

**NAME, IMAGE, AND LIKENESS: THE STATE OF  
INTERCOLLEGIATE ATHLETE COMPENSATION**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON MANUFACTURING, TRADE,  
AND CONSUMER PROTECTION

OF THE

COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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FEBRUARY 11, 2020  
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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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# **NAME, IMAGE, AND LIKENESS: THE STATE OF INTERCOLLEGIATE ATHLETE COMPENSATION**

**TUESDAY, FEBRUARY 11, 2020**

U.S. SENATE,  
SUBCOMMITTEE ON MANUFACTURING, TRADE, AND  
CONSUMER PROTECTION,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:05 a.m. in room SD-106, Dirksen Senate Office Building, Hon. Jerry Moran, Chairman of the Subcommittee, presiding.

Present: Senators Moran [presiding], Wicker, Thune, Fischer, Blackburn, Capito, Young, Blumenthal, Cantwell, Tester, and Rosen.

## **OPENING STATEMENT OF HON. JERRY MORAN, U.S. SENATOR FROM KANSAS**

Senator MORAN. Good morning, everyone. The Subcommittee will come to order.

We are honored to have the Full Committee Chairman with us this morning, and I expect Senator Blumenthal, the Ranking Member of this Subcommittee, to join us momentarily.

As Chairman of this Subcommittee, with jurisdiction over amateur athletics, I welcome all of you to today's hearing. It is entitled "Name, Image, and Likeness: The State of Intercollegiate Athletic Compensation." The expectation or hope is that we might limit ourselves to that type of conversation, but I have no control over my colleagues or necessarily what the witnesses will say that may take us a little broader in scope.

I absolutely look forward to hearing from our witnesses. I am appreciative of all of them being here but especially the Chancellor of my alma mater, the University of Kansas; the President of the National Collegiate Athletic Association; the Commissioner for Big 12; and two former student athletes.

In my home state, we have a rich history of college athletics. The University of Kansas won 14 straight Big 12 men's basketball titles and the women's soccer team just won their first Big 12 title last year. In my hometown of Manhattan, Bill Snyder revolutionized college football at Kansas State University, a legacy that has been continued by the current coach, Chris Klieman, and Athletic Director Gene Taylor. And who can forget Wichita State's Cinderella run at the NCAA men's basketball tournament in 2013?

In addition, Kansas City was the national headquarters for the NCAA for 45 years before moving to Indianapolis. Senator Young

is not here, but I would remind the NCAA we would welcome them back to Kansas City at any time.

[Laughter.]

Senator MORAN. While Division I schools often come to mind, in my view we cannot lose sight over the 1,000 colleges and universities across three divisions included in the NCAA. In Kansas, we have impressive Division II athletics at Fort Hays State, Pitt State who won four D-II titles, most recently in 2011, Emporia State, Newman, and Washburn. I hope that in this conversation that those schools and their athletes are not forgotten.

Altogether there are nearly 500,000 student athletes that compete in 24 different sports. The NCAA's considerable financial restrictions tied to amateur athletics eligibility has gained national media attention and heated debate in recent years, specifically how student athletes are currently restricted from profiting from their name, image, or likeness to supplement the current scholarships and related benefits they receive.

These debates have resulted in State legislatures taking their own actions. In California, the Fair Pay to Play Act was signed into law last September and will prohibit California universities and colleges from preventing their student athletes from gaining compensation for the use of their name, image, or likeness from third parties.

Coming into effect in 2023, the law will also allow student athletes in California to hire agents and other representation.

Following suit, legislation has been introduced in over 20 other states with more expected to follow raising concerns of the ability of nationwide organizations to function within a system of differing State laws and provisions.

Last May, the NCAA began to take steps to address the debate around student athletes potentially profiting from their name, image, and likeness by appointing a working group to examine potential modifications that still allow a clear demarcation between professional and amateur athletics and ensure that they are still aligned with the general student body. The working group is expected to issue recommendations later this year with new rules scheduled to be implemented in 2021.

Understanding how State and Federal laws and regulations on name, image, and likeness of student athletes would affect the existing intercollegiate athlete system is critical in shaping Congress' efforts on this issue. Some of the complexities surrounding this issue include the use of third party agents, the possible elimination of athletic programs, current definition of amateurism, and allowable incentives made available to today's college athletes.

As we will hear today, college athletics teaches young men and women many values and skills that serve them throughout their life, but the most important aspect is that they are first a student athlete. NCAA student athletes have considerably higher graduation rates than non-athletes which is significant because less than 2 percent of student athletes go on to become professional athletes.

It is important that actions taken by Congress do not harm the education, health, and wellbeing of student athletes.

Joining us today to provide a variety of different perspectives on this issue is Mr. Bob Bowsby, Commissioner of the Big 12 Con-

ference; Dr. Mark Emmert, President of the National Collegiate Athletic Association; Dr. Douglas Girod, Chancellor of the University of Kansas; Mr. Ramogi Huma, Executive Director of the National College Players Association and former UCLA football student athlete; and Mr. Kendall Spencer, Chair of the NCAA's Student-Athlete Advisory Committee and former University of New Mexico track student athlete.

We are also honored to be joined by former Ohio State University football student athlete and U.S. Congressman representing the 16th district of Ohio, Anthony Gonzalez. The Congressman's background and active advocacy for this issue is highly valued by the Subcommittee, and I thank him for his willingness to join us today and present an opening statement.

With the conclusion of my opening statement, I turn to the Ranking Member, Senator Blumenthal, for his.

**STATEMENT OF HON. RICHARD BLUMENTHAL,  
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thank you so much, Chairman Moran.

I want to express my special appreciation to you and to Chairman Wicker, who is with us, as well as to Ranking Member Cantwell, for addressing an issue that I think will grow in importance. Already it has preoccupied the minds and hearts of many who are interested in college athletes and the future of the great individuals who participate in college sports. And we are now holding the Senate's first-ever hearing on compensating college athletes, thanks to you, Representative Gonzalez, for advancing a number of very promising ideas, which I hope we will take into account in our work.

We have a highly significant opportunity today to better understand how we can protect college athletes while promoting inter-collegiate sports. Our college athletes fuel the \$14 billion industry that literally makes money for countless companies and agents and almost nothing for the athletes themselves. We should ensure they receive equitable compensation for their hard work and the value that they create.

Across the country, college athletes are being taken advantage of by a financial model that has allowed the NCAA and its members to profit off athletes' names, images, and likenesses without allowing those athletes to receive any compensation in return. College athletes risk their health and safety to play these sports, but in return, their compensation is capped at the cost of attending their college or university. Athletes are not even guaranteed to have costs for sports-related injuries be covered by their schools, and they can have their scholarships revoked in the event of a college and career-ending injury.

This system is deeply unfair, repugnant to the very ideals that the colleges so actively espouse, and inherently flawed as an economic matter, as well as marred with inconsistencies. Only student athletes are barred from compensation, whereas other students are able to monetize their skills in their free time by working, such as music students who teach budding musicians, or math majors who tutor high school students. College athletes receive no remunera-

tion, no compensation, no financial recognition at all. That has to change.

So we are here to hear from some of the experts and to begin this consideration. The kinds of egregious unfairness are multiple. We know well that college coaches are paid multimillion dollar salaries, outpacing the pay of many corporate executives and almost all the teachers at their schools. Many of the college coaches rank as the highest paid public employees. In fact, they do so in 41 out of 50 states. When universities are not turning their coaches into millionaires, they pump millions of dollars into lavish new athletic facilities, in fact, tens of millions of dollars that can cost upwards of \$130 million.

In short, everyone is profiting off the fame, image, likeness, and accomplishments of college athletes except for the athletes themselves, and it is during a period when their prowess and, in effect, earning capacity may be at one of its heights. Amateurism cannot be a means to monopolize college athleticism for lucrative media deals.

I hope that states like the California Fair Pay to Play Act will be part of our consideration. Among other things, these laws provide new opportunities for women athletes who have less professional sports options after college than men, allowing them to be compensated for their athletic achievements while in college.

And I look forward to continuing this work because we have a responsibility, especially in the absence of leadership elsewhere. But I hope there will be a leadership. I hope the NCAA will take advantage of the real opportunity it has to do right by hundreds of thousands of athletes across the country whose talents generate billions of dollars for the college sports industry. And I am glad that the NCAA is taking necessary steps to update its policies, and I look forward to hearing from the NCAA as to new rules to compensate athletes for their name, image, and likeness. Fundamental fairness is at stake here.

Thank you, Mr. Chairman.

Senator MORAN. Senator Blumenthal, thank you. I look forward to working with you on this topic in this subcommittee, and you and I have a habit of responding to California legislation.

[Laughter.]

Senator MORAN. We will see if we can do it one more time or maybe we can do it in both instances.

I now recognize the Chairman of the Full Committee, Senator Wicker. He and his staff have been instrumental and supportive of our efforts to bring this hearing to fruition this morning, and I appreciate his presence here this morning.

Senator Wicker is recognized.

**STATEMENT OF HON. ROGER WICKER,  
U.S. SENATOR FROM MISSISSIPPI**

The CHAIRMAN. Well, thank you very much, Chairman Moran and Ranking Member Blumenthal, for calling us together for this important hearing. I think we see by the size of the crowd and the attention that this hearing is receiving that we are onto something very important and very timely.



I do not know how I feel about this issue, Mr. Chairman. I do not know where it is going to lead, but let me say that I do not disagree with anything that the Chair or Senator Blumenthal have said during their opening statements. We have got a situation where states are moving forward, and we need to address the issue.

I am as proud of my state's history of intercollegiate athletics as Senator Moran is and pointed out in his opening statement. If Senator Blumenthal had taken the time to do so, he could have pointed to great accomplishments in Connecticut also.

Many college athletes come from middle class families, as I did, who could scrape together the funds and pay for a college education on their own if they had to. But for many collegiate athletes, male and female, in football, basketball, or some of the other sports that are not quite so popular, it is the first opportunity for that family to get out of poverty, to go to college, to grab a rung on the ladder of economic success.

And certainly the legislation in California and the legislation being proposed elsewhere recognizes that there has been a disparity there that ought to be addressed. I agree that it ought to be addressed.

Perhaps name, image, and likeness is the answer. I wonder, Senator Blumenthal, if it is the answer in all categories of intercollegiate sports, and I wonder if we can come up with something as a nation, with the help of the NCAA and with the help of States, to help us figure out the fairest way to make sure that no one is left out and that the athletes that do contribute to this \$14 billion per year economy are given their fair share in bringing this largesse to our universities.

I agree with you, Mr. Chairman, also. We could get into other issues. I had another hearing just a few days ago dealing with doping, and we learned that there is a problem with intercollegiate athletics with doping. I am going to stay away from that today. I hope that members up and down the dais will heed your admonition that we have a specific topic to talk about today. I do not know where this is going to lead, but I think this is an important step. And the Chair and Ranking Member are due kudos for getting us moving on that.

And with that, I yield back, sir.

Senator MORAN. Chairman Wicker, thank you very much and thank you for your leadership in this issue and on the Full Committee and your hearing last week.

Let me now recognize Representative Anthony Gonzalez, a Member of the House of Representatives from Ohio, with a history regarding being a student athlete, and we welcome your statement, Representative. Thank you.

**STATEMENT OF HON. ANTHONY GONZALEZ,  
U.S. REPRESENTATIVE FROM OHIO**

Mr. GONZALEZ. Thank you. Chairman Wicker, Chairman Moran, Ranking Member Blumenthal, and members of the Subcommittee, thank you for inviting me to speak on this timely topic.

As a former student athlete at Ohio State University, I know firsthand the impact college sports has on our students, our ath-

letes, and our communities across the country. For me, my time playing for Ohio State shaped my life immeasurably, and my appreciation for the lessons I learned on and off the field grows every day. College athletics has a way of doing that. For many of my teammates, college sports provided the best and sometimes the only opportunity to attend college and earn a degree.

That said, college sports has morphed into a multibillion enterprise that few could have imagined when the NCAA first formed in 1906. College athletics generated more than \$10 billion in revenue in 2018, but student athletes are still barred from capitalizing off their name, image, and likeness. This is a regulation unique to student athletes on college campuses. An award-winning, full scholarship chemist can accept any financial rewards that may come her way, but the fastest runner on the track team cannot.

The reality is that the majority of student athletes are facing the same intense financial pressures as the general student body, including student loan debt. Outside of the high revenue sports, the majority of student athletes do not receive full tuition scholarships. Division III athletes receive no athletic scholarship at all. NIL rights would empower these athletes to make a few extra dollars to alleviate some financial pressure.

It is this disparity that spurred the passage of California's Fair Pay to Play Act. The law grants NIL rights to student athletes who compete in California. While I agree with the idea in principle, California's law fails to capture the nuance that is required to get this right.

Firstly, a state-by-state approach to NIL would throw the collegiate athletic system into chaos. It would undermine competition among schools from different states even if they compete in the same conference. As it stands, UCLA and Arizona State, both PAC 12 members, are now on unequal footing because of the California law. Students considering athletic scholarship offers at the two schools now have an added outside incentive to pick UCLA, the ability to profit off name, image, and likeness. This reality will only get worse if a patchwork of State NIL laws becomes the norm.

Second, the California law created an anything goes system that fails to understand the realities of the hyper-competitive recruiting process. Guardrails are crucial to protecting the integrity of the game and student athletes from overzealous boosters who may want to buy their way to their school's next national championship.

Nevertheless, the California did get one thing right. It forced the discussion of NIL into the national conversation and compelled the NCAA, universities, and conferences to confront the reality head on. Over the past several months, I have talked to student athletes, conference commissioners, athletic directors, the NCAA, and university administrators, including some of those testifying here today.

Despite uncertainty on the right path forward, there is consensus that something must be done and that Federal action is needed. Over 20 additional states are in the process of passing different NIL laws. The question is not should student athletes be able to profit off of NIL. That question has been answered. The question before us today is how can we prevent state-by-state chaos and protect the collegiate athletic system that is beloved across the Nation.

First, the system must permit student athletes to capitalize on their NIL rights regardless of whether they participate in a high revenue sport like football or pitch for the university softball team. NIL will benefit star players in high revenue sports but also athletes who want to earn a little money using their talents to pay off student loans or take their significant other on a date.

Second, Federal legislation must protect student athletes in the recruitment process and penalize bad actors who seek to take advantage of the new NIL laws. By expanding upon existing protections in Federal law, we can deter bad actors, encourage oversight, and promote transparency so universities are aware of the NIL contracts their students are entering into.

Third, any legislation must also guarantee that student athletes are still considered students, not employees of an institution. Using NIL to create an employment framework would destroy college sports as we know it. Important protections that currently exist for student athletes would be completely eradicated. For one, if a student athlete can be hired, that means he or she can also be fired. From personal experience, I can tell you that incoming freshmen recruits often do not live up to expectations in their first few seasons. Firing these students instead of investing in their development would eliminate countless opportunities, in many instances the only opportunity.

The reality is the train has left the station on NIL. It is no longer a question of if but rather when and how. Congress must act to preserve the collegiate sports system we all know and love.

For those reasons, I have begun to draft Federal legislation in the House to allow student athletes to profit from their NIL and create one uniform national standard.

I look forward to hearing from the witnesses on this issue and working with my colleagues in the Senate to find a bicameral, bipartisan solution to the challenge before us today.

Thank you for the opportunity to provide a statement.

Senator MORAN. Representative, thank you very much for your statement. We appreciate your interest in this topic, and you bring a particular expertise both on the field and now in Congress. We look forward to that bipartisan, bicameral effort to get this right. Thank you.

We will now call the panel of witnesses to the table: Mr. Bob Bowsby, Commissioner of Big 12 Conference; Dr. Mark Emmert, President National Collegiate Athletic Association; Dr. Douglas Girod, Chancellor, University of Kansas; Mr. Ramogi Huma, Executive Director of National College Players Association; and Mr. Kendall Spencer, Former Chair, Student-Athlete Advisory Committee, National Collegiate Athletic Association.

Welcome to all of you, and we will begin with Mr. Bowsby when he is ready.

**STATEMENT OF BOB BOWLSBY, COMMISSIONER,  
BIG 12 CONFERENCE**

Mr. BOWLSBY. Good morning.

Chairman Moran, Ranking Member Blumenthal, Chairman Wicker, distinguished members of the Subcommittee, on behalf of

the Big 12 Conference and its members, I thank you for holding this hearing and providing me with this opportunity to testify.

I believe in the extraordinary opportunities our colleges, universities, provide to our Nation and the world. I also believe in the American model of intercollegiate athletics as a co-curricular activity on our campuses. I have worked in intercollegiate athletics for more than 40 years because I believe that the fundamental purpose is to help 18-year-old adolescents become 22-year-old adults and, in that process, to provide an opportunity for an outstanding athletics experience and a first-rate education.

I left my last position at Stanford University largely because I believed that there was much that is good and right about intercollegiate athletics and that I could perhaps better be a part of effecting change from a commissioner's position.

Over the past 8 years, I have been afforded the opportunity to participate in just such a change. Along with our commissioner colleagues and our members, we work to provide student athletes with the full cost of attendance in addition to tuition, fees, room, board, and books. This change provided funds for trips home, entertainment, and incidental living expenses in amounts ranging between \$3,000 and \$6,000 per student per year. We have changed rules so former participants can return to school on scholarship to complete their degrees. We have configured legislative changes to allow unlimited meals and snacks. We have implemented transitional health care so that medical expenses for injuries that linger on until after graduation or departure from school can be reimbursed, all of this plus Pell Grant benefits up to \$6,800 a year for those qualified.

The covenant with the 21st century student athlete is far superior to the scholarship and benefits package available just 5 years ago. We have made constant progress since receiving the prerogatives that have come with the new autonomy structure of the NCAA.

When all of the recent NCAA legislative amendments are considered along with the quality of the facilities, medical services, academic support, travel opportunities, and high level coaching and mentorship, the quality of the life of the student athlete in Division I is really quite high.

I have spent a great deal of time recently working with colleagues and advocates considering what an open NIL pay for play environment might look like. I find myself supportive of modernization, but daunted by the dark shadow between the ideas and the reality. The changes advocated in many of the State legislative proposals and likely in some of the national concepts will benefit a very small percentage of the 450,000 student athletes in our country and will, de facto, render a much larger percentage to a lesser status. For decades we have funded broad-based sports programs, including our nation's Title IX initiatives, on the revenue derived from a few sports. This approach is defensible and worthy of protection because of the multitude of opportunities that it creates.

Student athletes in a wide array of sports work very hard in search of excellence. Their labors are neither less intensive nor less strenuous than the efforts in football or basketball or baseball. The participants in high profile sports simply enjoy the benefits that ac-

crue to those in sports, that are adored by the public, and coveted by the television networks.

The current model of athletics funding works because it meets the university's objectives of offering a full array of co-curricular, equitable opportunities for its students. There is plenty of work to be accomplished and I advocate that we be thoughtful in our collaboration.

The potential for harm is present and changes that some assert as inalienable rights also have the possibility to irreparably damage the collegiate model of athletic participation. This model is and has been the envy of the world. College sports is not a vocation and the participants are not employees. Professional sports offer this arrangement. Conversely, for more than 98 percent of the college athletes population, the 4 years of college sports participation is the last they will enjoy in organized high level competition. Their active sports careers will be over, but the education they earned, the camaraderie they enjoyed, and the experiences they treasured will pay dividends for many years to come.

I thank you for this opportunity to testify and I refer you to the written version of my comments which go into greater depth on the pertinent issues of this hearing. Thank you.

[The prepared statement of Mr. Bowsby follows:]

PREPARED STATEMENT OF BOB BOWLSBY, COMMISSIONER, BIG 12 CONFERENCE

Chairman Moran, Ranking Member Blumenthal and distinguished members of the subcommittee, on behalf of the Big 12 Conference and its members, thank you for holding this hearing and providing me with this opportunity to testify. I am grateful for the expressed interest of the Senate in issues pertaining to intercollegiate athletics. The impact our Nation's student-athletes have had on our American culture is truly remarkable.

I believe in the extraordinary opportunities our country's colleges and universities provide to our Nation and the world. I also believe in the American model of intercollegiate athletics as a co-curricular activity on our campuses. I have worked in collegiate athletics for more than forty years because I believe that the fundamental purpose is to help 18 year-old adolescents become 22 year-old adults and in the process provide opportunities for an outstanding athletics experience and to provide first-rate educational opportunities. We should not forget in this discussion that an athletics scholarship has provided educational opportunities for millions of young men and women in the last century. Most of them have left college with a degree and little or no debt. Sometimes this experience also leads to a professional career or an Olympic opportunity; both are highly desirable byproducts of a successful collegiate athletics experience, but not the foundational goal. I served as the director of athletics at three fine universities for almost 35 years and left my last position at Stanford University because I believe there is much that is good and right about intercollegiate athletics and that I can be a part of changing that which is not as good as it can be.

I theorized that I could be a more effective agent for change by occupying one of the five Autonomy Conference (Pac12, BigTen, ACC, SEC and Big12) Commissioner positions. Over the past eight years I have been afforded the opportunity to participate in affecting just such change. Along with my commissioner colleagues and our members we worked to provide student-athletes with the full cost of attendance in addition to Basic Educational Expenses (Tuition, Fees, Room, Board and Books). This change has provided funds for trips home, entertainment, incidental living expenses, etc. and amounts to between \$3000 and \$6000 per student per year. We have changed rules so former participants can return to school on scholarship to complete their degrees. We have configured legislative changes to allow unlimited meals and snacks. We have implemented transitional healthcare so that medical expenses for injuries that linger on until after graduation or departure from school can be reimbursed. We have accomplished all of this while still making sure that scholarship student-athletes can also receive the full measure of PELL Grant benefits up to \$6800 per year.

The covenant with the 21st century student-athlete is far superior to the scholarship and benefits package available just five years ago. We have made constant progress since receiving the prerogatives that have come with the new Autonomy structure of the NCAA. Among these prerogatives is legislative authority to make changes that address the needs of highly recruited and exceptionally talented student-athletes. When all of the recent NCAA legislative amendments are considered along with the quality of the facilities, medical services, academic support, travel opportunities and high level coaching and mentorship, the quality of life for the Division I student-athlete is quite high. In fact, one of every five collegiate athletes is a first generation student and the opportunity to attend college is truly life changing for them and their families. Over my many years involved in higher education I have encountered very few former participants who did not view their college years as the best of their careers.

I recently attended the memorial service for Coach Hayden Fry. Coach Fry and I were colleagues while I was the Director of Athletics at the University of Iowa. It was remarkable to see so many former players come back and talk about the impact Coach Fry had on their lives. They talked of the value he placed on education and on learning to be a productive adult.

I also heard the story of how Coach Fry integrated the Southwest Conference when he brought Jerry Levias to Southern Methodist University. Mr. Levias went on to be a first team all-conference performer for three straight years but also endured the injustice of opponents' treatment. Coach Fry passed at age 90 and he and Mr. Levias spoke regularly until the time of his death.

I quickly realized that Coach Fry's legacy had much more to do with the relationships than it did with the 230+ victories or the induction to many halls of fame. I heard very few comments about the details of the games they all played but instead many anecdotes about the hard discipline when they missed a class or the celebration when a young man walked across the stage to receive his degree after coming to campus as a "high risk" student. I also heard of the shared experiences that truly made them a team.

The four years that student-athletes spend on campus are transformative. There are stories of failure but many more stories of extraordinary and unlikely success. The kinship of a college sports team is singular in its ability to shape. I fear that if we adopt a process that permits per se "play for pay" or any proxy for "pay for play" we will find ourselves changing the team chemistry that has made college athletics so special.

In the same time frame that we have provided more benefits and celebrated the growth potential afforded by intercollegiate athletics, we have witnessed explosive growth in debt service through mind-boggling facility projects intended to impress 17 year-olds and we have experienced meteoric escalation in compensation for coaches, directors of athletics and commissioners. This rapid escalation is principally facilitated by the increases in revenue from the sale of media rights. These trends require attention and I suggest for your review an essay by Dr. Kevin Blue, the Director of Athletics at the University of California at Davis, which thoughtfully dissects the expense trends and the causality for the dramatic increases in the past 20 years. I have included Dr. Blue's analysis for your reference.

Consistent with my comments above, I am a believer in constant evolution and I am devoted to any sort of continuing improvement program. As it pertains to a new model of collegiate licensing and a loosening of restrictions on how student-athletes might activate around their personal name, image and likeness opportunities, I find myself supportive of the concept but daunted by the shadow that lies between the idea and the reality. I am particularly hesitant regarding the viability of the "guard rails" that are nebulously asserted to be capable of ensuring boosters, donors, and other interested third parties are not disruptive, unregulated and unwelcome participants in the recruitment processes.

In an era of increasingly frequent transfers, the outside influencers noted above will most certainly engage in the transfer space, even without the knowledge or invitation of institutional employees. Within the Autonomy Conferences where recruiting competition is most acute, we have sought to do everything possible to embrace and enhance integrity. Our constituents, college sports fans and our universities, demand it. I fear, and I believe, that the invitation of third parties into the NIL space will irretrievably insert them into the recruitment and transfer environment. We have already witnessed far too many such intrusions on fair play.

The American collegiate model of intercollegiate athletics has no parallel in the world. We are not the NFL, NBA or MLB where well-organized drafts determine the participants. Neither are we the Olympics where the athlete's only choice of participation is with their country of origin. Recruitment, especially in Division I, is highly competitive and highly regulated. To replace or significantly amend the cur-

rent benefits system we must be able to move ahead with assurance that recruitment can exist and that integrity can be maintained and enhanced.

As a former collegiate wrestler, and having served two terms on the United States Olympic Committee, I have significant concerns regarding any legislative or structural initiative that will weaken our Olympic Sports on campus or that could compromise our Nation's aspirations to ascend podiums in international competitions. While all college sports participants might be alleged to have equivalent opportunities to profit from name, image and likeness activities, I believe that the present discussion is principally about football and men's basketball players and I am certain that the participants in these two sports will harvest the vast majority of the opportunities. It follows that this disparity will ultimately diminish other sports on campus. This diminishment could come in the form of reduced scholarships, declining budgets or even sport eliminations. Because more than 80 percent of our Summer Olympians come through college programs, any damage to Olympic Sports on campuses could have a profoundly negative effect for our international Olympic efforts. I also believe that the relegation of some sports to second-class citizenship could directly or indirectly impact institutions' compliance with Title IX. Before Title IX's implementation only 1 in 27 high school females played varsity sports, today that figure is 1 in 2.5. Simply put, I do not believe the architects of the Title IX of the Education Amendments of 1972 envisioned two or more classes of student-athletes on campuses, even if the funding were to come from outside the campus coffers. These two considerations implore caution.

Will intercollegiate athletics survive? Of course. Will we evolve and will games still be played? Without question. Likely, the balance of competition will not be dramatically altered. There have always been institutions and locations that have enjoyed advantages, and there always will be. Having stated that, we must go forward with our eyes wide open. The changes advocated in many of the state legislative proposals and, likely, in some of the national concepts, will benefit a very small percentage of the 450,000 student-athletes in our country and will de facto render a much larger percentage to a lesser status. It is difficult to argue that the American collegiate model is not collectivism in some form. For decades we have funded broad-based sports programs, including our institutions' Title IX initiatives on the revenue derived from a few sports. This approach is defensible and worthy of protection because of the multitude of opportunities it creates. Student-athletes in a wide array of sports work very hard in the search of excellence. Their labors are neither less time consuming nor less strenuous than the efforts in football, or basketball or baseball. The participants in high-profile sports enjoy the benefits that accrue to those in sports that are adored by the public and coveted by television networks. Likewise, the coaches in these sports have benefitted from an inflated marketplace and aggressive representatives who play institutions off against one another for the highest offer. Notwithstanding these sometimes misguided expenditures, the current model of athletics funding works because it meets the universities' objective of offering a full array of co-curricular opportunities for its students. There is plenty of work to be accomplished but I advocate that we be thoughtful in our collaboration.

The potential for harm is present and changes that some assert as inalienable rights also have the possibility to irreparably damage the collegiate model of athletic participation. This model is, and has been, the envy of the world. This unique and long standing model exists as a useful and appropriate rite of passage between high school and the rest of one's life. College sports is not a vocation and the participants are not employees. Professional sports offer this arrangement and it is fair and timely to consider whether the current limits to access should be amended or eliminated to allow those who wish to pursue professional opportunities to do so at any time. Conversely, for more than 95 percent of the collegiate athletics population, the four years of college sports participation is the last they will enjoy in organized, high level competition. Their active sports careers will be over, but the education they earned, the comradery they enjoyed and the experiences they treasured will pay dividends for many years to come.

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#### ADU

##### RISING EXPENSES IN COLLEGE ATHLETICS AND THE NON-PROFIT PARADOX

*This article examines the structural reasons why controlling expenses—especially for salaries and facilities—has been difficult in the current economic system of major college sports. The combination of three significant economic characteristics currently drives financial choices: the non-profit organizational structure, zero-sum competition, and accelerating revenue. The combination of these structural characteristics*

*creates inescapable upward pressure on expenses, and differentiates financial decision-making in college sports from both professional sports and other non-profit sectors. The structural uniqueness of the non-profit economic system of college sports calls for innovative business and legal solutions to curtail excessive spending and its associated problems, and ensure the long-term health of college athletics in the United States.*

#### FOR-PROFIT BUSINESS AND NON-PROFIT ORGANIZATIONS

A business exists to maximize income for its owners, while also maintaining a sense of corporate social responsibility to other stakeholders. On the other hand, a non-profit organization, such as a school or a charity, exists solely to execute its mission.

Non-profit organizations do not have owners expecting a financial return, so their leaders do not operate with the goal of making a profit. Instead, financial decisions are guided by the primary objective of mission impact, while also being mindful of long-term investments and sustainability.

Accordingly, when revenues increase for a non-profit organization, expenses tend to grow commensurately. New income is used by the organization to further pursue its mission, not to create profitable operating margins. For example, a food bank that receives a new large grant will expand to serve more disadvantaged people rather than keeping the money. The level of annual expenditures for a non-profit organization is generally determined by its anticipated annual revenues.

#### ATHLETICS DEPARTMENTS AS NON-PROFIT ORGANIZATIONS

College athletics departments and their associated foundations are structured as non-profit organizations since they are part of universities. However, they differ from most other non-profits in two important ways.

First, college athletics programs compete against each other in a zero-sum game; in other words, a college sports program can only succeed at the competitive part of its mission (win) if another fails (lose). Other kinds of non-profit organizations do not deal with this dynamic to the same extent. The zero-sum nature of competition in college sports thus creates an insatiable desire for an athletics program to make investments that drive success in the competitive part of its mission.

And second, for modern college programs in the major conferences especially, revenue has accelerated at an unusually strong rate in recent years. The median Division I Football Bowl Subdivision (FBS) athletics program experienced inflation-adjusted revenue growth of 67 percent from 2006–2015<sup>[1]</sup>, a higher rate of revenue growth than all other non-profit sectors in the United States over this period of time<sup>[2]</sup>.

The combination of zero-sum competition, revenue acceleration, and non-profit financial incentives would predict an increase in spending, which has indeed come to fruition in major college sports. With gravity-like inevitability, expenses are pulled to the threshold established by the highest revenue earners. Paradoxically, the non-profit organizational structure—typically associated with austerity and frugality—has actually helped to create the extraordinary spending growth we’ve seen.

#### COMPARING COLLEGE AND PROFESSIONAL SPORTS

Unlike professional teams, college athletics departments do not have owners with a personal financial stake in the game. Professional owners want to win, but they are simultaneously incentivized to control costs in order to turn a profit or manage operating losses, and to consider long-term franchise value. These incentives are reflected in league-wide policies developed to control spending and enhance competitive equity, and also in the financial decision-making of team executives.

On the other hand, financial decision-making in college athletics reflects the different set of incentives that the non-profit structure encourages. Every dollar of generated revenue is spent in pursuit of the competitive and student-athlete education missions. Some income might be saved for contingent or long-term use, but none is

<sup>[1]</sup>According to the 2016 edition of Revenues and Expenses of NCAA Division I Intercollegiate Athletics Programs, median revenue growth from 2006–2015, on an inflation-adjusted basis, was 67 percent for FBS, 55 percent for FCS, and 55 percent for D1 without football.

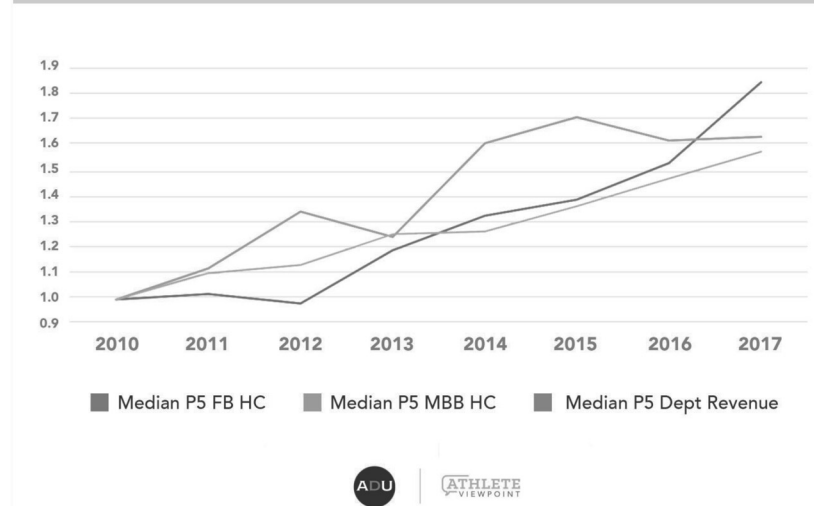
<sup>[2]</sup>Information about non-profit revenue and expense growth by sector can be found on this 2018 report by the Urban Institute called The Non-Profit Sector in Brief. On an inflation-adjusted basis, overall higher education sector revenue grew by 39 percent from 2005 to 2015. Religious organization revenue grew by 59 percent over the same time period, the most growth of any non-profit sector outside of college sports.



taken as profits<sup>[3]</sup>. When revenue increases dramatically, increases in spending quickly follow.

In fact, head coach salaries in Power Five college football and men's basketball have increased more rapidly than head coach salaries in the NFL and NBA, relative to the rate of revenue growth in each environment. The median Power Five head football coach salary grew by 87 percent from 2010–2017, at a faster pace than the median revenue increase of 58 percent for Power Five athletic departments during this period<sup>[4]</sup>. On the other hand, media reports suggest that NFL head coach salaries grew by approximately 50 percent during the same period, at a slower pace than the 70 percent growth of NFL revenue. In the NBA, revenue increased by over 90 percent from 2010–2017, but head coaching salaries are estimated to have grown less than 40 percent during this period<sup>[5]</sup>. Coaching salaries grow at a faster rate in college sports than in professional sports as more revenue becomes available to fund them.

### Change in Median FB HC Salary, MBB HC Salary & P5 Department Revenue 2010-2017



Of course, another notable difference between college and pro is that paid professional athletes share in revenue increases through collective bargaining agreements, which means that a smaller portion of revenue growth remains to flow through to coaches, management, or ownership. But the non-profit structure of athletics departments also inherently facilitates salary growth, especially when negotiating contracts with star coaches. Athletics directors and presidents do not have the support of an owner who is incentivized to keep costs in check and provide the reassurance—and personal career insurance—to walk away from unfavorable deals.

Instead, athletics directors and presidents know that they will be harshly criticized by vocal fans and influential benefactors if they fail to come to terms with a star coach, even if the terms being negotiated are not optimal for the school. Agents

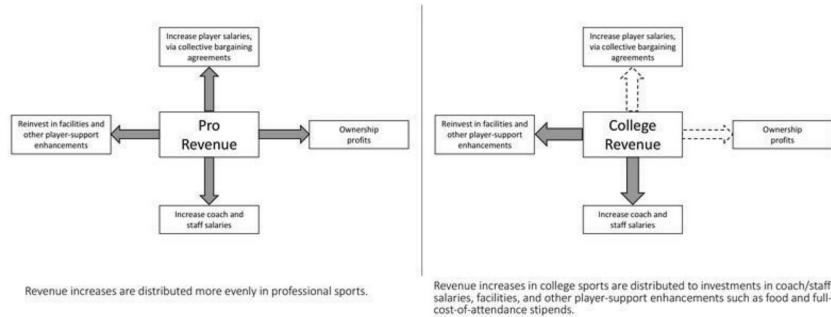
<sup>[3]</sup>In a few cases, a portion of net income from athletics is redirected to the financial needs of main campus.

<sup>[4]</sup>Salary information gathered from USA Today database and other publicly available sources. Analysis included public school data only, unless private school coaching salary information appeared on the Form 990. Revenue data gathered from EADA reports and Knight Commission College Athletics Financial Database.

<sup>[5]</sup>NFL and NBA revenue gathered from statista.com. Salary information gathered from media reports. NFL and NBA salary information is not comprehensive, but is sufficient for the purposes of these general conclusions.

understand this dynamic, and have been able to negotiate college coaching contracts that are increasingly favorable as media rights revenue growth created a larger pool of available funding<sup>[6]</sup>. There is a more direct path from organizational income received to coaching salaries paid in non-profit, mission-driven college sports.

#### Distributing Revenue Increases in Professional and College Sports



#### THESE DECISIONS ARE RATIONAL AND PREDICTABLE

From a behavioral economics perspective, financial decision-making in college sports has been perfectly rational within the structures of the current system. Aggressively reinvesting available revenue back into the competitive mission is sensible behavior that is aligned with the local interests of each school and its leadership. In some instances, there is clear evidence that a coach or team has made a transformational impact on the overall profile of a university, further justifying the decision to invest<sup>[7]</sup>.

The overall increase in spending on facilities and salaries in college sports is a natural byproduct of each school's mission-driven desire to compete in a zero-sum game, where leaders are incentivized to spend available revenue towards the competitive mission rather than make profits. Expense increases thus reflect systemic characteristics, and not "flaws" of involved individuals. College athletics decision-makers are acting rationally and predictably in the current system, just like others would if confronted with similar industry characteristics.

#### WHY DOES THIS MATTER?

Aggressive expense growth in college athletics—that is structurally reinforced by its economic system—has created some of the most pressing challenges our industry faces. It has increased perceptions of unfairness for student-athletes and led to gerrymandering around the definition of amateurism in an effort to preserve the educational roots of college athletics. It has intensified financial pressure—ironically, given that we're in an era of unprecedented revenue growth throughout the industry—on athletics departments who aren't at the very top of the revenue production pyramid (*i.e.*, the top quartile of Power Five programs) and placed these middle-income schools at an even greater competitive disadvantage. And, it has created long-term financial obligations that might turn into problematic exposures if revenue growth were to slow, stop, or reverse.

Importantly, the focal point of this issue is not the resource imbalance between Power Five schools and Group of Five or FCS, but rather the financial and competitive challenges that arise due to the effects of relative expense growth within each competitive level. For example, even though Power Five schools have more revenue to deploy than others on an absolute basis, a majority of them remain under financial pressure trying to keep up with the small group of schools who set a high bar on expenses in search of every possible competitive advantage.

Accordingly, even if setting aside financial sustainability considerations and viewing the issue only through the lens of competitive self-interest, a majority of Power

<sup>[6]</sup> Coaches are also incentivized to secure the best possible contract terms because schools are growing less patient about results. Available revenue makes it easier for schools to terminate coaches and endure switching costs.

<sup>[7]</sup> For example, here is a brief note about the major institutional impact of successful football at Clemson and Alabama.

Five schools ought to support a systemic solution among major conferences to control expenses. Such a system would not only mitigate challenges related to financial sustainability and public perception regarding spending, but would also enhance competitive opportunity for median schools by reducing the spending power advantage currently held by top-quartile revenue earners. In fact, *successfully lobbying for a system of expense limits would be the most impactful action some schools could take to enhance their competitive self-interests.*

#### WHAT SHOULD BE DONE?

To stimulate progress towards a solution, a critical mass of influencers must first recognize that the expense growth problem in college sports is structural in nature—*i.e.*, it is not the result of “flawed institutional leadership”, nor can it be effectively addressed without systemic change. The next step of identifying feasible solutions requires an in-depth legal, economic, and political analysis that is beyond the scope of this particular article.

Many people in our industry think about this problem often. Conventionally suggested methods—such as expense caps or other legislated changes about how resources are allocated or shared with central campus—are intuitive but complex to implement. Some solutions might present legal challenges, particularly around anti-trust law, that could require a degree of regulatory involvement. Additionally, there would be political difficulties for some campus leaders to advocate for solutions that may be unpopular with a portion of their local constituents, a dynamic which would slow legislative progress in the member-driven governance model of the NCAA.

However, even with the complexities involved, an invigorated focus on establishing mechanisms for expense control is worthwhile, and should be acted upon as an important priority for the sustainability of college sports. Aggressive expense growth, and its associated challenges, will continue unless there is systemic change.

The economic system of major college sports uniquely combines the non-profit structure, zero-sum competition, and extraordinary revenue acceleration. It is a structural outlier in the American economic landscape, and should be managed as such from a legal and antitrust perspective. The uniqueness of its economic system calls for new thinking and innovative solutions if we seek to ensure the long-term health of college sports in the United States.

*\*Undergraduate research assistants Mitch Iwahiro, Mia Motekaitis, and Tyler Mundy contributed to this article\**

Senator MORAN. Mr. Bowlsby, thank you for your testimony. We now turn to Dr. Emmert.

#### **STATEMENT OF DR. MARK EMMERT, PRESIDENT, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION**

Dr. EMMERT. Chairman Moran, Ranking Member Blumenthal, Chairman Wicker, and distinguished Members of the Subcommittee, thank you for this opportunity to appear before you today.

My name is Mark Emmert and for almost 10 years, I have had the privilege of serving as President of the NCAA. We are an organization led by the colleges and universities of America, and we are dedicated to the wellbeing and success of student athletes on the field, in the classroom, and in life.

College sports in our country provide student athletes with rewarding and a uniquely American experience. But while a record number of students play college sports today and more fans than ever enjoy watching them, there is also legitimate concerns being expressed about the fundamental fairness of our system. We share those concerns. We agree that college athletes should be allowed to benefit from their name, image, and likeness, commonly known as NIL, and we are in the process of identifying appropriate ways to do so.

After several months of analysis by a working group of student athletes, presidents, commissioners, athletic directors, and faculty members, in October our board of Governors directed each of the NCAA's three divisions to begin immediately to consider how to modify the rules to permit student athletes to benefit financially from the use of their name, image, and likeness consistent with the values of intercollegiate athletics. Like Congress, our process is thoughtful and deliberate, and our member schools plan to make changes no later than January 2021.

Unfortunately, constant litigation, litigation threats, and recent State legislative efforts to regulate aspects of college sports have complicated these efforts. These actions are doubtlessly the product of good intentions, but without proper guardrails and structure, some NIL proposals threaten to undermine the core values of college sports by allowing payments for NIL to serve as pay for play and potentially turning college athletes into employees.

Also, as many have pointed out, a patchwork of different laws from various states will create an uneven and unfair playing field for our schools and college athletes. We simply do not believe our schools can effectively support students and host fair national competition if college athletics is pulled in various directions by State legislatures.

It is critical that the administration of college sports be undertaken by the NCAA at a national level. We believe that the modernization efforts currently underway with respect to NIL will address the concerns about fairness, but we need to make sure that college sports operate consistent with two principles that are not always aligned. On the one hand, we want to allow student athletes to benefit from their NIL, like all college athletes. On the other hand, we want to preserve the unique character and quality of college sports that serves student athletes so well.

And, Senators, we may need your help to achieve those goals.

We have a history of making continual improvements to benefit college athletes. Our member schools now award nearly \$3.5 billion in athletic scholarships each year, and more students are earning degrees than ever before, including many whose financial circumstances would have otherwise prevented them from attending college. The past decade has seen enormous enhancements in the support for student athletes, including in health care, nutritional programs, academic assistance, prevention of sexual violence, and covering the costs of attending school entirely.

Today there are nearly a half a million NCAA athletes competing in 24 sports, three divisions, and on 19,000 different teams. Regardless of their sport, their gender, their division, regardless of whether their school is big or small, rural or urban, public or private, we seek to support all students and help them be successful.

We know we are not perfect. We know that the world is constantly changing and we want to change accordingly. I am confident that there is a path forward on this issue of NIL that preserves what we love about college sports while creating even greater opportunities for our students. That is what we are seeking, and that is what brings us here today, Mr. Chairman.

Thank you again, and I look forward to your questions.

[The prepared statement of Dr. Emmert follows:]

PREPARED STATEMENT OF DR. MARK EMMERT, PRESIDENT,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Chairman Moran, Ranking Member Blumenthal, and distinguished members of the Subcommittee, thank you for the opportunity to submit this testimony in connection with today's hearing. For almost ten years I have had the privilege of serving as the president of the NCAA, a school-led organization dedicated to the well-being and lifelong success of college athletes on the field, in the classroom, and in life. We appreciate the Subcommittee's attention to the important issue of name, image, and likeness ("NIL") opportunities.

College sports in America is at a critical juncture: while a record number of college athletes are benefiting from more opportunities than ever before, there is a legitimate concern about the fundamental fairness of our system. We share that concern, and NCAA schools and conferences are currently evaluating reforms to give athletes opportunities to take advantage of their own NILs. We believe that these efforts will address the concerns that have been raised about how to treat student-athletes equitably. But the process will take time, because we need to make sure that we operate consistent with two principles that are not always aligned. On the one hand, we want to allow opportunities for students to benefit from their NILs. On the other hand, we want to preserve the character and quality of the uniquely American phenomenon of college sports. And with ongoing serial litigation and NIL legislation pending in over half the states, we may need your help to accomplish this on a nationwide basis.

I welcome the opportunity to speak to you today about our progress and goals, and I welcome the opportunity to hear from the Members of this Subcommittee. We greatly value the ongoing dialogue with you and look forward to the continued support of the Congress as we work toward a solution that meets the needs of student-athletes in a manner consistent with the long-held educational values of the NCAA, its schools and conferences, and the nearly 500,000 individuals who participate in college sports each year.

**NCAA Background: Who We Are**

I would like to begin by briefly describing the mission of the NCAA. As the governing body for intercollegiate athletics, the NCAA prioritizes three important principles in providing opportunities for students: academic success, well-being, and fairness. While most people associate the NCAA primarily with college sports, the truth is that education is at the heart of our work. Each year, students from across the country and the world participate in sports they love. 16 percent are first-generation college students, and a similar number report that they would not have attended college if not for athletics. To make these opportunities possible, our member schools award nearly \$3.5 billion in athletic scholarships each year, including up to the cost of attendance. Athlete recruitment to attend a particular institution is one of the key principles that sets apart college sports from professional sports. This unique recruiting environment encourages student choice in where to attend college. No other model in sports is like it—not the Olympics nor professional sports.

Student-athlete graduation rates are the highest ever, with 84 percent earning their degrees. In Division I, nearly 9 in 10 student-athletes are earning bachelor's degrees, their highest rate ever. 83 percent of men's basketball players graduate, as well as 82 percent of Football Bowl Subdivision participants. And in particular, since 2002, the graduation rate for African-American men's basketball players has increased by 36 percentage points, and 79 percent of African-American student-athletes are earning their degrees. Historically, student-athletes have graduated at rates higher than the rest of the student body.

But I acknowledge that what happens off the field does not always garner as much attention as what happens on the field. When many people think of college sports, they think of March Madness, the College Football Playoff, or College Game Day. They think of the popularity and success of powerhouses like the University of Kansas men's and the University of Connecticut women's basketball teams. They see multi-million dollar contracts, elaborate facilities, and Hollywood-style productions. But this is just a sliver of college sports. College sports is half a million student-athletes in 24 different sports spread across three divisions and 19,000 teams, most of which generate no revenue. College sports is a culture in which hundreds of thousands of fans feel connected through alma mater or geography and appreciate that the athletes are "kids" in pursuit of an education that will last them a lifetime. College sports is, and always has been, about students playing other students.

College sports has always had commercial aspects, but its rules have consistently promoted education, opportunity, well-being, and fairness. While we are considering

important and necessary changes to create additional monetary opportunities for student-athletes, any changes must take into consideration these core values.

#### **NCAA Rules: The Legislative Process and Enforcement**

College sports as we know it is evolving. For over a hundred years, the NCAA's member schools have provided significant opportunities to tens of millions of athletes to obtain an education at this country's top colleges and universities. But recent increases in the popularity of NCAA-governed competition have brought greater interest in college sports, raising questions about how to ensure that this evolving system is inclusive, equitable, and fair.

The internal balancing act between preservation and reform poses particular challenges in an organization with hundreds of diverse schools. Each of our schools brings a unique perspective to college sports, often informed by the size of the school and its athletic program, the NCAA division in which it competes, its mission, its geography, and myriad other factors. Each perspective is valuable individually, but the adoption of each, without harmonizing, would result in a chaotic college sports landscape. The NCAA's role reflects the reality that no one school has the expertise or resources to ensure that all opponents play by the same set of rules, both on and off the field. The voluntary agreement to a central governing system offers a whole that is greater than the sum of its parts.

In its role as convener, the NCAA National Office oversees a ground-up, school-driven legislative process in which representatives serve on committees that propose rules, and schools ultimately decide which rules to adopt. Reflecting the diversity of our schools and conferences, each of the NCAA's three divisions develops and approves legislation unique to that division. Groups of presidents and chancellors lead each division through committees with regularly scheduled meetings. Once the NCAA schools and conferences establish a rule through the legislative process, responsibility for enforcing that rule on campus rests on both the institutions and the NCAA National Office. By mutual agreement, each school agrees to establish mechanisms to detect, prevent, and discourage rule violations, as well as protocols to self-report and cure any rule violations.

#### **Student Equity in the NCAA Model: Recent Reforms**

As president of the NCAA, my role is to make sure that, during our rigorous rule-making process, our schools and conferences are considering the best interests of students in a constantly evolving college sports landscape while keeping our values front and center. In recent years, we have undertaken initiatives or changed rules to promote better student well-being. For example, within the last few years the NCAA:

- Partnered with leading organizations to develop best practices and training modules for coaches and administrators in support of student-athlete mental well-being. The goal of these resources is to encourage a culture in which reaching out for mental health care is normal and expected.
- Paired with the U.S. Department of Defense to launch a landmark alliance to enhance the safety of athletes and service members by more accurately preventing, diagnosing, and treating concussions. This alliance is undertaking the most comprehensive longitudinal study of concussion and head impact ever conducted, managed by the Concussion Assessment, Research, and Education ("CARE") Consortium. Twenty-six participating universities enrolled their student-athletes in the study, and the four military academies enrolled all cadets. The CARE Consortium is continuing its work in a phase known as CARE 2.0, featuring 40,000 participants.
- Funded and operated the Sport Science Institute (the "Institute"), which promotes health and safety through a variety of initiatives, including research and training on cardiac health, concussions, overuse injuries, drug testing, mental health, nutrition and sleep, sexual violence prevention, athletics healthcare administration, and data-driven decisions. Last year, the Institute, in partnership with the NCAA Office of Inclusion, released the second edition of a sexual violence prevention tool kit that provides schools with appropriate tools to support a safer campus environment. The new tool kit was developed with input from leading professionals in the field and aims to help NCAA schools reduce incidents of sexual violence involving student-athletes and other college students, and to respond appropriately when they occur. The Institute also is collaborating with the most respected medical and sports organizations in the country to promote research, education, and best practices around cardiac health to reduce injuries and death from heart conditions.

- Enhanced funding for an insurance policy covering all college athletes who experience catastrophic injuries while playing or practicing their sport—providing up to \$20 million in lifetime insurance benefits—and saw many of our schools provide medical coverage for athletic-related injuries for at least two years after a student-athlete graduates or leaves school.
- Permitted any Division I institution to provide athletic scholarships to the federally-defined cost of attendance, without limits on duration.
- Enhanced student voice and vote by expanding the Division II and III student representation to Division I, where they are now voting participants at all levels of governance.
- Allowed college basketball players investigating their professional options to be represented by an agent.
- Reformed the transfer rules to make it easier for students to change schools.
- Required Division I schools to provide independent medical care for student-athletes to determine medical management and return-to-play decisions.

These reforms demonstrate that the NCAA is ready and able to address emerging challenges to ensure that students are treated equitably and the essential character of the college sports is preserved. While we have more work to do, including on the issue of NILs (discussed below), I am confident that the NCAA, in partnership with Congress, has the tools to achieve a balance that minimizes unintended consequences.

#### **Modernization of Name, Image, and Likeness Rules**

We have heard the concerns about the NCAA's current rules governing an athlete's ability to license his or her NIL for commercial purposes, and we recognize that changes need to be made. Currently, the NCAA schools and conferences are reviewing our rules and proposing changes. We are moving thoughtfully on this, and our membership plans to vote on those changes in January 2021.

#### *Recent Developments around NIL*

Recognizing the need to further modernize our rules with respect to NILs, in October 2019 our Board of Governors directed each of the NCAA's three divisions to immediately begin considering how the relevant NCAA rules could be modified to permit student-athletes the opportunity to benefit financially from the use of their NILs consistent with the values of intercollegiate athletics—including and especially the principle of amateurism. This principle means that students are “students first” and not professional athletes who are paid for their athletic performance. What makes college sports different from and more popular than other sporting options (such as minor-league professional sports) is that college athletes are participating in a sport they love as part of their educational experience, because the reality is that most student-athletes will not play professional sports and thus need to rely on their education to support their success in life. Our schools and conferences' commitment to amateurism helps keep athletics programs and student-athletes integrated within the larger educational mission, promotes competitive balance among schools, and creates a fairer system for recruiting and retaining top talent. Without rules, the highest-resourced schools would use their greater financial resources to attract the most promising student-athletes, depriving other schools of the ability to build strong teams and decreasing fair competitive opportunities for many student-athletes.

The Board of Governors' decision followed the work of our Federal and State Legislation Working Group (a group consisting of presidents, commissioners, athletics directors, administrators, and student-athletes) in gathering input on NIL issues from current and former student-athletes, coaches, presidents, faculty, and commissioners across all three divisions in response to Federal and state legislators proposing NIL legislation. The Board directed these modernization efforts to take place in harmony with eight principles and guidelines.

- First, schools should assure that student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.
- Second, schools should maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Third, schools should ensure rules are transparent, focused, and enforceable and facilitate fair and balanced competition.
- Fourth, schools should make clear the distinction between collegiate and professional opportunities.

- Fifth, schools should make clear that compensation for athletics performance or participation is impermissible.
- Sixth, schools should reaffirm that student-athletes are students first and not employees of the university.
- Seventh, schools should enhance principles of diversity, inclusion, and gender equity.
- Eighth, schools should protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.

The Working Group will continue to gather feedback from the schools and conferences and their student-athletes through April 2020 and will refine its recommendations. And the NCAA's divisions are working to create new NCAA bylaws reflecting divisional priorities. This effort is to be completed in January 2021.

We have undertaken this modernization effort committed to balancing the vital need for the continuation of college sports with the need to adapt our rules to changing student-athlete environments. We want to improve the experience for our student-athletes, as well as fans, alumni, and student bodies. We remain committed to our student-athletes being students first, with emphasis on their education and the physical, mental, and social benefits to be derived from intercollegiate athletic competition.

It is for this reason that, as part of this modernization effort, we will not consider any concepts that could be construed as payment for athletic play. We believe it is imperative to the success of college sports as both an integral component of the educational experience and a popular form of entertainment that we maintain a clear line of demarcation between college and professional sports. To do so, payment to student-athletes for use of their NILs should not be a substitute for or vehicle to deliver pay for athletic performance; nor should the payment serve as an inducement for a prospective or current student-athlete to select or remain at a particular NCAA school. Consequently, the NCAA has no intention of taking any action that is contrary to the position advocated by the NCAA or accepted by the Ninth Circuit with respect to the types of NIL payments that were at issue in the *O'Bannon* case decided a few years ago.

#### *Need for National Uniformity*

Just as the NCAA has done in the past on issues involving student fairness, we believe that the modernization efforts currently underway with respect to NILs will address the concerns about equity. But given the current legislative landscape, uniformity will not be achieved without Federal support for our mission.

The Subcommittee is aware of the dozens of proposals on NILs in state legislatures that, in our view, risk converting college sports into professional sports. While we understand the desire to assist student-athletes, we believe many of these ideas would be harmful to intercollegiate athletics and its many stakeholders, including the student-athletes. For instance, one state has passed legislation that effectively eliminates the distinction between college and professional sports. It allows payments for NILs to serve as pay for play and thus turns college athletes into employees. This law in particular, and others like it, threaten to undermine the mission of college sports within the context of higher education—that student-athletes are students first and choose to play a sport they love while earning a degree.

In the short term, such legislation is creating confusion for current and future student-athletes, coaches, administrators, and campuses. Some of these laws would take effect as early as July 2020. If implemented, these laws would give some schools an unfair recruiting advantage and open the door to sponsorship arrangements being used as recruiting inducements. This would create a huge imbalance among schools and could lead to corruption in the recruiting process.

As more states consider their own NIL legislation, it is clear that a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field—let alone the essential requirement of a common playing field—for our schools and nearly half a million student-athletes nationwide. It is thus critical that the administration of college sports be supported at a national level. We believe that, given its role, the NCAA—informed by its schools and conferences—is best positioned to provide a uniform and fair NIL approach for *all* student-athletes on a *national* scale. But we cannot effectively achieve our goals if we are pulled in various and potentially inconsistent directions by state legislatures that may be focused on serving one set of constituents rather than serving the entire array of participants that the NCAA's own rulemaking processes are designed to serve.



**Conclusion**

At the NCAA, we are proud of the role that intercollegiate athletics have played in creating opportunities for our Nation's student-athletes, especially those who might not otherwise have had the opportunity to pursue higher education. Over the last ten years, we have actively worked to drive much-needed change and address many of the concerns that surround intercollegiate athletics. Our membership is large and diverse with an equally large and diverse range of viewpoints. While this diversity can, at times, slow the pace of reform in our democratically governed association, we have made significant strides across a variety of areas and are actively working to modernize in the area of NIL opportunities. But that process takes time, and we may need Congress's support in helping maintain uniform standards in college sports. I appreciate the Subcommittee's attention to this issue and look forward to collaborating with this body to achieve these important goals. Thank you again and I look forward to your questions.

Senator MORAN. Thank you, Dr. Emmert.  
Now Dr. Girod.

**STATEMENT OF DOUGLAS A. GIROD, CHANCELLOR,  
UNIVERSITY OF KANSAS**

Dr. GIROD. Good morning, Chairman Wicker, Chairman Moran, Ranking Member Blumenthal, and members of the Subcommittee. Thank you for the opportunity to be here today.

My name is Doug Girod. I am the Chancellor at the University of Kansas.

The University of Kansas is a leading public research institution and a member of the Association of American Universities. We are also the proud sponsor of a robust NCAA Division I athletics program competing at the highest level of intercollegiate athletics.

Senator Moran, sir, I would like to begin this morning by thanking you for your outreach, not just to the University of Kansas and to our student athletes, but also to the Big 12 Conference and to the NCAA, and really all the constituents who care deeply about the model of collegiate athletics.

You have repeatedly stated in our conversations that we are in a fact-finding mission here to try and understand better how name, image, and likeness may impact collegiate athletics. And honestly, we too are in that fact-finding mode. And we join you and your colleagues on this subcommittee, as well as a growing voice of Members in the House of Representatives, to seek a working solution to the challenges brought by the patchwork of recently enacted and pending State legislation with varying degrees of name, image, and likeness provisions. And it is clear to me that the imperative of national consistency, fairness, and equity requires a Federal solution. Like all Division I universities, we compete in 50 states, and really only a Federal approach that creates a level playing field for competing athletes and universities makes sense.

KU acknowledges that it is a new day in college athletics, and if there is an opportunity for student athletes to earn value from their name, image, and likeness, we should support them and provide reasonable guardrails that will protect them and the integrity of the game while maintaining successful educationally based athletic programs across the country.

There is no doubt this is a complicated policy matter and none of us has the answers at the moment, which is why it is important we are having these discussions. But no matter what solutions we pursue, I think there are two ironclad principles that should inform

us every step of the way. First, we must continue to prioritize what is in the best interest and welfare of our student athletes; and second, we must preserve and protect the collegiate athletic model.

So as this process moves forward, we must not forget that more than 98 percent of student athletes do not turn professional in their sport after they graduate or have significant opportunity to earn income from name, image, and likeness, yet they benefit greatly from the education and the resources and the development that they have access to as student athletes. So we must be cautious not to risk losing what is so valuable for the 98 percent while addressing the specific needs for those blessed to take their athletic talents to the professional level. And additionally, we must preserve access for first-generation students and under-represented minorities to an education through sports and continue to enhance gender equity in compliance with Title IX. The bottom line is there are ways to allow student athletes to benefit from name, image, and likeness while maintaining the benefits of the collegiate athletic model.

Additionally, these actions that we contemplate today on name, image, and likeness have the potential to transcend athletics and really impact every aspect of the university mission from education and service to research. For better or worse, a major athletics department at a university like KU is inextricably linked to the entire university model in everything that we do.

For example, athletics is important in student recruitment, particularly for a Midwestern university like ours that is highly dependent on out-of-state student enrollment.

Athletics is crucial to our engagement with alumni and donors, whose support is essential to our most important academic missions and research initiatives.

And athletics enhances our work to improve access to education and campus diversity by enrolling students from diverse backgrounds.

As a university chancellor, one of my responsibilities is to support more opportunities for our students while they are enrolled at our university, whether that is an internship, an opportunity to research in a company, or study abroad. And most certainly today I want to support this new opportunity for student athletes who have the potential to earn money while competing at our institution to do so.

And right now student athletes, parents, alumni, and supporters of our universities are counting on us to do this fairly and correctly. Forming a comprehensive national plan for name, image, and likeness is a challenge and it will take some time to implement. But together, we can do this together.

So let us partner with the universities, Congress, our governing association, our conferences, and all our key stakeholders to create a solution that ensures the best interests of our student athletes are front and center while also preserving the current collegiate model to the benefit of all of our student athletes.

Thank you.

[The prepared statement of Dr. Girod follows:]

PREPARED STATEMENT OF DOUGLAS A. GIROD, CHANCELLOR, UNIVERSITY OF KANSAS

Good morning, Chairman Moran, Ranking Member Blumenthal, and Members of the Subcommittee. My name is Doug Girod, and I am the Chancellor of the University of Kansas.

The University of Kansas is a leading public research institution and a member of the Association of American Universities. We also are the proud sponsor of a robust NCAA Division I athletics program competing at the highest levels of intercollegiate athletics.

Thank you for the opportunity to appear in front of you today to discuss the impact of recently passed and pending state legislation around the country related to "Name, Image and Likeness."

Senator Moran, I would like to begin by thanking you for your outreach during the past several months, not just to the University of Kansas, our student-athletes, the Big 12 Conference and to the NCAA—but to the community of stakeholders who hold dear the value of collegiate athletic programs.

You have repeatedly stated that you are in a "fact-finding" mode to learn how the Name, Image and Likeness issue may impact college athletics. And honestly, we, too, are in a fact-finding mode. We join you and your colleagues on this Subcommittee and a growing voice of Members of the House of Representatives to seek a working solution to the challenges brought by the patchwork of recently enacted (and pending) state legislation with varying degrees of Name, Image and Likeness provisions. It is clear to me that the imperative of national consistency, fairness, and equity requires a Federal solution. Like all Division I universities, we compete across 50 states. Therefore, only a Federal approach that creates a level playing field for competing athletes and universities makes sense.

KU acknowledges that it is a new day in college athletics, and if there is an opportunity for student-athletes to earn value from their Name, Image and Likeness, we should support them and provide reasonable guardrails that will protect them and the integrity of the game while maintaining successful educationally based athletic programs across the country.

This is a complicated policy matter, and none of us has all of the answers. That's why it is important that we are having these discussions. But no matter what solutions we pursue, there are two ironclad principles that should inform us every step of the way: (1) we must continue to prioritize what is in the best interests and welfare of our student-athletes; and (2) we must preserve and protect the collegiate athletic model.

As this process moves forward, we must not forget that more than 98 percent of student-athletes do not turn professional in their sport after graduation or have significant opportunity to earn income from NIL, yet they benefit greatly from the education and resources they access as student-athletes. We must be cautious not to risk losing what is so valuable for the 98 percent while addressing the specific needs of those blessed to take their athletic talents to the professional level. Additionally, we must preserve access for first-generation students and underrepresented minorities to an education through sports and continue to enhance gender equality in compliance with Title IX. The bottom line is, there are ways to allow student-athletes to benefit from Name, Image and Likeness while maintaining the benefits of the collegiate athletic model.

Additionally, Senators, please keep in mind the following: The actions we take on NIL have the potential to transcend athletics and impact every aspect of our university mission—from education, to service, to research. For better or worse, a major athletics department at a university like KU is inextricably linked with the entire university model and everything we do. For example, athletics is important to student recruitment, especially for Midwestern universities that rely on out-of-state student enrollment. Athletics is crucial to our engagement with donors, whose support is essential to our most important academic and research initiatives. And athletics enhances our work to improve access to education and campus diversity by enrolling students from diverse backgrounds. Again, the decisions we make on Name, Image and Likeness have implications that extend beyond the athletic playing field and into virtually every aspect of what we do as universities.

As a university chancellor, one of my responsibilities is to support opportunities for students while they are enrolled at KU—whether that is an internship, a chance to study abroad, or a chance to do research with a company in our region. Today, I want to support this new opportunity for those student-athletes who have the potential to earn money while competing at our institution. Like all new initiatives, there will be hurdles, and we will learn from them and adapt. But let's work together to do what is right and support our student-athletes in these new opportunities.

Right now, students, student-athletes, parents, alumni and supporters of our universities are counting on us to do this fairly and correctly. Forming a comprehensive national plan for Name, Image and Likeness is a challenge that will take some time to implement. But we can do it together.

So let us partner—universities, Congress, our governing association and conferences, and other key stakeholders—to create a solution that ensures the interests of our student-athletes are front and center while also preserving the current collegiate athletic model to the benefit of all student-athletes.

Thank you.

Senator MORAN. Dr. Girod, thank you very much.

Mr. Huma, welcome.

**STATEMENT OF RAMOGI HUMA, EXECUTIVE DIRECTOR,  
NATIONAL COLLEGE PLAYERS ASSOCIATION**

Mr. HUMA. Thank you. Good morning. My name is Ramogi Huma. I am a former UCLA football player and the Executive Director of the National College Players Association, the NCPA, a 501(c)(3) nonprofit advocacy group comprised of over 20,000 current and former college athletes nationwide.

First, I would like to thank Chairman Wicker, Chairman Moran, and Ranking Member Blumenthal, and members of the Subcommittee for allowing me to testify today.

College sports is a \$14 billion per year commercial industry where multibillion dollar TV revenues fuel multimillion dollar salaries for coaches, administrators, and commissioners. The NCAA's basketball tournament alone generates over \$1 billion per year. Under Armour is paying UCLA \$280 million to require UCLA players to serve as walking billboards to advertise its apparel.

Meanwhile, the NCAA denies players third party compensation claiming it is to protect players from forces of commercialization. This double standard has inflicted serious economic harm on countless college athletes, many of whom are from low-income backgrounds.

The NCPA is a co-sponsor of California SB 206, known as the Fair Pay to Play Act, and is currently assisting 14 of an estimated 28 states that are pursuing similar legislation.

In short, a wave of bipartisan action is sweeping across this Nation in response to longstanding, unjust NCAA rules that deny college athletes economic freedoms afforded to other students and Americans.

As part of my written testimony for today, I submitted an updated white paper on this issue that was published last Friday, and I will cover some of the key advocacy positions included in that document.

First, Federal legislation is not necessary for positive reform in this area, but there are some reasonable provisions or guardrails that could be positive.

For instance, Congress could prevent third-party compensation offers used as inducements to high school recruits and college transfers to attend a particular college.

It could also ensure that colleges themselves do not coordinate third-party athlete compensation.

Similar to some of the state guardrails, they should be enacted directly through law and not through any NCAA antitrust exemption.

If Congress acts, it should also uphold the freedom for players to secure independent representation, which 28 states are currently pursuing. Congress should not grant the NCAA and its colleges the power to certify athlete agents and other representation because this representation would also be expected to represent players in disputes with the NCAA and colleges.

Also, current NCAA rules are discriminatory as they only allow elite men's basketball players the ability to secure agents while denying the same right to all female athletes. States are capable of setting athlete agent standards and many have already adopted such standards into law.

Additionally, the NCAA conferences and colleges should not be allowed to represent players in name, image, and likeness compensation agreements.

And Congress should not appoint any entity to control college athletes' group licensing rights, which the NCAA stated in December they will be asking Congress to do. The NCAA conferences and colleges are already taking advantage of players in this area, selling players' rights and refusing to give them any compensation for it.

Again, some guardrails can be helpful, but there are serious concerns about the potential for even well-intentioned guardrails to serve as hammers, hammers that can harm college athletes' economic freedoms being unlocked by the states. Some have proposed banning third-party compensation agreements from people and companies affiliated with players' colleges. This would mean players could not get a deal with Nike if Nike sponsored their college. They could not get a deal with countless companies that contract with their colleges. If a fan happens to be an alumni or donor, pays admission to a player autograph signing, the fan, player, and college could be in violation of Federal law and be subject to punishments.

Yet, these are precisely the opportunities that states are seeking to open up to college athletes. The states are realizing that proposals that would prohibit or cap college athletes' opportunity in the name of competitive equity are especially problematic largely because competitive equity does not exist under current NCAA rules. In fact, after 6 years of legal scrutiny in the O'Bannon v. NCAA name, image, and likeness antitrust lawsuit, the Federal courts came to this exact conclusion in their rulings. Colleges with the most revenues and wealthiest boosters have the largest recruiting budgets, have the best coaches, and build the best facilities. In turn, they get the best recruits, they win the most games, and score the richest TV deals allowing them to continue their dominance.

Importantly, if NCAA sports was truly committed to pursuing competitive equity and recruiting and winning, they would ban booster payments to athletic programs and teams would share TV revenue equally like they do in other multibillion sports leagues. College athletes should not be forced to sacrifice their economic freedom and rights so the NCAA and its colleges can pretend that competitive equity exists while doing nothing about huge disparities in booster donations and athletic revenues.

Finally, the State legislation in question will have no effect on players' employee status or Title IX because payments would be from third parties not colleges. If Congress does act, it should advance college athlete freedoms being pursued by the states not roll them back.

Thank you.

[The prepared statement of Mr. Huma follows:]



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February 7, 2020

Dear Chairman Wicker and members of the US Senate Committee on Commerce, Science, and Transportation's Subcommittee on Manufacturing, Trade, and Consumer Protection,

Thank you very much for inviting me to participate in the "Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation," on Tuesday, February 11, 2020. This discussion encompasses important economic rights and freedoms that college athletes should be afforded. The National College Players Association (NCPA) is a co-sponsor of California SB 206 known as The Fair Pay to Play Act and is providing information and support to 14 of an estimated 28 states pursuing similar legislation.

For my written testimony, please accept this letter, an updated version of a white paper that I authored entitled, "Name, Image, and Likeness: The Player's Plan for Economic Liberty and Rights", and a report from the office of Senator Murphy entitled, "Madness Inc. How everyone is getting rich off college sports - except the players" to be entered into the record as my written testimony.

Some of the key college athlete advocacy positions presented in the white paper include the following:

- Federal action to advance college athletes' economic freedoms and rights being pursued by the states would be helpful, but Congressional action to eliminate such protections would harm college athletes nationwide.
- Athletic associations, conferences, and colleges should not be permitted to represent college athlete name, image, and likeness (NIL) in agreements with third parties.
- Congress should not designate an entity to control college athlete group licensing, or college athlete representation standards, which states are capable of establishing.
- Federal action prohibiting colleges from arranging athlete NIL compensation opportunities, and 3<sup>rd</sup> party NIL offers to induce recruits and college athlete transfers to attend a particular college would be reasonable.
- Competitive equity does not exist under current NCAA rules and college athlete economic opportunities should not be sacrificed to pretend it does.

Thank you again for the opportunity to participate and I am committed to working with you in any continuing discussions on this issue and other issues concerning college athletes' well-being.

Sincerely,

Ramogi Huma  
NCPA Executive Director

NAME, IMAGE, AND LIKENESS:  
THE PLAYERS' PLAN FOR ECONOMIC LIBERTY AND RIGHTS

National College Players Association

Author: Ramogi Huma, Executive Director

February 7, 2020

**Overwhelming Support for College Athlete NIL Pay**

California made history when it approved SB 206, legislation that will allow California college athletes the right to secure legal and professional representation as well as earn compensation for use of their name, image, and likeness (NIL) beginning on January 1, 2023. The bill was voted into law with unanimous bipartisan support: 73-0 in the Assembly and 39-0 in the Senate.

The National College Players Association (NCPA) was a co-sponsor of SB 206 and is working with thirteen states of the estimated twenty states that are pursuing similar legislation at the time of this writing. Lawmakers in these states express sincere opposition to the NCAA's prohibition on such rights due to the harm it inflicts on athletes in their states.

Florida state lawmaker Representative Chip LaMarca who introduced a college athlete NIL stated, "Not allowing college athletes to participate in the same free market opportunities that drive our institutions runs counter to the American principles of free enterprise and equal rights."

Missouri state Representative Nick Schroer (R) introduced similar legislation and stated, "The NCAA has long banned student athletes from obtaining compensation from their own name and likeness. This ban violates every capitalistic principle of free markets which has made this country exactly what it is today. While student athletes are barred from making money off of their image and likeness, the NCAA continues to cash in as they siphon money away from the very student athletes the organization should be protecting."<sup>1</sup>

After introducing a Pennsylvania NIL compensation bill, state lawmaker Dan Miller (D) said, "Athletes are forced to give up their rights and economic freedom while the colleges make hundreds of millions of dollars off of their talent and likeness. This bill would help to balance the scales. . ."<sup>2</sup>

In addition, there is bipartisan interest in Federal college athlete NIL legislation among members of the United States Senate and House of Representatives.

US Senator Mitt Romney (R): "We're coming to help these young athletes in the future, and the athletes of today, make sure that they don't have to sacrifice their time and sacrifice, in many cases, their bodies without being fairly compensated."<sup>3</sup>

US Senator Chris Murphy (D): "College athletes are being used as commodities to make money for the NCAA, colleges and corporations, while not being compensated for the work they do, nor given the appropriate health care and academic opportunities they deserve."<sup>4</sup>

Congressman Mark Walker (R): "Signing on with a university, if you're a student-athlete, should not be (a) moratorium on your rights as an individual. This is the time and the moment to be able to push back and defend the rights of these young adults."<sup>5</sup>

The NCPA is engaging in talks with various members of Congress to help ensure any Federal legislation advances these protections nationwide without rolling back provisions sought by states.

Finally, polls show that 66 percent of Americans<sup>6</sup> and 80 percent of regular students<sup>7</sup> support allowing college athletes the ability to earn compensation for use of their NIL. Also, 52 percent of Americans support providing college athletes a share of millions of dollars in TV revenue generated by football and basketball players. While the NCAA opposes such legislation, it also ranks among institutions with the

<sup>1</sup> [https://www.stltoday.com/news/local/education/anger-with-ncaa-could-speed-measure-to-pay-missouri-college/article\\_2da211ed-3d06-5bd5-a96b-d13b0467b3db.html](https://www.stltoday.com/news/local/education/anger-with-ncaa-could-speed-measure-to-pay-missouri-college/article_2da211ed-3d06-5bd5-a96b-d13b0467b3db.html)

<sup>2</sup> <https://www.cbsnews.com/news/fair-pay-to-play-act-pennsylvania-lawmakers-look-for-compensation-college-student-athletes-2019-10-01/>

<sup>3</sup> <https://www.sportingnews.com/us/ncaa-basketball/news/mitt-romney-warns-ncaa-about-compensating-athletes-were-coming-for-you/mguqknsv5e3o1p19p3dtwi8ut>

<sup>4</sup> <https://www.athleticbusiness.com/college/senator-s-report-calls-for-ncaa-to-overhaul-its-health-care.html>

<sup>5</sup> <https://www.si.com/college/2019/03/07/ncaa-student-athletes-profit-name-use-bill-introduced-mark-walker>

<sup>6</sup> <https://apnews.com/3ab2b10f53e2c7f6a16b25ccaf49eb1a>

<sup>7</sup> <https://collegepulse.com/2019/09/college-students-say-the-ncaa-takes-advantage-of-athletes.html>

lowest public approval—only 14 percent of Americans have a favorable opinion of the NCAA and its colleges.<sup>6</sup>

### Declarations

1. College athletes' talents, time, and physical sacrifices are central to fueling a highly commercialized, \$14 billion per year industry that pays coaches and administrators multimillion salaries and allows apparel companies to spend millions of dollars to require college athletes to advertise their logos on their bodies.
2. The commercial use of college athletes' NIL rights is not necessary to field school-based athletics and non-revenue sports; it is an optional, lucrative activity for which athletes should have the freedom to be fairly compensated by 3rd parties.
  - a. If large commercial revenues were *required* for colleges to field athletic programs and their nonrevenue sports, NCAA Division II and III would not exist.
3. College athletes should have the same economic liberties and rights afforded to other students and Americans.
4. The NCAA's athlete NIL compensation ban infringes upon college athletes' 1st Amendment Rights. The NCAA prohibits college athletes from receiving compensation for engaging in highly protected forms of speech on their own time such as religious or creative expression.
  - a. The NCAA would punish a player receiving compensation for giving a speech or writing about his or her experience as a Christian college athlete. There are many players who are members of The Fellowship of Christian athletes and other organizations who are not allowed to pursue such opportunities.
  - b. Central Florida football player Donald De La Haye lost his NCAA eligibility for receiving compensation from his YouTube channel.<sup>8</sup>
5. NCAA rules prohibiting college athlete compensation for use of NIL rights do not bring forth competitive equity and do not justify denying college athletes equal rights and economic freedom.
  - a. After six years of deliberations in *O'Bannon v. NCAA*, federal courts determined that the NCAA's prohibition of players' NIL compensation did not foster competitive equity because various colleges have numerous other competitive advantages and disadvantages that the NCAA permits (recruiting budgets, quality of coaches/facilities, etc.)
6. Allowing successful female athletes (*i.e.*, Olympians) to enter into commercial activities can raise the profile, popularity, and value of women's college sports.
7. The NCAA, athletic conferences, and their member colleges should not be allowed to represent college athletes in NIL commercial agreements. These entities have a conflict of interest and they are currently taking advantage of such powers. The NCAA has stated publicly that it wants the U.S. Congress to grant it the ability to represent players' group licensing rights, yet this conflicted, forced athlete representation is among the injustices that states are seeking to eradicate.<sup>9</sup> <sup>10</sup> It is not necessary for the government to appoint a college group licensing entity, but if it did, it should not be the NCAA, conferences, or colleges.
  - a. NCAA sports has been a bad actor in this area. NCAA rules restricting college athlete compensation have been ruled illegal multiple times in Federal courts (*O'Bannon v. NCAA* & *Alston v. NCAA*) and have harmed countless college athletes.
  - b. The *O'Bannon v. NCAA* ruling found that the NCAA, conferences, and schools sell valuable players group licensing rights to 3rd parties but give players \$0 in return.
  - c. The NCAA chose to end the popular EA sports video games rather than allow college athletes, whose NILs were used in the games, to receive any portion of revenue.
8. College athletes' NIL representation should not be nationalized/operated by the government.

<sup>8</sup> <https://www.latimes.com/sports/more/la-sp-ucf-kicker-ineligible-youtube-20170801-story.html>

<sup>9</sup> <https://www.aspeninstitute.org/events/future-of-college-sports-governments-role-in-athlete-pay/>

<sup>10</sup> <https://www.usatoday.com/story/sports/ncaaf/2019/12/17/ncaas-mark-emmert-meets-mitt-romney-chris-murphy-reform/2675473001/>



9. Sports agents, financial advisors, and other individuals and entities facilitating college athlete compensation for use of their name, image, or likeness rights and athletics reputation should be subject to standards to help prevent fraudulent and negligent activity that can harm college athletes.
10. The NCAA, athletic conferences, and their member institutions should not govern certification of college athlete representation.
  - a. College athletes must have representation certified by an entity that does not have a conflict of interest. College athlete representation must have the freedom and qualifications to represent college athletes in negotiations with 3rd parties as well as during any NIL rights disputes with colleges, conferences, and the NCAA.
  - b. The NCAA has demonstrated ongoing opposition and poor judgment regarding college athlete representation. For instance, it denies all female athletes the ability to secure a sports agent while giving this right to select men's basketball players.
11. College athletes should receive financial skills development.
  - a. While NCAA sports leaders point to a lack of college athletes' financial skills as a reason to deny athletes economic freedom, but NCAA sports is responsible for failing to use its robust educational infrastructure and some of its commercial revenue to address any lack of financial development skills among athletes.
12. NIL college athlete compensation should not be locked in a trust fund but, if it was, the NCAA, athletic conferences, and their colleges should not administer it.
  - a. The NCAA did a poor job of administering the 2008 *White v. NCAA* anti-trust settlement that was supposed to provide \$10 million to players to complete their degree and continue their education. It did not do enough to inform players of available funds and returned \$4.3 million dollars in unused funds to its colleges.<sup>11</sup>

### Group Licensing

In addition to individual commercial opportunities that can benefit an individual athlete, group licensing would provide even revenue distributions among each athlete on each team or set of teams included in a group license. When it comes to group licenses, each player is equally valuable. For instance, a star quarterback cannot participate in a televised game and would have virtually no value to a sports videogame maker if his teammates—including backups who standby to fill in for injured and tired starters, did not participate. For this reason, each individual in the group is equally valuable.

Federal court antitrust rulings recognize that a group licensing market for college athletes' NIL rights exists and declared the following:

1. NCAA's prohibition on athlete name, image, and likeness compensation violated Federal antitrust law and deprives college athletes of compensation that they would otherwise receive.
2. If the NCAA did not have a prohibition on athlete compensation for use of their name, image, and likeness, athletes would be able to create and sell group licenses;
3. 3rd parties purchase groups of athletes' name, image, and likeness rights for commercial purposes including for use in live game telecasts, sports video games, game rebroadcasts, advertisements, and other archival footage to ensure they have the legal right to use every athlete in a group of athletes.<sup>12</sup>

California SB 206 and other similar legislation will allow players to secure representation to create, bundle, and sell group licenses. College athletes should be informed and empowered to make decisions regarding group licensing distributions.

### Title IX & Athlete Representation Certification

College athlete NIL compensation from 3rd parties is not subject to Title IX.

The NCAA's policy to allow men's basketball players to sign with sports agents while denying female athletes the same rights sets up NCAA colleges for possible violations of Title IX and the 14th Amendment's Equal Protection Clause.<sup>13</sup>

<sup>11</sup> <http://www.ncaa.org/about/resources/media-center/news/six-schools-selected-grant-program-pilot>

<sup>12</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015)

<sup>13</sup> <https://www.si.com/college/2018/08/09/ncaa-agents-student-athlete-one-and-done-nba-draft>

There is a reasonable desire to have standards for college athlete representation. Such standards can help protect college athletes against fraudulent and negligent activity. Inadequate representation can also lead to the loss of college athletes' eligibility.

For instance, there are questions surrounding a new online platform that allows fans to incentivize recruits to play for a particular college. Fans are allowed to pledge money by position and college. The platform, StudentPlayer.com, claims it has already raised \$100,000 from both named and anonymous donors to make offers to 800 athletes at 42 different colleges. It states that such activity is made legal due to emerging state legislation. However, no such state legislation is currently in effect, and some states like California have laws that likely prohibit such activity. The NCAA may punish a recruit if he or she publicly indicates such inducements as a factor in selecting a college team. Many states already have standards for athlete agents and are capable of addressing this area.

#### **Employee Status**

The NCAA argument that 3rd party college athlete NIL compensation will change players' employee status and lead to unionization is false. Such NIL payments would not come from the colleges and, therefore, would not be a factor in considering employee status of college athletes. If the NCAA were correct, bipartisan support for college athlete NIL compensation would not be taking place among states and in Congress.

#### **State Legislative Reform Model Summary**

(See Attachment 1 for The NCPA's Model State Legislation)

- Allow college athletes to receive NIL compensation from 3rd parties.
- Allow college athletes to secure professional and legal representation.
- Avoid language prohibiting NCAA and conference punishments. The NCAA has signaled it will use that language to pursue a legal challenge based on the Dormant Commerce Clause. While such a legal challenge would be weak, it could delay justice for college athletes and unnecessarily tax states' Attorneys General resources. States can enforce their own state antitrust laws to protect their players and colleges from NCAA group boycotts and other illegal cartel punishments. States may want to include their athlete NIL legislation under their antitrust law for this reason. In addition, and most importantly, it will not be practical for the NCAA to expel so many colleges from the numerous states that are likely to adopt similar laws.
- July 1, 2020 effective date
- \*States should leave out language regarding conference and athletic association penalties. The vast number of states pursuing similar legislation makes clear that such penalties against large numbers of colleges are unrealistic.

#### **Limits of State Legislation**

Some have expressed a desire to try to make college athlete compensation more equal. Any restriction on an individual athlete's NIL compensation would be unjust since other students, citizens, and athletes in other multibillion-dollar sports industries are not subject to such limits. It could also put that state's colleges at a competitive disadvantage.

Contrary to NCAA assertions, state NIL laws will not destroy college sports. The NCAA claims it is complicated to find a way to enact NIL compensation without allowing certain colleges an advantage over others. This is a smokescreen since such advantages and disadvantages exist under current NCAA rules. For instance, the SEC's television contract is much higher than "Group of 5" conferences' television contracts. This allows the SEC to maintain a much larger recruiting budget, hire better coaches, and build top of the line facilities. In turn, these advantages allow SEC colleges to secure the best football recruits, win the most games, and position itself for even higher television contracts in the future.

#### **Federal Legislative Reform**

Federal reform that advances college athletes' freedoms and rights being pursued by many states would represent positive reform, but Congressional action to eliminate these college athlete protections would undermine states' rights and harm all college athletes. It is not necessary for Congress to get involved but, if it does, it should do so in a way that does not cement unjust and exploitative NCAA rules into law.

The NCPA's Federal reform model would be similar NCPA's State Model Legislation with the following additional provision and considerations:

*Additional Provision:*

1. Congress should void all current NCAA punishments and investigations related to college athlete compensation and financial extra benefits. NCAA economic rules leave many college athletes desperate and vulnerable. Players, coaches, and colleges should not be punished for violating unjust and illegal NCAA rules—many of which would be eliminated upon the implementation of athlete NIL compensation legislation.

*Considerations:*

1. If Congress is truly looking for ways to make college sports “more equal”, it would be remiss in not considering equal media rights revenue sharing across all colleges themselves. The NCPA is neutral on this, but notions of fairness should not be used to limit players’ ability to receive NIL compensation. Perhaps a more powerful action would be for colleges to follow revenue sharing models of other multibillion sports leagues such as the NFL.
2. Congress should not buy into NCAA rhetoric and limit college athlete NIL compensation. Other multibillion sports leagues have no such limits and function just fine.
3. Federal legislation attempting to prohibit college boosters from arranging NIL endorsements for current college athletes in hopes of making college sports more equal would be seriously flawed. Booster donations are currently used by colleges to pursue an advantage by luring the best recruits via enhanced recruiting budgets, hiring better coaches, building flashy facilities, etc. A booster ban would inflict economic harm to college athletes and do nothing to make recruiting more equal since booster donations would continue to provide some colleges advantages over others. Federal legislation hoping to neutralize boosters’ affect on competitive balance would have to ban all booster donations to colleges, a proposition for which no stakeholder has voiced support. Alternatively, Federal legislation could take a more reasonable approach by prohibiting NIL opportunities explicitly aimed at recruits as inducements to attend a particular college. Prohibiting colleges from coordinating 3rd party NIL opportunities for their athletes could also be a more measured approach. That provision would be similar to other sports leagues that do not allow teams to coordinate player endorsement deals as a way to circumvent the salary cap. Notably, these leagues do not attempt to prevent players from entering endorsement deals with local businesses run by fans of the player’s team. These industries operate just fine, and these leagues are not seeking Federal legislation attempting to stop this practice due to any perceived or actual advantage or disadvantage this may give any team.

**A Federal NIL Trust Fund**

Some have expressed an interest in holding college athletes’ NIL compensation in a trust fund until their eligibility expires. The NCPA does not support compensation being held in this way because it would continue the economic hardships college athletes face during the duration of their college career. Additionally, college athletes would be more susceptible to turning to high interest credit cards and high interest loans to pay for expenses throughout college. In short, they would likely take out loans against what they hoped to eventually receive in a future NIL trust distribution. Tying up college athletes’ compensation in a trust would be a significant disadvantage to a state since California and (most likely) other states would have no such limitation. However, it would be viable via Federal legislation.

Any NIL trust fund established by Federal legislation should hold only a small portion of NIL revenue. For instance, California, Louisiana, New Mexico, and New York laws protecting child entertainers from being taken advantage of by their guardians require only 15 percent of their gross earnings to be placed into a blocked trust account.<sup>14</sup> It should be noted that these entertainers gain access to these accounts upon turning 18 years old, and virtually all college athletes are at least 18 years old. The NCPA believes young adults should be empowered to properly handle their earnings through financial skills development rather than receiving a delayed payment. However, if Federal legislation requiring a trust fund is enacted, college athletes should be allowed to generate interest via investments (*i.e.*, stock market) to earn more revenue.

**Summary**

NCAA sports imposes second-class citizenship on college athletes in its pursuit to monopolize all commercial dollars generated from college athletes’ NIL rights.

<sup>14</sup> <https://www.sagafta.org/membership-benefits/young-performers/coogan-law>

NCAA colleges are complicit since they collectively adopt and maintain NCAA rules. The NCAA and its colleges are making a mockery of Federal and state antitrust laws meant to protect free enterprise and have shown a disregard for players' 1st Amendment rights.

As the NCAA and its colleges fight to keep the status quo by lobbying state and Federal lawmakers and putting out vague media statements with empty promises, two questions should be asked persistently. Why should those who break laws be allowed to design new laws? Why should those who victimize college athletes be appointed stewards of college athlete well-being?

The NCAA and its colleges' assertion that college athlete NIL reform has been too complicated to address is further evidence that they are both unwilling and ill-equipped to do so. Reform is not too complicated to achieve, and justice for college athletes should not be delayed any longer.

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## ATTACHMENT 1

**Model Legislation—Name, Image, Likeness Pay****SECTION 1. Declarations**

1. The Legislature seeks to help ensure college athletes have equal rights and economic freedoms afforded to all students and residents in the state of \_\_\_\_\_.
2. The Legislature recognizes the disproportionate negative impact that economic and legal restrictions have on African American and female college athletes.
3. The commercial exploitation of college athletes' name, image, and likeness rights is not required for school-based athletics; it is an optional, lucrative activity for which athletes should be fairly compensated by 3rd parties.
4. College sports is a \$14 billion dollar industry with millionaire coaches and lucrative apparel deals that require college athletes to advertise for commercial interests.
5. Rules prohibiting college athlete compensation for use of name, image, and likeness rights, or athletics reputation do not bring forth competitive equity and cannot justify denying college athletes equal rights and economic freedom.
6. State legislatures have adopted or are pursuing legislation, to grant college athletes the right to secure professional representation, which includes their own group licensing representation; and the right to earn compensation for use of their name, image, and likeness beginning as early as July 1, 2020.
7. Federal court rulings recognize that a group licensing market for college athletes' name, image, and likeness rights exists and declared the following:
  - a. The NCAA, conferences, and schools sell valuable players group licensing rights to 3rd parties, but give players \$0 in return.
  - b. NCAA's prohibition on athlete name, image, and likeness compensation violated Federal antitrust law and deprives college athletes of compensation that they would otherwise receive.
  - c. If the NCAA did not have a prohibition on athlete compensation for use of their name, image, and likeness, athletes would be able to create and sell group licenses;
  - d. 3rd parties purchase groups of athletes' name, image, and likeness rights for commercial purposes including for use in live game telecasts, sports video games, game rebroadcasts, advertisements, and other archival footage to ensure they have the legal right to use every athlete in a group of athletes.
8. Sports agents, financial advisors, and individuals and entities facilitating college athlete compensation for use of their name, image, or likeness rights and athletics reputation should be subject to certification standards to help prevent fraudulent and negligent activity that can harm college athletes.
9. College athletes' representation should be independent from athletics associations, athletic conferences, and colleges to avoid a conflict of interest.

**SECTION 2. Definitions**

"Athlete" means an individual that participates or participated in intercollegiate sport for a postsecondary educational institution located in the state. An individual's participation in a college intramural sport or in a professional sport outside of intercollegiate athletics does not apply.

"Athletic association" means an entity with athletics governance authority and is comprised of postsecondary educational institutions and athletic conferences.

"Athletic conference" means an entity and/or a collaboration of entities such as the autonomy conferences that has/have athletics governance authority, is a member of an athletic association, and has members comprised of and/or competes against postsecondary educational institutions.

"Certification" means the process of developing enforcing professional and legal policies and practices.

"Group" means three or more athletes from the same sport.

"Group licensing" means an agreement or agreements to allow a 3rd party the right to use the name, image, and likeness rights and athletic reputation of a group of athletes.

"Postsecondary educational institution" means any campus of a public or a private postsecondary educational institution.

"3rd party" means any individual or entity other than a postsecondary educational institution, athletic conference, or athletic association.

**SECTION 3. Resolution**

The state of \_\_\_\_\_ requests that any Federal legislation regarding this act respect and permit \_\_\_\_\_ college athletes' rights, protections, and other provisions included in this legislation.

**SECTION 4. Legislation***Part A.*

1. A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution from fully participating in intercollegiate athletics without penalty and earning compensation as a result of the use of the student's name, image, or likeness rights, or athletic reputation. Earning compensation from the use of a student's name, image, or likeness rights, or athletic reputation shall not affect a student's grant-in-aid or stipend eligibility, amount, duration, or renewal.
2. For purposes of this section, a grant-in aid and/or a stipend from a postsecondary educational institution in which a student is enrolled is not compensation for use of a student's name, image, and likeness rights, or athletic reputation; and a grant-in-aid or stipend shall not be revoked or reduced as a result of a student earning compensation pursuant to this section.
3. A postsecondary educational institution shall not interfere with or prevent a \_\_\_\_\_ student from fully participating in intercollegiate athletics for obtaining representation unaffiliated with a postsecondary educational institution or its partners in relation to contracts or legal matters, including, but not limited to athlete agents, financial advisors, or legal representation provided by attorneys.
4. A college athlete shall not enter into an apparel, equipment, or beverage contract providing compensation to the athlete for use of the athlete's name, image, or likeness rights, or athletic reputation which requires a student to display a sponsor's apparel, equipment, or beverage or otherwise advertises for the sponsor during official team activities if such provisions are in conflict with a provision of the athlete's team contract.
5. A team contract of a postsecondary educational institution's athletic program shall not prevent a college athlete from receiving compensation for using the athlete's name, image, or likeness rights, or athletic reputation for a commercial purpose when the athlete is not engaged in official, mandatory team activities that are recorded in writing and made publicly available. Such team activities may not exceed up to 20 hours per week during the season and up to 8 hours per week during the off-season.
6. An athlete with remaining intercollegiate athletics eligibility who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness rights, or athletics reputation shall disclose the full contract to an official of the institution who is designated by the institution. The institution and its designated official shall not disclose terms of an athlete's contract that the athlete and/or the athlete's legal representation deems to be a trade secret and/or non-disclosable.
7. An institution asserting a conflict described in Part A. 6. shall disclose to the athlete and the athlete's legal representation, if applicable, the full contract they assert to be in conflict. The college athlete and/or the college athlete's legal representative shall not disclose terms of an institution's contract that the institution deems to be a trade secret and/or non-disclosable.

*Part B.*

1. Postsecondary educational institutions that enter into commercial agreements that directly or indirectly require the use of a college athlete's name, image, and likeness must conduct a financial development program of up to 15 hours in duration once per year.
  - a. The financial development program cannot include any marketing, advertising, referral, or solicitation by providers of financial products or services.
2. Athlete attorney representation shall be by persons licensed by the state.

*Part C.*

1. This legislation shall apply only to contracts entered into, modified, or renewed on or after the enactment of this section.
2. Athletes have the right to pursue private action against 3rd parties who violate this act through superior court, through a civil action for injunctive relief or money damages, or both.

- a. The court shall award court costs and reasonable reimbursement for attorneys' fees to the prevailing plaintiffs in an action brought against a violator of this legislation.
  3. Athletes and state or local prosecutors seeking to prosecute violators shall not be deprived of any protections provided under \_\_\_\_\_ law with respect to a controversy that arises in \_\_\_\_\_; shall have the right to adjudication in \_\_\_\_\_ a claim that arises in \_\_\_\_\_.
  4. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.
  5. Legal settlements cannot permit noncompliance with this act.
  6. This chapter shall apply to any applicable agreement or contract newly entered into, renewed, modified, or extended on or after July 1, 2020. Such agreements or contracts include but are not limited to the National Letter of Intent, an athlete's financial aid agreement, commercial contracts in the athlete group licensing market, and athletic conference or athletic association rules or bylaws.
- \*\*\*States may want to make clear that violations of this legislation is a per se violation of their state antitrust law and should consider granting the Attorney General some discretion for penalties.*

# Madness, Inc.

How colleges keep athletes on the field and out of the classroom



CHRIS   
**MURPHY**  
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### Student\*-Athlete

Every May, more than a million students across the country celebrate a life-changing moment: college graduation.<sup>1</sup> The pomp and circumstance takes over campuses, as cap-and-gown clad students take their final ceremonial steps across stages, move tassels from right to left, and collectively toss their caps as high as they can. But for far too many college athletes, this moment never comes. And if it does, they often walk across the stage without a degree that prepares them for life beyond athletics.

The lack of academic integrity across college sports may be the most insidious piece of a broken system. The only significant form of compensation many athletes will receive from their efforts is a scholarship. These scholarships are, of course, very valuable, and at every chance, the NCAA claims these scholarships are more than enough to compensate athletes for the full-time hours they devote to their sports. Yet, the NCAA and colleges look the other way as athletic programs – especially in revenue-generating sports – routinely defraud athletes of the tremendous value those scholarships hold.

**The whole time...I felt stuck. Stuck in football, stuck in my major. Now I look back and say, 'well what did I really go to college for?' Crap classes you won't use the rest of your life? I was majoring in football.**

College athletes purportedly receive every advantage – a scholarship, academic counseling, tutoring, etc. Despite these supposed advantages, only a fraction of athletes from many college athletic programs graduate. In some cases, only one or two players on a team will graduate. Across the board, top programs graduate their athletes at significantly lower rates than the student bodies that fill up stadiums to cheer them on. And even when athletes graduate, their diplomas are often worth far less than their peers' due to schemes aimed at keeping athletes eligible – rather than ensuring a real educational experience.

Take Stephen Cline, a former defensive lineman for Kansas State University. Cline dreamt of using his scholarship to become a veterinarian. Instead, his academic counselor pushed him to settle for a less demanding major so he could concentrate on what everyone understood was his real purpose while in Manhattan, Kansas: football.

“The whole time...I felt stuck – stuck in football, stuck in my major. Now I look back and say, ‘well what did I really go to college for?’ Crap classes you won’t use the rest of your life? I was majoring in football.”<sup>ii</sup>

Then there is Jonathan Cruz, who played offensive line for Oklahoma State University. Cruz said his academic advisors completed coursework for him and other athletes so they could maintain eligibility rather than focus on real learning. “I would write them, and they would take them and just completely change everything about it because it was just so awful. I never really learned how to write a paper, but I had to pull a B in Comp I, and I pulled my B in Comp I.”<sup>iii</sup>

These stories do not describe the experience of all college athletes. Many are able to pursue athletic and scholastic endeavors simultaneously. And some schools and some coaches are better than others at making sure athletes have the chance to be serious students as well. But, far too often, especially on the money-making Division I teams, so-called “student-athletes” are athletes first and students second. For their part, athletes commit to countless hours in weight rooms, training facilities, and public events, while at the same time putting their bodies on the line for the sake of winning games and competitions on behalf of their colleges. In return, colleges promise the opportunity for a world-class education and the support necessary for athletes to realize that opportunity.

**Unfortunately, the NCAA and its member schools care far more about the appearance of educating athletes than they do about actually educating them.**

Unfortunately, the NCAA and many of its member schools too often care more about the appearance of educating athletes than they do about actually educating them. That façade of educational opportunity manifests in too many former athletes left “worn, torn, and asking questions,”<sup>iv</sup> despite the massive commitments they made to the very colleges that failed to fulfill their basic missions as institutions of higher learning.

This report – the second in a series on the madness of college sports – will shine a light on this systemic abuse and suggest reforms that can help restore academic integrity to college sports.

### **Graduation Rates**

So how does this broken system work? And how do we change it?

Let’s begin at the end: graduation. While the NCAA reports record-breaking graduation rates for college athletes, a closer look at the numbers shows that far too many athletes – particularly black athletes – never make it to cap-and-gown ceremonies.

According to the NCAA, college athletes have never succeeded more in the classroom than they do today. Last year, the NCAA reported that nearly 21,000 Division I athletes graduated at an astounding 88 percent rate, a record high that outpaced non-athletes.<sup>v</sup> In fact, the NCAA claims that graduation rates increased 14 percent since 2002.<sup>vi</sup> By their measure, the modern NCAA is a success story in holding programs accountable and restoring academic integrity on college campuses.

Unfortunately, these numbers are both incomplete and misleading. That’s because the NCAA uses its own metric to calculate and report graduation rates: the Graduation Success Rate (GSR). The NCAA introduced the GSR in 2002 as a replacement for the Federal Graduation Rate (FGR), which they believed was unfair to athletic programs. The main difference between the two is how they account for students who transfer between colleges. The FGR calculates the rate of full-time freshmen at a college that eventually graduate from their original institutions within six years. When a student transfers, it reflects poorly on that rate. Due to the relatively high rate that athletes transfer between programs, the NCAA wanted to create a metric that would fairly account for athletes who transfer. The GSR, it insists, does just that.

In practice, however, the GSR is dramatically flawed. The GSR inflates graduation rates precisely because of how it accounts for athletes who transfer. If an athlete leaves a program prior to graduation but in good academic standing, the GSR calls that athlete a “Left Eligible” and they are excluded entirely. Wherever the athlete transfers to then becomes responsible for their academic success and it reflects upon their GSR. While this seems fair, the numbers on transfers paint a startling story. For the most recent cohort used to calculate GSR, the NCAA reported 95,782 athletes who entered college from 2006-2009.<sup>vii</sup> Within this group, the NCAA reported 23,112 athletes who transferred out of their programs in good academic standing, thus labeled “Left Eligible”.<sup>viii</sup> However, the NCAA only reported 8,165 athletes who transferred into programs, meaning there were nearly 15,000 – or two-thirds of all “Left Eligible” athletes and 16 percent of all athletes – who went missing in the data.<sup>ix</sup> These athletes did not graduate, but the numbers account for them as if they did – painting an inflated picture of academic success. As a result, the GSR for programs is consistently 20 points higher than the FGR, and the NCAA can falsely declare victory.<sup>x</sup>



15,000

**Number of players  
missing from NCAA  
graduation rate  
calculations**

No matter what metric you use, one thing is consistently clear: black male athletes are not doing well. Whether you use the NCAA’s metrics or the federal standard, significant disparities exist. According to the University of Southern California’s Race and Equity Center, black male athletes at the 65 colleges that comprise the top athletic conferences, also known as the Power Five, graduate at a rate that’s 5 percent lower than black undergraduate men overall, 14 percent lower than college athletes overall, and 21 percent lower than all students.<sup>xi</sup>

These gaps are even more startling for black football and basketball players, who generate most of the money in college sports. According to an analysis by the College Research Institute, black football and basketball players at Power Five

colleges have graduation rates that are 22 and 35 percent lower than their peers, respectively.<sup>xii</sup> In the Pac-12 Conference, the graduation gap for black men's basketball players is an astounding 53 percent.<sup>xiii</sup>

**According to analysis by the College Research Institute, black football and basketball players at Power Five colleges have graduation rates that are 22 and 35 percent lower than their peers, respectively.**

Within some individual programs, it can be a rarity for any athletes to make it to graduation. According to an analysis of the 2015 NCAA men's basketball tournament, also known as "March Madness," several teams were lucky to graduate any players at all. The University of Cincinnati and Indiana University each reported an FGR of 8 percent, with Oklahoma State University just behind them at 9 percent.<sup>xiv</sup> Compared with the student body as a whole, these programs had 52, 66, and 60 point gaps, respectively.<sup>xv</sup> That means in each of these cases, only one player out of a typical 15-player roster would have graduated within six years at the college from which they originally accepted a scholarship.

### **Federal Graduation Rates of 2015 March Madness Teams**

- 8%** **University of Cincinnati**
- 8%** **Indiana University**
- 9%** **Oklahoma State University**

Regardless of how you look at the numbers, there is a crisis on college campuses. While the NCAA may try to find ways to sugarcoat the data, far too many athletes are missing at graduation ceremonies. Considering that scholarship athletes must remain in good academic standing to be eligible to play at all, it begs the question: how could so many compete one day and fail to get a diploma the next? Further, these athletes are disproportionately black and primarily compete in basketball and football, the sports that generate billions in revenues for mostly white administrators, coaches, shoe company executives, and media company owners. As we covered in our first report, the refusal to compensate college athletes is a modern civil rights issue, as black teenagers are kept poor in order to enrich white adults. The failure of so many black athletes to graduate, especially in the program that makes the most money is another aspect of the growing civil rights crisis in college athletics.

Unfortunately, failing to graduate athletes is only one way that colleges and their athletic programs leave athletes without a meaningful education.

#### **Academic Fraud 101: Keeping athletes eligible, at all costs**

Every few months, it seems, a new academic scandal breaks out on a college campus. Since 1990, the NCAA has processed more than 40 cases of academic fraud, practically an annual tradition.<sup>301</sup> Yet, the NCAA and its member institutions routinely tout the opportunities big-time college sports afford. “A college education is the most rewarding benefit of the student-athlete experience,” they say.<sup>302</sup> In some sense they’re right: a college education is transformative. That is, if colleges maintain an environment where athletes have the opportunity to learn. Still too often, that promise is hollow.

**Since 1990, the NCAA  
has processed more  
than 40 cases of  
academic fraud.**

College athletic programs routinely find ways to undermine educational opportunities for athletes. Most egregiously, some programs have committed outright academic fraud to maintain an athlete's eligibility, often by having tutors complete assignments for athletes, enrolling athletes in courses that require no attendance or work, or fabricating eligibility information such as test scores.

Two cases of widespread academic fraud, at the University of North Carolina (UNC) and Syracuse University, best illustrate how programs put athletics before academics and what the implications are for athletes.

First up: Syracuse, New York. In 2005, following a season of poor academic performance from his players, Syracuse's head basketball coach, Jim Boeheim, hired a new director of basketball operations with an imperative: "fix" the academic problems of his athletes.<sup>xvii</sup> Coming off a national championship just two years prior, the program's poor academic performance threatened to keep Syracuse out of future "March Madness" tournaments, regardless of performance on the court. The message was clear: turn things around, at all costs.

According to an eight-year investigation by the NCAA, the director found a simple solution: impersonate the athletes at risk and do their coursework for them. The director and academic support staffers sent emails from players' accounts and corresponded directly with their professors.<sup>xix</sup> Many of these emails included attached academic coursework, which was necessary to maintain the required grades for eligibility. As with the emails, those assignments were completed by the staffers. The NCAA investigation revealed this scheme extended well beyond the precarious 2005 season.<sup>xx</sup>

Perhaps most telling was Syracuse's desperate attempts in 2012 to keep their star center on the court. In January of that year, Syracuse was the top-ranked team in the country with a perfect 20-0 record. However, their star seven-foot center Fab Melo had failed to make enough academic progress to remain eligible. Syracuse submitted a waiver to the NCAA hoping for an exception in his case due to medical and personal difficulties. When the NCAA denied the request, Syracuse held a meeting of top university leaders, including the associate provost, athletics director, and the director of basketball operations, to discuss their options. One day later, a professor met with Melo and agreed he could submit extra work to raise the C-minus grade he received the previous year. The assignment? A paper on the medical and personal problems Melo faced in college. Melo simply submitted a minimally revised version of the waiver Syracuse sent to the NCAA

and his grade improved to a B-minus. The grade change was posted on February 1<sup>st</sup>. Melo played three days later.<sup>xxx</sup>

Meanwhile, down in Chapel Hill, North Carolina, the biggest academic fraud scheme in college sports history was concluding after operating for nearly two decades.

The cheating began simply enough. In 1988, Julius Nyang'oro, a faculty member with UNC's African and African-American Studies (AFRI/AFAM) department, offered an independent study course to two basketball players with marginal academic records.<sup>xxii</sup> Typically, independent study courses are rare and only extended to outstanding students whose interests cannot be accommodated by traditional course offerings. Regardless, the two players earned B's, even though neither was an AFRI major and both had struggled in their other course work.

Over the next decade, independent study courses ballooned in the AFRI/AFAM department. In 1993, Nyang'oro became the chair of the department, and with the help of Burgess McSwain, the longtime academic counselor for UNC's basketball team, and Debbie Crowder, who served as Nyang'oro's administrative assistant, they developed a system of independent course offerings with increasingly large enrollments. From a handful of students in 1991, the enrollment in these courses grew to 34 in 1995, 50 in 1998, 86 in 2000, 175 in 2002, and a whopping 341 in 2004.<sup>xxiii</sup>

Colloquially known as "paper classes," the independent study courses required only a research paper at the end of the semester. The issue: no faculty members were involved in the courses. Instead, Crowder would sign up students, assign them papers, and do all of the grading. Students were guaranteed an A or a B no matter the quality of the paper. Often these papers were plagiarized, written by the athletes' tutors, or barely qualified as a legible paper at all.<sup>xxiv</sup> Later versions of the "paper classes" were designated as lecture courses to allow athletes to take more in a semester. These courses appeared in the course catalog as having a meeting room and time, but no students ever met.

By the end of the scheme in 2011, following Nyang'oro's departure, more than 3,000 students in total would enroll in nearly 200 courses that qualified as fraudulent.<sup>xxv</sup> Nearly half of all enrollments were athletes, despite accounting for only four percent of UNC's undergraduates. More than 20 percent of UNC athletes took these courses, while just two percent of the general student population did.<sup>xxvi</sup>



The results of the “paper classes” prove their singular intent was to keep athletes eligible and ensure they could focus entirely on athletics. Between 1999 and 2011, about 170 athletes would have seen their semester GPAs drop below the 2.0 eligibility threshold at least once if not for the “paper classes.”<sup>xxxvii</sup> After Crowder left in 2009, the football team experienced its lowest cumulative GPA in a decade. Ultimately, 80 students would not have graduated without these courses.<sup>xxxviii</sup>

Notably, when academic fraud schemes are uncovered, let alone any violations of NCAA rules, the athletes tend to bear the brunt of the punishments. Melo would eventually lose eligibility for the entire NCAA tournament in 2011-12, despite Syracuse’s best efforts.<sup>xxxix</sup> While Jim Boeheim and Syracuse would suffer from vacated wins and a one-year post-season ban, Boeheim remains the head coach and Syracuse continues to be a top contender annually. And at UNC, several football players and other athletes were banned from NCAA competition, but the university itself only received probation from its accreditor.<sup>xl</sup> Further, despite widespread participation by men’s basketball players, neither the program nor its Hall of Fame coach, Roy Williams, received any punishment and went on to win multiple national championships in the aftermath.<sup>xli</sup>

These scandals also speak to the tension between athletics and academics that routinely undermines academic integrity and with it, the educational opportunities colleges purport to provide. It is tempting to view these scandals as athletes being complicit in breaks and privileges not available to other students. But athletic programs have nearly complete control over the lives of their athletes as well as the culture they instill. Programs can choose to exercise that unique responsibility in ways that give their athletes both educational opportunity and freedom or steer their athletes away from a real educational experience. Far too often, under the pressure to win, programs elect to undermine the educational mission at the core of the institutions they represent. In these cases, regardless of victories on the field or court, the athletes lose.

#### **Academic Fraud 102: “Majoring in football”**

When Stephen Cline, a former Kansas State University lineman, explained to USA Today that “he was majoring in football,” he described an experience that has become pervasive across college sports: the pressure and commitment to win comes before the opportunity and responsibility to learn. The tension between

the “student” and the “athlete” has become increasingly unbalanced, as the latter takes precedence amid the high stakes of college sports. As a result, athletes promised an education implicit in their scholarships too often find that promise hollow, no matter the choices they make.

Consider the actual daily experience of a college athlete. While the NCAA makes clear at every chance that “student-athletes” are not employees, their schedules mirror the most strenuous jobs. According to the NCAA’s own study, athletes average more than 40 hours a week on athletic commitments, while in-season.<sup>xxxiii</sup> Already that amounts to a full-time job, but even this is likely an underestimation. A 2015 study by the Pac-12 conference found that athletes averaged more than 50 hours per week on athletics-related activities,<sup>xxxiii</sup> and during the Northwestern University football team’s hearing with the National Labor Relations Board that same year, the players revealed they spent upwards of 60 hours a week on football-related activities.<sup>xxxiv</sup>

Now add the hours required to qualify as a student and maintain eligibility. At a minimum, athletes must average 12 credit-hours per term to maintain adequate progress towards a degree. This typically includes two to three hours outside the class studying per credit-hour.<sup>xxxv</sup> That amounts to 36-48 hours devoted to coursework per week. Combined with average athletic commitments, an athlete will spend 80-90 hours per week just fulfilling their dual obligations as a student and an athlete, and easily those commitments can surpass 100 hours.

The extensive time commitments help explain another common part of a college athletes’ experience: counseling into easy majors and coursework unrelated to their interest or ambition. Again, Cline’s story offers an illustration. Despite a passion to become a veterinarian, which would require rigorous science coursework, his academic counselor pushed him toward settling for a sociology degree. A 2008 review by *USA Today* showed that athletic programs routinely push athletes toward a handful of majors they deem are either less demanding or that better fit athletic schedules. *USA Today* defined this phenomenon of “major clustering” as when a quarter or more of a program’s athletes were in the same major. After reviewing football, softball, baseball, and men’s/women’s basketball at 144 top division schools, they found that more than 80 percent had at least one cluster and more than a third had at least two.<sup>xxxvi</sup> Further analysis found that black athletes were far more likely to be clustered into majors than their white teammates. At six football programs in the Atlantic Coast Conference, over 75 percent of the black players were enrolled in one or two majors.<sup>xxxvii</sup>

### **In-season daily schedule for a Division-I football player**

**5:00 am Wake up**  
**6:00 am: Work out**  
**7:15 am: Check-in to breakfast**  
 (grab whatever you can so you're not late to class)  
**7:30 am: Class**  
**9:00 am: Class**  
**10:30 am: Rehab and treatment**  
**12:30 pm: Class**  
**1:30 pm: Grab lunch if you have time**  
 (most days you don't)  
**1:45 pm: Get taped, and get to meetings by 2pm**  
**2pm-6:30: Meetings and practice**  
**7:00 pm: Dinner**  
**8pm-10pm: Study hall**  
**10pm-Midnight: Finish school work, find food, watch film, study playbook**

(credit: former Purdue safety Albert Evans)

The frequency of this phenomenon proves a broad lack of academic integrity across college sports, and more importantly, a disregard for fulfilling the promise of a scholarship. If an athlete cannot pursue their academic interests, the central value of a college education is lost. Stephen Cline exemplifies the result of this practice: at the time of his *USA Today* interview and despite having a degree in sociology, he was trying to enroll again in college – to earn the prerequisites for acceptance into a veterinary program.

#### **“Left torn, worn and asking questions”**

Myron Rolle is the exemplar of what the NCAA argues a “student-athlete” can be and achieve. As a safety at Florida State University, Rolle managed a 3.75 GPA while completing pre-medical requirements and earning a Rhodes Scholarship, all while remaining a top prospect for the NFL.<sup>xxxviii</sup> If anything, Rolle should extol the virtues of a system that gave him so much opportunity.

Yet, testifying before the Senate Commerce Committee in 2014, Rolle told the truth:

“A lot of players would go through this academic machinery in their colleges and be spit out at the end of that machinery, left torn, worn and asking questions, with really no guidance on where they should go. No purpose, no idea of their trajectory, and sometimes left with a degree in hand that didn’t behoove any of their future interests.”<sup>xxxix</sup>

Mary Willingham also saw the product of this system, firsthand. Willingham served as a learning specialist at UNC before she courageously blew the whistle on its academic fraud scheme. “The guys I worked with are power-washing houses, they’re working odd state jobs, they’re working third shifts at Targets,” she recalls. “They’re not using their degrees because we didn’t teach them what that degree can really get you.”<sup>xl</sup>

**A lot of players would go through this academic machinery in their colleges and be spit out at the end of that machinery, left torn, worn and asking questions, with really no guidance on where they should go. No purpose, no idea of their trajectory, and sometimes left with a degree in hand that didn’t behoove any of their future interests.**

These stories disproportionately affect the most marginalized: those who are black and come from poverty. Meanwhile, they serve a multibillion-dollar industry and play before predominantly white audiences. Last year, black men made up 2.4 percent of undergraduate students enrolled at the 65 Power Five conference schools, but comprised 55 percent of football teams and 56 percent of men’s basketball teams on those campuses.<sup>xli</sup> In fact, at many of these schools, black male athletes make up as much as 40 percent of all black men on campus.<sup>xlii</sup>

College mission statements are littered with high-minded ideals about the value and purpose of an education. However, it’s clear these ideals too often do not extend to the athletes that dedicate their bodies and well-being to the very institutions that break their promises to them.

## Conclusion

A college degree and the education it represents have the power to transform lives. Unfortunately, the potential of a true college education will never be realized for far too many athletes across college campuses. Whether due to outright academic fraud, overly burdensome athletic schedules, academic counseling into specific majors and mismatched courses, many college athletes never get a fair shot at the opportunities that should come with a scholarship. Frequently, those most exploited within this system are athletes of color and those who come from impoverished backgrounds. The fact that this exploitation happens at institutions of higher education makes the current crisis all the more disturbing.

Incremental changes won't fix this crisis. The NCAA and its member institutions need to take immediate and significant steps to restore the promise and opportunity of a college education to athletes who have been denied that for too long. Those changes begin with complete transparency into the academic data of college athletes while they're on campus and their economic outcomes once they leave. It continues with ensuring that an athlete's educational opportunities are protected from and prioritized over the demands of their sport. College programs should guarantee scholarships for four years – rather than keep them subject to the year-to-year whims of coaches or the risk of career-ending injuries. Further, colleges must maintain a reasonable balance between the hours athletes commit to athletics and academics. Finally, there must be real accountability on programs that commit academic fraud – not just in the most egregious cases but when they systemically prioritize athletic commitments over educational pursuits.

Change means giving athletes a fair shot at an education. It means finally living up to the promise every institution makes to an athlete when it extends a scholarship offer. It means actually practicing the values these higher education institutions espouse.

Let's start supporting athletes not only when they're on the field, entertaining us, but also in the classroom when that support truly matters. Let's demand better from colleges, which benefit every day from their athletes' efforts without returning the favor.

### Preview of Future Reports

This is the second in a series of reports that will consider a range of problems with college athletics. Subsequent reports will examine the long-term health and well-being consequences that college athletes face and the lack of comprehensive healthcare afforded to them, why the NCAA fails to enact meaningful reforms, and a look forward at how we can address the litany of issues within this industry.

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<sup>3</sup> Sports Illustrated. (Sept 11, 2013). Special Report on Oklahoma State Football: Part 2 – The Academics.

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<sup>4</sup> Myron Rolle testimony before the Senate Commerce, Science & Transportation Committee Hearing on College Athletes & Academics on July 9, 2014. <https://www.c-span.org/video/?320346-1/hearing-college-athletes-academics>

<sup>5</sup> NCAA. (Nov 14, 2018). College athletes graduate at record high rates. <http://www.ncaa.org/about/resources/media-center/news/college-athletes-graduate-record-high-rates>

<sup>6</sup> *Id.*

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<sup>9</sup> *Id.*

<sup>10</sup> See note v.

<sup>11</sup> Harper, Shaun. (2018). Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports. USC Race and Equity Center. <https://race.usc.edu/wp-content/uploads/2018/08/2018-Sports-Report.pdf>.

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<sup>13</sup> College Sport Research Institute. (Aug 30, 2018). 2018 Adjusted Graduation Gap Report: NCAA Division-I Basketball. The University of South Carolina. [http://csriconference.org/home/wp-content/uploads/2019/01/2017-18-Basketball-AGG-Report\\_Final\\_8-30-18.pdf](http://csriconference.org/home/wp-content/uploads/2019/01/2017-18-Basketball-AGG-Report_Final_8-30-18.pdf)

<sup>14</sup> See note v.

<sup>15</sup> *Id.*

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<sup>20</sup> *Id.*

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Senator MORAN. Thank you for your testimony.  
Mr. Spencer.

**STATEMENT OF KENDALL SPENCER, CHAIR,  
STUDENT-ATHLETE ADVISORY COMMITTEE,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION**

Mr. SPENCER. Chairman Wicker, Chairman Moran, and Ranking Member Blumenthal, thank you for inviting me to speak on behalf of the hundreds of thousands of men and women who represent the current, former, and future student athletes, some of whom are sitting behind me today.

My name is Kendall Spencer. As a Division I track and field student athlete at the University of New Mexico, I have won national championships, secured multiple All-American honors both academically and athletically, and represented my country abroad in international competition.

Today my advocacy on behalf of student athletes starts with the Student-Athlete Advisory Committee. In this capacity, I led my group to numerous policy decisions that were set to benefit the student athlete welfare that eventually led to my appointment as the first student athlete to serve on the NCAA's Board of Directors.

Today I am a third-year law student at Georgetown University where I am a technology, law, and policy scholar focusing on privacy, election security, and the role that emerging technologies play in shaping this current digital economy. I continue to train competitively while in law school with my eyes firmly set on making the 2020 Olympic team.

In this testimony, I will discuss the name, image, and likeness through the lens of today's modern student athlete, giving strict emphasis to the technological framework that we live in today.

Now, as many of you know, NIL has the right to publicity which, as a result of our Federalist system, is determined by the extent of its recognition at the State level. Consequently, we left with a patchwork of State laws designed to regulate NIL.

Members of the Committee, let me illustrate for you what this actually looks like. It looks like a 17-year-old high school student athlete choosing between two institutions not because of the educational value but rather because of which state has the fewest restrictions on the financial benefit they can gain from their NIL. If within intercollegiate athletics and as a nation we value education, this is not something that we should allow to happen so freely.

Now, today's discussion is not for me to comment on the strain this places on interstate commerce or to describe the burden it places on institutions that conduct business throughout the country, but I can illustrate the glaring danger looming in the shadows for student athletes.

In all of these conversations, we must understand that today's student athlete lives in this innovation economy driven by social media influencers and emerging technology platforms. A student athlete's NIL, however, is inextricably tethered to technology, and this makes the value and protection of this right incredibly complex. The social media landscape that all student athletes today live in is grossly under-regulated leaving many of the users without protection when their NIL is misappropriated. Additionally, a stu-



dent athlete will have to monitor the use of his or her potential misappropriation and ensure that he or she is compliant with this myriad of State laws that may or may not recognize these rights.

The assumption that student athletes, many of whom already spend upwards of 60 hours a week on athletically related activities, will have the time to monitor the use of their NIL in order to protect their profit is absurd. The notion of expecting student athletes to potentially hire an agent to manage their brand on top of perhaps an attorney to ensure compliance with this patchwork of State laws is unreasonable. And this expectation that community members will continue to be able to support student athletes at such a high level without fear of violating a student athlete's NIL agreement is absurd.

Members of the Committee, this is not just a matter of protecting the student athlete experience. This is about maintaining the welfare of students who happen to be athletes.

So what is the student athlete experience? It is the flashcards we take into the ice bath. It is the textbooks that we take with us on long road trips to games. It is the term papers that my teammates reviewed for me when we were in the hotel rooms.

It is in this moment that we see the distinction between college sports and the professional leagues. This is the moment that we see the value in protecting the student athlete experience and more importantly the welfare of all student athletes. Here we recognize the role of education.

Members of the Committee, when it comes to protecting the welfare and the success of student athletes, it is not enough to get it done. We have to get it right. And this means allowing the membership and the institutions that help guide us to our educational goals the appropriate time to be able to design a structure where this current innovation economy can fit into.

So in conclusion, I would implore each of you to consider the impact this would have on the incredible value of the student athlete experience, what it means for intercollegiate athletics, and more importantly, the world that student athletes live in today. Thank you.

[The prepared statement of Mr. Spencer follows:]

PREPARED STATEMENT OF KENDALL SPENCER, CHAIR, STUDENT-ATHLETE ADVISORY COMMITTEE, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Mr. Chairman and Members of the Committee,

My name is Kendall Spencer. Thank you for the opportunity to offer testimony on behalf of the hundreds of thousands of current and former student-athletes on this important issue of Name, Image, and Likeness.

For more than a decade, my efforts—as they relate to student-athlete advocacy—focused on highlighting today's student-athlete experience, and making sure that the impact on our welfare is not misplaced in these discussions around emerging issues. Contrary to popular belief, student-athletes live considerably active lives beyond what the public streams on today's media platforms. In order to protect the lives and experiences of these individuals, we must all ensure that these conversations reflect the critical impact to relevant components such as education, time demands, and gender equity. The complexity surrounding the commercial use of Name, Image and Likeness is not exclusive to intercollegiate athletics, but reflects the broader societal issues that modern America faces today.

Today I am currently a third-year law student at Georgetown University Law Center, where I am a Technology Law and Policy Scholar focusing on Privacy and Election Security. Throughout law school, I have continued to train competitively as

a Track and Field athlete with the expectation of competing in the 2020 Olympic Games.

Before making my way to Washington D.C., I was a Track and Field student-athlete at the University of New Mexico. During my time on campus I competed in the Olympic Trials, was a National Champion, and a Two-Time Division I NCAA All-American, ultimately leading to me securing a silver medal for my country while competing in Mexico City.

As a student-athlete I was a member of the Student-Athlete Advisory Committee (SAAC) at the institutional, conference, and national levels, charged with representing the voice of student-athletes on all issues from time demands to pay for play. I served as the SAAC chair at the national level for a number of years and became the first student-athlete to serve on the NCAA's Board of Directors.

In this testimony, I will explain the framework that today's modern student-athlete lives in, as well as the value of the student-athlete experience, with emphasis on the practical application of Name, Image, and Likeness within intercollegiate athletics.

### NAME, IMAGE, AND LIKENESS

Name, Image, and Likeness (NIL) are smaller but complex elements comprising the Right of Publicity. This right, in all of its complexity and confusion, is the right of any person to control the commercial use of their identity by others without their consent. Despite widespread acknowledgement as a core right granted to every individual, there is no single right to publicity. A consequence of our federalist system in the U.S. is that the recognition of publicity rights is highly decentralized, with each state responsible for its standards for recognizing human identity—or what is left of it.

Contrary to today's discussion around NIL and the concept of this right to publicity, the first cases delving into this complex topic were rooted in privacy issues. Most of the causes of action around NIL involve a variety of infractions leading to the conclusion that a person was unduly harmed due to the commercial use of their identity without their consent. To date, there is no uniform model for the right to publicity to serve as a one-size fits all example suitable to cross state lines. This creates a porous system designed to protect human identity rather than a patch work of state laws.

Discussions surrounding the issues of commercial use of a person's Name, Image, and Likeness is not a new conversation; however, the discussion has continued to evolve into a popular issue with regard to intercollegiate athletics and the professionalization of student-athletes.

#### I. TODAY'S MODERN STUDENT-ATHLETE LIVES IN A WORLD DOMINATED BY POWERFUL ACTORS THAT DID NOT EXIST UNTIL RECENTLY.

Student-athletes today live in a world that is highly complex, both operationally and logistically. The day to day activities of athletes on campus involve a sequence of tasks, responsibilities, and hurdles shaping the lives of young students in ways that transcend their on-the-field activity. Beyond the typical balancing act student-athletes take up when they commit to an institution looms the societal framework we all subject ourselves to in today's modern culture. In today's social construct—driven by digital communication and emerging technology platforms—student-athletes live lives that often go unnoticed to today's fan and proponents who continue to call for the recognition of Name, Image, and Likeness as a form of compensation.

Laws and regulatory frameworks providing societal boundaries for Americans do not exist in a vacuum, rather they too manifest themselves through the context of the times they exist in. Student-athletes are also subject to these factors. As a result, the lives of student-athletes, and the impact of Name, Image, and Likeness within the constructs of intercollegiate athletics, cannot be discussed as if they exist in a world without technology. While our rights themselves may not change over the years, the way we express these rights is fundamentally different. As long as the U.S. values innovation and technological advancement, this will continue to be an emerging issue within American public policy.

#### A. ROLE OF TECHNOLOGY FOR THE MODERN STUDENT-ATHLETE

The lives of today's student-athletes—like most of the nation—are in fact dominated by the proliferation of emerging technologies. Technology serves a dual purpose in athletics that connects student-athlete to institutional resources (online lectures, and study materials) on and off the field. Emerging tools in the tech space also connect fans with the players they love to support and cheer for. Athletic contests can be streamed, recorded, duplicated, and used for educational purposes presenting enormous value to the student-athlete. While the innovative benefits in the

form of efficiency and access are graciously accepted, a regulatory structure around technology and its constructs has been difficult to create at both the state and Federal level given the rapid growth within those spaces.

*B. STUDENT-ATHLETES AND THE INNOVATION ECONOMY DRIVEN BY SOCIAL MEDIA*

This innovation economy is the idea that entrepreneurs, social media influencers, and other content creators (as it relates to technology) are really the ones who are helping to drive economic growth in today's society. Furthermore, it refers to this idea that most anyone has access to the potential for economic success but is not guaranteed any benefit for the efforts they are putting in. The innovation economy puts into context the world that today's student-athletes live in, how they interact with each other, and, more importantly, their ability to create any narrative that they choose.

Social media is a vehicle today's student-athlete uses to navigate this new innovation economy which allows influencers, entrepreneurs and technology authorities to become key drivers for economic growth. When people talk about how we exercise some of the core rights granted to us in the Constitution, such as free speech, social media is the way that today's student-athletes and youth are expressing themselves. Around the world, companies see this and, in recognition of its utility to reach their target audience and potential consumers of products they sell, have begun to redirect advertising to social media and social media influencers. The market around social media influencers is one of the engines powering the debate around potential financial success via Name, Image, and Likeness. One of the many concerns regarding this idea is the brand development, significant effort, and extraordinary talent or niche needed to capitalize on this opportunity. These necessary characteristics are not retained by all student-athletes however. While some influencers can receive a very lucrative living from social media by leveraging their network, the majority of users do not, and will never have access to that type of brand influence. More importantly, social media exemplifies one of the many question marks around building a regulatory structure involving emerging technologies.

To date, social media platforms still lack significant regulation—the current state of financial success when it comes to social media platforms, such as YouTube, Instagram, Facebook, and Twitter, are tied to the number of subscribers, views, or likes on a picture that any individual might receive on their post. At any given time, however, the individuals who run these platforms can remove any one of these features without permission from the user or the Federal government. Unfortunately, this would also remove one of the sources of revenue streams for social media users.

Social media gives us access to the world around us. It allows us (student-athletes) to connect with fans, supporters, individuals we admire and, more importantly, the community. Despite the role social media plays in everyone's lives, most platforms are grossly misunderstood and often allow for the Name, Image, and Likeness of any of its users to be misappropriated without consequence. A diligent review of terms and conditions for many of these platforms would illustrate this fact.

*C. REGULATORY FRAMEWORK IMPACTING THE STUDENT-ATHLETE EXPERIENCE*

The Right of publicity, personality rights, and Name, Image, and Likeness are all phrases often used interchangeably. As with other rights, however, the way we exercise this right through technology complicates already difficult issues. Because we live in a data driven society, one of the floating issues is how we define Name, Image, and Likeness. In particular, what is likeness and how can we arrive at a definition that is both fair and inclusive?

Generally, everyone has a right to control the commercial use of their Name, Image, and Likeness; however, the value of exercising this right is not necessarily worth the efforts needed to protect it. Not everyone's commercial use of their Name, Image, or Likeness will be a lucrative endeavor. Not all student-athletes attribute the same value to their Name, Image, and Likeness. Unfortunately, this publicity right has become a subject of popular debate in the U.S. but not for the reasons that it should be.

For the student-athlete, Name, Image, and Likeness has been thrown around by the public in an attempt to justify the collegiate model for amateurism. It has also been used as a justification for creating a free market in intercollegiate athletics despite the negative impacts that it would have on the majority of student-athletes. Within the current discussion on this topic, conversations fixate around the NCAA rather than the welfare of the student-athlete. This unfortunate truth reflects the bitter reality that this current debate is placing student-athletes in the crosshairs of a war between sports fans seeking access to content, and the NCAA looking to

provide a workable model that prioritizes educational opportunity and academic stability to all student-athletes.

NIL, like the right to publicity, also has important implications regarding privacy rights. The right of publicity and the right to privacy are inextricably connected. Some of the basic privacy rights we enjoy today evolved out of disputes regarding the right to publicity. Many privacy rights, for the most part, are, like publicity rights, states' rights, which means they exist within the framework that states choose to recognize them in. This is why we talk about privacy laws as a patchwork of regulations governing protections within this country. One of the causes for concern with regard to privacy issues and NIL is the close relationship with technology. States are struggling to wrap their heads around privacy, how to protect it, and what to do next. The patchwork of privacy laws at the state level are leading to constant petitions to the Federal government for a broad sweeping piece of legislation that will govern privacy protections in the U.S.

Like many other rights, the right of privacy exists through the constructs that student-athletes interact with—social media, a platform that exists without regulation. What's important is that privacy is intertwined through all of this. Privacy rights were created in an environment that did not foresee the changes in society or the regulatory structures that we see today. It also did not, or could not, predict the growing and emerging role that technology is playing in today's social structure. Furthermore, the U.S. reliance on digital communications are also heavily impacted by right to privacy—this includes streaming (music, television, athletic contests). Legally, in intercollegiate athletics, administrators at the institutional conference and national level need to understand how these rights and regulations operate in order to avoid liability when it comes to college athletics.

## II. UNDERSTANDING THE STUDENT-ATHLETE EXPERIENCE AND ITS VALUE IS A CRITICAL COMPONENT TO ASSESSING THE IMPACT OF COMPENSATION THROUGH NAME, IMAGE, AND LIKENESS ON THE MODERN STUDENT-ATHLETE.

The recognition of Name, Image, and Likeness as a form of compensation for student-athletes substantially impacts the student-athlete's experience: a critical component to intercollegiate athletics and the overall value of participating in college sports. The recognition of value and the substantial role that the student-athlete experience plays within intercollegiate athletics, and society, was one of the many reasons that the Student-Athlete Advisory Committee (SAAC) exists and continues to have a voice throughout the membership process. One of the many functions carried out by SAAC at both institutional and national levels involves highlighting current changes to regulatory, political, academic, and athletic frameworks, and analyzing their impact on the student-athlete experience. In this regard, the work done by SAAC at every level operates as more than a sounding board for institutional reform, but instead stands as a principled voice of the primary stakeholders in all of these discussions.

### A. *THE STUDENT-ATHLETE VOICE IS MANIFESTED THROUGH THE STUDENT-ATHLETE ADVISORY COMMITTEES PRESENT ON EVERY COLLEGE CAMPUS*

I served on SAAC at the institutional level, I chaired the Mountain West conference SAAC, and eventually became chair of the National Division I SAAC. This ultimately led to my appointment as the first student-athlete to serve on the NCAA's Board of Directors. National SAAC creates the opportunity for student-athletes to involve themselves in NCAA's governance, policy making, and transparency efforts as they relate to all sports. At the national level, all of the committees within the membership, including the Olympic committees that govern USA Olympic team selection, receive at least one liaison from the SAAC. In this capacity, I have served on the Competitive Safe-Guards and Medical Aspects of Sports Committee tasked with creating and reviewing many of the changes to concussion protocol and mental health resources. I also served as a liaison to the Olympic Sports Committee. This was an incredibly important role as it represents the fact that many of our outstanding performers at the Olympic Games are current, or former, student-athletes. How we deal with issues at the collegiate level impacts decisions made elsewhere.

### B. *THE VALUE OF THE STUDENT-ATHLETE EXPERIENCE*

The student-athlete experience is what gives intercollegiate athletics, and many of our college campuses, life. It's why colleges sponsor athletics. It's the reason student-athletes have higher graduation rates than the regular student body. And it's the motivating factor powering student-athletes to give their time, energy, and attention to four years of discipline, training and success beyond the field. The student-athlete experience encompasses components operating beyond the touchdown

passes, goals scored, and perfectly executed technique. The way we engage with our academic advisors, our student body, our coaches, our training staff, and perhaps most importantly, our teammates and surrounding community, are all relevant factors that impact the student-athlete experience.

When we arrive on campus, many of us will have an opportunity to compete in athletic contests at the institutional level. Some of us will have an opportunity to compete at the conference level. But very few student-athletes will have the privilege of competing for a national title or championship at the national level. Regardless of whether you are a third string quarterback, or Division I national champion, most student-athletes will find that upon graduation it's not the trophies or the on-the-field successes that they take with them after graduation. Instead, it's the lessons that come from participation in intercollegiate athletics that transcend every victory, every loss or injury, and any gold medal that a student-athlete may experience at one point in time or another. The few individuals outside of intercollegiate athletics that actually choose to recognize the value of the student-athlete experience and the valuable lessons we take away from our experiences usually hear about time management skills, discipline, and teamwork. But what you don't hear about are things like selflessness, patience, perseverance, and comradery. These are themes of our experience that connect us to our universities, our communities, and the people that support us beyond the talents that we display on the field. These are the interactions that student-athletes hold onto.

Unfortunately, when it comes to the current debates around Name, Image, and Likeness, the intercollegiate model for amateurism, and the overall value that student-athletes tap into by being a student-athlete, the majority of individuals leave the student-athlete experience out of the equation. This does a great disservice to the student-athlete, the institution, and society as a whole because it is an experience that makes the intercollegiate athletic model in the United States as important as it is. It's also the reason why comparing athletes at the professional level with student-athletes at the collegiate level is so incredibly dangerous. On balance, the public bases this comparison off of what they see. They base it off of the performances viewed on ESPN, and the incredible value that entertainment brings to their screens. But most viewers don't see the experiences we share with each other before or after the game. They don't see the flash cards we take into the ice bath. They don't see the textbooks that we bring on the bus ride to away games. And for athletes like myself, they'll never understand the value of surrounding ourselves with likeminded individuals connected by an ambition for success on and off the field.

Because the public typically only pays attention to the 2 percent of student-athletes at the elite level, they often fail to consider the hundreds of thousands of student-athletes who will go pro in something other than their sport. Soccer players who win conference championships still go to med school; football players who choose not to participate in the draft become professors; and track and field athletes, like myself, continue to train for the Olympics while balancing law school. But more importantly, student-athletes that participate in intercollegiate athletics have an opportunity of exposure that no other organization or institution has been able to provide. Student-athletes come to these great academic institutions and leave as scholars. The same individuals that come to these universities thinking their value in society is one dimensional, receive mentorship and guidance that enable them to leave with master's degrees and other fantastic credentials. Some of these very same student-athletes are probably in this room today.

### *C. KEY FACTORS SHAPING THE STUDENT-ATHLETE EXPERIENCE*

#### TIME DEMANDS

The student-athlete experience is tied to a variety of different factors. This includes, but is not limited to, time demands, team dynamics, and community engagement. The majority of fans think that our college experience revolves around the games they see on weekends, when in reality we are spending copious amounts of time in, and outside of, the training room. In 2014, myself, and the rest of my colleagues on Division I SAAC, launched the largest time demands survey in the country, which ultimately lead to many of the playing time policies and other athletic procedures that you see today. Unsurprisingly, we found that student-athletes were spending upwards of 50–60 hours per week on athletically related activities.

On top of these activities, student-athletes are also expected to be full time students and to rise to the highest levels of academic excellence. The presence of these standards and expectations are what lead to the successes off the field that student-athletes are known for, many of whom say they would not change it for the world. Name, Image, and Likeness complicates this fragile dynamic of time demands. NIL is only valuable if it can be controlled and protected. In order for a student-athlete

to capitalize on this dynamic, her NIL will need to be monitored at every level: academic, institutional, conference, national and state.

Any social media influencer will tell you that monitoring an individual's Name, Image, and Likeness on some of these platforms can be a hefty task. When coupled with the efforts needed to develop your brand on social media in order to gain a profit from it, this would place a substantial burden on the already limited time and attention student-athletes give to the tasks in front of them. Bad actors, acting with the malicious intent of taking advantage of this opportunity, threaten the welfare of student-athletes.

Given the current regulatory state of NIL, student-athletes choosing to embark on that journey would likely have to hire an individual to monitor the use of their brand and perhaps an attorney to regulate compliance with the porous framework of state laws governing its use. A considerable amount of effort would have to go into the management, development, and compliance with the state of Name, Image, and Likeness and the regulatory framework around it. Student-athletes do not live in world where these external pressures are non-existent. As a result, the impact on the already burdensome time demands of student-athletes would be exacerbated.

#### TEAM DYNAMICS

Another important aspect of the student-athlete experience is the impact of the team dynamic. On the surface, student-athletes develop teamwork and the ability to manage expectations. But teamwork and team dynamics go a lot deeper than that. It's the value of altruism—really being selfless and understanding that some things are more important than you. This is understanding that regardless of what your role is, everyone has a role to play. One of the reasons I think this lesson is so incredibly important, and why its tie to the student-athlete experience is so valuable, is because teamwork transcends college athletics; teamwork is the way our country should work.

Society initially was designed to function through teamwork. Teamwork is one of the reasons we are all here today, because we recognize the value, and more importantly, the need to work these problems out as a unit. On balance, I think the issues we find plaguing intercollegiate athletics and the complexities around college sports are the same complexities and problems that we deal with on a societal level.

Teamwork and the relationships that I built as a track and field student-athlete with my relay, with the other student-athletes at my school, within my conference, and throughout the NCAA, are the lessons that all of us actually take with us and the connections that make this experience what it is. To this day, I still talk to my college roommate, and I still talk to teammates that left my team after the first year, many of whom are no longer competing. I couldn't imagine the impact on the student-athlete experience if issues like Name, Image, and Likeness began to put pressures on those dynamics. The unfortunate result of this strain would fall on coaches who have to manage, not only the success of the team, but the dynamics of this team and the overall cohesion within the program.

#### COMMUNITY RELATIONSHIPS

Stepping the student-athlete experience outside of the institutions, community engagement is often the lifeline for a student-athlete participating in intercollegiate athletics. Many student-athletes attend institutions far away from home—away from parents, family, and loved ones. The communities that surround our athletic or academic institutions serve, not only as a great resource for fan support, but are often homes away from home. There is a kinship built between student-athletes and the communities that they're connected to. Many children within the community look up to student-athletes as role models and parents look to student-athletes with a trust that they will set the tone and example for success in every field of the human endeavor for their children. More importantly, student-athletes are looked to as leaders in the community, often because of the lessons they learn while participating in intercollegiate athletics.

The bond between student-athletes and their communities is multi-faceted, however. Outside of family dynamics, student-athletes also form relationships with many places of business that have been cornerstones within these communities. This is the sandwich shop owned by the married couple that has been in the community for thirty years. It's the diner that's been family owned and operated since before the school even had an athletic department. And it's the bakery that always buy seasons tickets to our games and continues to hang up posters of their favorite athletes in their shops. For student-athletes, this has never been about value in the commercial sense, but about creating value in other places that transcends financial compensation.

Up until this point, most of these establishments, some of which struggle to stay afloat, have not needed to concern themselves with potential legal violations to the right of publicity when it comes to their student-athletes. Name, Image, and Likeness could greatly impact the communities that support college athletics. This is a speed bump that comes with now potentially holding the community responsible for supporting their student-athletes. It follows that NIL impacts the way student-athletes experience each factor tied to the student-athlete experience, greatly impacting the welfare of the student-athlete.

*D. EDUCATION IS THE EPICENTER OF THE STUDENT-ATHLETE EXPERIENCE*

The debate around a potential pay for play model and the use of NIL as a source of compensation for student-athletes has continued to persist with little to no discussion of the most important aspect of the student-athlete experience: education. The emphasis on academic scholarship and excellence is one of the many factors separating collegiate athletics from the professional leagues. Notwithstanding any of the tremendous benefits serving to illustrate the value of the student-athlete experience, education continues to play a substantial role in our interaction with these academic institutions. Acknowledging this reality is paramount to understanding the value of the current collegiate model for student-athletes and the impact NIL might have on this framework. The primary function for any of our academic institutions is—and should continue to be—the education of students.

The potential for NIL as a means to provide compensation for student-athletes has grown, in part, due to criticisms that the collegiate model does not compensate student-athletes fairly. In order to truly evaluate the merits of such a claim, institutions and other key stakeholders have to assess, and put a price tag on, all of the services that student-athletes currently receive. Naturally, this would include putting a price tag on a college education for both scholarship and non-scholarship athletes. Even if we could place an accurate price tag on the value of education in America, we then face the situation of what to do about the number we see. In the event that the student-athlete experience, education, and the like are not comparable to the value student-athletes bring to the table, NIL might not be the best vehicle to address the disparity. Rather, if we truly value this idea of education and the role that it plays in producing a productive and useful member of society, it may substantially benefit the entire nation to increase the value of the education and experiences student-athletes take part in. I shudder to think, however, that notions around educational opportunity and value will instead be shut down because, at the end of the day, the viewing public has never looked at the student-athlete as a student, but rather as a form of entertainment. Most fans could probably never tell you what any of their student-athletes do off the field. The respect and admiration fans have for many student-athletes seems to only go as far as they can throw a football or, in my case, jump into a pit full of sand. This is likely the reason why compensation for student-athletes has centered around Name, Image, and Likeness, and something so closely tethered to entertainment for the 2 percent of student-athletes that the fans actually see, rather than the 98 percent of outstanding student-athletes who are doing amazing things beyond the fields of play.

**Conclusion**

Today's student-athlete faces problems similar to the rest of the American people when it comes to the issue of modernization. Regulatory uncertainty and the rapid growth of technology places a strain on many of the factors impacting the welfare of Americans. It is no secret that most institutions, organizations, and legal frameworks are in desperate need of a new approach that takes into account important components of the world we live in today. Digital communications, social media platforms, and other advances in technology are nestled within an innovation economy that student-athletes must live in. NIL can only be understood through the lens of how it is exercised by student-athletes.

Fairness is another common theme floating in the periphery of these NIL discussions. Intercollegiate athletics looks at fairness from the vantage point of equality between all student-athletes. By contrast, the public evaluates these levels of fairness by comparing scholar athletes to regular students. This comparison is misguided but not because fairness is not important to student-athletes. Most student-athletes do not expect to receive an experience equal to the average student, we expect an experience that is better and our institutions provide that experience for all of us. The current model for intercollegiate athletics places us in the best possible position to achieve this standard because the individuals that run college athletics—senior women administrators, university presidents, athletic directors, coaches, athletic trainers, and other student-athletes—understand our needs and the value of

our experiences better than anyone. Our institutions see to the proper administration and equality of women's athletics beyond the requirements of Title IX. Our institutions see to it that all student-athletes have access to health and wellness resources on their campuses. The current efforts managed by the membership institutions of the NCAA see to it that roughly 300,000 student-athletes have access to an outstanding education.

The porous framework of NIL legislation across the country poses a substantial threat to the welfare of today's student-athlete. These upstream approaches to state legislation that neglect to consider the world of technology and experiences of today's student-athlete, will surely have downstream consequences. Student-athletes are more than the entertainment that fans subscribe to in between professional football games. The value of our education and welfare is no less important than those of other students on campus. Rapid growth of state legislation pertaining to NIL without the structural guidelines from the governing bodies of intercollegiate athletics creates a serious problem for student-athletes seeking to navigate this patchwork of state laws that govern their likeness. Protecting the welfare of student-athletes is not about getting it done, it's about getting it done right. When regulatory frameworks that affect the education and welfare of students get it wrong, the entire nation suffers. Are we—the student-athlete—not worth protecting?

Senator MORAN. Thank you, Mr. Spencer.

Let me start the round of questioning with a directed question at Dr. Emmert perhaps to set the stage of where the NCAA is and what this committee and Congress might envision for its role.

In October 2019, the NCAA board of Governors voted unanimously to permit student athletes the opportunity to benefit from the use of name, image, and likeness in a, quote, manner consistent with the collegiate model. Unquote.

While the details of the NCAA's policies will not be established until January 2021, after additional feedback from its members, are you able to describe the general principles that the NCAA and its members seek to preserve as they establish rules for name, image, and likeness compensation from third parties to student athletes?

How do you foresee the NCAA's internal input-seeking and policymaking timeline aligning with the actions now taking place in states?

As has been acknowledged, states have clearly made known their interests to be active in this matter. Is there a concern that the NCAA's deliberation process may take too long to keep up with the expected rate of states legislating on this issue?

Dr. EMMERT. Well, thank you for the question, Senator.

I think the first point that needs to be made is to recognize that the rules of the NCAA are made by the schools themselves coming together through a legislative process that is not that dissimilar from a congressional process. The members meet on a quarterly basis on a multi-day period of time. They have a regular legislative cycle, and they are in the midst of that cycle right now.

The working groups that have been established by the Board of Governors representing students and coaches and athletic directors and faculty members are meeting as we speak. They will be reporting back in April to the board of Governors with the expectation that full legislation will be drafted and then crafted and then passed to come into effect at January 2021 at our national convention of that year.

Throughout that process, they have been working to try to winnow down the general ideas around what is and is not permissible, what could or could not be consistent with intercollegiate athletics,



and that is a work in progress and we will know a lot more about as they bring out their findings in April.

Senator MORAN. Does the NCAA have other powers, opportunities to deal with this outside that deliberation process that is going to take the period of time that you just outlined? Let me suggest to you that a Member of Congress complaining about the slowness of the process is somewhat hypocritical.

[Laughter.]

Dr. EMMERT. Well, the process can be accelerated should any of the three divisions—we do all these decisions through our three divisional structures—decide to do so. And I and the presidents who lead the association have been working very hard to try and get them to move this along as quickly as possible. As we have heard from the presenters, it is a complex topic. The answers are not cut and dried, but I believe that the members, the schools themselves, are working on this as aggressively as they can under the current circumstances.

There certainly is a possibility that some State legislators could pass legislation that could go into effect over the course of this summer. Many states have been modifying their proposals to have them slow down on the implementation date. We were pleased to see that, and we hope that the states will, indeed, provide, as California did, the association with some time to modify their rules before their State laws are triggered.

Senator MORAN. Mr. Huma, in particular, addressed this question, but I would ask the rest of you what role for Congress exists to legislate on this issue? I think Dr. Emmert indicated there may be a role for Congress. What do you each envision as a request of us?

Mr. BOWLSBY.

Mr. BOWLSBY. I believe at this point our request would be some assistance on creating a time window within which we can complete our work. I serve on the task force that has been working on this topic, and we continue to make progress. I think we have a better vision of what the guardrails that have been mentioned look like. We have some near-term implementation dates that are problematic for all the reasons that have been noted. So I think some set-aside that would allow us an opportunity to have some time to work would be altogether appropriate.

And then as we seek to shape the future of intercollegiate athletics, we ask your consideration and indulgence in allowing institutions to act in concert. Sadly acting in concert is characterized as collusion by the plaintiffs bar, but we feel like institutions acting together is the right way to make rules. It is the right way to prepare the environment for student athletes, and we ask that some consideration down the road would be given to us as to whether or not our organization can continue to function at the highest possible level, which is what we all seek.

Senator MORAN. Others want to add or subtract from Mr. BOWLSBY's comments?

Mr. HUMA.

Mr. HUMA. I would like to just reiterate that basically what Commissioner BOWLSBY is describing would be some kind of antitrust exemption, which we oppose. And if you look at the history of anti-

trust challenges to the NCAA, each of those challenges brought progress. They improved the industry, improved the lives of college athletes, starting with the 84 Board of Regents when the NCAA used to have a monopoly on TV money, and now today, because Oklahoma stood up and challenged that, you can see that the industry has benefited very mightily not just the revenues but also through consumers being able to watch TV, watch their favorite teams virtually every single week perform.

The other benefits that have come from that are the elimination—these are antitrust challenges against the NCAA—the elimination on the NCAA's ban on summer workout medical expenses. There used to be a ban.

There used to be a cap on the cost of attendance, the price tag of the school. A full scholarship fell below that by several thousands of dollars. In the O'Bannon case, part of the result was that now today colleges can provide the full cost of attendance.

A current case, *Austin v. NCAA*, is another area as well that has unlocked educational opportunities as well. The U.S. DOJ, which we helped support an investigation into the NCAA's one-year cap on scholarships—there used to be four until the 1970s when the coaches kind of pressured the NCAA to turn it around because the DOJ acted as a catalyst over antitrust scrutiny. Now college athletes can have multiyear scholarships.

So again I reiterate if any of these issues it feels require guardrails from Congress, they should be enacted directly not through an antitrust exemption. The NCAA has been operating as if they had an exemption, and we have seen what they have done. Name, image, and likeness would not be on the table. The states would not be able to even bring this issue to light had they had an antitrust exemption. So there are a lot of problems with that.

Senator MORAN. Mr. Spencer.

Mr. SPENCER. Thank you, Mr. Chairman.

I would ask this group to consider the current way student athletes live in today. I think the world that student athletes lived in when the NCAA was formed is entirely different than how student athletes interact with each other now. I would ask this group to consider the current regulatory framework that we exist in and, more importantly, all student athletes, not just the 2 percent that some of us might see during March Madness or during the bowl season and the role that our education plays in shaping that experience and how NIL fits into that equation more broadly.

Senator MORAN. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

I want to begin by saying that I mean no disrespect to anyone, but I think Mr. Spencer has really made the critical point here. A lot of what I hear from the NCAA and coaches and college officials evokes the fantasy of college sports as it existed 50 years ago. When I was a Supreme Court law clerk, I once visited with Byron White who played football in an era when helmets were made of leather. I think a lot of the rhetoric and images that we hear about college sports are as antiquated as leather helmets. And that makes me angry because I think that the present state of college sports is exploited.

And as I listen to the hand-wringing about states creating a patchwork of different laws, it is coming, and the reason is that intercollegiate programs earned a total revenue of \$14 billion, rivaling the National Football League's \$16 billion. And the NCAA, by the way, grossed a billion dollars. So the states are going to fill this gap, and frankly, I am going to encourage them to fill it because it will provide an additional incentive for the NCAA to move more quickly. January 2021 is simply too late. The NCAA is late to this game.

So let me ask you, Mr. Emmert, what can you do to speed and make more effective the NCAA's changes and initiatives so that we simply do not wait until sometime in the distant future and we can avoid the patchwork of different laws that rightfully will create unfair playing fields for different colleges and universities, as the Chancellor of the University of Kansas has pointed out quite correctly?

Dr. EMMERT. Senator, first of all, I happen to completely agree with you that many of the approaches to intercollegiate athletics are, in fact, embedded in history or sometimes even grossly inaccurate notions of what the real environment is. And I am delighted that Mr. Spencer is here providing the current balance on the life of student athletes.

I can assure you and the members of this Subcommittee that I will do everything in my power to encourage the schools themselves in their decisionmaking processes to accelerate those discussions and the decisionmaking as quickly as they can. They are working very hard to make sure that they have opportunities to consult with students themselves, with the various levels of the association across its three divisions, with all of the various programs to make sure they actually do understand the realities on the ground to make sure that they do not create unintentional consequences from any of the rules that they modify and change.

Senator BLUMENTHAL. I apologize for interrupting, but my time is limited.

Dr. EMMERT. Certainly.

Senator BLUMENTHAL. Would you agree that the present system of compensation is unfair and outdated?

Dr. EMMERT. I certainly agree that the NIL model that is in place needs to be modified and is appropriate for change.

Senator BLUMENTHAL. Radically modified.

Dr. EMMERT. Correct.

Senator BLUMENTHAL. Does everyone on the panel agree with that point? Please raise your hands if you agree.

[A show of hands.]

Senator BLUMENTHAL. The record should reflect that all of the witnesses today have agreed that radical modification is in order.

Let me ask you, Mr. Spencer. What kinds of NIL compensation do you think as a future lawyer should be provided?

Mr. SPENCER. Thank you, Senator Blumenthal, for the question.

I think this is an incredibly complex issue, and I think part of the problem with creating a structure around this is the definitions around name, image, and likeness are constantly evolving. I really appreciate you acknowledging my comment earlier about how the world that student athletes today live in is entirely different, but

I do want to highlight that a key aspect of that statement is that this is also a world that society as a whole is still trying to get a grasp of. I think we see that in this rush to create regulations around technology, whereas when we look at this patchwork of State laws that are trying to create a boundary around this, the way that I use social media and that I use my likeness is on the Internet and the Internet does not have these boundaries. So that is part of what makes it a little bit difficult. And I think that is something that we will be taking back to our student athletes. You know, again, some of them are right behind me now. And we want to look at that a little bit closely.

Senator BLUMENTHAL. And would you agree—and I would welcome Mr. Huma’s comments as well—one of the areas that I think the public finds most dismaying the discarding of student athletes who have injuries and cannot continue playing? Is that a problem that is on your mind?

Mr. SPENCER. I think the way that we take care of student athletes today is continuing to grow. The university students that I am in touch with, the way that I see athletic training rooms and coaching staffs take care of their athletes is quite frankly amazing. It is one of the reasons why I am here today not because of the scholarship that I would receive but because of how enriching that experience was and how that was able to propel me to where I am today.

Mr. HUMA. Thank you for asking that question.

Under current NCAA rules, the minimum scholarship is a one-year scholarship that can be non-renewed for any reason, including injury. The injury rate in Division I athletes across all sports is 66 percent suffer a major injury, 50 percent go on to have chronic. Many coaches use that as an excuse to not renew the scholarships, which is very difficult for those players, especially some of them are being forced back into play too early with serious medical conditions.

And you know, if you look at—again, big picture—the nature of whether or not to entrust the NCAA with an antitrust exemption and other things, the priorities of NCAA sports do not align with the priorities to protect players, even on health and safety. So it is a big concern, yes.

Senator BLUMENTHAL. So athletes really deserve better protection physically, financially, and otherwise. Correct?

Mr. HUMA. Absolutely.

Senator BLUMENTHAL. Thank you.

Dr. Girod.

Dr. GIROD. Yes, thank you.

If I could just add a comment to that, and as a head and neck surgeon, it is an area that I have particular interest in. And I would say that we have actually come quite a ways in the protection of our student athletes from robust research and implementation of concussion protocols to most recently at our institution, we have created a new entity to take care of our student athletes, an entity that employs our physicians, our trainers, and most importantly probably our strength and conditioning coaches. They are not employed through athletics. They are actually employed through our health system and overseen by medical professionals to take that decisionmaking away from—that pressure away from

the coach and from the athlete, quite frankly, to make sure that the best interests of the student athlete is looked after.

Senator BLUMENTHAL. And, Chancellor, I do not mean to imply that athletic programs do not care about physical injury. Preventing physical injury is the best way of keeping those players on a field. Right?

Dr. GIROD. Absolutely.

Senator BLUMENTHAL. So they have an economic incentive in making sure those players get back to the game just as professional sports teams do.

My worry is about the lasting impacts after that student leaves and careers cut short by injuries that simply cannot be prevented. And I think that this whole system has to be fundamentally reformed, far-reaching fundamental reform. And the NCAA has a role to play but only if it gets into the game which right now it is failing to do.

Senator MORAN. Senator Fischer.

**STATEMENT OF HON. DEB FISCHER,  
U.S. SENATOR FROM NEBRASKA**

Senator FISCHER. Thank you, Mr. Chairman.

On football game days at Memorial Stadium in Lincoln, Nebraska, we have over 90,000 fans. It becomes the third largest city in the State of Nebraska. We have sold out every single Husker home game since 1962, and although we are blessed with a very incredible football history, we are also a very rural state that is built around an agricultural economy.

I have questions about the impact of NIL on recruiting in college athletes, particularly on the marketing and sponsorship opportunities for star players, which may be enhanced in states that have those larger urban areas.

Dr. Girod, how could NIL impact recruitment for schools in rural communities with smaller media markets and less business infrastructure?

Dr. GIROD. Thank you for the question, Senator.

And as your neighbor to the south, I share entirely what your concerns are, which is this has a strong possibility to create a big market-small market problem where frankly states like mine with 3 million people in it will struggle to be able to compete in an environment where the biggest media package for an athlete is going to win the day. And so we have serious concerns about that, and we have serious concerns about then what happens with the economic imbalances that follow and our ability to support our non-revenue sports. To be quite honest with you, I am blessed. Our athletics department is largely self-sufficient. They take the revenues and they pump it into the non-revenue sports. And if that dynamic changes, particularly through an employment model, then really that landscape will change dramatically as will our Olympic training system.

Senator FISCHER. And, Dr. Emmert, what could an imbalance for urban versus rural-based campuses do to the concept of fair competition in college sports both in revenue and in those non-revenue sports that Dr. Girod mentioned. We have that in Nebraska as well. We have successful football, volleyball. Money is pumped back

into other sports, into the university. What is going to happen there?

Dr. EMMERT. Well, Senator, I think you are asking one of the most important and complex questions.

Again, the support that we have within the association around finding a better model for NIL is predicated on our ability to make sure that recruitment inequities do not occur, and there may well be ways of doing that, but under an unrestricted and unfettered model, you would simply wind up with those institutions in urban areas having an extraordinary competitive advantage both in terms of garnering sponsorship deals which they would use as part of the recruiting inducements for student athletes to come to those marketplaces. And similarly, you could see—as Chancellor Girod said, if there were no guardrails around this model, there could be some severe disadvantages to the Olympic sports in particular because the resources that flow into a big program like your football program in Nebraska would no longer be available for programs like your marvelous volleyball program.

Senator FISCHER. You know, with our volleyball program—five time national champions, one of the best in NCAA history—Mr. Bowsby, could NIL have any Title IX implications? I am very concerned about that and what is going to happen with risks that we are going to see to Title IX. Also, how are we going to be able to preserve its integrity?

Mr. BOWLSBY. Thank you very much for the question.

If you will allow me a bit of time, I really think—

Senator FISCHER. You have less than a minute.

Mr. BOWLSBY. I might not be able to do it in that time.

But I think what I am raising as an issue is really the heart of the matter. The recruiting environment is absolutely critical on this, and it will have Title IX implications, Senator. But we will also see student athletes that come to campus with agents and managers, and their representatives will participate in many aspects of their life on campus. Recruits will come to campus with preexisting agent relationships and established business ventures, and coaches will be forced to recruit both the player and the family as well as the agent representative.

Boosters and donors and third parties will inevitably be involved in the recruitment and transfer decisions, including without the knowledge of institutional representatives, and much of that will happen on the Internet.

Non-scholars and walk-on players will receive support from boosters and donors and third parties and effectively increase the scholarship allocations beyond agreed-upon numbers.

The project will commence with student athletes not using institutional marks and logos but will eventually transition, and the negotiations will be part of the recruitment process.

It goes on and on and on. The intersection with the recruiting environment is the absolute epicenter of this consideration. And given the entrepreneurial nature of coaching staffs, they will find very effective ways of having third party inducements to enroll and transfer a big part of the NIL environment. And it is that integrity that I worry about the decline of.

Senator FISCHER. We need to make sure we get this right so that every student athlete, male, female, whatever sport they are going to be in, is going to be able to be treated fairly, be able to have a good experience for themselves, their family and for the school that they attend.

Mr. BOWLSBY. That is absolutely correct, Senator.

Senator FISCHER. Thank you.

Mr. BOWLSBY. And I think also the extent to which institutional representatives become involved in helping with NIL reintroduces Title IX to the root of your question into the conversation because the 13 components of Title IX certainly bear on the recruitment.

Senator FISCHER. Thank you.

Thank you, Mr. Chairman.

Senator MORAN. You were slightly more effective than the Chairman in enforcing the time limits.

Senator Tester.

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman, Ranking Member. I appreciate you holding this hearing as always. It is one of the best hearings we will have today because of the good work of the Chairman and Ranking Member.

I also noticed that when you pointed out all the advantages that Kansas had in the sporting arena, you failed to mention Kansas' Super Bowl champion, the Kansas City Chiefs.

[Laughter.]

Senator TESTER. But we will set that aside.

Senator MORAN. Senator Tester, we do appreciate the President pointing out the Chiefs and its relationship to Kansas.

[Laughter.]

Senator MORAN. And second, I have told most of the witnesses today they were all my second choice for a witness. I was hoping for Mahomes as a witness to talk about this.

Senator TESTER. That would have been good too.

So, look, I mean I think we can all agree that what is going on right now is not working. If you want to dispute that, I would love to hear the dispute.

I think we also agree that if you have 50 different states having 50 different sets of rules, that is not going to work too well either. In fact, that is not going to work at all. And my concern here is that as tuition in colleges continue to go up, it is whoever has the biggest wallet to pay these athletes could really screw things up badly.

So before I get to my question that I really want to know, I just want to say that I want to confirm what I have heard, that if an athlete gets injured, that potentially the scholarship could or would be taken away and that they are on their own after that. Is that true? Go ahead, Mark.

Dr. EMMERT. Senator, thank you for asking the question because it is a very, very important one.

No, it is not true. Indeed, schools are expressly prohibited from pulling a scholarship from a student because of an injury.

Senator TESTER. So they can make up another excuse potentially. They are not doing that?

Dr. EMMERT. Well, can you clarify what you are asking?

Senator TESTER. So what I am saying is that there are a lot of ways to skin a cat. You could figure out ways to make their GPA go down. There is probably things in it. But the point is this if in fact the intent of the law or the intent of the rule is—and I assume there is an NCAA rule or you would have responded to this, Mark. But I would assume that they are not allowed to jerk a scholarship if a student gets hurt.

Dr. EMMERT. That is correct, Senator.

Senator TESTER. All right. Go ahead. Make it quick.

Mr. HUMA. Because they are in the period of award. If it is a one-year scholarship and they are injured during that year, it cannot be removed. But as soon as that scholarship ends for that year—

Senator TESTER. It is over.

Mr. HUMA.—the college can non-renew it. So a non-renewable is a big deal.

Senator TESTER. I got you.

So that is a problem. OK? I think that is a problem. If a kid gets hurt and he is playing football, basketball, volleyball, it does not matter. They should be taken care of.

The more important point is this. Patchwork is not going to work. What is currently out there is not going to work.

Mr. Emmert—and by the way, sorry I called you Mark. We got a list of states here, Kansas and Connecticut and Tennessee and Nebraska and West Virginia. I come from Montana. Mark knows this because he worked at Montana State University. And quite frankly it is great athletics. It is incredible. You guys have done a marvelous job in the NCAA making this what it is today. But the truth is I would hate to have to compete with Alabama or Duke because I do not think we have got thick enough wallets to do that.

So the question is, how advanced are the talks within the NCAA to solve this problem, this problem of students creating an economy that is so good and not getting much, if any, reward for it? Do you want to tell me where you are at in conversations about solutions? Because I am going to tell you, to be honest with you, you do not want us to solve this. You want us to help you solve this. So the question is, where are we at in talks? Where are we at as far as putting stuff on paper? Because time is a'clickin' and we cannot stop the states from doing what they are doing. So we have got to figure it out.

Dr. EMMERT. Yes, Senator Tester. Well, as I was explaining earlier, there is a timeline in place with a target of having this resolved by January 2021. Whether that is sufficiently aggressive or not is in large part dependent upon—

Senator TESTER. And do you have anything on paper right now?

Dr. EMMERT. We do not but we will by April.

Senator TESTER. You will in a few months?

Dr. EMMERT. Yes.

Senator TESTER. Are you willing to share that with other folks, the folks that are at this table and with us?

Dr. EMMERT. At that time?

Senator TESTER. Yes.



Dr. EMMERT. Certainly.

Senator TESTER. And you are willing to take input on how you can make it better?

Dr. EMMERT. Absolutely.

Senator TESTER. OK.

Could you just very quickly—20 seconds—Mr. BOWLSBY, just tell me what impact a patchwork solution like California would have something, Montana might have something, North Carolina might have something, Texas might have something—what does that do to the ecosystem?

Mr. BOWLSBY. Well, thank you for the question.

Once again, this is the very epicenter of the challenge.

I think the coin of the realm becomes what can you offer under the State laws that you have in effect. The description of the California-Arizona situation that was mentioned earlier is a good example. That is one that is within an individual conference. But when Oklahoma comes to Texas to recruit in my conference, if the laws are different in Oklahoma than they are in Texas, you will find a disparate recruiting environment, and that is problematic.

Senator TESTER. So I am going to wrap this real quick, Mr. Chairman. It was touched on a little bit about the pay of coaches. I think we are going to end up doing the same thing for the players if we are not careful. You are going to have schools that can pay players a lot of money and they probably should earn it, but the truth is that if we are not careful what we are doing, it might on somebody else's back. I think right now it is on all the student athletes' backs. So we got to figure out how to make it fair for everybody moving forward.

I am not even going to get into northern latitudes or rural schools because I think if we do not do it right, it further puts them behind. And I do not want to see that. Education is education. I think athletics is a part of education. I hope it remains that way, although in a lot of cases if you are playing football or basketball in these bigger schools, it is hard to get an education. You can get an education, but it is hard to get an education because so much of your time is dedicated to that sport. And that is why we are here.

Thank you, Mr. Chairman.

Senator MORAN. Senator Tester, thank you.

Senator Thune.

**STATEMENT OF HON. JOHN THUNE,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman, for having this important hearing on a subject that many on this Committee and all around the country care deeply about.

And I will get into northern latitudes and rural schools. The Summit League, Dr. Emmert, is comprised, as you know, of nine schools throughout seven States, and it is home to South Dakota State University and the University of South Dakota. Several of the states where the Summit League has schools are contemplating legislation to address student athlete compensation.

Are conferences today equipped to comply with a patchwork of State laws that seek to address the issue of name, image, and likeness?

Dr. EMMERT. Thank you for the question, Senator. And I think your question applies to both urban and rural environments, and the answer is, in short, no, they are not. In large part, most conferences—indeed, virtually all of them—have interstate boundaries as does the Summit Conference. Having conferences with multiple State rules within them would be incredibly dysfunctional for the reasons we have been discussing. And it is also true that it brings to bear competition between rural and urban areas even within those conferences that currently exist that would be very, very problematic.

Senator THUNE. Commissioner Bowsby, the Big 12 conference, another good example of that. Is the Big 12 prepared to comply with several State laws?

Mr. BOWLSBY. We are not.

Senator THUNE. Dr. Emmert, as I understand it, the NCAA ban on athletes profiting from the use of their names, images, and likenesses violates Federal antitrust law. But the Federal appellate court in the Ninth Circuit has ruled that the NCAA essentially holds an antitrust exemption so long as it allows its member schools the chance to offer college athletes the full cost of attendance.

How would the name, image, and likeness rules that you are considering likely impact the NCAA's antitrust exemption?

Dr. EMMERT. Part of the conversation that is going on right now, Senator—and again, thank you for that equally important question. Part of the discussions that are going on right now is to try and address precisely the question you are asking. The association schools are deeply committed to maintaining the college model and making sure that we can adhere to the values that are consistent with the legal precedents that exist and how college sports has gone on for a great deal of time. So, threading the needle is trying to determine how can we expand opportunities because there is a general agreement that providing greater opportunity for students around their name, image, and likeness is a very good thing, but doing that in a way that does not immediately provoke antitrust litigation around the actions of the association. How can we make sure that we can do good without immediately being back in court is one of the greatest problems that we have right now.

Senator THUNE. I will direct this to you, Dr. Emmert, but I want to open it up to members of the panel. It has been suggested that there should be a limit on the amount of funds a potential name, image, and likeness sponsor can offer a student to protect students from inappropriate predatory actions. Do you agree with that? And then I would like to hear others on the panel comment on that as well. Dr. Emmert?

Dr. EMMERT. Senator, I think again the question is what can and cannot be done in the current legal context. The current legal context in the litigation environment that we have found ourselves in makes it extraordinarily difficult to determine what boundaries can, indeed, be set on those forms of compensation that might come toward a student athlete and for what they are being compensated

without turning that student into an employee of an institution. That is part of the debate that is in front of us today.

Senator THUNE. Others?

Mr. HUMA. We do not want to see caps. I mean, caps do not protect the players. A cap would reduce the opportunity economically.

And I think getting at the idea of competitive equity is kind of one of the issues. But under the current rules, there was a study over the course of 10 years that found that 99.3 percent of the top 100 football recruits chose teams in the power conferences. That is under current NCAA rules. The power conferences have advantages with alumni. They are the bigger schools, bigger alumni, richest donors, and they continuously pull the best recruits across different sports.

So one of the points I made earlier today was that to cap players and still allow booster payments to flow to these Power Five conferences, to allow them to continue gaining the lion's share of the TV revenue in order to further outspend on recruiting, outspend on coaches, outspend on facilities—they will continue to get the recruits.

So without addressing those other issues especially—and we are not advocating. We are just talking about what reality is. The reality is that you are not going to change the migration of recruiting by blocking players' opportunities. The Power Five conferences are going to get the best recruits year in and year out.

Senator THUNE. I would just close, Mr. Chairman—my time has expired—by saying that, Dr. Emmert, we look forward to your working group as those activities continue—feedback from you and hopefully on a timeline that enables us to stay ahead of what is happening in all the states. So we look forward to hearing more from you on this subject. Thank you.

Senator MORAN. Senator Thune, thank you very much.  
Senator Blackburn.

**STATEMENT OF HON. MARSHA BLACKBURN,  
U.S. SENATOR FROM TENNESSEE**

Senator BLACKBURN. Thank you, Mr. Chairman.

And I want to say thank you to each of you for taking the time to be here today and to work with us on this issue.

And, Mr. Spencer, I wish you well. I have a son who was a track runner and ran in college and still, as an adult, is out there competing in triathlons. And I know how important that training is. So we wish you well in that endeavor.

I have to tell you I think that Senator Blumenthal and I are kind of on the same page. I think that this is something that, Mr. Spencer, you are closest to this. We have got athletes that are coming to your schools with YouTube channels, their Internet, social media influencers. So it is different. And it is very important that you all get this right.

Fair, consistent, transparent. Mr. Emmert, you say that is your priorities. But I have to tell you I was really disappointed with our meeting last week. And I think we are looking at a time when the NCAA has failed when it comes to women in sports, sexual harassment, sexual assault, sexual abuse that has occurred. And I think a question that must be going through a lot of minds of student

athletes and their parents is how in the world are they going to be able to trust you to get this right.

And I have to tell you I look at the issue around James Wiseman at University of Memphis. And this is a situation where in 2017 Penny Hardaway gave a star Tennessee player, James Wiseman's mother \$11,500 to help the family move to Memphis. And this young man would go on and play for University of Memphis. And then in 2018, Hardaway became the head coach at Memphis. In 2019, Mr. Wiseman chose to play at Memphis. The NCAA cleared him. In November 2019, NCAA suspended this freshman basketball player from 12 games because of concerns over the \$11,500.

And I will tell you I think there has been little, if any, transparency between James Wiseman, the University of Memphis, and your organization. And the way you arrived at your decision—I think when you talk student academic success, wellbeing, and fairness, this has been a failure for you all in the way that you have handled this.

So we are looking at a time where now student athletes are going to be trying to figure out if they are better off going straight to the pros and skipping college because of situations like James Wiseman and because of a lack of transparency and a lack of consistency and a lack of fairness that is being doled out to them.

Dr. GIROD, I see you nodding your head. Would you like to comment?

Dr. GIROD. I guess I would just comment that as probably most of you know, we are in an episode of notice of allegations—what is in the NCAA. I guess I would just say that as a member organization, we are part of the organization that makes the rules. We understand those rules. We support those rules. Our current situation is we do not believe the evidence necessarily supports the allegations, but actually we support the system.

Senator BLACKBURN. Thank you.

Mr. Emmert, if there was a potential conflict of interest, why was the university and the Wiseman family not informed earlier in the process?

Dr. EMMERT. Senator, first of all, I respect and appreciate the concern that you expressed over this issue. No one anywhere in the intercollegiate system takes any pleasure in sanctioning or punishing a university or especially a young man or a young woman around these issues through an enforcement action.

I am not involved in the details enough of that particular case to be able to answer your specific question.

Senator BLACKBURN. But you are the CEO, and when there is a lack of transparency or subjectiveness, the objectivity should come to you.

I yield back my time.

Senator MORAN. Senator Capito.

**STATEMENT OF HON. SHELLEY MOORE CAPITO,  
U.S. SENATOR FROM WEST VIRGINIA**

Senator CAPITO. Thank you, Mr. Chairman.

And thank you all for coming today. It has been a very interesting hearing.

I am going to diverge a little bit from what the Chairman requested that we stay strictly on message because I have Commissioner Bowlsby here and I wanted to ask him a question, and Dr. Girod will probably know exactly what I am talking about.

You recently signed a Big 12 deal to stream on ESPN Plus. Rural State, West Virginia. We are playing Kansas tomorrow. I have my Mountaineer colors on. And you can only view the game in West Virginia if you pay the \$4.99 monthly streaming fee and if you have connectivity. And it has been a source of very deep concern to West Virginia.

So I want to give you a chance to respond what a rural state—we have no pro states. These teams are our pro teams, and we want to see that WVU victory on our TVs on Wednesday. And then we play Baylor, again number one team in the country, same thing. So could you respond to that please?

Dr. EMMERT. I would be happy to. And, Senator, I have had the opportunity, not surprisingly, to respond to this question previously.

We took a leap of faith with a new technology. We believe that streaming and the ESPN platform is best in class. So it is a voyage of exploration. There is not any doubt about that. We live in states, the five of them, that have 35 million people, and as such, we really do not have the option of a linear network as some of the other conferences have done. And so the digital process is the best we have available to us, and frankly it is quite good. We are up to 8 million subscribers. We are part of a package with Disney Plus that now has almost 30 million subscribers. We think it is an environment where the cable universe is shrinking about one and a half to two and a half percent a year, that we are going to end up with a lot fewer cable households down the road than we have today, and the digital platforms are the future.

So I was involved in the rollout of the Big 10 network and I was involved in the rollout of the Pac 12 network. And I have to say the number of complaints we have had have been much less than those two rollouts.

But the objection you raise is exactly the right one. If you do not have broadband that is capable in a rural area, it is difficult to get it. But it is available on a multitude of different platforms, and for the most part, that level of broadband is available just about everywhere if you want to go pursue it and then subscribe.

Senator CAPITO. This is a source of contention. You obviously talked with our West Virginia University folks. And maybe it is a little bit before its time, but it is a source of irritation for us back home.

Dr. EMMERT. It is.

Senator CAPITO. And I am sure you understand that.

Dr. EMMERT. Certainly.

Senator CAPITO. I do not want to go back over the Title IX issue because Senator Fischer talked about it, but it is a source of concern for me. Our daughter played Division I sports for 4 years in volleyball. But one of the best athletes we have in our state is Jenny Thrasher, who was on our WVU rifle team. She won the first Gold Medal last year. She has since graduated.

What kind of NIL opportunities would she have, and how are you going to keep that fair? I think that is a major challenge for particularly women's sports that do not generate the revenues, are not going to have the big sponsors coming in and wanting to sponsor. Even the women's basketball team is going to have trouble, even though they are very popular in certain areas. So I just want to register that complaint.

And I want to ask Mr. Huma this question because you are a former football player. He is a problem I see too particularly if you look at football. You have got the quarterback who gets the ball all the time, who makes the passes. You see this in the pros. He makes the passes, gets the glory, gets the touchdowns and all that. But the quarterback cannot do what he does if he does not have a center who gets the ball to him. Now, how many opportunities is the center going to have to capitalize on something like this in comparison to what a quarterback could have? And to me, one of the beauties—and, Mr. Spencer, you talked about this—of intercollegiate sports is the team aspect, the leadership, the development, the intellectual, the camaraderie, the ability to overcome losses and triumph in games. How are you going to handle that inequity and keep that team element that is so critical to these team sports?

Mr. HUMA. Actually I am glad you asked that question.

Really, that dynamic already exists in NCAA sports. When you look at many of the equivalency sports which are partial scholarship sports, you have on the very same team maybe a few players on full scholarships, you have some that are on partial scholarships, some that have no scholarship that desperately want a scholarship. And in the other leagues as well, there is a big variety of salary differences in all the other leagues, the other pro leagues. But whether it be on the college level or the pro leagues, you do not hear about riots in the locker room and that kind of discontent. It is everything you just said. You know, the camaraderie still exists. We see it already again in the partial scholarship sports. You see it in the other pro leagues as well.

And I think that the opportunities for women are extraordinary. If you have an Olympic Medal Gold winner, they can have a lot of different exposures and opportunities. That is a blessing. That is great in her life. There was Katie Ledecky from Stanford, five time swimmer. She basically left NCAA sports which, had she stayed, she could have helped grow the visibility of the sport because little girls who are watching these swimmers and soccer players and other people—they are seeing these popular athletes come. It is going to draw more attention. And historically women have not been given the same exposure as the male sports, specifically football and basketball. So it can definitely be an equalizer in terms of women's sports.

Senator CAPITO. Thank you.

I finished my time, unfortunately, and I know the Chairman wants to stick to the time.

But I do want to work with you, with the schools, with the conferences to try to figure out this issue. I think having a patchwork of 38 different regulations is just a nightmare for our country, and

I think we have got to figure out a way to even this out and make it fair. Thank you.

Senator MORAN. Senator Capito, thank you very much.  
Senator Young.

**STATEMENT OF HON. TODD YOUNG,  
U.S. SENATOR FROM INDIANA**

Senator YOUNG. Well, thank you, Mr. Chairman. I appreciate you holding this hearing. It is big of you, seeing as you lost the headquarters of the NCAA a number of years ago.

[Laughter.]

Senator YOUNG. Just responding to your earlier commentary.

We are grateful to have the NCAA in Indianapolis. I thank our entire panel for your testimony today. It is a really important issue that comes down to a question of fairness and equity, and we need to tackle it intelligently.

We are trying to strike a balance here. We want to maintain the fundamental notion of college sports, if at all possible, while addressing this issue of name, likeness, and image that a number of states have already gone out and proactively addressed in different ways.

I think about a Hoosier teenager, maybe the first one to attend college, and they go out onto the court or the field and are able to make a real impact and create some value for the institution, for their conference, for the NCAA.

Dr. Emmert, how can we create opportunity for kids that bring this value to an institution to the broader constellation of entities that are involved here without doing harm to the collegiate model that provides so much value to roughly a half million kids around the country?

Dr. EMMERT. Well, thank you, Senator.

I think the question that you have raised is also central to this topic, and I think this is true of all of the witnesses before you. What we would like to do is find ways in which that individual you are talking about can be able to take advantage of the name, image, and likeness whether they brought it with them from high school or whether they developed it while they were in college, but at the same time, do so in a way that creates sufficient guardrails that the recruiting issues that Mr. Bowsby raised and others have talked about, the involvement of the institution in providing recruiting inducements are not constrained and that indeed what we are seeing is the real market value, if you will, of that individual. But crafting that particular model is a challenge and that is indeed why we are having this conversation.

Senator YOUNG. So as we reflect on—perhaps it is premature to ask this question, but as we reflect on what success might look like after we have worked this out, will it be qualitative in nature or will there be some things that we think we can actually measure to determine whether or not we have arrived at a fairer outcome?

Dr. EMMERT. I am sorry. Could you elaborate on your question a bit? I am not quite sure—

Senator YOUNG. Sure. How do we measure success?

Dr. EMMERT. Well, I think first of all, if we can craft a model collectively that again provides some opportunity for students—I can-

not put a quantitative number on it—but provides a greater level of opportunity for students so that they can engage in activities that look and feel more like the rest of the student body and that they are not prohibited from participating in those kinds of activities while at the same time providing guardrails that prevent inappropriate recruiting inducements or the conversion of these students de facto into employees, I think somewhere between those two parameters, Senator, is where we want to be.

Senator YOUNG. That is helpful. Thank you.

Commissioner BOWLSBY, I keep hearing there are concerns about California's Fair Pay to Play Act and the patchwork of State laws that may present a challenge to the NCAA if other states enact their own versions of NIL laws.

Can you elaborate on your specific concerns about the California law?

Mr. BOWLSBY. Thank you for the question, Senator.

I have specific concerns about the breadth of the California law. Many of the subsequent proposals share those same characteristics. Others have included amendments that render something that is akin to guardrails.

But my concern has always been around the recruitment environment. I believe that we will essentially find ourselves in an unregulated recruitment environment because what is NIL, name, image, and likeness, owned by the individual student athlete or recruit will quickly become currency in the recruiting environment, and one institution will play off the other. The same will happen in the transfer environment. There will be inducements made that sometimes institutional officials will not even know about.

Senator YOUNG. Thank you, Commissioner.

Just very briefly, does anyone disagree with the Commissioner's concerns?

Mr. SPENCER. Senator Young, I do not. Student athletes—this is a very realistic pressure.

Senator YOUNG. You do not disagree.

Mr. HUMA. I would just say the inducements on recruiting—I absolutely agree that there are ways to solve that. But the whole premise that it has to be done on a Federal level—the states are just getting started. 28 are already involved. I think it is only a matter of time before the rest of the Nation handles it. Our concern is that there is going to be an overreach by the NCAA and they are going to turn it right back to what it looks like today because in reality, they would have never been here at this table without the states pushing.

The other thing actually, if you let me. The Board of Governors has express authority to settle legal issues. So all the talk about how long it would take the NCAA to come up with something—the Board of Governors—they do not have to go through that route that takes a long time. California has a law. That is a legal issue. They could wake up tomorrow and actually put uniform policies in place structured around what is going on in the states.

Senator YOUNG. Thank you, Chairman.

Thank you, all.

Senator MORAN. Thank you, Senator Young.



We are going to have another round of questions, and I am going to yield my time at the moment to Senator Thune.

Senator THUNE. Thank you, Mr. Chairman.

Just as kind of a follow up to the discussion we were having about how these rules might work among different sized institutions, say, Division I, Division II, Division III, would you envision—I guess, Dr. Emmert, starting with you—these rules having one set of rules for all divisions, or would you have different rules for each division?

Dr. EMMERT. Currently the way NCAA legislation, the rules, are put together is on a division-by-division basis. It is only each individual division that has authority to pass rules within their division.

The board of Governors can set broad parameters. The board of Governors includes representatives, university presidents, from all three divisions. They have the authority to set the policy parameters, and that is what they are trying to do now. I believe that most people are comfortable today saying if these parameters are extant and those are well enough defined, individual divisions can have some variations within them as suits those divisions' philosophies and approaches to college sports. That is what exists today. But the differentiation between a Division III school and a Division I school is not just financial. It is also what does that school want, what level do they want to participate in intercollegiate athletics. And there could be variation in how this is applied as well depending on where those schools wanted to go.

Senator THUNE. This has been suggested and, Mr. Huma, Mr. Spencer, maybe comment on this. But this has been socialized with the professional sports leagues, for example, the NBA or the NFL, some discussion about perhaps removing anything that would impede an athlete from going pro right out of high school and just allow them to go up and take advantage and get paid right away. Has there been discussion about that? And does that make sense? And if not, why would it not make sense?

Mr. HUMA. That is definitely something we support. Players should have options. They should not be forced into college if they do not want to go to college and if they have the talent to go on another level. I know that is not an NCAA issue. It is actually a collective bargaining agreement issue between the unions and the sports leagues.

Now what is an NCAA issue is that if a player enters the draft and gets drafted low, does not like where they are drafted or does not get drafted at all, those players are not allowed to stay in NCAA sports. And this is supposed to be about education. Entering the draft is more of a testing the waters kind of thing, seeing where you can be. This is about education. Why kick those players out when they have not stepped foot at a pro level contract, pro level practice, pro level competition? So those are the concerns around drafting.

Senator THUNE. But is there a way that that could be structured so that athletes who have the skill level to go to that next—I understand it is about education, but a lot of cases, the one-and-done schools—their athletes are going up after they fulfill their requirements at the collegiate level. Is there not a way in which you could

allow some of these athletes, if they have that skill set—I know what you are saying is it would take changes within leagues and in the unions. But would that partially help solve the problem we are talking about here, which would be allowing athletes to capture the value of their skill?

Mr. HUMA. I do not think it comes close to solving the problem for college athletes as a whole. You know, at the end of the day, these are freedoms that every player across all divisions—if they want to go and throw a camp at their old high school—if you are a college athlete, you are somebody at your old high school. You can throw a camp at your old junior high or elementary school, do an autograph signing back home. You can start a small business.

And we have not got into it, but some of the restrictions impede on freedom of speech. If you are a Christian athlete—a fellowship of Christian athletes—and someone wants to pay you to write a blog about your experience as a college athlete, the NCAA would prohibit that. That is highly protected speech. We are talking about religious speech. It is restricted by NCAA rules.

So this is far beyond just the elite athletes. This is the everyday athlete that really deserves the same freedoms and rights as every other student and every other American.

Senator THUNE. And I know it is a challenge for all the reasons we are talking about this morning, but it does seem, as someone who represents a state with major universities that are not part of the Power Five conferences, how you structure this in a way that is fair and that does not create disincentives for some of those smaller but very good schools to attract and recruit good athletes to their program. So I am sure this will be an ongoing discussion.

Thank you, Mr. Chairman.

Senator MORAN. You are welcome.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

This has been a very, very instructive hearing, and I want to thank all of you for being here today, especially the Chairman for his leadership in bringing us together.

You know, John F. Kennedy famously said life is unfair, and life is unfair. Not all of us are born with the athletic prowess that others have, which I say as a college athlete of very, very limited ability as a swimmer who never would have had any access to any NIL compensation. But there are ways to overcome some of these challenges in a way that is fair.

And, Dr. Emmert, let me just ask you. In 2018, the NCAA implemented new rules to allow basketball players to sign with agents, but those rule changes did not apply to women. Is that unfair?

Dr. EMMERT. Senator, I think the question of representation is a very, very important one. The rule that you are talking is an evolution that came out of our trying to address some of the issues that Mr. Huma was just mentioning, trying to line up more effectively the professional draft system with the opportunities that may or may not occur for student athletes. So the athletes in men's basketball to be able to have representation when they go into a draft conversation with professional sports ranks and still have the opportunity then to go undrafted, come back and continue to compete—that was the very first time that it has ever been done. It

is my hope that we can have a model put in place for women and all student athletes that mirrors and models that approach. It is one that has been tried. It has been working successfully now for a year. I think the members saw it as a pilot project, and I hope that we can extend it to all—

Senator BLUMENTHAL. Well, coming from a state that takes great pride in our women basketball players, I think it is desperately unfair, and I hope you will correct it.

Let me ask you, Dr. Emmert. When a school gives a one-year scholarship and then kicks the young athlete out of school because of an injury at the end of that scholarship, if that injury prevents him or her from playing, that is unfair. Is it not?

Dr. EMMERT. It is in my mind, yes, sir.

Senator BLUMENTHAL. And the kinds of practices, it seems to me, where an athlete works hard and the name and image and likeness become of such value that the school can make money from it but the athlete gets nothing strikes me as unfair. Do you agree?

Dr. EMMERT. Senator, I believe that is precisely why we are sitting here is to try to find a way to address that issue.

Senator BLUMENTHAL. And the fact that very often athletes exceed the 20-hour limit in practice, in fact exceeded by a lot I am told in many schools, just compounds the unfairness. Does it not? Because they work hard to gain that athletic ability.

Dr. EMMERT. Yes, Senator. Student athletes work incredibly hard at both their athletic and their academic endeavors. We strive very hard to create a rules structure that creates a more appropriate balance between their academic and their athletic lives. Indeed, the rules were changed just this last year to do exactly that, and we will continue to strive to do so.

Senator BLUMENTHAL. And in a lot of schools there is no provision for insurance paid by the school. In other words, athletes may be covered by insurance, but they have to pay for it themselves. That strikes me as unfair.

Dr. EMMERT. The requirement, Senator, for student athletes is that they have insurance coverage. In many cases that is their family's insurance policy that is already existing. In many others, it is by the schools' insurance policies themselves, and in all cases there is an umbrella covered by the NCAA for catastrophic injury.

Senator BLUMENTHAL. But as you said, many families have to cover their athletes' insurance out of their own pockets, and that seems unfair to me.

I want to just finish by saying that there are various different models for dealing with the issues that Senator Capito raised, for example, the financial inducements to athletes who may not be stars. New York has a bill that focuses on NIL compensation but it allows athletes to receive 15 percent of revenue made from ticket sales. If that were distributed evenly among the team, there would be some financial compensation even for the athletes whose names do not become marquis attractions. There are all kinds of ways to deal with some of these complexities.

And I think that the challenges here, although they are difficult and complex, are less so than the challenges athletes overcome every day to provide the performances on the field that they do. The mental and physical challenges of athletes doing what they do

on college teams these days certainly are extraordinarily impressive, and I think we ought to match their courage and skill with what we do in this Congress and on this committee. And if we do not at the Federal level, they will at the State level. And those Florida and New Jersey and New York bills that I mentioned are on their way to passage, if not there, in other states. So the leadership that we need in this area is very much urgent and immediate.

Thank you.

Senator MORAN. Senator Blumenthal, thank you.

Let me run through a series of questions that I have and perhaps we will conclude then.

Mr. Huma, first of all, you promote states making the decisions and pursuing their path in their state. What we were designed to talk about today was name, image, and likeness. I would take from your testimony that if we were successful or the NCAA was successful in developing a program that rewarded, compensated athletes for NIL, that would be insufficient and that would then lend itself toward the next step of additional compensation or other ways of compensating what are today amateur athletes?

Mr. HUMA. No. My only concern with Federal law is that it rolls back what the states are doing. And really, though there are about 28 states in play, the legislation looks very similar. It is independent representation and it is freedom on name, image, and likeness. While there could be some additional guardrails in terms of recruiting incentives, incentives for transfer, there is not any artificial caps. It looks like what America looks like. It looks like—you know, it is similar to the other leagues. If you are a free agent and you go somewhere, you are on a team, you are free without restrictions to get endorsements in whatever area that team happens to be in.

But the concern is if the Federal Government acts and acquiesces and grants the NCAA an antitrust exemption, which it has already abused without an exemption, there is an extreme trust gap. We have seen what the NCAA has done as if it had an antitrust exemption. So those are the issues.

But it could be positive. If it was a good bill, it could be definitely positive.

Senator MORAN. Let me ask the question a different way. If NIL became the rule of the land, however that comes about, Congress, the NCAA, and amateur athletes were compensated for their name, image, and likeness, then would there be other steps that the athletes would take for additional compensation? And while you said the states generally have similar kinds of legislation that are pending, New York and ticket revenue would be an outlier. And my question is intended to get to would this be sufficient to satisfy the problems you see for college athletes today if NIL was addressed and addressed appropriately.

Mr. HUMA. That basically is economic justice from our perspective. We have been advocating for. I think a lot of it would be in the details because as we have said, this is a multibillion industry. So if we are talking about crumbs, then absolutely not. If players truly got real economic justice that reflected their value, that might be a whole other conversation. It would be hard to say without any details.

Senator MORAN. I am not trying to prejudge anything. In many of the things I get involved in, the argument against something is do not do it. It is the camel's nose in the tent. And I was trying to figure out if there is something more on the horizon that then is required beyond NIL. And I take it your testimony is NIL, if done appropriately, provides economic justice that you are looking at for the players.

Mr. HUMA. It does. Again, without the details—I think we have different opinions about what that justice would look like, but potentially.

Senator MORAN. Thank you.

Mr. Spencer.

Mr. SPENCER. Yes. Thank you, Chairman Moran.

That idea assumes that every single athlete is going to have the brand to capitalize off of NIL. What we end up looking at is the truth that NIL, while it might be a solution, it is a solution to a different problem. Quite frankly, when it comes to the compensation, if we are looking at that as the broader issue here, we have to really evaluate how much compensation a student athlete is actually going to be able to receive if we go to that type of model.

Individuals earlier mentioned the New York situation. That 15 percent then would probably roll out of either the university or other different parties, and that means that money is not going into those athletic facilities. And for me as a student athlete, I want that. I really appreciate having upgrades to my facilities. They have got a new toy at Georgetown University, when I go lift, that measures your bar speed, and for a track and field student athletes to be able to know how fast I am moving the weight is incredibly beneficial. So these are the kind of things that we are looking at, but as we move forward, we have to really examine whether or not NIL is the appropriate model to give student athletes the adequate compensation that is discussed.

Senator MORAN. Well, Mr. Spencer, you lead me into my second question, which is my concern is—you are in front of a committee that has lots of members from rural states with small schools. You, from New Mexico, have an understanding of those schools. I want to make certain we take care of athletes who are not necessarily in the sports that generate significant revenues or profits at universities. And I think Mr. Huma—as we have had this conversation, he has come back to many of my concerns to tell me, to tell the Committee that those disparities already exist.

So when I began the hearing, toward the top of my priority is how do you take care of places that the schools are small, the programs do not generate a lot of revenue, there are sports within those schools that are not moneymakers? You want to take care of women and the issues of Title IX.

And the question is to me is, does this, does NIL, solve—does it create more problems in that regard? Does it create greater disparities between the top schools and the top athletes and the top programs in the top sports? Is there a greater disparity that occurs because of NIL, or do all those problems—that disparity that I am worried about that comes from compensation—already exist and this is not a relevant topic to that disparity?

Mr. SPENCER. Chairman Moran, if I may. You hit the nail right on the head. Even if some of these disparities exist, we do not create something that then exaggerates those issues.

Senator MORAN. The question is this would then exaggerate those issues.

Mr. SPENCER. Absolutely. This is also one of the reasons why this is such a complex discussion that involves all hands on deck, the student athletes, the senior women administrators. This is one of the reasons why it takes as long as it does because in order to adequately answer the question of what success looks like, you need all of the stakeholders at the table having that discussion, and that is something that cannot be done overnight.

Senator MORAN. Mr. Huma has been strong in outlining his belief that the disparities exist today. And I do not have any reason to dispute that they do exist. Is there anyone, Dr. Girod or Dr. Emmert or Mr. Bowsby, that would comment on NIL and those disparities? Are they exacerbated? Are the challenges made more difficult? Or does this help address the issue?

Dr. EMMERT. Yes, Senator. Well, I will ask my colleagues to address it as well, since they are on campuses, directly.

Yes, indeed, it would exacerbate it, and that is part of the conversation about how can we create a model that has some form of guardrails that can mitigate some of those issues. But there is little doubt that it would, in fact, create greater disparities between schools and in some cases between the athletes themselves. That in and of itself may not be a reason not to pursue it, but it has to be done in a very thoughtful manner.

Senator MORAN. Mr. Bowsby, you talked about Texas and Oklahoma, a couple of schools that we are well familiar with, and the difficulty they would have within the conference if Texas had different rules than Oklahoma in regard to NIL compensation. So do those advantages and disadvantages exist today?

Texas to me is the place where the TV markets are within our conference. So are we solving a problem or adding to a problem with name, image, and likeness? Is recruitment more difficult one place than another already?

Mr. BOWLSBY. Thank you for the question, Senator.

I believe recruitment will be made infinitely more contentious. There will be more disagreements among institutions as to who did what and who offered what, or was it the institution or was it an outside entity? Was it a third party?

Essentially my thoughts on this are we need to modernize, and there is not any doubt about it. We need to continue broad-based programming that takes Title IX into account. We are not the NFL or the NBA. We do not have a draft and we are not the Olympics. You do not have the prerogative to compete for anybody other than your own country. The liberalization and the modernization is something we should absolutely do, but it should not be per se pay for play and it should not be a proxy for pay for play.

And so with that caveat, as I said in my statement, between the idea and the reality there is a shadow. How do you treat student athletes fairly? How do you put more money in their pocket? How do you allow them to use their name, image, and likeness without it entering into the choice of institutions or the choice of transfer?

I would have hoped that Senator Thune was in the room for this comment, but one of the practical outcomes of this will be when you get to be a high profile athlete at the University of South Dakota, you will be recruited away with inducements to play at a higher level. And if there is no penalty for transfer, it will be an open market of recruitment. The concept of an unregulated recruitment environment and an unregulated transfer environment I think is an absolute certainty in this environment.

Senator MORAN. The issue of amateurs—in other words, that is not an employer-employee relationship—does NIL itself, with whatever we define as appropriate guardrails—does it change an athlete from being an amateur to an athlete being an employee of the university or the athletic department? Is there enough in NIL that legally changes the relationship between team and player?

Dr. EMMERT. Senator, if I might address that one. I think it depends. Should it be the case that the institution, that a university, was in fact orchestrating the NIL payment, if a university was in the midst of brokering those sponsorship arrangements, for example, I believe it would be extremely difficult to differentiate that from an employee-employer model. With sufficient guardrails to assure that this is being conducted by a truly independent third party, it is certainly possible that it might not, but that again is one of the details and challenges of working out this model.

Senator MORAN. The notes I have made today that NIL would have a consequence on recruitment inducements is my note. What would occur in nonprofitable areas of the country or in specific teams, the employer-employee relationship, not amateur, consequences to Title IX. Somewhat related to the issue of profitability but large schools and small schools, the consequence, the recruitment that you just outlined in regard to South Dakota. I do not know that that list is all encompassing, and rather than take the time of the moment, I would ask any of you to lengthen that list or shorten that list for me as to what concerns we ought to have about NIL.

I think I am just about done. Let me ask Dr. Girod one question. You indicated, Dr. Girod, in your testimony about inextricably linked with the university model, and you highlighted some of the things that were involved in that and what athletics means to your university or to a university in a number of areas. I want to give you the chance to reiterate or highlight that component of why an amateur team or teams on campus is important to a university. We have talked about what this means to an athlete, the ability to get an education and a wider array of benefits. Why is having a sports team at a university important to the university community?

Dr. GIROD. Thank you, Senator, for the opportunity to reiterate that and recognize that collegiate athletics is unique in the world. It does not exist anywhere else in the world. It is part of what makes our universities the envy of the world. It is part of what keeps—it attracts students. It attracts faculty. It keeps our alumni engaged. It keeps our donors engaged, and it creates a campus life that really cannot be replicated anywhere else. That benefits earlier student athletes, and we have talked about how that is so today. But certainly it creates tremendous benefit for our students

and the experience that they have while they are pursuing their education and equally growing into adults.

Our athletics department does not fund the university. Fortunately, our university does not fund our athletics department either. So we are blessed in that regard.

But the benefits that the university gains, again, being a Midwest university where we are reliant on out-of-state student recruitment, being on a national stage on a regular basis—you cannot replace that.

Senator MORAN. Let me ask a question specifically related to the University of Kansas and how it would then have a broader consequence or an understanding. So we are a successful basketball program at the University of Kansas historically and currently. And the concern has been the ability for schools to recruit athletes in other places. Even though the University of Kansas has such a successful basketball program, what is the consequence in regard to the ability for the University of Kansas to compete for athletes to come play basketball with NIL?

Dr. GIROD. Well, I would not disagree with some of the comments, that there are some disparities in the system today. Those do have somewhat to do with the size of athletic budgets. They also have to do with history and they have to do with the success of student athletes that come to our institutions.

But reality is today we all play by the same rules, and that does not completely eliminate the disparities but at least we are recruiting on the same rules. And we could just as easily lose a student athlete to any of the other conferences or to non-power conferences because we all play by the same rules, and it is about student choice and student fit.

Potentially going into an unregulated environment, as Commissioner Bowlsby has mentioned, I think profoundly limits the ability of a school in a town of 100,000 people to compete in a media market.

Senator MORAN. Thank you.

Mr. Huma, my last question is to you. Your testimony makes clear that you have concerns with the NCAA representing student athletes in NIL commercial agreements. You indicate that—I think this is a quote—is not necessary for government to appoint a college group licensing entity. What type of entity is appropriate for that role?

Mr. HUMA. So there are group licensing organizations. Actually in the run-up to the California bill, when it was imminent that the bill would pass, I wanted to make sure that college athletes had a good vehicle for group licensing like in some of the other leagues. So I reached out to the NFL Players Association. They have their own licensing company called Players, Inc. It turns out they were in the middle of a kind of a big collaboration with major league baseball players associations, licensing company because name, image, and likeness globally is under-utilized. So when I discussed these options with them, they said they would be happy to help.

If these opportunities opened up for college athletes, group licensing is a powerful vehicle. You know, if you are familiar with the video games, for instance, it is one of those things where play-



ers receive an equal share of distributions regardless of if they are the first string quarterback or the third string lineman.

In college sports, it is very critical. In the O'Bannon case, as matter of fact, a law, there was a group licensing market that was recognized, which includes video games. It includes TV broadcasts. It includes archival footage, advertisement, merchandise. And I think it sounds like we agree that the school should not be providing those kinds of representations. It is possible maybe there would be an employee-employer relationship established so they get involved.

But in those instances, for instance, if there was merchandise and there is a jersey, it could be up to the apparel company to initiate some kind of a communication with the school and with the licensing company to say, hey, we would not be able to do these things. We are willing to pay. The apparel company pays the licensing company. So the players get their distribution, and they also pay separately the schools or whatever entity, collaboration, whether it be other forms of group licensing opportunities. But the third party is the source of payment.

And our concern with the NCAA is that there is a big conflict of interest that they have already acted on because by de facto, which was also in the rulings, it showed that the colleges, the conferences, and the NCAA are already selling players group licenses in all these different areas. They have given the players absolutely no money. And so that is a big red flag when the NCAA mentions the opportunity to group licensing as a matter of congressional Federal law.

Senator MORAN. It is my practice to always give the witnesses any opportunity to say anything that they were not asked that they wish they were or something they were asked they wish they were not and would like to clarify. If any of you have anything you would like to make sure is on the record, I would be glad to hear from you before we conclude the hearing.

Mr. Spencer.

Mr. SPENCER. Thank you, Chairman Moran.

Just a few things responding to the last comments.

First and foremost, student athletes do not know the NCAA as the gentleman, Mark Emmert, to my right here. They know it as the people we have on campus, our administrators, our athletic directors, our coaches, and our staff. There is no way that you are going to be able to convince me or any other student athlete that group licensing organizations know more about our welfare than the individuals that we have on campus, and those are the individuals that I would much rather see handle that type of issue.

Second of all, when we talk about NIL and the potential impact that it might have on the employer-employee relationship, we have to remember that when it comes to social media, that is where us as student athletes are going to leverage some of that. And so your compensation comes from NIL in the form of the content that you produce. The content that you produce is going to be the stuff that you demonstrate on the field, which is going to be through your institution. So that could have a bit of a legal issue in terms of how that relationship actually works.

Finally, we really have to think about the way that our rights are executed right now when it comes to technology and the way that it comes executed when it comes to the right of publicity, which is NIL. We live in a framework that is digitally driven. We live in an innovation economy driven by social media and our influencers. And we really have to consider that playing field.

More importantly, in all of these discussions—and I know we talked a lot about some of the failures of the system, but one of the best successes is the simple fact that student athletes—we are involved in each and every one of these discussions. The student athlete advisory committee is present on every campus in every division across the country, and that is why it is important to make sure that we consider that because in order to recognize the differences between schools that are in rural neighborhoods and schools that perhaps are in more affluent areas, we have to give student athletes the chance to actually help craft some of these rules. And that is what we do when we come together. For the student athlete advisory committee at the institutional, conference, and national level, that is what we do, and that is why we have been able to make the strides that we have made.

Senator MORAN. Mr. Huma.

Mr. HUMA. I just wanted to talk about the question you had about exacerbating the advantages and disadvantages currently. There is really not much room to really exacerbate it. 99 percent of the top 100 football recruits go to the Power Five, and that is a reflection of the migration all the way around.

But let us just say there are 2,500 recruits in football. Most of the top ones end up in the Power Five. Whether or not the Power Five—you know, and within the Power Five, there are 65 schools. Let us just say 30 to 40 of them typically get the stronger recruits. The reason why it will not be exaggerated is because there are still roster limits. There are still scholarship limits. So no matter how many players want to be on one particular basketball team, they cannot go there—or football or basketball or any other sport. There is still going to be a limit of where they can go. So it is not going to magically produce double the amount of talented athletes. So that is a built-in mechanism.

And I would suggest that Congress looking at this, knowing there are advantages, disadvantages of today, whether that changes a bit because of any given factors, I do not know that it would be Congress' job to cement the status quo in whatever power structures. We can see Clemson in the national championship football game with Alabama or LSU—I do not know that that should be the concern especially when we are talking about opening up freedoms and opportunities for players. It is much more important I think to weigh the rights of these players rather than any particular migration of recruits that is limited anyway and where those recruits end up.

Senator MORAN. Thank you. Mr. Huma, thank you. Mr. Spencer, thank you. Anyone else?

Dr. Girod.

Dr. GIROD. Yes. I guess I would just like to, first of all, say thank you, Senator, for your leadership and willingness to take on this obviously incredibly complicated topic and would just reiterate that

as we look at these issues, let us not forget the 98 percent of the student athletes who get an education and a great launch on life and will not go into professional athletics and have very limited ability to generate revenue off their name, image, and likeness.

Senator MORAN. Thank you.

Dr. EMMERT. Mr. Chairman, just let add my words of thanks and also let you know again that we stand ready to work with you and the rest of the Committee to make sure that we can move forward with this issue to provide greater opportunities for our students and preserve all those things we love about college sports.

Senator MORAN. Thank you.

Mr. BOWLSBY, you do not have to speak if you do not want to.

Mr. BOWLSBY. I will be brief. Thank you, Senator.

I think almost remarkably we agree on a number of things. First, I think we all agree on the modernization of the model. I think we agree about broad-based programming and compliance with Title IX and all the opportunities that has created. I think we all agree with fair national competition and disagree a bit on how we get there. Indeed, one in five college athletes is a first-generation college student. The college athletic scholarship program is the second largest scholarship program in the history of our country, second only to the GI Bill. And so what we are seeking is a safe harbor to allow us to modernize and cling to the things that we find important about college athletics and yet make the progress that is required.

Senator MORAN. Thank you.

My view is that each and every one of you have been exceptionally helpful to us, to the Commerce Committee in developing thoughts and about how we proceed going forward. My personal view is that the burden lies with those of you at that table at the moment, not us. But we stand—I was going to say able. We stand ready and willing to be helpful as we try to figure out how we appropriately change the status quo to the benefit of all athletes who attend college and get an education. So I appreciate what you all had to say, and it is very useful for me in understanding what is ahead of us.

With that, the hearing record will remain open for two weeks. What that means is that members of this committee can submit questions to you during that time. Upon receipt of those questions, we would ask you as witnesses to submit your written answers to the Committee as soon as possible, just as we would hope that you would do in resolving this issue just as soon as possible.

With that, the hearing is concluded and we are adjourned.

[Whereupon, at 12:24 p.m., the hearing was adjourned.]



## A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO  
BOB BOWLSBY

*Question 1.* Your testimony mentioned the utility of the new autonomy structure of the NCAA, which provides specific decision-making authority to the “Power 5” conferences related to governance of student athlete policies. What categories of issues or policies are eligible for this type of autonomy structure model determinations?

Answer. In August of 2014, the NCAA Division I Board of Directors adopted a new governance structure (the “Autonomy Structure”) pursuant to which the Atlantic Coast Conference, The Big Ten Conference, The Big 12 Conference, Pac-12 Conference, and Southeastern Conference, who comprise the “Autonomy 5” conferences in the NCAA, were allowed the autonomy to determine future changes in the following types of NCAA rules:

- Cost of attendance stipends
- Insurance benefits for student-athletes
- Non-coaching staff members and volunteer coaches
- The use of agents and their interaction with student-athletes
- Medical expenses during enrollment and two-years post-enrollment
- Mental health services and resources
- Management of student-athletes’ time in light of required practice schedules

The following are some of the types of rule changes that must still be adopted under the shared NCAA governance rules and cannot be adopted under the Autonomy Structure:

- Amateurism
- Transfer eligibility rules
- Academic eligibility rules
- Enforcement and scholarship limits
- Financial aid limits
- Name, Image and Likeness (“NIL”) payments
- Recruiting rules
- Mandatory limits on time spent on sport related activities
- Division membership requirements

NCAA rules to be adopted under the Autonomy Structure must be sponsored by at least one of the Autonomy 5 Conferences, approved by a group made up of presidents from the Autonomy 5 Conferences, and then adopted by the vote of either:

- (a) 60 percent of the representative 65 member schools in the Autonomy 5 Conferences plus 15 student-athletes that are appointed to that group (at least 52 of those 80 representatives) *plus* a simple majority of the members of at least three of the Autonomy 5 Conferences; *or*
- (b) 51 percent (41) of the 80 representatives *plus* a simple majority of the members in four of the Autonomy 5 Conferences.

*Question 1a.* How are policies that are implemented at the “Power 5” conferences through the autonomy structure considered and translated, if appropriate, to the other NCAA conferences?

Answer. The NCAA conferences other than the Autonomy 5 conferences may decide to opt-in on any NCAA rule changes adopted by the Autonomy 5 conferences under the Autonomy Structure so that they are applicable to their conference members.

*Question 2.* In the case that NIL payments were permitted to be paid, what are appropriate or necessary protections for our student athletes?

Answer.

- Academic services, academic counseling and tutoring because even if student-athletes are permitted to commercialize their NIL, they are not professionals, and it is critical that the academic mission of collegiate athletics remain a point of emphasis
- Top quality medical care, including mental wellness support, which could be particularly important with the added pressures that come with receiving compensation from third parties
- Career services and professional counseling
- Financial literacy training because student-athletes who receive NIL payments may not have experience managing such large sums of money
- Personal development support, coaching and mentorship

*Question 2a.* Is it possible these payments open our student athletes up to wider predatory circumstances?

Answer. Yes, particularly if agents are permitted to interact with student-athletes. Unscrupulous agents may seek to incentivize student-athletes to enroll at particular universities for the benefit of the agents themselves, instead of acting in the best interest of their clients, the student-athletes. We have already seen several incidences of such behavior in recent years. Indeed if agents are permitted, we may find ourselves in an environment with even more unscrupulous third parties (including agents, financial advisors and the like) than exist today because more and more individuals consider themselves to be qualified agents. A much more vigorous agent preparation and certification process would be vital, but likely of marginal success.

Even if agents are not permitted to participate in the collegiate model, boosters or sponsors who have relationships with a given school will be involved in recruitment and transfer decisions and may similarly attempt to induce recruits or transfer students to initially enroll in or transfer to a given school, as applicable. Such an open system would be very difficult to regulate.

*Question 3.* While California's Fair Pay for Play Act does not authorize payment by the educational institution to student athletes, there are examples of other state legislation that do. The New York Collegiate Athletic Participation Compensation Act would require a percentage of revenue from tickets sales be distributed among the student athletes. Do you believe student athletes should receive compensation in any form from the institution or its athletic department?

Answer. NCAA rules allow the school at which a student-athlete is enrolled to provide extensive benefits allowing schools to provide student-athletes up to the full cost of attending and pursuing completion of a degree at that institution in his or her chosen course of study. The rules defining what benefits can be provided by the school within this standard has been reviewed and revised by the NCAA membership from time to time, and additional changes can be considered in the future by the NCAA membership. However, I believe that it would be inconsistent with the collegiate sports model for those changes to allow payments to be made to student-athletes that constitute direct or indirect "pay to play" compensation, payments to induce them to initially enroll in or transfer to a specific school, or payments that would make them employees of the school.

*Question 4.* In 2015, the "Power 5" conferences, including the Big 12 Conference, voted to increase scholarships to include the full cost of attendance for student athletes, and these reforms also included coverage of medical care for athletics-related injuries at least two years out of college, increased reimbursement to family members to attend certain events, and allowing student athletes to borrow against their future professional earnings to purchase loss-of-value insurance to protect athletes financially should a potential career-ending injury occur. These all appear to be appropriate benefits to offer student athletes, and while I understand that the institutions that make up the "Power 5" conferences are more likely to be able to offer such benefits to their student athletes, is it the policy of some institutions outside of the "Power 5," including non D-1 programs, to offer any of these types of benefits to their student athletes?

Answer. I completely concur that the list of additional benefits for student athletes you've listed are entirely appropriate and were long overdue when enacted by the Autonomy 5 in 2015. As I referenced in my earlier response to Question 1 above, the member institutions within the Autonomy 5 are required to offer the full cost of attendance to student-athletes. The other colleges and universities in Division I outside of the Autonomy 5 are given the option of providing the same. It is my un-

derstanding that the majority of those schools and an additional number of “non D-1 programs” do, in fact, offer full cost of attendance to many of their student-athletes.

*Question 5.* If Congress decided to pursue Federal legislation regarding NIL payments to student athletes, a critically important component of such legislation would be determining what types of arrangements, activities, and agreements would be eligible for the categorical definition of an NIL payment. Do you have suggestions for this subcommittee as it relates to defining the NIL in statute?

Answer. The California Fair Pay for Play Act and other proposed state laws require that the NCAA allow student-athletes to receive virtually *unlimited* compensation relating to their NIL, which could undermine the current collegiate sports model. If Federal legislation is enacted to preempt an unworkable patchwork of potentially inconsistent if not contradictory state laws, then it will be critical that the Federal legislation establish which existing or new body will determine which types of NIL compensation will be permitted, the limitations (or “guardrails”) on these payments to ensure that they are consistent with the collegiate sports model, and how these determinations may differ for NCAA members of different sizes and resources in the three Divisions of the NCAA, consisting of 347 colleges and universities.

I am a member of a Federal and State Legislation Working Group appointed by the NCAA Board of Governors in May of last year to focus on exactly these NIL issues. We have collectively spent thousands of hours on conference calls, in in-person meetings, and in consultation with our members to consider many very complex and rapidly evolving issues involving NIL and the interrelated rules that permit student-athletes to transfer from one school to another on a conditional basis after beginning their eligibility. Based on this work, I can only tell you at this point that I am confident that progress can be made within the spirit of the college sports model to modernize our rules for the benefit of student-athletes, but the analysis is complex, the possible unintended and interdependent consequences of any one action are hard to predict, and the best path forward has not yet become clear.

Therefore, I respectfully suggest that instead of putting the burden on Congress to draft into legislation the specifics of a permissive NIL structure, Congress “deputize” in this legislation an existing or new body to establish and oversee this new NIL structure and to modify it as circumstances change in the future (without the need—within certain parameters—to come back to Congress) based at least in part on the work of the three divisional NCAA working groups when it is complete. If the Federal statute provides 1) the appropriate framework for mandating that permissive NIL compensation rules be adopted by this body within a reasonable time frame, 2) appoints the body to define the framework for these rules and any limitations thereon and future changes thereto, 3) provides preemptive protection from a patchwork of inconsistent and possibly contradictory state laws and safe harbors from ongoing antitrust attack of actions taken in compliance with the rules adopted under this Federal legislation, and 4) a framework for and body authorized to enforce the statute’s mandate, then I believe that prompt and constructive progress can be made toward adopting a modernized NIL compensation structure that aligns the benefits that can be earned by student-athletes for use of their NIL going forward with the corresponding rights of other students that are not athletes in a manner consistent with the underlying principles of the college sports model.

You asked: “Do you have suggestions for this subcommittee as it relates to defining the NIL in [the] statute.” I find it interesting that few, if any, of the enacted or proposed state NIL statutes define what constitutes a student-athlete’s “name, image, and likeness,” and to my knowledge no other state laws define these terms in the context of collegiate sports.

However, the NCAA working group referred to above, of which I am a member, has discussed this extensively without definitive resolution to this point and based in part on that discussion, I offer the following. The concept of a student-athlete’s “name” is relatively clear in its basic form: “Jane B. Athlete.” However, does it include nicknames taken by the student-athlete, nicknames proclaimed by the press or other outside persons, stylized adoptions of the name (such as “J-Bee”)—or the like? What types of uses of the name are covered: use in typed and broadcast print, Internet blogs, sponsorship advertisements, signing autographs, placement of the name on the back of souvenir uniforms (using the school’s proprietary logos and colors), the student-athlete’s name being used in product promotions or the student-athlete appearing in “influencer” Facebook videos for which advertisers pay the student-athlete a fee for each “click”?

The concept of the “image” of a student-athlete also may appear to be fairly straight forward, such as any still photograph or moving video of or in which the student-athlete is included. Many of the same questions noted in the preceding

paragraph of the types of uses of a student-athlete's name that are permitted could also apply to the use of his or her image. However, care must be taken to differentiate use of a student-athlete's name and image in legitimate news and promotional activities relating to his or her voluntary participation as a public figure in the sporting and other related activities of his or her team and school. Payment to the student-athlete for these traditional "news" and "publicity" purposes would clearly cross the line into "pay for play." In contrast, certain uses of names and images could be commercialized without undermining the traditional concepts of collegiate sports, such as when a student-athlete gives lessons to youngsters in his or her sport at "market rates" or publishes a book on subjects not related to his or her sport.

The "likeness" of a student-athlete could include much broader concepts and potential uses that may be much more challenging to define. Presumably it would include drawn or painted (in any medium) or virtually-created electronic depictions of a student-athlete that are clearly recognizable representations of what he or she looks like, perhaps in uniform, perhaps in sports action. Beyond this, does it include stylized depiction of an athlete that do not attempt to recreate his or her image, but include certain characteristics of the athlete (hair style, size or shape, characteristic athletic move, etc.) that could cause a viewer to conclude that likeness as being of a given student-athlete? Or, does it include non-stylized images, such as stick figures or "automaton" robot-like figure that just happens to use the jersey number of, hair and skin color of, and have statistics similar to those of a real student-athlete, such as might be used in an online or video game?

These just illustrate a few of the complicated issues that would be involved in a compressive definition of what falls within the "name, image, or likeness" of a student-athlete. As a result, although a Federal NIL statute could include a broad and general definition of the concepts of "name, image, and likeness," I respectfully suggest that the detailed evaluation and definition of these many permutations may be beyond the scope of a legislative structure and perhaps also could be delegated to the entity that is "deputized" to create the overall NIL structure and guardrails, as I described earlier in this answer to Question 5.

*Question 5a.* What types of commercial arrangements, activities or agreements should this subcommittee remain wary of?

Answer. The NCAA Federal and State Legislation Working Group on which I participate has identified a number of types of commercial arrangements that could be misused to damage the collegiate sports model. These include arrangements that would undermine the bilateral national recruiting model on which colleges and students have traditionally and successfully used to determine the schools at which students will matriculate and participate in the co-curricular activity of intercollegiate sports. Unlike most professional sports leagues, which force athletes to play for a specific pro team without them having any choice through a unilateral "draft" structure, or the Olympic model, in which an athlete may play only for the team of the country of citizenship, the long-standing, highly-competitive and highly-regulated collegiate model allows any student (regardless of where they live) to be recruited by any college that is a member of the NCAA.

This bilateral choice structure (much like the graduate medical education residency matching program by which future doctors decide where to serve their medical residencies and which is subject to a congressional antitrust exemption), allows the student to decide to accept an offer to play at a given school based on the level of competitive experience, academic program, size, location, and student-athlete experience that best fits his or her vision for their future. If the rules were to change to allow boosters or sponsors who have relationships with a given school to provide direct or indirect "compensation" to a recruit or transfer student to induce him or her to initially enroll in or transfer to a given school, then the benefits to student-athletes of this open and bilateral recruiting process would be undermined.

Other types of structures with student-athletes that masquerade as commercial "endorsement" or "sponsorship" arrangements that do not bear an economic relationship with the market value of the services provided by the student-athlete may in fact be arrangements disguised to compensate the student-athlete to play or continue to play for a given school, thus constituting "pay for play" arrangements that are clearly inconsistent with the traditional collegiate sports model.

Although possibly an exceptional example, it is not at all inconceivable that a sponsor (such as a sports equipment supplier) that has strong sponsorship ties with a given school might tell a top high school recruit that if he enrolls in and plays at that school through his eligibility period, then upon graduation (or the later completion of his professional career) they would hire him for a four year "paid internship" (at a pay level significantly above the market rate for other graduate interns) to advance education.



I am of the firm opinion that these and many other similar types of commercial arrangements constitute “pay for play” arrangements that would significantly damage the very underpinnings of the collegiate sports model that is so popular with collegiate sports fans.

*Question 6.* According to the 2018 financial data collected by USA Today, there were only 12 athletic departments in the country that did not receive any support from its own institution or the state in which it is located. Furthermore, approximately 90 percent of athletic departments received over \$1 million in support, and for nearly 80 percent of departments, this support accounted for more than a quarter of their revenue. For instance, 91 percent of the revenue for the University of California-Riverside came from outside the athletic department, and James Madison University athletics received \$41.7 million in assistance. This demonstrates that the vast majority of athletic departments rely upon funding resources outside of the department. How will legislation like that of California affect the operation of athletic departments?

Answer. As noted by the question, it has been well-documented by a variety of reputable sources that very few athletic departments make a profit and that most athletic departments rely upon a number of funding sources outside of the department, including student fees. I suggest those interested to consult the essay attached to my written statement by Dr. Kevin Blue, Director of Athletics at the University of California-Davis, which lays out the dramatic increases in expense trends.

On the revenue side of the equation, mine is a discordant voice as I believe we have nearly reached the pinnacle of revenue growth for Division I intercollegiate athletics. Legislation like the newly-enacted law in California could negatively impact the operation of athletic departments by diverting monies intended for athletic budgets directly to student-athletes and to their unregulated agents. Moreover, if laws like that of California become a proxy for pay-to-play and student-athletes are actually compensated for their performances, I believe you will see a further decline in attendance, season ticket sales and donor donations as college sports fans will balk at supporting what they deem to be professional athletes at their alma mater or home-state school.

*Question 6a.* What are the negative impacts you foresee?

I anticipate any number of negative implications in an open NIL system. Boosters, donors and other third parties will be involved in the recruitment and transfer decisions and we will find ourselves in a largely unregulated recruitment system. Non-scholarship and walk-on players will receive support from boosters, donors and third parties to effectively increase scholarship allocations beyond agreed upon limits.

In addition to the tax consequences of outside income from NIL, there will be legitimate questions regarding taxation of other elements of the athletics scholarship, creating a business transaction for a few players and the potential for an unfunded obligation for a large majority of non-NIL scholarship recipients. A few football and basketball players will capture the vast majority of NIL opportunities greatly diminishing the shared experiences of the team environment.

I believe the number of sports offered on campuses will eventually decline and Olympic and non-revenue sports will give way to the reality of Division I schools competing in a few high popularity sports causing an overall reduction in scholarship opportunities. As such, the academic priorities of some student-athletes will become an even lower priority on the path to the subsequent professional opportunities.

I also envision the limitations on when student-athletes can enter the professional drafts will be eliminated in favor of open access beginning in high school.

Lastly, while many dismiss Title IX implications as a nonissue, some legal experts are raising red flags. (Please see “*What Title IX Fallout Might NIL legislation Pose*,” Paul Steinbach, Athletic Business, January 2020.) I foresee institutional personnel at universities, acting in the best interest of a school’s student-athlete, will participate in arranging NIL opportunities for selected players and will thereby reintroduce questions about the 13 components of Title IX.

*Question 7.* Amateur athletics has major participation through the NCAA but it also covers many athletes who participate on our Olympic teams. What impact could these NIL payments have on U.S. Olympics?

Answer. Having served two terms on the United States Olympic Committee, I have significant concerns that an open, unregulated NIL system will weaken our Olympic sports on campus and compromise our Nation’s desire to send our country’s best athletes to international competitions. As my written statement predicts, while all college sports participants might be alleged to have equivalent opportunities to profit from name, image and likeness activities, I believe that the present discussion is principally about football and men’s basketball players. It is my strong belief the

participants in these two sports will harvest the vast majority of NIL opportunities. It follows that this disparity in NIL payments will ultimately diminish other sports on campus. This diminishment could come in the form of reduced scholarships, budget declines or even sport eliminations. Because more than 80 percent of our Summer Olympians come through college programs, any damage to Olympic sports on campuses could have a profoundly negative outcome for our international Olympic efforts.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DAN SULLIVAN TO  
BOB BOWLSBY

*Question.* What role do you foresee Sports Agents playing in college athletics after the State laws begin taking effect?

*Answer.* Senator, your question suggests the absence of a uniform Federal standard and that scenario is extremely problematic. Some of the state initiatives share similar provisions with each other; others are radically different. Many of the proposed measures at the state level have effective dates well in the future and provide the NCAA Working Group with ample time to create a workable NIL system. Other states have immediate effective dates. Such a patchwork of disparate laws would present an enormous challenge to the NCAA and its member institutions. My concern has always been focused on the unique national recruitment environment currently in place and an NIL system with unregulated sports agents will favor an institution in one state over another, depending upon that state's law.

In addition, the real-world impact of "sports agents playing in college athletics" are significant and disturbing. Student-athletes will have agents and managers and their representatives will participate in many aspects of their lives on campus. College recruits will come to campus with pre-existing agent relationships and established business ventures. Coaches will have to recruit the player, his family, and the prospective student-athlete's agent. Boosters, donors and other third parties will develop relationships with sports agents in an effort to impact the student-athlete's recruitment and transfer decisions. An open NIL/pay-for-play model evokes unscrupulous and unworkable scenarios. It is my belief that a patchwork of state laws will not be successful in governing interstate competition and, therefore, Federal regulation will eventually be required.

## What Title IX Fallout Might NIL Legislation Pose? (/college/how-might-nil-legislation-be-impacted-by-title-ix.html)

### Details

by Paul Steinbach (/featured-ab-writers/paul-steinbach.html)

📅 January 2020

Allowing a college student-athlete to make money from the use of their name, image and likeness has seen support from nearly every corner of the country, but the biggest challenge to the concept of amateurism in decades brings all sorts of legal questions. *Forbes* (<https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/#7c9490607625>) points to what it calls "a neglected area of the law" — Title IX — as posing potential headaches for schools mandated to keep treatment of male and female student-athletes equitable.

As reported by *Forbes* contributor Kristi Dosh, schools must offer equitable treatment of male and female student athletes in the areas of participation, financial aid and the provision of things such as equipment, travel, facilities, scheduling, recruitment, publicity and more. Opportunities need not be identical, but they do have to be equitable. Many have dismissed Title IX as a nonissue because payment would presumably be made directly from third parties to student athletes, but legal experts have a different take.

"There are some scenarios that seem to at least require further analysis before dismissing them as third party payments," says Julie Roe Lach, of Church Church Hittle + Antrim, a group of attorneys with NCAA national office experience who advise institutions and individuals on Title IX matters.

"For instance, I could foresee some approval process that includes institution involvement if and when student athletes engage with these third parties opportunities. Although no funds would be coming from the institution, the institution would need to administer that approval process in a way that meets Title IX and NCAA compliance obligations and ensure that there are equal standards set to review opportunities for males and females."

"If that forthcoming legislation allows in any way for this to become a recruiting tool, Title IX tentacles will certainly connect dots to other sports and student athletes," says Jeff Schemmel, president of College Sports Solutions, who is also a former Division I athletic director and an attorney who's consulted with athletic departments on Title IX issues. "It is likely that the new legislation will attempt to keep this out of the coaches' hands relative to recruiting, but the practicality of that is difficult."

One area of potential impact is recruiting.

"If a local business offers a sponsorship deal to a high-profile prospect, and the school is aware of it — assuming this is all permissible under NCAA rules — there's a question as to whether that school's knowledge creates an obligation to try to ensure similar opportunities are offered for the other gender," Roe Lach says. "Similarly, what if a booster, an institutional employee, or a trustee is also involved with the sponsor? For example, the institutional employee is on the board of a local charity. The charity wants to pay a student-athlete \$500 to speak at an event. Does the institutional employee's involvement bring the payment to the student athlete closer to looking like an institutionally driven payment?"

Outside influences could pose "a very real dilemma," according to Schemmel. "There is also a valid argument that the schools should step in and assist student-athletes in their pursuit of NIL rewards rather than having those student-athletes pursued and distracted by competing outside agencies and agents."

Another issue presented by Dosh is promotion and marketing.

"Title IX policy interpretations clearly point to the need for equitable promotion/marketing for both men's and women's programs," says Dr. Lindsey Darvin, an assistant professor and gender equity researcher within the Sport Management Department at the State University of New York College at Cortland. "This lack of promotion or

promotion that is not of the same quality for the women's teams could directly influence the NIL earnings women student-athletes receive. Those teams with more promotions and higher level promotions will be in essence providing additional opportunities for those athletes to be recognizable.

"If these efforts are not equivalent, women student athletes could argue that their earning potential is in jeopardy. Women student athletes would be required to work harder than their men student athlete counterparts to promote themselves in an effort to benefit from their NIL, if the institution will not do this for their programs."

Additional factors that may emerge include the quantity and quality of publications and other promotional materials — right down to the number of pages and the specified paper stock — as well as access to other publicity sources for men's and women's programs. Just as with affected athletic departments, the legal experts cited by *Forbes* are taking a wait-and-see approach.

"Title IX claims relative to NIL will depend greatly on what the new legislation looks like," Schemmel told Dosh. "The legislation, however it looks, will also be a new area of interpretation for the courts and the Office of Civil Rights. In fact that legislation will allow a school, an athletic department, or its representatives and employees to become involved in the process of securing monetization of a student athlete's NIL, it will certainly get the attention of Title IX officials on a national scale."

Tags: Title IX (</search.html?ordering=&searchphrase=all&searchword=Title%20IX>) Name Image and Likeness (</search.html?ordering=&searchphrase=all&searchword=%20Name%20Image%20and%20Likeness>) NCAA (</search.html?ordering=&searchphrase=all&searchword=%20NCAA>) compliance (</search.html?ordering=&searchphrase=all&searchword=%20compliance>)



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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER WICKER TO  
DR. MARK EMMERT

*Question 1.* There are a growing number of states that have adopted, introduced, or signaled plans to introduce legislation similar to the law in California. How would the NCAA handle a potential situation where there are 50 state laws governing the use of student-athletes' name, image, and likeness?

Answer. Conducting intercollegiate athletics with a patchwork of 50 state laws is untenable. Absent a national standard, the NCAA would need to examine a variety of options, including a potential constitutional challenge based on violations of the commerce clause. Collegiate athletic competition and the recruitment of student-athletes is an inter-state activity, and the success of intercollegiate athletics is based on the concept of national competition and national championships.

For example, if a prospective student-athlete who lives in Oklahoma is being recruited by institutions in Oklahoma, Florida, and Maryland, it is unclear which state's rules would apply. The student might be subject to inconsistent rules, which would be difficult and unfair for the student to navigate without jeopardizing his or her eligibility to play. An institution might be subject to one set of rules when recruiting a student in one state and another set of rules when recruiting a student in another state, creating confusing and burdensome compliance obligations, jeopardizing the eligibility of individual players and even the entire team. And any discrepancies between states would advantage or disadvantage an institution based on its location or the location of a recruit. That uneven playing field would then undermine the fairness of intercollegiate athletic competitions.

*Question 2.* How will athlete compensation impact non-revenue generating sports at universities?

Answer. As the NCAA works to modernize its rules to allow student-athletes to take advantage of NIL opportunities, we worry about the consequences to student-athletes playing non-revenue generating sports, including whether women would have equitable opportunities. There is the possibility that student-athletes in sports attracting larger fan bases would dominate the NIL opportunities. Further, those few students might detract from an institutions overall athletics budget, which could result in the elimination of varsity sports.

*Question 3.* What policies and procedures does the NCAA have implemented to prevent and eliminate doping in college athletics?

Answer. The NCAA is committed to the prevention of drug and alcohol misuse and to protecting the integrity of its competitions. The NCAA Drug Testing Program, clear policies, and education programs protect and deter student-athletes from using both performance-enhancing and recreational drugs.

- As a condition and obligation of membership, institutions must abide by the requirements set forth in NCAA legislation (Constitution 3.2.4.8) which requires, among other things, that all active member institutions educate athletics staff (e.g., administrators, coaches) and student-athletes about *banned drug classes and banned substances* including the risks of nutritional supplement use.
- The NCAA Drug Testing Program is robust, executing well over 12,500 tests annually. Testing occurs year-round (including summer), and during championships. Individuals selected for testing are given less than 24-hour notification. Should a student-athlete fail to appear or provide a sample, they are sanctioned as if they had a positive test for a performance-enhancing drug.
- The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports (CSMAS) is an Association-wide committee which has oversight of the NCAA drug testing program. This committee includes physicians and other health care providers with expertise in drug testing and drug education. CSMAS, working in concert with the NCAA Sport Science Institute (SSI) staff consistently reviews and evaluates data and emerging science to ensure that the NCAA drug testing program policies and procedures reflect contemporary and appropriate standards.
- *The NCAA Drug Program Booklet* includes all NCAA drug testing program policies and procedures and is used by those on campus responsible for assisting with execution of the drug testing program. Campus personnel are made aware of any changes to the program prior to the start of each academic year. In addition, the booklet provides a drug education framework for member schools to use and assists them in conducting adequate drug education for their student-athletes.
- SSI has also developed a *Substance Abuse Tool Kit*, which is endorsed by 14 leading higher education and medical organizations in the country. It provides

recommended approaches and evidence-based resources for administrators to address the use of alcohol, cannabis, prescription drug abuse and more.

*Question 3a.* How are the NCAA's anti-doping policies different from those of the U.S. Anti-Doping Agency?

Answer. The NCAA generally aligns with the U.S. Anti-Doping Agency because it understands the importance of shared and internationally-recognized standards. It also regularly consults with the director of UCLA's drug testing lab (one of only two WADA-accredited labs in the United States) regarding emerging trends and evidence-based science related to banned substances and lab analysis.

For reasons that are unique to the NCAA, like the fact that our athletes are also students, or because our 1,100 member institutions have unique and varying philosophies, the NCAA drug testing program has some differences in purpose and policy from USADA. Such differences include:

- USADA tests only Olympic-level athletes. In contrast, the NCAA oversees drug testing for 500,000 student-athletes, and only one-percent of these student-athletes become Olympic or professional athletes
- USADA provides advanced notice to those Olympic athletes who may be tested year-round. The NCAA provides no advance notice to ANY student-athlete, and we conduct year-round out-of-competition testing in addition to championships testing.
- The NCAA tests more athletes out-of-competition than does USADA.
- The NCAA has a more rigid marijuana/cannabis policy in place than USADA, and uses a threshold that aligns with professional sports. This means that a student-athlete will be disqualified at a lower level than USADA, and it is a threshold that has more evidence basis than that of USADA.
- The NCAA has in place a more rigorous pain management/opiate deterrence model in place—one that was created by the NCAA Chief Medical Officer, who was also co-Chair of the International Olympic Committee's summit on pain management in elite athletes.
- The NCAA does not share information in the same way as USADA because of FERPA rules.
- The NCAA utilizes a different threshold for testosterone, which is based on the scientific analysis of thousands of test results. However, for any world record, the NCAA works with USADA and they oversee drug testing in these circumstances.
- The NCAA does not perform blood tests at present because of concerns with the general student-athlete body. We are actively investigating performing finger sticks as an alternative to venous blood drawing. Because of blood drawing concerns, we do not test for human growth hormone at present but hope to do so once we can utilize the finger stick method. However, for world level athletes, as noted above, blood testing under the direction of USADA may be performed.
- The NCAA widely socializes the Substance Abuse Prevention and Intervention Tool Kit (referenced above). This tool kit is endorsed by 14 of the leading higher education and medical organizations in the country. USADA does not have in place such an endorsed educational program.

*Question 3b.* Has the NCAA considered aligning its anti-doping policies with those developed by the U.S. Anti-Doping Agency?

Answer. Please see answer to previous question. Despite the identified distinctions, the NCAA is very aligned with USADA. Both organizations test for and ban the same category of drugs. It is especially noteworthy that both organizations ban and test for erythropoietin.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO  
DR. MARK EMMERT

*Question 1.* In the case that NIL payments were permitted to be paid, what are appropriate or necessary protections for our student-athletes?

Answer. The NCAA Board of Governors provided its initial direction about the safeguards necessary to preserve college athletics, but some of those potential safeguards may leave the NCAA vulnerable to legal attack without Congressional action. The NCAA believes that the following safeguards will help protect the student-athlete:

- Transparency around the NIL activity.

- Avoidance of transactions intended to induce a young person to choose to play for an institution based on financial motives.
- Avoidance of using NIL activities as a means to pay a student for his or her athletic performance.

*Question 1a.* Is it possible these payments open our student athletes up to wider predatory circumstances?

Answer. Unfortunately, there are those who already try to lure student-athletes to sign long-term contracts with onerous terms without visibility and accountability and allowing student-athletes to benefit from certain NIL activity may bring the temptation to engage in similar predatory conduct in the NIL context. To help protect student-athletes from such practices and to help them achieve financial benefits in a more equitable manner across the race, gender, and economic spectrums, the NCAA would impose transparency requirements on any permitted NIL activities and allow student-athletes to use professional services with appropriate institutional and NCAA oversight.

*Question 2.* While California's Fair Pay to Play Act does not authorize payment by the educational institution to student athletes, there are examples of other state legislation that do. The New York Collegiate Athletic Participation Compensation Act would require a percentage of revenue from tickets sales be distributed among the student athletes. Do you believe athletes should receive compensation in any form from the institution or its athletic department?

Answer. Any compensation by an institution raises structural challenges, as all agree that the intent of allowing NIL opportunities is not to make student-athletes employees of his or her institution. New York's legislative proposal to compensate student-athletes based on athletics department revenue would lead to a variety of unintended consequences, including employment consequences. A state law requirement to compensate student-athletes beyond permissible benefits amounts to "pay for play," which the NCAA's governing bodies do not believe is appropriate. For the vast majority of athletics programs, a revenue sharing model with student-athletes could divert funds now used to provide educational and sports participation opportunities resulting in a reduction in both.

*Question 3.* If Congress decided to pursue Federal legislation regarding NIL payments to student athletes, a critically important component of such legislation would be determining what types of arrangements, activities, and agreements would be eligible for the categorical definition of an NIL payment. Do you have suggestions for this subcommittee as it relates to defining the NIL in statute?

*Question 3a.* What types of commercial arrangements, activities or agreements should this subcommittee remain wary of?

Answer. The NCAA believes that legislation does not need to have specific provisions that regulate the permissible NIL transactions of a student-athlete. Rather, Congress can recognize the extensive engagement by the NCAA's governance boards and validate their discretion to make reasonable rules. Further, rapid advancements of technology could make NIL definitions outdated at the time of passage or soon after. Congressional recognition of the NCAA's authority to regulate in this space would allow for more nimble adjustments to student-athlete opportunities as circumstances change.

*Question 4.* According to the 2018 financial data collected by USA Today, there were only 12 athletic departments in the country that did not receive any support from its own institution or the state in which it is located. Furthermore, approximately 90 percent of athletic departments received over \$1 million in support, and for nearly 80 percent of departments, this support accounted for more than a quarter of their revenue. For instance, 91 percent of the revenue for the University of California-Riverside came from outside the athletic department, and James Madison University athletics received \$41.7 million in assistance. This demonstrates that the vast majority of athletic departments rely upon funding resources outside of the department. How will legislation like that of California affect the operation of athletic departments. What are the negative impacts you foresee?

Answer. Most institution athletics budgets rely upon third-party program and sport sponsorships to provide maximum participation opportunities for their male and female students. Individual, permissible NIL payments from third parties to student-athletes will not go to benefit the program and there is some concern that those individual payments will reduce sponsorship opportunities for the institution. The NCAA should be given the authority to protect campus athletics budgets or allow conferences and institutions to pass policies that would protect maximum participation opportunities so that new sports can continue to be added and student-

athletes' academic, health and safety, equipment, and nutritional needs will continue to be met.

*Question 5.* Your testimony mentions the unique principle of student-athlete recruitment in which the student-athlete is empowered with the choice of where to attend school, and that no other model in sports is like it, professional sports nor the Olympics. Why is this such an important fact to consider? How could laws at the state or Federal level impact this principal unintentionally?

Answer. Many of the NCAA rules on student well-being and competitive balance address aggressive school booster and coach recruiting tactics. There are bad actors for whom regulation is needed, just like in any other environment. Techniques to "buy" student-athlete participation, to choose to play for a school or to transfer to a new school, are especially pernicious. Inducing students through payment disrupts their school choice and perhaps even their progress toward graduation. These impermissible payments devalue the academic mission of our campuses. Federal legislation giving the NCAA clear authority to prohibit NIL payments that are disguised "pay for play" payments will be vital to the success of offering appropriate NIL opportunities to students.

*Question 6.* The NCAA has a process of determining the amateurism status of a current or prospective student-athlete at a Division 1 or 2 institution. This process includes an "amateurism certification" initiated by registration with the NCAA's Eligibility Center. What are the major functions of the Eligibility Center, particularly as it relates to the "amateurism certification"?

Answer. The NCAA Eligibility Center is charged with certifying the academic and amateur status of incoming NCAA Divisions I and II student-athletes in accordance with *NCAA Bylaws 12 and 14*. For amateurism certifications (NCAA Bylaw 12), students respond to a series of Eligibility Center registration questions regarding their sports participation history. Upon review, additional information may be requested. Students must also submit a request for their final amateurism certification beginning April 1 (fall enrollees) or October 1 (winter/spring enrollees). Outcomes of the amateurism review are either Final Certified, Final Not Certified or Final Certified with Conditions. A member institution may submit a waiver request if it believes relief from the application of NCAA legislation is warranted for a particular student.

*Question 6a.* Is there an ongoing eligibility oversight and compliance responsibility that the Eligibility Center is required to uphold?

Answer. The NCAA Eligibility Center's oversight is limited to initial academic certifications (based on the student's high school academic record) and initial amateurism certifications (based on activities that occurred before the student's request for final amateurism certification or initial full-time enrollment at a Division I or II school, whichever occurred earlier). However, it may re-evaluate a final academic or amateurism certification if new information is subsequently received that calls into question the information on which the final certification was based.

*Question 6b.* What is done by the Eligibility Center in terms of educating student athletes on the rules pertaining to amateurism and eligibility?

Answer. The NCAA Eligibility Center employs a variety of outreach measures to educate college-bound student-athletes (*e.g.*, via the *registration process*, our *website*, social media, presentations at schools and events). Further, high school counselors and coaches receive educational newsletters regarding Eligibility Center resources and updates, and they can access resources via our *high school portal*. The Eligibility Center also conducts live presentations at a variety of academic and athletic organizational meetings each year.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MIKE LEE TO  
DR. MARK EMMERT

*Question 1.* The NCAA was formed in 1906 after President Theodore Roosevelt convened a conference to address football injuries. This conference concluded with the presidents of 62 colleges and universities founding an association to create uniform rules. While President Roosevelt encouraged the meeting, he did not expressly ask that the Federal government take an active role in the regulation of college sports. The NCAA has now helped govern college sports for 115 years with minimal Federal government intervention. In fact, it's well known that the NCAA has long resisted congressional involvement in college sports for numerous reasons.

*Question 1a.* Is it still the NCAA's position that college sports should remain free of congressional involvement?

Answer. The NCAA has supported Federal direction on matters of national importance, and we think attempts by individual states to regulate student-athlete NIL



is one of them. We have supported Title IX legislation, and we supported Federal efforts to keep sports wagering regulated, among other Congressional actions that have had a positive impact on college athletics and higher education.

*Question 1b.* The NCAA has long prided itself on having its own “legislative bodies” that are made up of volunteers from all member schools, who debate, resolve, and set rules and standards to address its own emerging issues. What unintended consequences could result from Congress instituting “one-size-fits-all” Federal standards on college sports?

Answer. The NCAA hopes that Congress will provide a general statutory framework that will allow the NCAA governance processes to continue to make responsible decisions regarding NIL benefit regulation that will preserve the collegiate model, reaffirm that student-athletes are not employees of the institution, and not result in a “pay for play” environment. We think the Federal solution is superior to a state-by-state approach, which would subject college sports to an unmanageable patchwork of regulation that would disrupt the Association’s ability to conduct fair national competition and championships.

*Question 2.* The NCAA is currently developing “Name, Image, Likeness” rules that would permit student-athletes to benefit from use of their name, image, and likeness.

*Question 2a.* When do you anticipate completion of these rules?

Answer. The NCAA Board of Governors has asked each division to vote on new rules related to NIL no later than January 2021.

*Question 2b.* If Congress decides to move on legislation prior to the release of the NCAA’s new rules, could that inhibit the NCAA’s efforts to modernize rules?

Answer. We urge Congressional action as soon as possible so that our rules are in sync with the intent of Congress.

*Question 2c.* What is the NCAA’s most challenging or complex consideration in the crafting of these rules?

Answer. The issues are complex, but Congressional support to allow the NCAA to responsibly regulate NIL activity will help. The NCAA will need to be able to enforce transparency of NIL activities so that related compensation does not become a disguised recruitment incentive or “pay for play.” There are concerns that unrestricted NIL activity will dilute athletics budgets to shift compensation to individual student-athletes in a way that will diminish participation opportunities or resources available for supported teams. There also are concerns that academics will suffer through efforts by third parties to induce students to pursue short-term economic opportunities. Congressional validation of NCAA rulemaking will help alleviate those concerns and others.

*Question 2d.* Why is it important for the NCAA to preserve student-athlete “amateur” status rather than treating athletes as “employees”? What consequences do you foresee if you shift student-athletes to a “professional athlete” status?

Answer. Were student-athletes to be employed to perform on the court or field, we believe that the incentive to be compensated for performance—as with any job—would dominant student-athletes’ and coaches’ motives and accordingly fundamentally alter the nature of the experience. As amateurs, student-athletes participate in intercollegiate athletics for the love of the sport and to derive many non-pecuniary benefits, such as camaraderie, the opportunity to develop discipline, leadership, and teamwork skills, and the opportunity to obtain a higher education that could be transformational but might otherwise be unavailable. We think there is widespread agreement in Congress and the public that this collegiate model is valuable and should be preserved.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAN SULLIVAN TO  
DR. MARK EMMERT

*Question 1.* As you may or may not know, the University of Alaska Fairbanks has won eleven National Rifle Championships. How should we regulate those student athletes who want to endorse, or pose with a rifle or ammunition manufacturers’ product?

Answer. We do not foresee Congress regulating at a level that would determine permissible and impermissible categories of student-athlete sponsorship. In our view, the Association and its members are best situated to identify permissible categories and rules of NIL activity, and that—within that regulatory framework—decisions about specific endorsements would be made by the student-athlete and his/her institution.

*Question 2.* What role do you foresee Sports Agents playing in college athletics after the State laws begin taking effect?

Answer. We do not believe that sports agents, whose primary mission is to negotiate and secure a professional sports career for an athlete, should have an expanded role with NIL opportunities. However, we do recognize that a student, whether an athlete or not, may need professional services of lawyers, accountants, business advisors, and others to navigate NIL proposals in a manner that fairly protects the student. Students engaged in business ventures and entrepreneurial and artistic activities already are entitled to utilize these types of services, and the NCAA is considering adopting rules that would allow for such services specific to NIL opportunities.

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SUPPLEMENTAL INFORMATION FOR THE RECORD:

*Sen. Blumenthal:*

In 2018 the NCAA implemented new rules to allow basketball players to sign with agents, but those rule changes did not apply to women. Isn't that unfair?

In response to the September 2017 announcement of a Federal investigation into fraud in college basketball, the NCAA formed an independent Commission to examine critical aspects of Division I men's basketball. The Commission, chaired by Dr. Condoleezza Rice, developed a range of recommendations to improve the environment for prospective and current student-athletes and member schools. Among the legislative, policy and structural changes put forth by the Commission was a recommendation that men's basketball student-athletes be allowed to contract with NCAA-certified agents without jeopardizing their eligibility. The Commission found that due to the NBA's draft eligibility rules, many students were considering whether to declare for the draft during the early stages of their collegiate athletic experience. Allowing Division I men's basketball student-athletes to contract with an agent would enhance their access to beneficial information to better assess their professional prospects. This recommendation was unanimously endorsed by the NCAA Board of Governors, approved by the Division I Board of Directors and took effect August 2018.

While this rule currently applies to only Division I men's basketball student athletes, NCAA member schools continue to discuss whether Division I women's basketball student-athletes should be afforded the same opportunity. As these discussions continue, member schools will examine whether the issues that led to changes in men's basketball also exist in women's basketball. This includes examining whether earlier agent involvement would be beneficial based on factors such as the draft eligibility rules of the WNBA. For example, to be eligible for the NBA draft, a player must be at least 19 years old during the calendar year in which the draft is held and at least one NBA season must have elapsed since the player's graduation from high school. In contrast, to be eligible for the WNBA draft, a player must be at least 22 years old and have no remaining NCAA eligibility or have renounced remaining eligibility.

*Sen. Blumenthal:*

Let me ask you, Dr Emmert, when a school gives a one-year scholarship and then kicks the young athlete out of school because of an injury at the end of that scholarship. If that injury prevents him or her from playing, that's unfair, isn't it? It is in my mind.

Current Division I bylaws do not allow any institution to reduce or cancel athletics aid for an injury or other athletically related reason during the period of the award. The period of an athletics aid agreement must be at least one academic year, and may be up to a student's full five-year period of eligibility. Further, autonomy conferences adopted legislation prohibiting the non-renewal of athletics aid for any athletics reason or injury. This effectively ensures that student-athletes at autonomy institutions are provided a financial aid agreement for the student's full period of eligibility unless the student fails to meet academic or other institutional standards.

Institutions outside the five autonomy conferences may be required to adopt this legislation by their conference governance board, may choose to adopt this legislation at their own initiative, or may continue to follow bylaws that allow institutional discretion on renewing awards on a yearly basis. However, if an institution outside the five autonomy conferences elects to not renew the athletics aid of a student-athlete, or renews at a reduced amount, the institution's financial aid authority is required to notify the student-athlete in writing by July 1 and provide the student-athlete with written policies and procedures to appeal the athletics department deci-

sion to an institutional authority outside of athletics. The athletics department decision to not renew athletics aid is not final until the outside appellate authority reviews and affirms the decision.

Additional Division I bylaws are also in place to minimize any competitive incentive to exercise nonrenewal or reduced renewal discretion relative to a student-athlete with an injury or medical condition. Athletics aid received by a student-athlete who suffered a career-ending injury or illness (including mental illness) will not count against team financial aid limitations during the academic years following the medical determination that he or she is unable to participate. Further, the Division I Academic Performance Program incentivizes institutions to renew the athletics aid of all student-athletes through penalties for institutions that fail to retain scholarship student-athletes. These penalties are assessed on a team-by-team basis and have included ineligibility for NCAA championships.

*Sen. Moran:*

And rather than take the time of the moment I would ask any of you to lengthen that list or shorten that list for me as to what concerns we ought to have about NIL?

*Disrupting the Recruiting Environment:* The recruitment process is unique to college athletics, where prospective and transfer student-athletes have the ability to select an institution that offers the best academic and athletic opportunities for that individual. It is distinctly different than professional leagues, where athletes are drafted, and the Olympics, where participants compete for their country. NCAA rules have been designed to protect this freedom of choice and to ensure that each of the NCAA's 1100 diverse institutions has a fair chance of pursuing recruits by adhering to a uniform set of regulations.

If NIL opportunities are not carefully and uniformly regulated, they could undermine the fairness within the recruiting environment and exacerbate competitive imbalance that exists between institutions due to a range of factors including geographical location and booster involvement. The lure of the best financial NIL prospects—likely from schools with the greatest name recognition or in the largest media markets—may add a detrimental layer to the decision-making process for student-athletes about which school to attend. As a result, recruits may prioritize where they have the most marketing opportunities—and diminish the focus on the best academic and personal fit. The focus on financial gain could lead some student-athletes to move from school to school in search of the best earning possibilities instead of being focused on the best personal and academic fit. This could inevitably have a negative impact on a student-athlete's progress toward a degree.

Carefully crafted and uniform guardrails are necessary to allow student-athletes an opportunity to benefit from their NIL, while preserving the collegiate model, protecting student athletes from bad actors, ensuring student-athletes' freedom and incentives to choose the educational institution that will serve them best overall, and preserving competitive equity in the recruitment of prospective and transfer student-athletes.

*Converting Student-Athletes into Employees:* College athletics is about competition between participants who are students first but who also participate in athletics as a co-curricular activity. Allowing student-athletes to use their NIL to in effect be paid to play or otherwise treating them as employees would fundamentally alter their athletic and academic experience and harm the nature of intercollegiate athletics.

*Title IX and Gender Equity:* One of the NCAA's principles of conduct for intercollegiate athletics focuses on gender equity. Some legislatures are considering NIL models that would have Title IX implications, particularly if the NIL payments were to be made by the educational institutions. Even without institutional involvement, there could be gender imbalance of opportunities.

*Team Dynamics:* College athletic teams succeed in large part due to the philosophy that all team members receive access to the same coaching, facilities, health and safety resources, and tutoring resources. Competition among teammates to land an endorsement deal could lead to self-promotion and create division within the team.

*Impact on Athletic Department Budgets and Opportunities for Student-Athletes:* Allowing student-athletes to be compensated for their NIL could lead to conflicts with an institution's existing endorsement contracts (e.g., a school with an apparel contract could have student-athletes enter into contracts to wear apparel from another company). This could result in a reduction in value of existing endorsement contracts, which would inevitably have a negative impact on athletic department budgets and force schools to reduce the number of sports and participation opportunities.

*Tax Implications:* Some state legislatures are considering NIL models where money would be passed through an institution to student-athletes. These models could have adverse tax implications for student-athletes, including making athletic scholarships taxable or student-athletes ineligible for important educational benefits.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO  
DR. MARK EMMERT

Our Committee has heard testimony that the NCAA anti-doping program is deficient. As we evaluate what the NCAA's role should be, if any, in coordinating lucrative licensing deals for college athletes, I am concerned about conflicts of interest exacerbating the NCAA's deficient oversight of its anti-doping program.

*Question 1.* Why does the NCAA not use blood testing in its anti-doping program?

Answer. The NCAA does not believe the inclusion of blood testing is justified in its drug testing program because the advantages provided by blood testing (primarily the detection of human growth hormone) do not outweigh the privacy interests of NCAA athletes, all of whom are students first and foremost. Unlike USADA, which tests only Olympic-level athletes, the NCAA oversees drug testing for 500,000 student-athletes. Of these, only one-percent will become Olympic or professional athletes.

The NCAA conducts extensive survey data of our student-athletes, and these data have been validated by multiple mechanisms, including how they match with random, out-of-competition testing for numerous substances. For NCAA student-athletes, 0.5 percent have used hGH in the past year. The detection window of hGH is less than 24 hours, and there remain scientific discrepancies as to its validation accuracy. We continue to monitor hGH use through our validated surveys, while also exploring less invasive ways to obtain blood samples (*e.g.*, a finger stick).

At present, given the much larger pool of athletes subject to NCAA drug testing as compared to USADA, the very low rate of hGH use among our student-athletes, the cost and privacy issues of venous blood draws, the extremely narrow window of detection coupled with validation accuracy issues, and the methodological certainty of our monitoring of drug use among student-athletes, we are continuing with urine sample testing while exploring alternative methods of drug use detection, including saliva and finger stick analysis.

It is also important to note that NCAA athletes who go on to compete at the Olympic level, or who set American/world records, are automatically subject to blood testing under the direction and authority of USADA.

*Question 2.* In the absence of blood testing, how do you ensure that athletes are not using human growth hormone?

Answer. The NCAA conducts very detailed surveys of drug use among student-athletes. The methodology and results of our surveys have been validated, including by comparing the survey results with drug-testing results for substances that are detectable in urine. We monitor both the incidence and prevalence of hGH use and are confident that use of this substance remains very low and is not increasing over time.

*Question 3.* The USADA program and the world standard for the ratio of testosterone to epitestosterone is 4:1 whereas the NCAA uses a 10:1 ratio. Why do you use a different, more lenient ratio?

Answer. The purpose of establishing a T/E ratio is to accurately screen those samples that should be subjected to subsequent IRMS testing. IRMS is a very expensive and time-intensive test, and so it is important that it be employed judiciously and intentionally. The NCAA T/E threshold was established at 10:1 as a result of a focused scientific analysis of the results of thousands of NCAA drug tests. That analysis demonstrated that a T/E ratio of 4:1 was producing too many false positives—in other words, samples with a T/E ratio of 4:1 were not being confirmed by subsequent IRMS testing. The frequency of these false positives was effectively reduced with a T/E ratio of 10:1.

It is also important to note that for any situation in which a world record is ratified, the NCAA works collaboratively with a WADA signatory (*e.g.*, USADA), who then directs doping control in these circumstances.

*Question 4.* Does the NCAA test for erythropoietin? If not, why not?

Answer. Yes, the NCAA does test for EPO, which it recognizes as a banned substance in the category of *peptide hormones, growth factors, related substances and mimetics*. A full list of substances banned by the NCAA can be found here.

*Question 5.* Is it true that the NCAA has not implemented an Athlete Biological Passport program, testing an individual athlete over time and comparing the results?

Answer. The NCAA does not employ an Athlete Biological Passport program. There are several reasons for this. First, ABPs include a hematological component, and for reasons described above, the NCAA has chosen to not include testing requiring venous blood draws. Moreover, ABPs can require an average of three annual blood tests, and if an athlete's passport is atypical/suspicious, they are subject to more testing than those with normal passports.

Lastly, the NCAA population of athlete poses several unique challenges to the ABP concept. First, the typical college career is usually 4–5 years, a relatively small window of time in which to maximize the advantages offered by ABPs. Second, the selection process for the biological passport pool is quite complex and would be difficult to implement in the current NCAA organizational structure. Lastly, the timing of sequential testing may be difficult to coordinate considering the multitude of factors that impact the student-athlete educational experience (*e.g.*, campus calendars, academic obligations, professional internships, travel, etc.). That being said, the NCAA utilizes a deterrence model for its year-long, out-of-competition drug testing. Unlike USADA, which selects their athlete pool for out-of-competition drug testing (and therefore this pool of athletes know in advance that they are subject to drug testing at some point during the year), our pool of out-of-competition drug testing includes ALL Division I and Division II student-athletes. With our deterrence model, many schools and student-athletes are randomly drug tested up to three times in a single academic year.

*Question 6.* Does the NCAA have an out-of-school testing program? If not, why not?

Answer. Yes, the NCAA drug testing program includes a year-round component. This means that student-athletes are subject to testing outside of both championship/tournament competition and outside of their competitive season. Indeed, the NCAA out-of-competition, unannounced drug testing program is the largest program in the country. Member schools and student-athletes receive notification of random drug testing within the conceptual framework of a deterrence model with less than 1-day notice. If an athlete does not submit to such testing, they receive the same penalty as testing positive for a banned substance.

*Question 7.* How often are NCAA urinalysis tests conducted without notice to the athlete or their school?

Answer. In any NCAA drug testing situation, notice is given to the school no more than 24 hours in advance. This is the minimum amount of time necessary to ensure that the school can inform the student-athlete of the pending test and to provide the facilities necessary for implementation of testing procedures. The NCAA conducts over 12,000 random drug tests within the deterrence model framework. The deterrence model (originally developed in consultation with USADA during an NCAA task force that USADA attended) relies on our extensive survey data and analysis of drug testing results over time. This means that in addition to random drug testing for student-athletes, certain pools of athletes (*e.g.*, Division I football) are tested up to three times in an academic year.

In 2017, the NCAA released a study on college athlete time demands and found that it is not uncommon for athletes to exceed the 20-hour weekly practicing limitation.

*Question 1.* How are schools currently able to circumvent the NCAA's weekly practicing limitation?

Answer. There are different types of athletically related activities a student-athlete may be involved in at different times throughout the year—some voluntary and others required for participation in intercollegiate athletics. Members in each division set limits on required athletically related activities consistent with that divisions' values and approach to college athletics. Divisions I and II institutions have legislated daily and weekly limits for countable athletically related activities and require schools, on a daily basis, to record any countable individual or group athletically related activity. Schools educate their student-athletes and administrators about what activities are and are not permissible and head coaches have a legislated responsibility to promote an atmosphere for compliance within their program and to monitor activities regarding compliance. Failure to comply with these standards could result in a range of penalties through the NCAA infractions process.

*Question 2.* What are the total number of hours that athletes spend practicing their sports in season? Include all time spent in sport related activities, including

administrative meetings, weight-lifting, film study and other game preparations, voluntary activities, and travel.

Answer. We do not have information that covers all activities listed in the question. However, information from our GOALS (Growth, Opportunities, Aspirations and Learning of Students in college) study provides some insight. The 2019 GOALS study, which will be released in the spring, is the study's fourth iteration. It was previously conducted in 2006, 2010 and 2015. For the 2019 GOALS study, 560 faculty athletics representatives assisted us in collecting data from more than 22,000 current student-athletes. As part of the 2019 GOALS survey, student-athletes were asked to consider a "typical" weekday on campus while school was in session during their season and share the number of hours they spent on a variety of activities, that fall within two categories of sport commitments: athletic activities (practicing, training, competing, athletic training room etc.) and non-athletic activities (meetings with coaches, team functions, film study, etc.). Student-athletes were also asked to consider a typical weekend on campus during their season and share the number of hours spent on the same types of activities. Based on the responses received, current college student-athletes are generally reporting slightly less time devoted to athletics pursuits when compared to what was reported in 2015. In Division I, the median time reported as spent on athletics decreased from 34 hours/week in-season in 2015 to 33 hours/week in 2019. Division II student-athletes reported a decline from 32 hours/week to 31 hours/week. And, Division III student-athletes reported a decline from 28.5 hours/week to 28 hours/week.

*Question 3.* What actions is the NCAA taking to close the loopholes in its 20-hour weekly practice limitation?

Answer. Student-athlete time demands is a topic all three NCAA divisions recognize as an important component of student-athlete well-being and have taken several steps to address concerns in this area. Beginning with the 2017–18 academic year, schools in Division I autonomy conferences adopted legislation requiring them to create a student-athlete annual time management plan for each varsity sport in which the Association sponsors a championship or that is an emerging sport for women. The plan must, at a minimum, include policies to ensure (1) student-athletes are provided adequate notice of all countable athletically related activities and other required athletically related activities; (2) schedules for all countable athletically related activities and other required athletically related activities are developed through a collaborative process involving student-athletes, coaches and senior athletics department staff members and (3) student-athletes are provided adequate notice of changes to a previously established schedule for countable athletically related activities and other required athletically related activities. The plan is required to be reviewed annually by the school's director of athletics, faculty athletics representative, the sport's head coach and at least one student-athlete representative. If a sports program acts in a manner that clearly demonstrates a disregard for the school's stated policies, the institution can be held accountable through the NCAA infractions process. The NCAA Division I Council recommended that all Division I schools create a student-athlete time management plan as a best practice.

In addition to the student-athlete time management plans, other autonomy conference legislation that took effect for the 2017–18 academic year prohibits student-athletes from participating in required athletically related activities other than competition for a continuous eight-hour period between 9 p.m. and 6 a.m.; prohibits a travel day from being considered as a day off; prohibits required athletically related activities for a seven-day period beginning the day after a student-athlete's or team's last contest of the championship segment; and requires an institution to provide each student-athlete with 14 additional days off during the playing season or outside the playing and practice season when classes are in session.

The GOALS study continues to provide valuable information for our membership as they continue to consider the time demands faced by student-athletes. The governance structure in each division is well-positioned to act on future recommendations in this area from our student-athletes and athletics administrators.

In 2018, the NCAA implemented new rules to allow basketball players to sign with agents, but those rule changes did not apply to women. When asked about this rule during the hearing, you acknowledged that the purpose of the rule is to "allow athletes in men's basketball to have representation when they go into a draft conversation with professional sports ranks" and that it is working successfully. It is highly unfair that women basketball players are not being treated the same as men.

*Question 1.* When will the NCAA modify its representation bylaws to allow women basketball players the same access to agents as their male counterparts?

*Question 2.* Why does the NCAA not allow other college athletes, such as football and soccer players, to have access to agent representation?

Answer. In response to the September 2017 announcement of a Federal investigation into fraud in college basketball, the NCAA formed an independent Commission to examine critical aspects of Division I men's basketball. The Commission, chaired by Dr. Condoleezza Rice, developed a range of recommendations to improve the environment for prospective and current student-athletes and member schools. Among the legislative, policy and structural changes put forth by the Commission was a recommendation that men's basketball student-athletes be allowed to contract with NCAA-certified agents without jeopardizing their eligibility. The Commission found that due to the NBA's draft eligibility rules, many students were considering whether to declare for the draft during the early stages of their collegiate athletic experience. Allowing Division I men's basketball student-athletes to contract with an agent would enhance their access to beneficial information to better assess their professional prospects. This recommendation was unanimously endorsed by the NCAA Board of Governors, approved by the Division I Board of Directors and took effect August 2018.

While this rule currently applies to only Division I men's basketball student athletes, NCAA member schools continue to discuss whether Division I women's basketball student-athletes and student-athletes competing in other sports should be afforded the same opportunity. As these discussions continue, member schools will examine whether the issues that led to changes in men's basketball also exist in other sports. This includes examining whether earlier agent involvement would be beneficial based on factors such as the draft eligibility rules that are created by the professional leagues and their respective players associations. For example, to be eligible for the NBA draft, a player must be at least 19 years old during the calendar year in which the draft is held and at least one NBA season must have elapsed since the player's graduation from high school. In contrast, to be eligible for the WNBA draft, a player must be at least 22 years old and have no remaining NCAA eligibility or have renounced remaining eligibility.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO  
DOUGLAS A. GIROD, M.D.

*Question 1.* In the case that NIL payments were permitted to be paid, what are appropriate or necessary protections for our student athletes?

Answer. This is an important question and gets to the heart of the matter. As we work to develop an NIL framework in the months ahead, our guiding priority must be to do what is in the best interest of student-athletes and their families. This includes protecting them from external influencers and agents who may not be acting in the student's best interests.

*Question 1a.* Is it possible these payments open our student athletes up to wider predatory circumstances?

Answer. Yes, this is a real possibility if an NIL model is not properly constructed. That is why it is important that we get it right.

*Question 2.* While California's Fair Pay for Play Act does not authorize payment by the educational institution to student athletes, there are examples of other state legislation that do. The New York Collegiate Athletic Participation Compensation Act would require a percentage of revenue from tickets sales be distributed among the student athletes. Do you believe athletes should receive compensation in any form from the institution or its athletic department?

Answer. First, this question highlights the reality that a patchwork of different state laws is not workable. This is why President Emmert and other witnesses asked the subcommittee to consider national legislation to create an even playing field and unified standards upon which to build a new NIL framework. While there are many plausible NIL frameworks in which student-athletes could profit, we do not support any model that creates an employment relationship wherein a student-athlete would receive compensation from the institution or its athletic department. This type of arrangement could have serious consequences that would effectively end the collegiate athletic model, as we know it.

*Question 3.* If Congress decided to pursue Federal legislation regarding NIL payments to student athletes, a critically important component of such legislation would be determining what types of arrangements, activities, and agreements would be eligible for the categorical definition of an NIL payment. Do you have suggestions for this subcommittee as it relates to defining the NIL in statute? a. What types of commercial arrangements, activities or agreements should this subcommittee remain wary of?

Answer. There is no concise answer to this question. The reality is, there are many plausible NIL frameworks for our community to consider in the months ahead, and each framework would present its own unique opportunities and challenges, requiring unique policies and procedures. As you will recall from testimony, both the Big 12 Conference and the NCAA have initiated working groups to consider this, and these processes are ongoing.

*Question 4.* According to the 2018 financial data collected by USA Today, there were only 12 athletic departments in the country that did not receive any support from its own institution or the state in which it is located. Furthermore, approximately 90 percent of athletic departments received over \$1 million in support, and for nearly 80 percent of departments, this support accounted for more than a quarter of their revenue. For instance, 91 percent of the revenue for the University of California Riverside came from outside the athletic department, and James Madison University athletics received \$41.7 million in assistance. This demonstrates that the vast majority of athletic departments rely upon funding resources outside of the department. How will legislation like that of California affect the operation of athletic departments? a. What types of commercial arrangements, activities or agreements should this subcommittee remain wary of?

Answer. Nationally there is tremendous variability in the financial arrangements between universities and their athletic departments. Therefore, I am unable to provide a succinct answer to this question. As I testified, Kansas Athletics is a self-sufficient entity that receives about 1 percent of its operating budget from the university, and this amount is only provided to comply with Kansas Board of Regents policy related to institutional control. However, your question highlights the key point that I addressed in my testimony: “The actions we take on NIL have the potential to transcend athletics and impact every aspect of our university mission—from education, to service, to research. For better or worse, a major athletics department at a university like KU is inextricably linked with the entire university model and everything we do. For example, athletics is important to student recruitment, especially for Midwestern universities that rely on out-of-state student enrollment. Athletics is crucial to our engagement with donors, whose support is essential to our most important academic and research initiatives. In addition, athletics enhances our work to improve access to education and campus diversity by enrolling students from diverse backgrounds. Again, the decisions we make on Name, Image and Likeness have implications that extend beyond the athletic playing field and into virtually every aspect of what we do as universities.

*Question 5.* Since Kansas is not one of the states to have legislation currently introduced or enacted, how could the unintended consequences of enacted laws that allow for NIL payments in other states impact the student-athlete recruiting outcomes at the University of Kansas?

Answer. First, it should be noted that Kansas lawmakers did introduce NIL legislation earlier this year. However, this question is a good one and highlights the reality that a patchwork of different state laws is not a workable solution because it will put some states (and their universities) at an advantage or disadvantage relative to their national peers. This is precisely why President Emmert and other witnesses asked the subcommittee to consider national legislation to create an even playing field and unified standards upon which to build a new NIL framework.

*Question 6.* What role do you foresee Sports Agents playing in college athletics after the State laws begin taking effect?”

Answer. While the collegiate model has, for the most part, insulated itself from the influence of sports agents, we believe that they will become a necessity should many of the proposed state laws take effect. We anticipate that most student athletes lack the expertise and time to negotiate NIL deals with third parties, and as such will need agents/lawyers to protect their interests. This will likely necessitate the licensing/certification and oversight of sports agents both by States and by the NCAA. Additionally, it should be noted that under current proposed state legislation, it is possible that many *prospective* Student Athletes (specifically blue-chip/5-star prospects) will already have NIL agreements and *agents* prior to the recruitment process.

Again, thank you for the opportunity to testify before the Senate Committee on Commerce, Science, and Transportation’s Subcommittee on Manufacturing, Trade and Consumer Protection. If you should have any additional questions or need further clarification, please do not hesitate to contact me.



RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JERRY MORAN TO  
RAMOGI HUMA

*Question 1.* The recently enacted Fair Pay to Play Act in California allows college athletes to hire agents and other representatives to assist them in negotiating and securing commercial NIL opportunities. Do you foresee any unintended consequences arising from allowing agents to represent student athletes?

*Question 1a.* Are there ways to thoughtfully allow for agent representation of student athletes with certain protections to prevent bad actors from taking advantage of student athletes?

Answer to 1. According to the Uniform Law Commission, 42 states have adopted legislation regulating sports agents. Many of the same states are pursuing legislation to allow college athletes the ability to secure sports agents and other representation, and the ability to earn NIL compensation. This demonstrates states' interest and capability to address anything they would view as an unintended consequence. Given these facts, I do not anticipate unintended consequences that the states cannot address.

Also, I'd like to clarify that the California Fair Pay to Play Act does not limit athlete representation to NIL opportunities. The law places no limit at all on areas in which college athletes' interest may be advanced by their representatives. This is a positive aspect of the state legislation that should be protected.

Answer to 1a. I believe proposals to protect college athletes from bad actors can include ensuring that college athletes know whether or not an agent meets any required legal standards to serve as an athlete agent; have access to a recent background check for a prospective agent and their own agent; have easy and timely access to information about claims made against an active agent related to college athlete representation (and the outcomes of such claims); and each agent should have a clear understanding about what will and will not jeopardize college athletes' intercollegiate athletics eligibility.

In addition, prohibiting college personnel, colleges, athletic conferences, athletic associations, and their business partners from certifying agents, arranging player representation, or representing players themselves is a very important provision to protect college athletes. They currently impose and/or adhere to a prohibition on college athlete representation, and capitalize financially from it. These organizations have been bad actors in this area by any reasonable measure. This protection would also ensure that college athletes' representation does not have a conflict of interest.

*Question 2.* While California's Fair Pay for Play Act does not authorize payment by the educational institution to student athletes, there are examples of other state legislation that do. The New York Collegiate Athletic Participation Compensation Act would require a percentage of revenue from tickets sales be distributed among the student athletes. Do you believe athletes should receive compensation in any form from the institution or its athletic department?

Answer. I appreciate this question, and I have had time to consider the thoughtful question you posed to me during the hearing regarding whether or not NIL freedom would satisfy the economic equity piece of college sports reform. The answer to this question requires a broader look at important areas that affect college athletes' finances, and parallels to other multibillion-dollar commercial sports leagues.

In the hearing, members of the Subcommittee raised concerns about the ability of colleges to end college athletes' athletic scholarship opportunities due to permanent injury; the prevention of injuries and abuse, which play a role in the 66 percent injury rate among current players and 50 percent chronic injury rate among former players; and the lack of due process and fairness in NCAA investigations that can end a college athlete's educational opportunity and compromise their athletic future. In addition, whether or not a college athlete has a fair and realistic opportunity to complete his or her degree—and in their major of choice, has a profound economic impact on that player's finances. College sports is a \$14 billion enterprise that enjoys tax free money because of its educational mission. The truth is that little of that revenue is used to foster an environment whereby college athletes, especially those on football, basketball, and baseball rosters, can complete a quality education. In addition to Part 1 of Senator Chris Murphy's "Madness, Inc." report on NCAA sports economics that I submitted as part of my original written testimony, I am including his second report regarding academics in NCAA sports as part of my response to this question.

The NCAA's limit on the amount and types of compensation colleges can provide directly to players have been ruled in violation of Federal antitrust laws in both *O'Bannon v. NCAA* and *Alston v. NCAA*, which is currently under appeal in the 9th Circuit. I served as an advisor in each of these lawsuits. In *O'Bannon v. NCAA*, the court found that the NCAA unreasonably prevented colleges from allowing com-

compensation that covers the full cost of attendance as part of a full athletic grant-in-aid scholarship. As a result, college athletes now receive direct payments in the form of stipends worth several thousands of dollars per year. In *Alston v. NCAA*, the court found that NCAA bans on numerous forms of compensation, such as travel abroad expenses, are illegal. The illegal NCAA price-fixing of college athlete compensation has had a disastrous economic consequence for college athletes.

In 2013, the NCPA and the Drexel University Sports Management Program published a *joint study* finding that the fair market value of college football and men's basketball players in the FBS Division was \$137,357 and \$289,031, respectively; the value of an average full athletic scholarship at an FBS college was \$23,204 per year, and over 80 percent of college athletes receiving a full scholarship lived below the Federal poverty line. Collectively, the study found that NCAA price-fixing denied college athletes \$6.2 billion between 2011–2015.

This glaring disparity is at the core of why state lawmakers from both parties and approximately 66 percent of the public support allowing college athletes to earn compensation from their NIL rights. It's worth noting that 52 percent of the public supports college athletes receiving a portion of the lucrative media rights generated by their talents and sacrifice.

At the time of this submission, Florida HB 7051 introduced by Florida State Representative Chip LaMarca, is expected to soon receive a House floor vote. HB 7051 would not only guarantee Florida college athletes the freedom to secure representation and NIL compensation, it would require Florida colleges to pay for players' sports-related medical expenses, medical insurance premiums for uninsured or underinsured college athletes, and scholarships and disability benefits for permanently injured players. Representative LaMarca and Florida lawmakers deserve much praise for seeking these additional player protections, protections that are forms of direct compensation from colleges to their athletes. At times, colleges nationwide opt to provide such forms of direct compensation.

Similarly, the NCPA sponsored a California bill signed into law in 2012 requiring colleges receiving at least \$10 million per year in media rights revenue to pay for medical premiums for low-income college athletes and out-of-pocket sports-related medical expenses for all athletes for up to two years after the expiration of their intercollegiate athletics ability. Colleges have had the options to provide these forms of compensation since the *White v. NCAA* class action lawsuit settlement in 2008, and the U.S. Department of Justice antitrust investigation on the NCAA's 1-year scholarship limit led to the NCAA's approval of allowing multiyear scholarships in 2012. Prior to these developments, the NCAA prohibited colleges from providing comprehensive medical coverage, sports-related medical expenses during summer workouts, and guaranteed scholarship continuation for permanently injured college athletes.

State legislation that allows or requires additional direct compensation from colleges to their athletes, such as the proposed New York legislation that would give college athletes a portion of ticket sale revenue, are positive and I support it. I also believe that states have a right to address college athlete compensation in a manner that they deem appropriate. Such provisions can be an avenue to help resolve the economic inequity NCAA rules impose on college athletes.

The focus of the Subcommittee hearing and almost all of the adopted and proposed state legislation nationwide has been on a 3rd party compensation model. I believe it is possible to implement a 3rd party compensation model that is the core of a financially equitable arrangement for college athletes, even if revenue streams such as ticket revenue are included. For instance, ticket transactions can be conducted by a 3rd party which, in turn, could distribute revenue to colleges and college athletes/college athlete representatives separately. It would be similar to how EA Sports, a 3rd party, distributes revenue separately to the NFL and the NFL Players' group licensing entity.

When considering college athletes receiving other forms of revenue such as ticket sales, it is important to address the false NCAA narrative that such compensation would require colleges to cut nonrevenue sports. If significant commercial/ticket revenue is *required* for colleges to field nonrevenue sports, then NCAA Division II and III would not exist. The NAIA would not exist. All of the sports in these divisions are nonrevenue, yet they field teams with hundreds of thousands of athletes without any significant commercial revenue and at a fraction of the cost.

Economic equity for college athletes is inextricably tied to not only college athlete NIL freedoms and a significant portion of commercial revenue that their talents generate, but it is tied to their freedom from medical expenses, freedom from preventable sports-related injury and abuse, freedom from serious obstacles that impede degree completion, freedom to transfer once without punishment in pursuit of better academic and athletic opportunities, freedom from unfair athletic association

investigations that can harm their economic stability and future, and freedom from illegal, cartel activity that stifles their economic opportunities.

*Question 3.* If Congress decided to pursue Federal legislation regarding NIL payments to student athletes, a critically important component of such legislation would be determining what types of arrangements, activities, and agreements would be eligible for the categorical definition of an NIL payment. Do you have suggestions for this subcommittee as it relates to defining the NIL in statute?

*Question 3a.* What types of commercial arrangements, activities or agreements should this subcommittee remain wary of?

Answer to 3. I suggest that, if Congress pursues Federal legislation, it should state that any payment to a college athlete for use of his or her name, image, likeness, or received because of his or her athletics reputation is protected with the following exceptions:

- I. NIL payment offers and arrangements used as inducements to lure high school recruits or college transfers to a particular college.
- II. NIL deals arranged by colleges. This would be similar to other league's prohibitions on teams luring free agents with pre-arranged 3rd party NIL deals in addition to a salary as a way to circumvent salary caps.
- III. Predatory NIL loans. Perhaps legislation could exclude any loan issued to a college athlete conditioned upon the use of the college athlete's NIL that has a prime interest rate and lender spread that exceed the United States Small Business Administration's Loan limits.
- IV. \*Possibly. . .NIL arrangements with select industries, entities, and products as discussed in 3a. below.

As I stated in my written and oral testimony on 2/11/2020, NIL arrangements with boosters, alumni, and college sponsors should not be banned in the name of competitive equity because competitive equity does not exist in college sports. These same sources already give athletic programs money that is used to recruit the best recruits, win the most games, and generate the biggest TV deals that allow rich athletic programs to continue their dominance. In their most recent report to the Department of Education, Ohio State reported \$203 million dollars in athletic revenue while Florida Atlantic reported only \$28 million in athletic revenue. They are both in the FBS Division. How can anyone suggest that these two colleges compete on an equal playing field? How can colleges, conferences, and the NCAA justify denying college athletes economic freedoms in the name of competitive equity when this severe disparity among colleges exists and is held up as the system that should be preserved? Colleges, conferences, and the NCAA have not moved to address these inequities—they haven't banned booster payments to colleges and they don't share athletics revenue equally in the name of competitive equity. In addition, other leagues do not ban 3rd party NIL deals with fan clubs and those leagues operate very well.

Any Federal legislation should not sacrifice college athletes' freedom so that the NCAA and its colleges can pretend that competitive equity exists. Additionally, roster and scholarship limits keep the inequity from getting worse. There is a finite number of recruits each year and the top recruits already flow to the Power 5 Conferences. If legislation inadvertently changes recruiting migrations to where some of the top recruits begin to flow away from some of the Power 5 Conferences, it would actually increase competitive equity compared to where it is today. Also, Federal legislation should not exclude the group licensing market as described in my answer to Senator Fischer question 1.a. below.

Answer to 3a. In my communication with various states pursuing similar legislation, I've heard concerns about whether or not college athletes should be restricted from NIL opportunities in certain industries. Most have stayed away from excluding select industries because it may unjustly reduce players' NIL freedoms and lead to conflicts in political ideology that may undermine proposed NIL legislation that otherwise enjoys bipartisan support. This may be a correct assessment, but I do not think the risk should stifle discussion in this area.

The exclusion of some industries and products may have bipartisan support. For instance, there may be bipartisan support to exclude college athlete NIL opportunities in the adult entertainment industry. There may also be bipartisan support to exclude NIL deals related to prescription pain medicine like oxycodone. Exclusions that have been discussed by state legislators that may be more controversial include possible prohibitions on college athlete NIL deals with the gun, tobacco, and marijuana industries.

Additionally, prohibitions on college athletes receiving some portion of sports gaming revenue would be controversial given players in the NFL and other sports

leagues may soon receive a portion of revenue generated by legal in-stadium gambling activities, another form of 3rd party commercial activity that capitalizes off of players' commercial value. Colleges seeking additional revenue may soon include such activities in their stadiums, sell players' statistics to gaming companies, or otherwise benefit financially from gaming entities. The NCPA remains neutral on sports gaming, but college athletes should not be excluded from commercial gaming revenue from sources that have commercial arrangements with their colleges.

Similarly, while a ban on college athlete NIL deals with alcohol companies may make sense, many would be surprised to learn that a number of colleges sell alcohol during college football bowl games, NCAA championships, and on-campus college sports events. Some colleges even have direct sponsorships with alcohol companies and allow them to place university logos on alcohol products. In short, it may be unjustifiable to impose industry, entity, or product-specific NIL deal prohibitions on college athletes if the same prohibitions are not placed on deals with colleges, athletic conferences, and athletic associations.

The goal for Federal NIL legislation should be to maximize college athletes' economic freedoms with the least government regulation, and without giving colleges, conferences, and athletic associations the discretion to prohibit players' opportunities.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEB FISCHER TO  
RAMOGI HUMA

*Question 1.* In October 2019, the National College Players Association announced that it would explore a partnership to market college athlete group licensing rights to companies, ranging from the gaming to apparel industries. Would you provide the Subcommittee with more details of this effort and its status?

Answer. The National College Players Association entered into a collaboration with "One Team", a partnership that includes the NFL Players Association and the Major League Baseball Players Association, to ensure college athletes of all sports have experienced and robust group licensing representation.

One Team represents group licensing rights for all athletes in the NFL, Major League Baseball, Major League Soccer, the WNBA, the Women's National Soccer Team, and other professional sports.

Proper group licensing representation is essential for college athletes. Federal court antitrust rulings in *O'Bannon v. NCAA* recognize that a group licensing market for college athletes' NIL rights exists and declared the following:

- NCAA's prohibition on athlete name, image, and likeness compensation violated Federal antitrust law and deprives college athletes compensation that they would otherwise receive.
- If the NCAA did not have a prohibition on athlete compensation for use of their name, image, and likeness, athletes would be able to create and sell valuable group licenses;
- 3rd parties purchase groups of athletes' NIL rights for commercial purposes including for use in live game telecasts, sports video games, game rebroadcasts, advertisements, and other archival footage to ensure they have the legal right to use groups of athletes' NIL rights.

The NCPA is positioned as a steward in this collaboration and has since formed an Oversight Board. Over 75 percent of the NCPA Oversight Board is comprised of former college athletes who are industry experts and notable college athlete advocates.

*Question 2.* How do you plan to secure the marketing rights from the players and universities?

Answer. The NCPA-One Team collaboration does not intend to secure any university marketing rights and any entity that represents a university should not represent college athletes. That would be a conflict of interest that truly should not be allowable.

Securing player's group licensing rights is currently not allowable under NCAA rules and the California NIL law is not effective until January 1, 2023. Other states may choose to allow their college athletes the ability to secure representation prior to that date. While there are continuous discussions related to this question, I would not disclose specific details at this early stage in the process. However, I can assure you and members of the subcommittee that the NCPA would not consider being involved in any actions that would violate a law.

*Question 3.* Will all universities and athletes be compensated similarly from group licensing contracts? Additionally, will the revenue from these group licensing agreements affect the competitive parity among Division I athletic conferences?

Answer. To clarify, the use college athletes' group licensing rights should not be a source of university revenue. For instance, the NCAA faced an antitrust lawsuit for generating profits not only from licensing its own properties, but for selling college athletes' NIL rights in video games created by EA Sports. The court found that essentially, the NCAA and its colleges were operating as defacto group licensing representatives of their athletes, but providing their athletes no compensation. In the face of the lawsuit, the NCAA chose to terminate the video game instead of allowing the players to receive any group licensing compensation. This conflict of interest harmed players economically and underscores why college athletes must have independent representation—including group licensing representation. The NFL has a similar video game with EA Sports whereby the NFL Players Association's licensing company sells NFL players' bundled NIL rights to EA sports and distributes equal group licensing revenue checks to each NFL player. It's important to note that equal group licensing distributions among NFL players does not eliminate individual NFL players' ability to secure individual NIL deals that are not uniform.

There may be a number of group licensing entities that surface after the effective dates of state legislation and the likelihood that all distributions will be similar in that environment is not likely. I believe some group licensing distributions may be similar from sources such as a video game featuring players of each school. However, Federal legislation would likely be necessary if the goal is to ensure that all athletes within each sport and division are compensated similarly from all group licensing contracts.

Without Federal legislation requiring similar group licensing distributions among college athletes in the same sport and Division, I believe parity among conferences will be similar to parity among athletic programs as described in the last two paragraphs of my Answer #3 to Chairman Moran's Question #3 above.

*Question 4.* What, if any, steps will be taken to ensure a clear distinction between collegiate athletes and professional athletes in such potential group licensing agreements, so as not to blur the lines between the two groups?

Answer. Those who believe that these lines have already been blurred and those who do not will likely continue to maintain their beliefs regardless of any group licensing agreement or Federal legislation. However, college athletes receiving revenue from group licensing representation provided by colleges or colleges' representatives NIL brokers (*i.e.*, conferences, athletic associations) may be additional evidence of college athletes' employee status. That is a designation that has not yet been clearly established as a matter of law.

*Question 5.* Can you assure the Subcommittee that all revenue generated from these group licensing agreements will flow back to the athletes and/or the universities, or will some portion of such revenues be diverted elsewhere?

Answer. Again, college athletes' group licensing revenue should not be a source of university revenue. Ultimately, the NCPA's goal is to ensure current college athletes are empowered by the NCPA's Oversight Board to make informed decisions related to their group licensing revenue. In addition to direct group licensing player distributions, college athletes may also want to consider using funds to make sure all athletes can participate in a financial skills program so that players can make the most of their NIL earnings, assistance for injured athletes stuck with sports-related medical expenses, or other considerations.

However, there could be a number of group licensing entities that come into existence that structure things much differently. Additionally, group licensing entails overhead expenses needed to promote, secure, and execute group NIL arrangements.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DAN SULLIVAN TO  
RAMOGI HUMA

*Question.* What role do you foresee Sports Agents playing in college athletics after the State laws begin taking effect?

Answer. I envision sports agents playing a critical role in college athletics once state laws become effective. Agents can help prevent 3rd parties from taking advantage of unsuspecting college athletes through unfair or predatory contracts. Agents can also play the primary role in proactively pursuing NIL deals for college athletes whose time demands would otherwise make it more difficult to manage. Additionally, agents can represent college athletes in disputes with their college or athletic association. Finally, agents can help some players make important decisions about whether or not to play with potentially high-risk injuries and whether or not to

enter a professional draft. These examples are not intended to be an exhaustive list, but they represent what I see as the central roles that agents will play after state laws take effect.

Thank you each again for allowing me to answer your questions. Again, I would like to continue these important discussions with each of you and the Subcommittee as ideas for Federal legislation progress.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. RICHARD BLUMENTHAL TO  
RAMOGI HUMA

*Question.* Do you agree that an antitrust exemption is necessary or desirable? Please explain.

*Answer.* I do not agree. An antitrust exemption is not necessary or desirable when considering NIL reform. Because the NCAA has been operating as if it already has an antitrust exemption, its record clearly demonstrates how it would negatively wield such power. Federal courts have determined on multiple occasions that the NCAA's restrictions on interstate commerce have been overly burdensome and has caused significant financial harm to both college athletes and colleges.

In the 1984 *NCAA v. Board of Regents of Oklahoma* lawsuit, the U.S. Supreme Court ruled that the NCAA's control and restraints on college football television broadcasts violated Federal antitrust laws. This lawsuit was triggered when the NCAA threatened an illegal group boycott against colleges that formed an organization to broker their own TV deals. The NCAA argued that its TV limits were beneficial to college sports because it fostered live attendance. The U.S. Supreme Court struck down the NCAA's restraints on TV broadcasts, which significantly advanced the college sports revenues and consumer benefits. Decades after the Supreme Court's ruling, fans can regularly watch their favorite college teams either on TV or through streaming services while college sports revenue has exploded by billions of dollars.

In 2005, former Stanford football player Jason White filed a class-action antitrust lawsuit against the NCAA for price-fixing full athletic grant-in-aids below the cost of attendance. Though the lawsuit was settled with no change in that price-fixing amount, the NCAA eliminated its limits on colleges paying for comprehensive medical coverage and out-of-pocket medical expenses.

After a U.S. Department of Justice antitrust investigation into the NCAA's 1-year athletic scholarship limit, the NCAA relented and began allowing colleges to provide multiyear athletic scholarships in 2012. The NCAA could not defend its 1-year limit, which was clearly unnecessary and harmful to college athletes. In particular, college athletes suffering permanent injury from their sports were especially vulnerable. Antitrust scrutiny in this area led to an important advancement for college athletes.

In 2015, the U.S. Court of Appeals for the 9th Circuit upheld a ruling in the *O'Bannon v. NCAA* antitrust lawsuit finding that the NCAA's rule capping full athletic grant-in-aids below the cost of attendance violated Federal antitrust law and struck down that limit. As a result, colleges nationwide can pay their athletes an additional \$2000-\$5000 per year to cover expenses deemed educationally necessary.

In 2019, the same district court once again found the NCAA in violation of Federal antitrust laws for illegally price-fixing compensation to college athletes. In its remedy, the court struck down NCAA prohibitions on thousands of dollars of educational-related athlete compensation that exceeds the cost of attendance. This case is on appeal in the 9th Circuit.

Also in 2019, California adopted SB 206, the Fair Pay to Play Act, which will allow college athletes to secure representation and receive name, image, and likeness compensation beginning in 2023. It is estimated that 28 other states are pursuing similar legislation, some of which may become effective as early as July 2020. Such legislation is receiving overwhelming bipartisan and public support. However, these laws contradict NCAA rules. If the NCAA had an antitrust exemption, the states would not have had the option to address this issue.

Finally, on March 2, 2020, the National Association of Intercollegiate Athletics (NAIA), an intercollegiate athletic association comprised of more than 250 colleges and 65,000 college athletes, announced a *NIL proposal* that mirrors the pillars of SB 206 and virtually all of the other proposed state NIL legislation. The proposal would allow college athletes to secure representation and receive NIL compensation. The only condition would be that college athletes would have to report such agreements to their athletic director in a timely manner. This is significant. This proposal undercuts the NCAA's notion that the "Collegiate Model" must impose overbearing restrictions and exclude various economic freedoms that the states are pursuing. Additionally, the NAIA embodies what the NCAA touts as the core of The Collegiate

Model—athletes playing for the love of the game and prioritizing education. This proposal offers proof that athlete compensation and freedom can be compatible with these aspects of college sports. Whether or not this proposal survives the NAIA's vote (expected to take place on April 1), it is a strong example of a collegiate model that Congress should support.

It would not be fair or reasonable for Congress to give a badge to the NCAA (which has regularly violated Federal law) in hopes of bringing justice to the college athletes who are economically harmed by the NCAA's illegal price-fixing. The NCAA must be subject to the law, not above it.

Alternatively, Congress can address certain restraints on trade directly through legislation. For instance, Congress can prevent NIL agreements from being used as inducements to lure high school recruits and college transfers to a particular college. It can ensure that colleges do not directly arrange NIL deals for their athletes. Congress doesn't need to give the NCAA an antitrust exemption to accomplish these things.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. AMY KLOBUCHAR TO  
RAMOGI HUMA

*Question.* In your view, what are the most important factors to consider in assessing proposals that would enable college athletes to receive this type of compensation?

*Answer.* I believe that the core tenants of economic freedoms being pursued by the states should be upheld. They include allowing college athletes the freedom to secure representation and earn NIL compensation.

**Representation**

Proposals to protect college athletes from bad actors can include ensuring that college athletes know whether or not an agent meets any required legal standards to serve as an athlete agent; have access to a recent background check for a prospective agent and their own agent; have easy and timely access to information about claims made against an active agent related to college athlete representation (and the outcomes of such claims); and each agent should have a clear understanding about what will and will not jeopardize college athletes' intercollegiate athletics eligibility.

In addition, prohibiting college personnel, colleges, athletic conferences, athletic associations, and their business partners from certifying agents, arranging player representation, or representing players themselves is a very important provision to protect college athletes. They currently impose and/or adhere to a prohibition on college athlete representation, and capitalize financially from it. These organizations have been bad actors in this area by any reasonable measure. This protection would also ensure that college athletes' representation does not have a conflict of interest.

According to the Uniform Law Commission, 42 states have adopted legislation regulating sports agents. Many of the same states are pursuing legislation to allow college athletes the ability to secure sports agents and other representation, and the ability to earn NIL compensation. This demonstrates states' interest and capability to certify athlete agents.

**NIL Compensation**

I suggest that, if Congress pursues Federal legislation, it should state that any payment to a college athlete for use of his or her name, image, likeness, or received because of his or her athletics reputation is protected with the following exceptions:

- I. NIL payment offers and arrangements used as inducements to lure high school recruits or college transfers to a particular college.
- II. NIL deals arranged by colleges. This would be similar to other league's prohibitions on teams luring free agents with pre-arranged 3rd party NIL deals in addition to a salary as a way to circumvent salary caps.
- III. Predatory NIL loans. Perhaps legislation could exclude any loan issued to a college athlete conditioned upon the use of the college athlete's NIL that has a prime interest rate and lender spread that exceed the United States Small Business Administration's Loan limits.
- IV. *\*Possibly . . . NIL arrangements with select industries, entities, and products as discussed below . . .*

In my communication with various states pursuing similar legislation, I've heard concerns about whether or not college athletes should be restricted from NIL opportunities in certain industries. Most have stayed away from excluding select indus-

tries because it may unjustly reduce players' NIL freedoms and lead to conflicts in political ideology that may undermine proposed NIL legislation that otherwise enjoys bipartisan support. This may be a correct assessment, but I do not think the risk should stifle discussion in this area.

The exclusion of some industries and products may have bipartisan support. For instance, there may be bipartisan support to exclude college athlete NIL opportunities in the adult entertainment industry. There may also be bipartisan support to exclude NIL deals related to prescription pain medicine like oxycodone. Exclusions that have been discussed by state legislators that may be more controversial include possible prohibitions on college athlete NIL deals with the gun, tobacco, and marijuana industries.

Additionally, prohibitions on college athletes receiving some portion of sports gaming revenue would be controversial given players in the NFL and other sports leagues may soon receive a portion of revenue generated by legal in-stadium gambling activities, another form of 3rd party commercial activity that capitalizes off of players' commercial value. Colleges seeking additional revenue may soon include such activities in their stadiums, sell players' statistics to gaming companies, or otherwise benefit financially from gaming entities. The NCPA remains neutral on sports gaming, but college athletes should not be excluded from commercial gaming revenue from sources that have commercial arrangements with their colleges.

Similarly, while a ban on college athlete NIL deals with alcohol companies may make sense, many would be surprised to learn that a number of colleges sell alcohol during college football bowl games, NCAA championships, and on-campus college sports events. Some colleges even have direct sponsorships with alcohol companies and allow them to place university logos on alcohol products. In short, it may be unjustifiable to impose industry, entity, or product-specific NIL deal prohibitions on college athletes if the same prohibitions are not placed on deals with colleges, athletic conferences, and athletic associations.

#### **Ignore the Competitive Equity Myth**

As I stated in my written and oral testimony on 2/11/2020, NIL arrangements with boosters, alumni, and college sponsors should not be banned in the name of competitive equity because competitive equity does not exist in college sports. These same sources already give athletic programs money that is used to recruit the best recruits, win the most games, and generate the biggest TV deals that allow rich athletic programs to continue their dominance. In their most recent report to the Department of Education, Ohio State reported \$203 million dollars in athletic revenue while Florida Atlantic reported only \$28 million in athletic revenue. They are both in the FBS Division. How can anyone suggest that these two colleges compete on an equal playing field? How can colleges, conferences, and the NCAA justify denying college athletes economic freedoms in the name of competitive equity when this severe disparity among colleges exists and is held up as the system that should be preserved? Colleges, conferences, and the NCAA have not moved to address these inequities—they haven't banned booster payments to colleges and they don't share athletics revenue equally in the name of competitive equity. In addition, other leagues do not ban 3rd party NIL deals with fan clubs and those leagues operate very well.

Any Federal legislation should not sacrifice college athletes' freedom so that the NCAA and its colleges can pretend that competitive equity exists. Additionally, roster and scholarship limits keep the inequity from getting worse. There is a finite number of recruits each year and the top recruits already flow to the Power 5 Conferences. If legislation inadvertently changes recruiting migrations to where some of the top recruits begin to flow away from some of the Power 5 Conferences, it would actually increase competitive equity compared to where it is today.

#### **Group Licensing**

Federal legislation should not exclude the existing college athlete group licensing market which, according to Federal court rulings, includes but is not limited to video games, live television broadcasts, archival footage, and advertisements. I believe some group licensing distributions to college athletes from different teams would be similar from sources such as a video game that features players of each school. If the goal is to ensure that all athletes within each sport and division are compensated similarly from all group licensing contracts, Federal legislation would likely be necessary.

#### **Economic Equity**

In the hearing on February 11, 2020, Chairman Moran asked me whether or not college athlete NIL freedom would satisfy the economic equity piece of college sports reform. The answer to this question requires a broader look at important areas that



affect college athletes' finances, and parallels to other multibillion-dollar commercial sports leagues.

In the hearing, members of the Subcommittee raised concerns about the ability of colleges to end college athletes' athletic scholarship opportunities due to permanent injury; the prevention of injuries and abuse, which play a role in the 66 percent injury rate among current players and 50 percent chronic injury rate among former players; and the lack of due process and fairness in NCAA investigations that can end a college athlete's educational opportunity and compromise their athletic future. In addition, whether or not a college athlete has a fair and realistic opportunity to complete his or her degree—and in their major of choice, has a profound economic impact on that player's finances. College sports is a \$14 billion enterprise that enjoys tax free money because of its educational mission. The truth is that little of that revenue is used to foster an environment whereby college athletes, especially those on football, basketball, and baseball rosters, can complete a quality education.

State legislation that allows or requires additional direct compensation from colleges to their athletes, such as the proposed New York legislation that would give college athletes a portion of ticket sale revenue, can also help bring forth economic equity.

The focus of the Subcommittee hearing and almost all of the adopted and proposed state legislation nationwide has been on a 3rd party compensation model. I believe it is possible to implement a 3rd party compensation model that is the core of a financially equitable arrangement for college athletes, even if revenue streams such as ticket revenue are included. For instance, ticket transactions can be conducted by a 3rd party which, in turn, could distribute revenue to colleges and college athletes/college athlete representatives separately. It would be similar to how EA Sports, a 3rd party videogame maker, distributes revenue from its NFL video game separately to the NFL and the NFL Players Association's group licensing entity.

When considering college athletes receiving other forms of revenue such as ticket sales, it is important to address the false NCAA narrative that such compensation would require colleges to cut nonrevenue sports. If significant commercial/ticket revenue is *required* for colleges to field nonrevenue sports, then NCAA Division II and III would not exist. The NAIA would not exist. All of the sports in these divisions are nonrevenue, yet they field teams with hundreds of thousands of athletes without any significant commercial revenue and at a fraction of the cost.

Economic equity for college athletes is inextricably tied to not only college athlete NIL freedoms and a significant portion of commercial revenue that their talents generate, but it is tied to their freedom from medical expenses, freedom from preventable sports-related injury and abuse, freedom from serious obstacles that impede degree completion, freedom to transfer once without punishment in pursuit of better academic and athletic opportunities, freedom from unfair athletic association investigations that can harm their economic stability and future, and freedom from illegal, cartel activity that stifles their economic opportunities.

Thank you both again for allowing me to answer your questions. Again, I would like to continue these important discussions with each of you and the Subcommittee as ideas for Federal legislation progress.

