conduct from antitrust liability.”⁸⁶

Interestingly, for the NCAA, engaging in collective bargaining could provide relief from further antitrust lawsuits, as well as pressure from Congress.⁸⁷ Yet, collective bargaining between the NCAA and college athletes is not as straightforward as the analysis for the negotiations of their professional counterparts. Due to the inclusion of public and private institutions, it is unlikely that the NCAA will obtain the same exemptions from antitrust scrutiny that the professional leagues enjoy. It would also require the NCAA to abandon its claim that college athletes are students, not employees.⁸⁸

The Supreme Court has yet to delineate a precise test for this exemption, leaving lower courts the difficult task to define the boundaries.⁸⁹ The U.S. Court of Appeals for the Ninth Circuit has applied a test which holds that “the parties to an agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide arm’s length collective bargaining.”⁹⁰ Given the uncertainty of a potential finding of the non-statutory labor exemption and the success of *O’Bannon* and *Alston*, employee status is hardly appealing considering the weighty sacrifice of antitrust protections. Antitrust law has proven to be one of the largest bargaining chips in the hands of college athletes. By forfeiting these claims, it would shift further power into the hands of the NCAA.

In June 2021, the Supreme Court unanimously held that the NCAA was in violation of federal antitrust laws when placing limits on the education-related benefits that schools can provide to their athletes in *National Collegiate Athletic Association v. Alston*.⁹¹ This antitrust lawsuit was brought by current and former college athletes against the NCAA and major athletic conferences, challenging restrictions on compensation that barred college athletes from receiving fair-market

⁸⁶ *Id.*

⁸⁷ Dan Papsun, *For NCAA’s Antitrust Woes, Athlete Unions Pose Ironic Solution*, BLOOMBERG L. (Aug. 6, 2021, 5:56 AM), <https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution/> [<https://perma.cc/4FM5-WJ5Z>].

⁸⁸ *Id.*

⁸⁹ Richman, *supra* note 85.

⁹⁰ *Id.* (quoting *Phoenix Elec. Co. v. National Elec. Contractors Ass’n*, 81 F.3d 858, 861 (9th Cir. 1996)).

⁹¹ *O’Bannon*, *supra* note 43; Dan Murphy, *Supreme Court Unanimously Sides with Former College Players in Dispute with NCAA about Compensation*, ESPN (June 21, 2021), https://www.espn.com/college-sports/story/_/id/31679946/supreme-court-sides-former-players-dispute-ncaa-compensation/ [<https://perma.cc/D5JQ-5AFW>].

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compensation for their labor.⁹²

The Court’s unanimous decision, written by Justice Neil Gorsuch, held that the NCAA could restrict benefits unrelated to education, such as cash salaries, but the NCAA could no longer restrict benefits related to education.⁹³ Under a rule of reason analysis, the Court determined that NCAA regulations limiting educational benefits had an anticompetitive effect.⁹⁴ The limitation of educational benefits is essentially the NCAA’s establishment of a ceiling for the amount of educational benefits member schools could offer athletes. Ultimately, this means that schools could not offer common additional benefits, such as additional tuition for graduate or vocational school, paid internships, or tutoring fees.⁹⁵ The Court reasoned that the athlete-plaintiffs demonstrated the NCAA could maintain a distinction between college and professional sports, i.e., the “tradition of amateurism,” with substantially less restrictive alternative rules.⁹⁶

Alston remains a narrow legal opinion that applies antitrust law to the NCAA’s fixed-sum educational benefits offered to scholarship athletes. However, it signals a shift in the application of relevant regulation and treatment of college athletes. With the rulings of *O’Bannon* and *Alston* and major congressional

⁹² Amy Howe, *In Unanimous Ruling, Court Agrees with Athletes that NCAA Violated Antitrust Laws*, SCOTUS BLOG (June 21, 2021, at 12:22 PM), <https://www.scotusblog.com/2021/06/in-unanimous-ruling-court-agrees-with-athletes-that-ncaa-violated-antitrust-laws/> [<https://perma.cc/3ADR-DC2B>].

⁹³ *Id.*

⁹⁴ *Alston*, *supra* note 54.

⁹⁵ Howe, *supra* note 92.

⁹⁶ *Id.* Justice Kavanaugh joined the Court’s opinion in full, but in a separate concurring opinion, engaged in a thorough antitrust analysis in which he concluded that the NCAA “is not above the law.” *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring). Kavanaugh notes the NCAA fails to provide “a legally valid procompetitive justification for its remaining compensation rules.” *Id.* Thereby, failing to pass the traditional means of evaluating an alleged restraint of trade under federal antitrust laws, under the rule of reason. *Id.* Kavanaugh further found the NCAA’s position against paying athletes to maintain amateurism unpersuasive, “The NCAA’s business model would be flatly illegal in almost any other industry in America.” *Id.* Antitrust laws distinctly forbid price-fixing, or technically, wage-fixing labor because “it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.” *Id.* Suppressed wages result in lower economic output and higher prices for consumers. Eric Posner, *The Supreme Court’s NCAA Ruling has Huge Implications Outside of Sports*, WASH. POST (June 22, 2021, at 1:08 PM), <https://www.washingtonpost.com/outlook/2021/06/22/ncaa-supreme-court-wage-suppression-monopoly/> [<https://perma.cc/8KDN-95BJ>]. Ultimately, then, employers profit at the expense of others. *Id.* Antitrust laws are based on a commitment to free markets and will not waiver to allow firms to cartelize labor markets because that is what consumers desire. *Id.*

developments in antitrust, specifically in the technology industry, forfeiting antitrust claims through the non-statutory exemption against the NCAA is incredibly unappealing. Rather than college athletes becoming employees, congressional interference will minimize these worries, ensuring that conferences and the NCAA can maintain their § 501(c)(3) designations, maintain federal tax-free scholarships, and safeguard college athletes' federal antitrust claims against the NCAA and conferences.

III. THE SOLUTION: A COMPREHENSIVE FEDERAL LAW ENSURING ACCESS TO REPRESENTATION

Considering the vast social, economic, and legal advantages to be gained from legislation, the implementation of a federal law represents the most efficient and equitable method for establishing a more balanced dynamic between college athletes and the NCAA. Federal legislation facilitates a robust discussion and negotiation period to resolve the remaining policy concerns, including the allocation of revenue streams to athletes who play non-revenue-raising sports, Title IX compliance, salary caps, as well as the implementation of collective bargaining protections while avoiding employee classification. Moreover, federal legislation circumvents problems like taxing scholarships and varying state standards. In an effort to create a national NIL framework, several bills have been introduced in Congress. Each of the bills vary in terms of restrictions imposed on the NCAA, if any, and rights and protections afforded to athletes, as reflected by these three particular examples.

Senator Roger Wicker, a Republican of Mississippi, introduced the College Athlete and Compensation Rights Act ("CACRA"), which adopts a limited scope and deference to the institutional status quo.⁹⁷ The bill allows college athletes to earn NIL compensation "commensurate with market value."⁹⁸ Practically speaking, this may allow governing authorities the power to approve or disapprove of NIL deals based on their cash value.⁹⁹ Moreover, CACRA limits NIL eligibility to college athletes who completed twelve percent of the college credits required for graduation and prohibits college athletes from entering into NIL agreements that might conflict with existing college sponsors.¹⁰⁰ Though, it allows college athletes "to obtain and retain a certified agent for any matter or activity relating to such covered compensation,"

⁹⁷ Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020); Marino, *supra* note 57.

⁹⁸ Marino, *supra* note 57.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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but does not provide a guarantee to such representation and requires any representative to report the details of each transaction to the university.¹⁰¹ CACRA further seeks to establish an independent agency, subject to the Federal Trade Commission for any violations.¹⁰² Most notably, CACRA provides the NCAA, athletic conferences, and universities broad exemption from antitrust scrutiny.¹⁰³

In contrast, Senator Cory Booker, a Democrat of New Jersey and former Stanford University athlete,¹⁰⁴ championed an ambitious player-friendly proposal, titled the College Athletes Bill of Rights (“CABOR”).¹⁰⁵ Booker cites his own experience as a collegiate football player, as well as conversations with college athletes that “centered on the racial inequities of an unpaid, largely Black work force generating millions for largely white coaches and administrators” as motivation for its drafting.¹⁰⁶

CABOR would guarantee lifetime scholarships, long-term health care, regulates sports agents, government oversight of health and safety standards, public reporting of booster donations, unrestricted transfers, and create a commission with subpoena power to ensure compliance.¹⁰⁷ Moreover, it sets health standards, including concussion protocols and the investigation of sexual assault cases, and sets a salary cap for coaches and administrators.¹⁰⁸ Perhaps to appeal to those across the aisle, CABOR allows state governments to restrict college athletes from endorsing certain product categories, such as gambling and alcohol-related products, so long as such state laws equally restrict universities in such categories.¹⁰⁹

CABOR proposes a bold revenue-sharing provision that would require colleges to share the profits equally with the athletes who generate them in sports where revenues exceed the costs of scholarships across an entire division.¹¹⁰ Using data provided by universities to the Department of Education, this “would mean payments of \$173,000 a year to football players, \$115,600 to men’s basketball players, \$19,050 to women’s basketball players, and \$8,670 to baseball players who

¹⁰¹ Collegiate Athlete Compensation Rights Act, *supra* note 97.

¹⁰² *Id.*

¹⁰³ Marino, *supra* note 57.

¹⁰⁴ Blinder, *supra* note 56.

¹⁰⁵ College Athletes Bill of Rights, S. 5063, 116th Cong. (2020); Witz, *supra* note 58.

¹⁰⁶ Witz, *supra* note 58.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Marino, *supra* note 57.

¹¹⁰ Witz, *supra* note 58.

are on full scholarship.”¹¹¹ The bill further seeks to establish a congressional oversight board, the Commission on College Athletics (“Commission”).¹¹² Within the Commission, various councils, including an athlete advisory council, would be established to provide “advice and expertise.”¹¹³

Representative Anthony Gonzalez, a Republican of Ohio, and Representative Emanuel Cleaver, a Democrat of Missouri, re-introduced an amended bi-partisan NIL bill called the Student Athlete Level Playing Field Act (“LPFA”).¹¹⁴ The LPFA seeks a middle ground compromise “between CACRA’s deference to the status quo and CABOR’s expansive approach.”¹¹⁵ Like both CACRA and CABOR, LPFA generally prohibits the restricting of college athletes’ ability to earn compensation through NIL deals.¹¹⁶ Like CACRA, it limits athletes from working with companies associated with drugs, alcohol, gambling, or adult entertainment.¹¹⁷ Also like CABOR, LPFA maintains that any institution limiting college athlete NIL activity in a particular category must also abstain from engaging with that same category.¹¹⁸ The proposal also preempts state NIL laws and amends the Higher Education Act of 1965 to allow students to enter an agency contract.¹¹⁹

These proposed bills encompass distinct legislative approaches. However, they each fail to adequately balance the rights of college athletes against the business interests of the NCAA that would pass bipartisan scrutiny, be workable in a practical sense, and explicitly provide any assurance of access to representation.

A. Establishment of an Enforcement Body

The establishment of an enforcement body is essential to properly implement new regulations and monitor violations of rules governing college athletes. The current intercollegiate athletic enforcement body has repeatedly

¹¹¹ *Id.* These numbers hardly compare to coaches’ salaries that are currently available. According to a *USA Today* database, fifty head football coaches earned at least \$3 million in 2020. *Id.*

¹¹² College Athletes Bill of Rights, *supra* note 105.

¹¹³ *Id.*

¹¹⁴ Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. (2021); Marino, *supra* note 57; Sydney Umeri, *How each NIL Bill in Congress Will Affect Student-Athletes*, SB NATION (June 23, 2021), <https://www.sbnation.com/college-basketball/2021/6/23/22545287/college-athletes-name-image-likeness-bills-ncaa/> [<https://perma.cc/89X8-6KA9>].

¹¹⁵ Marino, *supra* note 57.

¹¹⁶ Student Athlete Level Playing Field Act, *supra* note 114.

¹¹⁷ *Id.*

¹¹⁸ Marino, *supra* note 57.

¹¹⁹ *Id.*

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failed to uphold their self-made standards for rules violations.¹²⁰ State-by-state enforcement would be ineffective because each authoritative body would be incentivized to design a scheme to favor its own athletes. Thus, there is a need to delegate enforcement power to a task force, separate from the NCAA and its member institutions. On a practical level, this task force can function within the Federal Trade Commission (“FTC”), as proposed by CACRA,¹²¹ and would allow for a national standard to appropriately promulgate endorsement policies and adjudicate disputes to protect college athletes and promote fair competition.

A federal oversight enforcement body provides a level of consistency that is not feasible, should it be left to the states or NCAA. The transparency afforded by FTC oversight provides the ideal mechanism, as an uninterested party, for resolving intercollegiate athletic violations and disputes without unnecessarily involving courts.¹²² Since its inception in 1915, the FTC has long ensured the protection of consumers and promotion of fair competition.¹²³ As a well-established and respected entity, it is well-suited to oversee new regulations involving intercollegiate athletics by providing stability and predictability in a rapidly evolving industry.

B. Restructuring Flows of Revenue

The NCAA’s suspension of NIL rules and state legislation restricting limitations imposed by universities, athletic conferences, and the NCAA, now requires college athletes to navigate a complicated legal and taxation landscape, in addition to fulfilling their academic and athletic commitments. Recognizing that these students are largely unsophisticated individuals carrying heavy academic obligations while newly living independently, they are unlikely to fully appreciate the ramifications of entering contracts offered to them by outside promoters. While some legislative proposals envision allowing athletes to contract with agents to provide guidance and representation through NIL contract negotiations, none of the proposals address the need for such representation to be guaranteed.

¹²⁰ Pat Forde, *Feckless NCAA Misses Latest Enforcement Opportunity by Letting Auburn Off Easy*, SPORTS ILLUSTRATED (Dec. 10, 2021), <https://www.si.com/college/2021/12/10/auburn-bruce-pearl-fbi-ncaa-sanctions-chuck-person/> [<https://perma.cc/HZ7D-YR9V>]; Jon Terbush, *The NCAA is already relaxing Penn State’s punishment*, WEEK (Jan. 8, 2015), <https://theweek.com/articles/459672/ncaa-already-relaxing-penn-states-punishment/> [<https://perma.cc/4JZS-JSK6>].

¹²¹ College Athletes Bill of Rights, *supra* note 105.

¹²² *Legal Library: Cases and Proceedings*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/cases-proceedings/> [<https://perma.cc/AY55-PEH2>].

¹²³ *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history/> [<https://perma.cc/47X2-2LAD>].

Nor do any of the proposals consider how a college athlete will compensate these professionals. Although some athletes have the resources to compensate representation and therefore understand their contractual duties, this privilege is not universal. Athletes who do not have the means to obtain representation should not be disadvantaged by predatory contracts simply because they do not have the same resources as other athletes. NIL opportunities vary widely across sports and rosters. Adequate representation is not realized if it is only achievable for college athletes with ample NIL opportunities and ample financial resources. Cameron March, a member of the women's golf team at Washington State University, called for congressional intervention. "I know this too well as a female athlete of color, currently playing women's golf, a sport that isn't the most lucrative or visible."¹²⁴ She continued, "This is why I feel as though it'd be wishful thinking to believe that someone like me would ever be on an equal financial playing field as a star quarterback."¹²⁵ With glaring disparities, it is not unreasonable to assume that athletes with limited opportunities will likely forsake representation.

This problem of representation can be resolved through federal legislation to create a fund or revenue redistribution model to provide access to representation to all NCAA athletes. In fact, CABOR outlines two possible ways this could be done.¹²⁶ A fund could be created where universities with athletic departments make contributions determined by a Commission to be reasonable.¹²⁷ Otherwise, a standard could be set in which universities must redistribute their revenue streams and allocate some of that to an independent fund.¹²⁸ Of course, a provision such as this may have difficulty passing bipartisan muster, but college athletes, some of whom are minors, should not be penalized due to their limited accessibility. Now that the Democratic party controls both chambers of Congress and the White House, Republicans have offered measures to provide college athletes greater autonomy but impose more limited checks on the NCAA's power, compared to Democratic proposals.¹²⁹ Although persuading both sides of the aisle to agree on a common goal is a daunting task, surely members of Congress will balance the century-long abuse of power against those disadvantaged by the inability to retain sound legal advice.

¹²⁴ Maria Carrasco, *Some College Athletes Cash in While Others Lose Out*, INSIDE HIGHER ED, (Oct. 12, 2021), <https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out/> [<https://perma.cc/Y99D-WVMQ>].

¹²⁵ *Id.*

¹²⁶ College Athletes Bill of Rights, *supra* note 105.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Blinder, *supra* note 56.

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CONCLUSION

In protecting something as inalienable as one's likeness, reliance upon any measure other than federal legislation is no longer adequate. The development of individual state laws surrounding NIL rights for college athletes have created a need for a level of uniformity that can only be provided through federal legislation. Moreover, the NCAA's lackluster attempt at suspending its NIL rules has only heightened the need for Congressional action. The NCAA has rid the problem by turning to lobbying, in hopes of carving out an antitrust exception. Meanwhile, considering college athletes as employees falls just as flat. The NCAA and conferences not only jeopardize their § 501(c)(3) status, but college athletes then forfeit all antitrust claims because of the non-statutory exemption and leave their scholarships open to federal taxation.

Current bills have failed to address the vulnerability of college athletes to the whims and disparate interests of the NCAA. Legislation must be enacted to ensure college athlete access to adequate legal representation to navigate the complicated landscape created by the NCAA's failure to lead. By failing to do so, college athletes may never seek the proper counsel and fall victim to deceptive and predatory contracts and jeopardize their relationship with their school and the NCAA.