

# “SWIPE UP?”: REALITY STARS-TURNED-INFLUENCERS VS. COLLEGE ATHLETES AND THE ROAD AHEAD WITH NAME, IMAGE, AND LIKENESS

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## INTRODUCTION

Reality television stars and college athletes are about to have more in common than one could have ever predicted: the ability to make money off of their name, image, and likeness. While celebrities have always had the ability to entice everyday people to buy products based on their recommendation and the notoriety of their personal brand, the power of social media proved to the world that the average person is capable of “influencing,” too. The National Collegiate Athletic Association (“NCAA”) currently prevents college athletes from making money outside of their scholarship package; but based on impending rule changes from the NCAA, and additionally federal and state legislation, that could be changing very soon.

The monetization of name, image, and likeness for college athletes is about to change college sports, with football being the most affected. One of the most controversial issues in sports today is whether to pay college athletes.<sup>1</sup> The 9<sup>th</sup> Circuit Court of Appeals in *O’Bannon*<sup>2</sup> and *Alston*<sup>3</sup> exacerbated the issue through

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<sup>1</sup> Dan Wolken, How the game changed in college sports: ‘It’s like lighting a fuse,’ USA Today (Nov. 12, 2019, 6:00 AM), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2019/11/12/ncaa-how-name-image-likeness-debate-quickly-shifted/2522382001/>.

<sup>2</sup> *O’Bannon v. National Collegiate Athletic Association*, 7 F.Supp.3d 955 (N.D. California 2014).

<sup>3</sup> *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation, Alston v. National Collegiate Athletic Association*, 958 F.3d 1239 (9<sup>th</sup> Cir. 2020).

decisions that slowly eroded the NCAA and its authority of college sports through their mandate of “amateurism.” For years, although not since its inception<sup>4</sup>, the NCAA has mandated amateurism for collegiate athletes, defined by the requirement that collegiate athletes not be paid outside of their scholarship package. “Name, Image, and Likeness” and the monetization thereof has been an issue in regard to collegiate student athletes for years.

*O’Bannon* originated when players sued Electronic Arts, Inc. (hereinafter, “EA”) after the company used the name, image, and likeness of college players in their NCAA college football video game yearly from 1997 to 2013.<sup>5</sup> The players sued in order to get a right to compensation for the usage of their name, image, and likeness.<sup>6</sup> While EA did not use the names of the athletes, the game depicted avatars wearing corresponding jersey numbers with similar heights and weights to individual players, along with their skin tones, hair colors, and home states listed in the bios.<sup>7</sup> While EA settled with the athletes outside of court, the suit remained between the players and the NCAA.<sup>8</sup> Interestingly, part of the fallout from *O’Bannon* was the discontinuation of the game after the last edition was published in 2014.<sup>9</sup>

Generally speaking, the NCAA continually strives to promote the idea of the “student-athlete,” a term they coined in the 1960s to depict their ideal: a young adult attending college in order to both get an education and obtain a degree, while also playing the sport they love for “the love of the game.”<sup>10</sup> The idea behind keeping college level athletes amateurs is that the focus should be

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<sup>4</sup> *O’Bannon*, 7 F.Supp 3d at 965.

<sup>5</sup> *Id.*

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

<sup>7</sup> Darren Rovell, EA Sports settles with ex-players, ESPN (Sept. 26, 2013), [https://www.espn.com/college-football/story/\\_/id/9728042/ea-sports-stop-producing-college-football-game](https://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game). See also SI Wire, Report: Average payout in EA/NCAA lawsuit around \$1200, Sports Illustrated (Mar. 15, 2016), <https://www.si.com/college/2016/03/15/ed-obannon-trial-ea-sports-settlement-average-1200> (noting that the average payout per player was \$1,200. There were 29,000 athletes compensated, with the total settlement totaling \$60 million [\$18.8 million of which went to the plaintiff’s lawyers]).

<sup>8</sup> Rovell, *supra* note 7.

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

<sup>10</sup> Paul C. Weiler, Gary R. Roberts, Roger I. Abrams, Stephen F. Ross, Michael C. Harper, Jodi S. Balsam, & William W. Berry III, *Sports and the Law* 719 (6<sup>th</sup> ed. 2019).

on learning academically and developing a career, with their sport merely being part of their college experience.<sup>11</sup> The goals behind the rules of the NCAA are for students to be able to get an education while enjoying their sport, and to prevent young adult players from being exploited.<sup>12</sup> Recently, however, several states passed legislation (going into effect as early as 2021) regarding the monetization of name, image, and likeness for college athletes.<sup>13</sup> Shortly after, the NCAA Board of Governors also announced that they are making changes to their rules, with few specifics about those changes.<sup>14</sup>

Because of the inevitability of the name, image, and likeness legislation being passed, the NCAA should take control of the situation, in order to be proactive rather than reactive. This article argues that the NCAA should introduce the distinction of the “quasi-professional” athlete in order to distinguish between amateurs and players for profit. This new classification of athlete would 1) minimize administrative costs and headache for the NCAA by containing the athletes opting in to the monetization of their name, image, and likeness in one classification with applicable rules and regulations; 2) place restriction benchmarks on which athletes qualify, while still giving all athletes the option to remain amateurs; 3) financially benefit both university athletic departments and student-athletes, and retain the NCAA’s core tenant of amateurism. This article stresses the benefits of the new classification for all parties, and athletes having the choice of financial compensation. Athletes who remain an amateur would continue to receive the classic benefits of being a college athlete, including the educational benefits and cost-of-attendance scholarships that the NCAA currently allows as compensation. Athletes that want to change their status to quasi-professional

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<sup>11</sup> Id. at 720.

<sup>12</sup> Id.

<sup>13</sup> See Steve Berkowitz, California governor signs bill that makes it easier for college athletes to profit from name, likeness, USA Today (Sept. 30, 2019), <https://www.usatoday.com/story/sports/college/2019/09/30/college-sports-california-governor-signs-image-and-likeness-bill/2367426001/>. See also Dennis Dodd, Bipartisan name, image, likeness bill introduced to U.S. House would supersede state laws for college athletes, CBS Sports (Sept. 25, 2020), <https://www.cbssports.com/college-football/news/bipartisan-name-image-likeness-bill-introduced-to-u-s-house-would-supersede-state-laws-for-college-athletes/#:~:text=Updated%20Rankings->.

<sup>14</sup> Id.

would still receive a tuition scholarship from their institution, but would not receive full cost-of-attendance allowances. Requiring eligible athletes to choose their preferred compensation package would allow them the freedom they are advocating for, while also providing a cost benefit to university athletic departments. Finally, this article discusses the proposition of allowing athletic departments to partner with athletes for the promotion of university branding, and the benefits those partnerships would bring to university enrollment.

#### I. BACKGROUND: HISTORY OF THE JUDICIAL TREATMENT OF AMATEURISM AND CURRENT LEGISLATION

One of the first notable attacks on the NCAA's control of collegiate athletics came from a lawsuit by University of Oklahoma and University of Georgia Athletic Association against the NCAA for restricting their ability to enter and negotiate their own television contracts.<sup>15</sup> At the time of the lawsuit, the current NCAA rules only allotted two games per season, per NCAA team to be televised. The universities contended the rule was a restraint on trade, or a violation of antitrust law.<sup>16</sup> Most of the time, the courts hold that a horizontal restraint of trade is a *per se* violation of the Sherman Act.<sup>17</sup> In other instances, specifically in cases related to sports, the Rule of Reason analysis purports that a plaintiff proves there is an unreasonable restraint on trade, the burden shifts to the defendant to surpass the burden of proof and show that the restraint promotes competition in another marketplace, or has a "pro-competitive effect."<sup>18</sup> If the defendant meets this burden, the burden of proof shifts back to the plaintiff to show that the restraint is not necessary to promote the competition in that market or that the restraint is too broad.<sup>19</sup>

In *Board of Regents*, the plaintiffs contended this restriction was a violation of the Sherman Act, the hallmark of antitrust

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<sup>15</sup> NCAA v. Board of Regents of the Univ. of Oklahoma and Univ. of Georgia Athletic Ass'n, 468 U.S. 85, 89 (1984).

<sup>16</sup> Id.

<sup>17</sup> Weiler et al., *supra* note 10, at 252-257.

<sup>18</sup> Id. at 256-257.

<sup>19</sup> Id.

law.<sup>20</sup> The district court held that the regulations imposed by the NCAA violated the Sherman Act in three different ways: 1) fixing the price for each telecast, 2) only allowing networking contracts with certain networks, the equivalent to a boycott of other networks, and 3) placing a limit on the televised production of college football.<sup>21</sup> The Court of Appeals upheld the district court and rejected each of the three arguments furthered by the NCAA.<sup>22</sup> NCAA argued that the reduction in television allotments promoted live attendance, which the court rejected because the plan required a reduction in televised games did not automatically equate to a higher attendance in person.<sup>23</sup> Secondly, the court rejected the argument that the plan furthered “athletically balanced competition,” saying the argument basically equated to the NCAA saying that competition would ruin the marketplace, a notion that violated the Sherman Act.<sup>24</sup> Further, the court did not find that the NCAA plan was justified by the need to compete competitively with other tv programming, since it eliminated competition between other football programs.<sup>25</sup> Most importantly, the Court found that the NCAA did not rebut the Rule of Reason, and that the anti-competitive nature of the TV contracts was not offset by a procompetitive justification in another marketplace.<sup>26</sup>

In 1984, the Supreme Court upheld the Court of Appeals and ruled in favor of Oklahoma and Georgia.<sup>27</sup> Despite their loss, the NCAA continues to cling to the dicta of the case, which justified the need for amateurism in collegiate sports:

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

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

<sup>21</sup> *Id.* at 95-97.

<sup>22</sup> *Id.* at 97.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 97-98.

<sup>27</sup> *Id.* See also Weiler et al., *supra* note 10, at 272, note 2. It was after this decision that college football conferences started to make exclusive television contracts with networks for televised games.

league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as pro-competitive.<sup>28</sup>

Despite the Supreme Court’s classification of the NCAA’s brand of amateurism as “properly justified,” the 9<sup>th</sup> Circuit Court of Appeals held otherwise in both the *O’Bannon* and *Alston* cases.<sup>29</sup> Both cases, class action suits which were brought by current or former college athletes, held that the NCAA, through the mandated amateurism, violated the Sherman Act.<sup>30</sup>

In *O’Bannon*, a group of current and former college athletes brought suit against the NCAA challenging their rule prohibiting athletes to receive a portion of the revenue that the NCAA and its member schools receive based on “the sale of licenses to use the student-athletes’ name, images, and likeness in video games, live game telecasts, and other footage.”<sup>31</sup> The plaintiffs argued that the NCAA restricted trade in two marketplaces: college education and group licensing.<sup>32</sup> The 9<sup>th</sup> Circuit Court of Appeals found that the NCAA’s asserted purposes for restraint, including “preserve[ing] its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product,” did not justify the antitrust injury suffered by the plaintiffs.<sup>33</sup> While the district court found that cash payments for athlete’s name, image, and likeness were a viable

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<sup>28</sup> Id. at 101-02.

<sup>29</sup> See *O’Bannon*, 7 F.Supp.3d 955. See also *Alston*, 958 F.3d 1239.

<sup>30</sup> Id.

<sup>31</sup> *O’Bannon*, 7 F.Supp.3d at 963.

<sup>32</sup> Id.

<sup>33</sup> Id. at 973.

alternative to educational expenses, the 9<sup>th</sup> Circuit disagreed, holding that NCAA member schools to awarding grants-in-aid (scholarships) up to the respective university's full cost of attendance was a broadly reasonable market restraint with the pro-competitive effect of preserving the NCAA's principles of amateurism.<sup>34</sup>

More recently, the 9<sup>th</sup> Circuit Court of Appeals revisited the same issue it analyzed in *O'Bannon* in deciding *Alston*, another loss for the NCAA's amateurism narrative.<sup>35</sup> The court held in *Alston* that the NCAA violated the Sherman Act by placing a limit on the amount of educational benefits that college athletes can receive.<sup>36</sup> The court upheld much of their earlier decision in *O'Bannon*, using the same antitrust framework and determining that the NCAA violated section 1 of the Sherman Act.<sup>37</sup> The court again applied the Rule of Reason test, shifting the burden to the NCAA, and requiring the organization to prove that the violation provided for a pro-competitive effect in a different marketplace.<sup>38</sup> The NCAA's only procompetitive justification was that the rules promote amateurism, which distinguished from professional sports broadens the marketplace, an argument the court found unpersuasive.<sup>39</sup> Contrary to contentions from the NCAA, the court held that while some of the challenged rules serve that purpose, restricting "non-cash education related benefits" do not serve that same purpose, and in no way could be confused with a professional sports player's salary.<sup>40</sup> The court further held that giving more compensation to college athletes would not deter fans from tuning in to watch college football, similar to the Supreme Court's opinion in *Board of Regents*.<sup>41</sup>

While recent judicial treatment of "amateurism" has slowly begun to erode the NCAA's narrative, the NCAA's decision to change their rules regarding name, image, and likeness was a result of state legislatures forcing their hand as opposed to

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<sup>34</sup> Id. at 999-1002.

<sup>35</sup> *Alston*, 958 F.3d 1239.

<sup>36</sup> Id. at 1256.

<sup>37</sup> Id. at 1253-57.

<sup>38</sup> Id. at 1256-57. See also 15 U.S.C. § 1.

<sup>39</sup> *Alston*, 958 F.3d at 1257.

<sup>40</sup> Id.

<sup>41</sup> Id. at 1259.

proactive action on their own accord.<sup>42</sup> In September 2019, California governor Gavin Newsom approved a bill that would enable college athletes to profit off of their name, image, and likeness starting in 2023.<sup>43</sup> Over 20 other states have since passed bills or considered legislation for the monetization of name, image, and likeness for college athletes.<sup>44</sup> Florida governor Ron Desantis quickly followed suit, and on an even quicker timeline: the Florida law will go into effect on July 1, 2021.<sup>45</sup> The push for legislation stems both from increases in revenue from college sports and increased salaries for college coaches while players receive compensation disproportionately capped at each university's cost of attendance calls for reform to the NCAA rules.<sup>46</sup> The NCAA's proposed rules remove the moratorium on college athletes profiting from name, image, and likeness and lessen the restrictions on the transfer rules that apply to college football, basketball, and baseball players.<sup>47</sup> There is still work to be done by the NCAA in regard to fleshing out the details of the new rules and procedures for profiting off of name, image, and likeness.<sup>48</sup> The rules currently include provisions allowing the players to make money off of endorsements (with the exception of college branding), hire agents in certain scenarios, and use popular crowd-based fundraising platforms, such as "Go Fund Me," in the event of family hardship.<sup>49</sup>

Despite all attempts to change the status quo from within the NCAA and from state legislatures, if federal legislation is passed, all other attempts would be thwarted.<sup>50</sup> In September 2020, a bill called, "The Student Athlete Level Playing Field Act" (hereinafter,

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<sup>42</sup> Berkowitz, *supra* note 13.

<sup>43</sup> *Id.*

<sup>44</sup> Dodd, *supra* note 13.

<sup>45</sup> Steve Berkowitz, Florida governor signs bill on college athletes' name, image, and likeness, USA Today (June 12, 2020), <https://www.usatoday.com/story/sports/college/2020/06/12/florida-bill-college-athletes-name-image-likeness/5347470002/>.

<sup>46</sup> Brent Schrottenboer, NCAA moves forward with historic reforms for athletes on name, image, and likeness, as well as transfers, USA Today (Oct. 14, 2020: 6:55 PM), <https://www.usatoday.com/story/sports/college/2020/10/14/ncaa-moves-forward-historic-athlete-reforms-name-image-likeness-transfer/3658056001/>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



the “Act”) was introduced in the U.S. House of Representatives.<sup>51</sup> Despite the level of political party polarization in the United States in the current era, this was a bipartisan bill, introduced by Representative Anthony Gonzalez (Republican, Ohio) and Representative Emanuel Cleaver (Democrat, Missouri).<sup>52</sup> The federal bill would be a benefit for the NCAA in that it would avoid the confusion and disparity between fifty different state laws on the issue, as the federal law would preempt the various state laws.<sup>53</sup> The NCAA desired to carve out an exemption from antitrust law, something that the Act does not do.<sup>54</sup> The Act does not prevent future antitrust claims from being brought based on existing causes of action, but it does not provide any additional grounds for suit.<sup>55</sup> Similarly, the Act also avoids delving into any issues with tax law or employment and labor law.<sup>56</sup>

To summarize, change is coming to college athletics. While amateurism is a core pillar of the NCAA’s approach to governing college athletics, action from state legislatures and Congress is pressuring the NCAA to redefine what amateurism means for college athletes, and what rules for compensation will be going forward. With competing opinions from players, coaches, the public, the media, and national representatives of how the monetization of name, image, and likeness should be implemented at the college level, the NCAA has a fantastic opportunity to seize control of the situation and work swiftly to come up with a solution.

## II. *THE BACHELOR* FRANCHISE AND COLLEGE ATHLETES: HOW NAME, IMAGE, AND LIKENESS MONETIZATION WILL IMPACT UNIVERSITY BRANDS

In the unchartered territory that name, image, and likeness monetization brings to college sports, the NCAA should turn to an unexpected source for guidance: *The Bachelor* franchise. The long-

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<sup>51</sup> Dodd, *supra* note 13.

<sup>52</sup> *Id.*

<sup>53</sup> Michael McCann, Latest NIL bill overrides states but leaves tax and labor questions behind, Sportico (Sept. 29, 2020, 2:55 AM), <https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

running reality show that first aired in 2002 was once a very modern way to find love, but in recent years has become a springboard for attractive twenty-somethings to become “influencers,” and be sponsored by brands and make money through social media.<sup>57</sup>

In the age of booming and uber prevalent social media advertising, “influencers,” or individuals who use social media to make money by promoting products, and persuading followers to purchase said products based on their personal review, or the reputation of their brand as a whole.<sup>58</sup> Typically speaking, the more followers that an influencer has, the better brand deals he or she will get, as companies want their products to go to a wider audience.<sup>59</sup> The holy grail of influencing is the infamous “swipe up” feature on Instagram.<sup>60</sup> In order to achieve the coveted tool that enables selected users to link websites to stories, allowing followers to simply “swipe up” on a smartphone to go directly to the website in which a product is listed for sale.<sup>61</sup> Currently, this feature is only available to Instagram users that have a minimum of 10,000 followers.<sup>62</sup> Because of this benchmark, access to the feature is coveted, but only held by a small percentage of the user population on the popular social networking app.<sup>63</sup>

Even after contestants leave *The Bachelor* franchise, they have usually gained a following through the show, and companies seek them out to promote their products. Through these partnerships, former contestants make anywhere between \$1,000 and \$30,000 for a single branding deal.<sup>64</sup> The show is their

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<sup>57</sup> Influencer Marketing Hub, What is an influencer? (Oct. 15, 2020), <https://influencermarketinghub.com/what-is-an-influencer/>. See also Anabel Pasarow, From Bachelor(ette) Contestant to Full-Time Influencer: A Timeline of Social Media Shilling From the Beloved Reality Franchise, Refinery29 (March 9, 2020: 3:05 PM), <https://www.refinery29.com/en-us/2020/03/9522674/the-bachelor-contestants-social-media-influencers>.

<sup>58</sup> Id.

<sup>59</sup> Madison Malone Kircher, Instagram Should Give Everyone Swipe Up, Vulture (June 3, 2020), <https://www.vulture.com/2020/06/how-can-i-get-instagram-swipe-up.html#:~:text=On%20Instagram%2C%20E2%80%9Cswipe%20up%E2%80%9D,to%20that%20user's%20designated%20link>.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

platform to gain followers. People around the world watch the show, and during the season develop favorite contestants, who are popularized through Twitter and Instagram memes and other internet buzz. Naturally, contestants that stay on the show, or “in the competition” longer are the ones that gain the most followers and get the best deals after the show.<sup>65</sup> Though the participants do not actually make money from being on the show, the opportunity for profit from third party brand sponsorships does not come to fruition until after their time on the show ends.<sup>66</sup> Further, contestants on the *Bachelor* provide all their own clothing and makeup services while filming the show.<sup>67</sup> Despite not getting paid to be on the show, the promise of branding deals is what makes the opportunity enticing. Debatably, a 24-year-old “model” from Knoxville, Tennessee whose only major booking was with the fast-food restaurant “Sonic” would not be making hundreds of thousands of dollars from “influencing” on Instagram but for a national platform.<sup>68</sup> Hannah Ann Sluss was a contestant on Season 24 of *The Bachelor*, and while she ended up “winning” the show, getting engaged to Bachelor Peter Weber, it was short lived, with the pair breaking up after only a few months.<sup>69</sup> Despite being unlucky in love, Sluss currently has 1.3 million Instagram followers, often posting paid partnership posts with brands such as “Revolve” and “SheIn,” both popular women’s clothing companies.<sup>70</sup> Sluss is only one example of dozens of contestants that have risen to that level of fame. Another recent contestant on the show, Hannah Godwin, has 1.5 million Instagram followers

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<sup>65</sup> Compare Mykenna Dorn, a contestant on the 24<sup>th</sup> season of *The Bachelor* (318K Instagram followers, eliminated in week 6 of the show) [Mykenna Dorn [@mykenna]]. Retrieved on Dec. 3, 2020. <https://www.instagram.com/mykenna/>. with Madison Prewett (1.7 million Instagram followers, finished as first runner-up after voluntarily leaving the show on the finale episode) [Madison Prewett [@madiprew]]. Retrieved Dec.3, 2020. <https://www.instagram.com/madiprew/>.

<sup>66</sup> Pasarow, *supra* note 57 (noting that contestants are not paid for being on the show).

<sup>67</sup> *Id.*

<sup>68</sup> Hannah Ann Sluss [@hannahann]. Retrieved Nov. 21, 2020, from <https://www.instagram.com/hannahann>.

<sup>69</sup> Amanda Lucci, Bachelor Star Hannah Ann says Peter Weber broke up with her a week after speaking with Hannah Brown, *Women’s Health Magazine* (Mar. 11, 2020), <https://www.womenshealthmag.com/relationships/a31401319/the-bachelor-hannah-ann-peter-weber-hannah-brown/>.

<sup>70</sup> Hannah Ann Sluss, *supra* note 68.

and makes anywhere from \$3,114-\$5,191 per Instagram post.<sup>71</sup> Jojo Fletcher was a runner up on Season 22 of *The Bachelor*, and she went on to star in Season 12 of *The Bachelorette*, where she got engaged to sports commentator Jordan Rogers.<sup>72</sup> Fletcher has 2.2 million Instagram followers, and hosts two popular reality shows with Rogers.<sup>73</sup>

Similar to the way that *Bachelor* contestants and other reality stars receive stardom based on the platform from their shows, college athletes receive the platforms and huge followings from playing on their teams. Mac Jones, current quarterback at the University of Alabama, is a great example, with “80K” Instagram followers.<sup>74</sup> Looking specifically at the University of Mississippi, current Ole Miss quarterback Matt Corral has “42.1K” followers on Instagram.<sup>75</sup> Florida quarterback Kyle Trask has “51.4K” followers.<sup>76</sup> All three players are notable and recognizable by fans, and they each have far surpassed the 10,000 followers required for the infamous “swipe up” feature on Instagram.<sup>77</sup>

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<sup>71</sup> Julia Campbell, Here’s How Much Bachelor Contestants Can Earn Per Instagram Post, AT&T Entertainment (April 22, 2020), <https://www.attsavings.com/resources/entertainment/bachelor-contestants-instagram-earnings/>.

<sup>72</sup> Sarah Grossbart, Why Jojo Fletcher and Jordan Rogers May Just Be The Bachelorette’s Biggest Success Story, E! Online (Nov. 1, 2020), <https://www.eonline.com/news/1202970/why-jojo-fletcher-and-jordan-rogers-may-just-be-the-bachelorettes-biggest-success-story>.

<sup>73</sup> Id. See also Jojo Fletcher [@joelle\_fletcher]. Retrieved Dec. 3, 2020. [https://www.instagram.com/joelle\\_fletcher](https://www.instagram.com/joelle_fletcher).

<sup>74</sup> Mac Jones [@macjones\_10]. Retrieved Dec. 3, 2020. [https://www.instagram.com/macjones\\_10/](https://www.instagram.com/macjones_10/)

<sup>75</sup> MATTY [@mattcorral2]. Retrieved Dec. 3, 2020, <https://www.instagram.com/mattcorral2>.

<sup>76</sup> Kyle Trask [@ktrask11]. Retrieved Dec. 3, 2020, <https://www.instagram.com/ktrask11/>.

<sup>77</sup> Kircher, *supra* note 59. “On Instagram, “swipe up” means your account has been deemed worthy of having the tool that allows users to add links to their Instagram Stories. If a user links something to a story slide, the viewer can swipe up from the bottom and be directed to that user’s designated link. This feature is currently only available to verified users and accounts with over 10,000 followers.” Id.

### III. THE SOLUTION: INTRODUCTION OF “QUASI-PROFESSIONAL” CLASSIFICATION FOR COLLEGE ATHLETES

Because of the inevitability of the opportunity for college players to monetize their name, image, and likeness, the NCAA must consider a solution to retain control of college football. The introduction of a “quasi-professional” classification for athletes allows the NCAA to retain the idea of amateurism and their control of college football.

Currently, the NCAA does not allow college athletes to make money outside of their scholarship package at all. With upcoming legislation, that ideal is no longer realistic. The introduction of the quasi-professional athlete is a meeting of the minds of the athletes and the NCAA. The fact that college athletes will *have* the opportunity to profit off of their name, image, and likeness does not mean that in reality all athletes *will*. In all likelihood, only the most popular and notable athletes will receive opportunities to create brand partnerships. This, like in professional sports, will exemplify “survival of the fittest” and other attributes of the free market economy: the best and most popular athletes will be the people that companies want to work with. In order to retain the qualities of amateurism, the NCAA should allow all athletes the choice to accept those brand partnerships or remain amateurs. The benefit to remaining amateur would be to keep the educational benefits provided by the school: a scholarship package worth up to their university’s cost of attendance. Alternatively, athletes that choose to take in the benefits of branding and making a profit off of their name, image, and likeness would forfeit most of their scholarships in favor of that money. The only scholarship the quasi-professional athlete would keep is a scholarship specifically for their tuition.<sup>78</sup> Likely, the student-athletes who would stand to make a significant profit would forfeit their amateur status and majority of their scholarship package, while the student-athletes with little or no profiting opportunities would opt to keep their scholarship package and amateur status.

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<sup>78</sup> The idea behind keeping the tuition scholarship is that athletes must be full time students in order to be eligible to play. The tuition would be covered, which would keep them in school, but they would be responsible for covering other living expenses, like rent, meals, and other incidentals.

In order to achieve quasi-professional distinction, the NCAA should follow Instagram in the way that the “swipe-up” feature is only awarded to users that have a certain number of followers.<sup>79</sup> To mimic this, the NCAA should require that athletes meet certain benchmarks in order to be granted the option to switch to quasi-professional status. In reality, most brands would not be offering partnerships to athletes below that benchmark anyway, as the idea behind partnering with influencers is to advertise to the largest pool of people possible. With social media, that idea is exemplified through influencers or content creators with the largest following. By quantifying the number of followers required to qualify for the quasi-professional level, the NCAA would alleviate the headache for compliance offices by limiting the number of athletes that they would have to monitor within this new classification.

The benefit from the quasi-professional classification would be three-fold. First, eligible athletes would have their choice of compensation and could make their decision based on their fact-specific situation. Depending on the benefits offered by brand deals and those offered by the institution based on their scholarship package, athletes would likely pick that which is the most profitable. Second, athletic programs would save money, during a time when budgets are struggling because of the COVID-19 pandemic and its aftermath. Third, the NCAA would have the opportunity to retain one of their core tenants, amateurism, for the vast majority of players.

First, the athletes would have the benefit of being able to choose the best option for their personal situation. The proposed name, image, and likeness legislation opens the door for college athletes to have the opportunity to be influencers. However, those opportunities likely are only going to be afforded to players with the most notoriety. Similar to how the more popular and longer-lasting *Bachelor* franchise contestants get better brand deals, the best and most notable college athletes would be getting brand deals. For the athletes that truly are attending college because of their scholarship package and educational benefits, those opportunities would still be available to them. The players in a

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<sup>79</sup> Kircher, *supra* note 59.

position of fame and notoriety would be left with a decision to make in regards to their compensation.

Further, this scenario would eradicate complaints from athletes because they would be able to choose their preferred method of compensation. An unfortunate truth is that many football players do not attend their university simply to receive a college education: they attend because they're required to put in three years at the college level before becoming eligible for professional football in the National Football League ("NFL"). While the NCAA continues to feed the narrative that amateurism exists because all college players are "student-athletes" and thus are getting an education in order to "go pro in something else" after college, roughly 70% of them actually do so by graduating with a college degree.<sup>80</sup> While that number is high, that still leaves a great deal of players that do not graduate. For the athletes that want to attend college and get a degree, thus prioritizing academics and a future career outside of football, a full cost of attendance scholarship is a fantastic opportunity. For those that are in it for the opportunity to make quick cash and become famous and have dreams of eventually going to the NFL, they can choose the "influencer" route and hope for the best. Players choosing this alternative would still receive a scholarship to cover their tuition, and thus not risk their classification as a full-time student. While they would continue to receive a tuition scholarship, they would be forfeiting the remainder of the cost-of-attendance scholarship for the opportunity to engage in brand partnerships for profit.

Second, the quasi-professional classification would save money for university athletic departments. Because of the COVID-19 pandemic, the athletic departments have struggled due to cancelled games and seasons, drastically reducing revenue. It is likely that many universities would have at least a handful of athletes that opt to take the brand partnerships and convert to quasi-professional status as opposed to retaining their amateurism and full cost-of-attendance scholarships. Rather than simply being ridden of those scholarships, the money originally

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<sup>80</sup> Derrick Z. Jackson, NCAA needs a reality check when it comes to grad rates for black athletes, *theundefeated.com* (Dec. 26, 2018), <https://theundefeated.com/features/grad-rates-for-black-athletes-ncaa-needs-a-reality-check/>.

allotted to and not accepted by quasi-professional athletes could be given in the form of scholarships to other recruits, or be put toward something else within the athletic program. With football programs being allotted 85 scholarships, even a handful of athletes opting to convert to quasi-professional would allow the programs to either recruit more athletes and build toward a stronger program with talent, or upgrade facilities, get new uniforms, etc. Essentially, quasi-professional status would give programs the opportunity to stretch their money further, something that will be beneficial in the aftermath of the pandemic.

This approach is seemingly counterintuitive because it reinvents the NCAA's narrative, thus forcing athletes to choose one form of compensation (i.e., payment vs. full cost of attendance college scholarships) over the other. Despite offering compensation outside of the traditional scholarship package, the quasi-professional approach preserves the future of college athletics because it prevents ambiguity. Compliance offices are already busy making sure that each university is following NCAA rules and policies, both with recruiting prospective student-athletes and evaluating and maintaining academic policies for current students. Limiting the number of students eligible for quasi-professional classification would enable compliance offices to continue the work already delegated to them, while learning the intricacies and common issues that will inevitably arise with this new addition. Further, because the economic market will naturally only grant a limited number of players at each school the opportunity for partnerships and money, the decision to quasi-professional makes sense financially.

The monetization of name, image, and likeness would change the game for recruiting. Athletes would still be looking to go to top ranked programs, like Alabama, Ohio State, or Clemson because of the likelihood of playing on a winning team, along with the notoriety and strength of those programs granting them greater opportunity to advance to the NFL. Importantly, though, players would also be looking at those schools because of the potential of high-profile brand endorsements and social media deals. Alternatively, smaller schools have a hidden advantage that larger schools lack—the ability for younger players to see time in



the game at an earlier age. Schools like Alabama get many top recruits per year, and typically younger players do not start until further into their time on the team. A school like Ole Miss, for example, could potentially benefit with recruiting because they would be able to lure players with the opportunity to play sooner, thus the ability to gain popularity and potential brand endorsement deals sooner into their time on the team.

Third, the introduction of quasi-professional classification allows the NCAA and college players to both be happy. Because of the rise of influencers in the era of social media, it only makes sense that college athletes would want to advocate for their right to use their personal brand to their advantage. These players not only see themselves as a commodity, but they also see their coaches making large sums of money and want to financially benefit from their talent, too. It also makes sense that the NCAA would want to retain control over the brand and commodity that they have built, one that historically has classified college athletes as “amateurs” in that they do not receive monetary compensation outside of their scholarship package. The quasi-professional classification provides the best of both worlds because the NCAA will still be able to classify the majority of their athletes as amateurs in the traditional sense: allotting educational benefits to athletes who attend college to get a degree while simultaneously participating in the sport that they love. Alternatively, athletes of prominence and notoriety will have the opportunity to participate in their chosen sport (specifically for sports like football and basketball, working toward eligibility in the professional leagues) while also profiting off of their own brand and popularity.

#### IV. WHY THE QUASI-PROFESSIONAL CLASSIFICATION WOULD WORK: SOCIAL MEDIA AND BRANDING

Many Americans (and the NCAA, for that matter) view the issue of name, image, likeness simply as “whether college athletes should get paid.” Contrary to that stance, the question is more nuanced in the era where anyone, anywhere has access to social media and can make money off their personal brand. The provision in the legislation, however, prohibits athletes from using their team association in their personal brand. It makes sense that universities want to control their own brand and are

concerned about bad actors and the potential risk that monetization of name, image, and likeness brings. The proposed legislation specifically prohibits athletes from entering partnerships with alcohol and tobacco companies, marijuana dispensaries, casinos, or adult entertainment companies, which is an attempt to prevent predictable inappropriate scenarios.<sup>81</sup>

Despite fears from university athletic departments, preventing athletes from using university branding will prove to be disadvantageous to universities and will hinder them from the huge possibility of using the monetization of name, image, and likeness to their advantage. The universities should have the opportunity to work with the athletes and provide compensation in exchange for branding with their own athletes.

Instead of referring to “universities” in general, take the Ole Miss as a specific example. The university has a spot in the Southeastern Conference and is home to one of the most beautiful college campuses in the nation—the combination of those two things make it a hot destination for college visits.<sup>82</sup> While the SEC has not always been<sup>83</sup> the powerhouse of college football that it is today, there is no denying that there is an allure to attending college in what today is debatably the most dominant conference in college football.<sup>84</sup> Ole Miss, in the early 2010s, had the benefit of piggybacking off of two excellent forms of free advertising: Hollywood and college football.<sup>85</sup> The 2009 film, *The Blind Side*, inspired by Michael Oher’s journey from homelessness to being adopted by Ole Miss graduates and major donors Leigh Anne and Sean Tuohy sparked a decade-long boom for Ole Miss

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<sup>81</sup> Student Athlete Level Playing Field Act, HR 8382, 116<sup>th</sup> Congress, 2d Session (Sept. 14, 2020).

<sup>82</sup> USA Today 2016 Reader’s Choice Awards, Best Beautiful College Campus, <https://www.10best.com/awards/travel/best-beautiful-college-campus/> (last visited Feb. 22, 2021).

<sup>83</sup> Ole Miss Sports, Hugh Freeze, <https://olemisssports.com/sports/football/roster/coaches/hugh-freeze/296#:~:text=In%20all%2C%20Freeze%20has%20a,the%20first%20time%20since%201971> (last visited Feb. 22, 2021).

<sup>84</sup> Allen Barra, Why Has the South Dominated College Football for So Long?, *The Atlantic* (Nov. 30, 2012), <https://www.theatlantic.com/entertainment/archive/2012/11/why-has-the-south-dominated-college-football-for-so-long/265758/>.

<sup>85</sup> University of Mississippi, More than 19,500 Students Set Enrollment Record at UM (Sept. 10, 2010), <https://news.olemiss.edu/enrollment2010/> (showing the 1,192 student increase from 2009 to 2010 after the film “The Blind Side” was released in November 2009).

enrollment.<sup>86</sup> Head Football Coach Hugh Freeze was hired at Ole Miss in December 2011.<sup>87</sup> He inherited a losing team (Ole Miss won 2 football games during the 2011 season) and proceeded to lead the team to their first ten game winning season since 2003 and to a bowl game in four of his first five years, one of which was the Sugar Bowl.<sup>88</sup> After the 2016 season's commencement with their victory in the Sugar Bowl over Oklahoma, Ole Miss finished the season ranked in the Top 10 for the first time since 1969.<sup>89</sup>

After twenty-two years of consecutive enrollment growth ending in 2016, the University of Mississippi entered their fourth year of consecutive enrollment decline in 2020.<sup>90</sup> In the past five years, the University of Mississippi has seen a steady decline in enrollment, being demoted to the second largest university in Mississippi after Mississippi State University jumped to the largest in 2020.<sup>91</sup> During that same time period, from 2017-2019, the University of Mississippi received sanctions from the NCAA Infractions Committee, resulting in many penalties, including reduction in scholarships. This was a huge detriment to recruiting because it reduced the number of players that could be offered a scholarship each year.<sup>92</sup>

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<sup>86</sup> Amy Rosenthal, *Ole Miss Growth Thanks Most to Out-of-State Students*, hottytoddy.com (Mar. 4, 2017), <https://www.hottytoddy.com/2017/03/04/state-state-enrollment-ole-miss/>.

<sup>87</sup> Ole Miss Sports, *supra* note 83.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Kate Royals, *University enrollment hits all-time high*, Mississippi Today (Sept. 9, 2016), <https://mississippitoday.org/2016/09/09/university-enrollment-hits-all-time-high/>. See also Jake Thompson, *University of Mississippi sees an almost three-percent decline in enrollment*, Oxford Eagle (Nov. 3, 2020), <https://www.oxfordeagle.com/2020/11/03/university-of-mississippi-sees-an-almost-three-percent-decline-in-enrollment/>.

<sup>91</sup> Mississippi Public Universities, *University System Enrollment Remains Steady Despite Pandemic* (Nov. 2, 2020), <http://www.mississippi.edu/pr/newsstory.asp?ID=1663>.

<sup>92</sup> Juco All-American, *Here's what losing 12 scholarships over 3 years could mean for Ole Miss football*, redcuprebellion.com, <https://www.redcuprebellion.com/2016/6/20/11975976/ole-miss-ncaa-investigation-punishment-scholarship-reduction-recruiting-violations-hugh-freeze> (last visited Feb. 22, 2021).

Another example of sports impacting enrollment is a study at Texas Tech University.<sup>93</sup> In a study about sports impacting higher education enrollment, 33% of participants admitted that football player Michael Crabtree's winning catch to beat rival University of Texas in 2008 impacted their decision to attend Texas Tech.<sup>94</sup> At the University of Alabama, the tenure of legendary football coach Nick Saban directly correlates with exponential enrollment growth.<sup>95</sup> In 2006, the year prior to Saban's hire, Alabama's freshman class sat at 4,404 students (2,926 in-state, 1,478 non-residents).<sup>96</sup> By the fall of 2017, the freshman class had 7,407 students (2,406 in-state, 5,001 non-residents).<sup>97</sup> During that same time period, Alabama brought home four national championships and five SEC (Southeastern Conference) championships.<sup>98</sup>

Stories like this attest to the fact that a national brand is not only what defines a university, but also what increases out of state enrollment, which is where the bulk of tuition dollars come from.<sup>99</sup> These examples also demonstrate the connection between a successful football program and university enrollment growth. Universities could use popular players to their advantage and actually bolster their brand through advertising with those players.

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<sup>93</sup> Joshua M. Hansen, *The Effects of Athletic Success on College Enrollment Applications* (May 2011), <https://ttu-ir.tdl.org/bitstream/handle/2346/ETD-TTU-2011-05-1392/HANSEN-THESIS.pdf?sequence=2>.

<sup>94</sup> *Id.* at 58.

<sup>95</sup> Erik Brady, Steve Berkowitz, and Christopher Schnaars, *Saban's Football Success Boosts Enrollment*, *Athletic Business* (Oct. 2017), <https://www.athleticbusiness.com/college/saban-s-success-goes-beyond-football-coach-boosts-enrollment.html>

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See Jackson Fryburger, *Alabama football: How many championships do the Tide technically have?*, *USA Today* (Sept. 12, 2019, 11:14 AM), <https://rolltidewire.usatoday.com/2019/09/12/alabama-football-how-many-championships-do-the-tide-technically-have/>. See also Chris Chavez, *How Many National Championships has Alabama won?*, *Sports Illustrated* (Dec. 27, 2018), <https://www.si.com/college/2018/12/27/how-many-national-championships-won-alabama-football#:~:text=Alabama%20claims%20they%20have%20won,coach%20Bear%20Bryant%20took%20over.>

<sup>99</sup> Rosenthal, *supra* note 86. See also University of Mississippi, *Cost of Attendance 2020-2021*, <https://finaid.olemiss.edu/cost-of-attendance-2020-2021-#2> (last visited Feb. 22, 2021). For the 2021 school year, the cost of attendance for a Mississippi resident was \$25,572 and for a non-resident of Mississippi was \$42,024.

Aforementioned Mac Jones, Matt Corral, and Kyle Trask are all great examples of athletes that would have the option to convert their status to quasi-professional. They would no longer receive the full cost-of-attendance scholarships to attend their respective universities, but they would receive scholarships to cover their tuition and would be able to profit off their name, image, and likeness through a variety of avenues, including brand partnerships through social media. These players are also excellent examples of the way that universities could use team members to their advantage for marketing purposes. Similar to *Bachelor* contestants, these young men have thousands of people watching their every move, and in many instances, wanting to emulate them in various ways. With appropriate supervision (potentially consisting of approval from public relations specialists before posting with university-brand related content), using players as the face of the universities could provide to be the best marketing strategy for universities as a whole, and could positively impact recruitment. The proposal of the quasi-professional athlete aligns with the *Bachelor* method in that brands can choose to partner with individuals who will make them most profitable. This gives the college athletes what they want because they have the ability to profit off their name, image, and likeness and make brand deals, assuming they meet the benchmarks. College athletic departments save money based on athletes that opt out of the entire amateur scholarship package, allowing them freedom to move money in their budgets around, or just give those scholarships to other athletes. This classification is a victory for all parties involved because money is distributed three-fold and each party is getting what they desire.

#### CONCLUSION

The NCAA and Congress face the same uphill battles: they must come up with a solution to the problem of name, image, and likeness before Florida's legislation takes effect on July 1, 2021. There is controversy and pressure on all sides: universities, student-athletes, fans, legislators, the NCAA, and even the courts all have an opinion on how this should play out. While the NCAA wants to preserve amateurism and the unique commodity that is college football, student athletes and proponents of the proposed

legislation want to progress the rights of college athletes in a way that does not align with college sports as we currently know them to be. The introduction of the quasi-professional classification to college athletics has the potential to fix the problems that the NCAA is facing through providing athletes the opportunities they want, while maintaining amateurism for a majority of college athletes. It is highly foreseeable that the year 2021 will bring clarity and specificity as to the rules surrounding monetizing name, image, and likeness. Regardless of what the NCAA or Congress decides, at least in Florida, college athletes are about to start telling us to “swipe up.”