

THE NEXT FRONTIER: NIL RECONCILING ANTITRUST LAW WITH EFFECTIVE SPONSORSHIP

*John A. Fortunato**

INTRODUCTION

Contentious debates surrounding student-athletes profiting from their name, image, and likeness (NIL) are continuously at the epicenter of public policy and higher education scrutiny.¹ Courts, student-athletes, and the National Collegiate Athletic Association (NCAA) are consistently wrestling with legal principles involving NIL and revenue-generating activities.² However, on July 1, 2021, historical changes around NIL favorably pivoted toward student-athlete compensation.³ The historic ruling by the Supreme Court of the United States (SCOTUS) shifts toward a new course for all student-athletes.⁴

* Doctor of Philosophy, Rutgers University, 1999. Bachelor of Arts in Communication, William Paterson University, 1992.

† This article was written prior to and during the announcement of NCAA policy changes stemming from judiciary and legislative policy enforcement of Name, Image, and Likeness matters surrounding student-athletes. Due to the longevity of time from press to print, new amendments or changes to certain policies may be absent or not discussed herein.

¹ See Talia Blake, *How Will Student Athletes Profiting Off Their Name, Image, And Likeness? WMFE* (May 24, 2021), <https://www.wmfe.org/name-image-likeness-florida-student-athletes/181554>.

² See Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete's Right of Publicity*, *Willamette Univ. L. Rev.* 51 (2015).

³ See Dan Murphy, *Everything You Need to Know About the NIL debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

⁴ See Steve Berkowitz, *Supreme Court Rules against NCAA*, USA Today (June 21, 2021, 7:50 PM), <https://www.usatoday.com/story/sports/2021/06/21/shawne-alston-vs-ncaa-case-supreme-court-ruling/5237656001/>.

Brand sponsorships, personal appearances, autographs, and social media are now new revenue channels for student-athletes.⁵ However, the turning point around NIL pivots when California passes the first piece of NIL legislation in the United States.⁶ Shortly after, Florida accelerates the discussion around student-athlete compensation by becoming the second state to enact NIL legislation.⁷

The brewing pressure from Congress pushes the NCAA to establish a group designed to study and examine the NCAA's position on NIL benefits and rule modifications tethered to education policy recommendations.⁸ However, the ruling by the Supreme Court against the NCAA lifts the veil of the organization's convoluted policies that egregiously violate the fundamental principles of antitrust.⁹ The Court's ruling explicitly challenges the association's ability to place national limits on educational benefits for student-athletes and fundamentally alters the NCAA's system of amateurism.¹⁰

The NCAA's concerns derive from variances in state laws.¹¹ A great law to analyze is Arizona's NIL state law. Arizona's NIL regulation seems to be arguably the least disruptive to the current

⁵ See Sharon Epperson & Erica Wright, Top college athletes strategize how to turn their 'brand' into financial gains with new sponsorship deals, CNBC (Nov. 16, 2021, 12:55 PM), <https://www.cnbc.com/2021/11/16/how-top-college-athletes-monetize-their-brand-with-sponsorship-deals.html>.

⁶ S.B. 26, 2020-21 Reg. Sess. (Cal. 2021); see also Brian Costa & Louise Radnofsky, NCAA Clears Way for Athletes to Earn Endorsement Money, Wall St. J. (Oct. 29, 2019, 3:52 PM), <https://www.wsj.com/articles/ncaa-clears-way-to-allow-athletes-to-be-compensated-11572372807>.

⁷ See Christina Monroe, Florida To Become First State To Allow Student Athlete Compensation, Legal Sports Betting (June 15, 2020, 11:31 AM), <https://www.legalsportsbetting.com/news/florida-to-become-first-state-to-allow-student-athlete-compensation>.

⁸ See Michelle Brutlag Hosick, NCAA working group to examine name, image and likeness, NCAA (May 14, 2019, 2:40 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness>.

⁹ See Paul Myerberg, Supreme Court Justice Brett Kavanaugh rips NCAA in antitrust ruling, says it 'is not above the law', USA Today (June 21, 2021, 5:20 PM), <https://www.usatoday.com/story/sports/college/2021/06/21/justice-brett-kavanaugh-rips-ncaa-in-shawne-alston-opinion/7771281002>.

¹⁰ See Steve Berkowitz, Supreme Court Rules Against NCAA in antitrust case in unanimous decision, USA Today (Jun. 21, 2021, 10:24AM), <https://www.usatoday.com/story/sports/2021/06/21/shawne-alston-vs-ncaa-case-supreme-court-ruling/5237656001/>.

¹¹ See generally Braly Keller, NIL Incoming: Comparing State Laws and Proposed Legislation, Open Dorse (Feb. 28, 2022), <https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation>.

collegiate model as it essentially defers to any legislation the NCAA sets forth.¹² Although it cites that institutions shall allow student-athletes to earn compensation for the use of their NIL, it is limited to the extent allowed by the rules established by the relevant national association.¹³

Yet, alternatively, in January of 2022, the State of Arkansas enacted a more standard bill.¹⁴ Under this law, student-athletes are free to receive professional representation and compensation regarding NIL without fear of negatively impacting their athletic or scholarship eligibility.¹⁵ Disclosure of any NIL transactions to educational institution officials is a requirement by both the student-athlete and their representative within a time set by the university.¹⁶

The NCAA also seemingly believes that varying state laws and university guidelines will lead to harmful outcomes for college sports.¹⁷ To protect against harmful outcomes, the NCAA seeks a federal law creating a singular national policy.¹⁸ A singular national policy can take the form of a non-regulated system with student-athletes receiving unlimited compensation in an entirely unfettered marketplace¹⁹ to a restrictive system anchored in stipulations challenging economic competitiveness in the marketplace.²⁰ Nevertheless, will such policies overcome the challenges stemming from antitrust law? The answers to antitrust

¹² Keller, *supra* note 11; see also S.B. 1296, 55 Leg., 1st Sess. (Ariz. 2021).

¹³ Keller, *supra* note 11.

¹⁴ See H.B. 1671, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); see also Keller, *supra* note 11.

¹⁵ See H.B. 1671, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

¹⁶ See generally H.B. 1671, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

¹⁷ Ross Dellenger, NCAA Leaders Still Wary of NIL Modernization as Congress Aims for Federal Solution, *Sports Illustrated* (July 1, 2020), <https://www.si.com/college/2020/07/01/ncaa-congress-name-image-likeness-federal-standard>.

¹⁸ *Id.*

¹⁹ Scott A. Burns, Prohibition is Ending in College Sports, *American Institute for Economic Research* (Nov. 7, 2019), <https://www.aier.org/article/prohibition-is-ending-in-college-sports>.

²⁰ See Burns, *supra* note 19. (“As a private regulatory body, the NCAA has the prerogative to change its [student-athlete compensation] rules whenever it likes. It would be much easier for the NCAA to take the initiative to make these changes itself than for it to wait for state legislators in all 50 states to craft their own rules for college athletics.”).

challenges are generally within the fundamental principles of antitrust.

U.S. antitrust laws protect and promote economic competitiveness by combating trusts and other arrangements that potentially restrain trade in the marketplace.²¹ The NCAA's policies and practices are popular targets of sports litigation surrounding antitrust principles, revenue-generating NIL activities of student-athletes,²² and payments to student-athletes for education-related expenses.²³ In light of the Supreme Court's unanimous ruling in *NCAA v. Alston*,²⁴ it appears that NIL policies will probably receive greater scrutiny regarding compliance and the antitrust ideals of promoting and inducing competition.²⁵

This Article examines the legal and practical implementation of student-athlete NIL policies. Section I analyzes the understanding of antitrust law, revenue sharing in sports, and

²¹ Compare with The Antitrust Laws, Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Mar. 3, 2022), and Earl W. Kintner, *An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws For Businessmen* 15 (2d ed. 1973); see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911) (“[T]he dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions....”); see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

²² See Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, *The New York Times*, <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> (Sept. 29, 2021) (“The laws and N.C.A.A. rules do not guarantee any [NIL endorsement] deals; they just make them possible.”); Compare with *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), and William D. Holthaus Jr., *Ed O’Bannon v. NCAA: Do Former NCAA Athletes Have a Case Against the NCAA for its Use of Their Likenesses?*, 55 *St. Louis U. L.J.* 369 (2010).

²³ See Abigail Johnson Hess, *Here’s how college athletes can now make money, according to the NCAA’s new policy*, *CNBC* (July 1, 2021, 2:37 PM), <https://www.cnbc.com/2021/07/01/how-college-athletes-can-make-money-according-to-new-ncaa-nil-policy.html>.

²⁴ See *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (ruling that NCAA restrictions on “education-related benefits,” such as tutoring or scholarships, for student-athletes violates antitrust law).

²⁵ *Id.* at 2169 (Kavanaugh, J., concurring) (“[T]raditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.”).

sponsorship practices. Section II conducts a historical review of collegiate court cases surrounding antitrust legal issues and the NCAA. Section III analyzes college sports' economic structure and sponsorship practice. Section IV explores media rights and sponsorship practices. Lastly, Sections V and VI attempt to dissect name, image, and likeness by concluding with an analysis of recommended proposals for collegiate conferences.

I. ANTITRUST LAW AND SPORTS

The Sherman Antitrust Act primarily aims to combat arrangements that unfairly restrict trade.²⁶ Section One of the Sherman Antitrust Act prohibits combinations and conspiracies restraining trade.²⁷ Section Two examines the practice of monopolization with willful acquisition or maintenance of that power through predatory or exclusionary conduct.²⁸ The goal of the Sherman Antitrust Act is to foster competition within an industry.²⁹ Essentially, there must be a marketplace with various options for consumers.

The application of antitrust laws considers unique competitive characteristics.³⁰ In sports, the complexity centers on revenue sharing and balancing competitive forces.³¹ Whereas most firms' decision-making processes are guided entirely by the goal of maximizing profits at the expense of competitors, the sports world must act not only in their self-interest but in the best interests of their overall governing body."³²

²⁶ Sherman Antitrust Act, 15 U.S.C. § 1, et seq.

²⁷ See Ross D. Petty, *The Impact of Advertising Law on Business and Public Policy* 131-32 (1992).

²⁸ *Id.*

²⁹ See SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT: CHAPTER 1, United States Dept. of Justice, <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1>.

³⁰ See United States Department of Justice, *supra* note 29.

³¹ See John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 *Rev. Indus. Org.* 5 (2009); see also Edan Lisovicz, *Protecting Home: Are MLB's Television Market Protection Restrictions Reasonable Under Antitrust Law?*, 24 *Seton Hall Law J. Sports & Ent. Law* 203 (2014); see also James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims after American Needle*, 21 *Marq. Sports L. Rev.* 517 (2011).

³² Edan Lisovicz, *Protecting Home: Are MLB's Television Market Protection Restrictions Reasonable Under Antitrust Law?*, 24 *Seton Hall Law J. Sports & Ent. Law* 203 (2014).

Collegiate sports teams vigorously compete on the playing field while simultaneously vying for fans and sponsorships.³³ In some aspects of business, this type of competition is essential for survival.³⁴ However, truly ‘free and unfettered competition,’ the hallmark of an ideal marketplace, is impossible in the sports industry.”³⁵

Further complicating the economic dynamics of college sports are disparities among member conferences.³⁶ The different broadcasting schemes among college basketball and football teams easily create a sense of disparity in what different conferences are making in return.³⁷ Many conferences will divide the money from television rights among their schools.³⁸ Specific high-demand conferences get paid much more for TV rights than others, putting certain schools at a disadvantage.³⁹ In a sense, this disparity is not created by the broadcasting networks. However, it is somewhat amplified, as the teams that benefit most from lucrative TV deals are already successful, with high levels of exposure and a solid fan base.⁴⁰

II. HISTORICAL EXAMINATION OF ANTITRUST AND NCAA

The case *NCAA v. Regents of the University of Oklahoma* appears to strongly influence college sports regarding the aspects of antitrust and student-athletes.⁴¹ In *Regents*, several universities with major college football programs argue against the NCAA and its television partners’ policies limiting the number of times each university appears on television.⁴² The universities contend that the restrictions reduced and hindered economic opportunities.⁴³

³³ Id.

³⁴ Id.

³⁵ Id. at 210.

³⁶ See id.

³⁷ See Nidin Bhandari, The 10 Most Expensive College Sports TV Contracts, *TheRichest* (Dec. 30, 2013), <https://therichest.com/luxury/the-10-most-expensive-college-sports-tv-contracts/>.

³⁸ Id.

³⁹ See Bhandari, *supra* note 37.

⁴⁰ Id.

⁴¹ See *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 85 (1984).

⁴² See *Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. at 85.

⁴³ Id.

In a 7-2 Supreme Court ruling, the Court decides that the restrictions are anti-competitive.⁴⁴ The NCAA loses the ability to negotiate television contracts for regular-season games exclusively.⁴⁵ Individual universities gain the ability to license their conferences to negotiate television deals with the networks on their behalf.⁴⁶ Nevertheless, the Court states, “that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and, therefore, pro-competitive because they enhance public interest in intercollegiate athletics.”⁴⁷

In light of the Supreme Court’s ruling, antitrust challenges against the NCAA involving student-athlete compensation grow.⁴⁸ The uniformity of student-athlete scholarships is the central issue in *Jenkins v. NCAA*.⁴⁹ The plaintiffs argue that the scholarship system limits competition and restricts student-athletes’ earning capabilities by restricting their talents to an open market.⁵⁰ The case ends up settling for two hundred and eight million, with payments totaling between five and eight thousand dollars to the student-athletes in the class action suit.⁵¹

The specific issue of student-athletes receiving compensation for the use of their NIL reaches its apex in *O’Bannon v. NCAA*.⁵² On appeal, the *O’Bannon* court deduces that the NCAA violates antitrust laws by prohibiting student-athletes’ use of their likeness without compensation.⁵³ However, in the initial ruling, the trial court in *O’Bannon* determines that universities must set aside a minimum payment of five thousand dollars per year for an athlete’s

⁴⁴ *Id.* at 88.

⁴⁵ See *Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. at 98.

⁴⁶ *Id.*

⁴⁷ *Id.* at 117.

⁴⁸ Jay L. Levine & Luke Fedlam, NCAA’s Legal Woes: Antitrust challenges from student athletes continue, *Antitrust Law Source* (June 24, 2020), <https://www.antitrustlawsource.com/podcast/ncaas-legal-woes-antitrust-challenges-from-student-athletes-continue>.

⁴⁹ See *Jenkins v. NCAA*, 311 F.R.D. 532, 532 (N.D. Cal. 2015).

⁵⁰ *Id.*

⁵¹ Michael McCann, NCAA Amateurism to Go Back Under Courtroom Spotlight in *Jenkins Trial*, *Sports Illustrated* (Apr. 2, 2018), <https://www.si.com/college/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships>.

⁵² See 802 F.3d 1049 at 1055.

⁵³ See 802 F.3d 1049 at 1079.

NIL and cease using their NIL at the termination of their athletic eligibility.⁵⁴

Similarly, other courts challenge the policies of the NCAA. The initial argument of the plaintiffs in *Alston v. NCAA* deals with the NCAA and conferences violating antitrust laws with claims that athletic scholarships are not equivalent to the total cost of attendance.⁵⁵ In March 2019, Judge Wilken's ruling cited that the NCAA's actions violate antitrust laws because of their anti-competitive rules.⁵⁶ Wilken rules that educational compensation cannot be subject to cap limits.⁵⁷

The Court points out explicitly that conferences and universities can offer additional non-cash education-related benefits to student-athletes.⁵⁸ The trial court, however, clearly stated that "non-cash education-related benefits" are for "legitimate education-related costs" and not for luxury cars or expensive musical instruments for students who are not studying music.⁵⁹ Potential educational benefits include computer equipment, study abroad programs, graduate or vocational school scholarships, and monetary awards up to six thousand dollars for academic achievement.⁶⁰

The plaintiffs appealed the ruling, and the Ninth Circuit, in May of 2020, unanimously affirmed that the NCAA violated antitrust laws by restricting competition through their compensation caps on student-athlete benefits related to education.⁶¹ A critical distinction in the *Alston* case is behavior leading to less competition married with behavior leading to a suppression of educational benefits.⁶²

⁵⁴ *Id.* at 1053.

⁵⁵ *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom*, *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

⁵⁶ *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1058.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1105.

⁵⁹ See *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1261.

⁶⁰ Brent Kendall & Louise Radnofsky, *NCAA Pressed by Supreme Court Justices on Player Compensation*, *The Wall Street Journal* (Mar. 31, 2021), <https://www.wsj.com/articles/ncaa-player-compensation-restrictions-reach-supreme-court-11617183001>.

⁶¹ See *In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1239.

⁶² Brent Kendall, *Supreme Court's NCAA Case Could Sweep Beyond Athletics*, *The Wall Street Journal* (Mar. 30, 2021), <https://www.wsj.com/articles/supreme-courts-ncaa-case-could-sweep-beyond-athletics-11617121355>.

In writing the opinion for the Supreme Court, Justice Gorsuch commented on the ruling's limitation to education-related benefits, stating:

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics.⁶³

The *O'Bannon* and *Alston* cases paved the way for student-athletes to receive additional compensation beyond a scholarship.⁶⁴ The *O'Bannon* case resulted in compensation up to the total cost of attendance.⁶⁵ The *Alston* case resulted in the non-capping of education-related compensation.⁶⁶ However, neither case allows for direct cash payments to student-athletes akin to a salary from the NCAA or their respective university.⁶⁷ *Alston* provides a path for universities to differentiate themselves surrounding education-related expenses, which adds a competitive element in alignment with the principles of antitrust law.

III. THE COLLEGE SPORTS' ECONOMIC STRUCTURE

The NCAA surpassed one billion dollars in revenue for the first time in 2017.⁶⁸ Eighty percent of the NCAA revenue comes from broadcasting contracts.⁶⁹ Contracts between the NCAA, CBS, and Turner networks equate to about ten billion dollars running

⁶³ *Alston*, 141 S. Ct. at 2166.

⁶⁴ See *Alston*, 141 S. Ct. 2141; see also *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

⁶⁵ See *O'Bannon*, 802 F.3d at 1049.

⁶⁶ See *Alston*, 141 S. Ct. at 2141.

⁶⁷ See generally *id.*; see also *O'Bannon*, 802 F.3d at 1049.

⁶⁸ See Ahiza Garcia, NCAA surpasses \$1 billion in revenue for first time, CNN Business (Mar. 7, 2018), <https://money.cnn.com/2018/03/07/news/companies/ncaa-revenue-billion/index.html>.

⁶⁹ How Television is Affecting College Sports, Athletic Business (Dec. 19, 2016), <https://www.athleticbusiness.com/operations/programming/article/15148654/how-television-is-affecting-college-sports>.

through 2024.⁷⁰ Other broadcasting networks are extending contracts covering the men's basketball tournament through 2032, totaling around eight billion dollars.⁷¹

The NCAA also receives a substantial amount of revenue through sponsorships.⁷² The sponsorship revenue from the NCAA aids in funding all college sports.⁷³ However, the men's basketball tournament revenue generation is vital for college athletics.⁷⁴

The NCAA reports that only five Division I championship tournaments are financially self-sustaining, including men's basketball, men's ice hockey, men's lacrosse, men's wrestling, and baseball.⁷⁵ Ninety percent of the NCAA's revenue goes to universities.⁷⁶ Other financial distributions by the NCAA include money to any conference that competes in Division I basketball and universities depending on the number of sports and scholarships they offer.⁷⁷ In 2017, the NCAA's Commission on College Basketball pointed out the significant disparity between university athletic programs' revenue generation and expenses and the significant disparity in the revenue generated by each sport.⁷⁸ Most notably,

⁷⁰ See Eric Brady, NCAA extends tournament deal, Turner through 2032 for \$8.8 billion, USA Today (Apr. 12, 2016), <https://www.usatoday.com/story/sports/ncaa/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/>.

⁷¹ *Id.*

⁷² See generally Paul Sarker, NCAA Explores Revised Rules Governing Student-Athletes' Name, Image and Likeness Rights, GreenburgTraurig (June 12, 2020), <https://www.gtlaw.com/en/insights/2020/6/ncaa-explores-revised-rules-governing-student-athletes-name-image-and-likeness-rights>.

⁷³ See Mark Schlabach, NCAA: Where does the money go?, ESPN (July 12, 2011), https://www.espn.com/college-sports/story/_/id/6756472/following-ncaa-money.

⁷⁴ See Christina Settimi, College Basketball's Most Valuable Teams: March Madness May Be Canceled, But The Top Programs Are Thriving, Forbes (Mar. 19, 2020), <https://www.forbes.com/sites/christinasettimi/2020/03/19/college-basketball-most-valuable-teams-ncaa-march-madness/?sh=785f066f285d>.

⁷⁵ Where Does the Money Go?, NCAA, <http://www.ncaa.org/about/where-does-money-go> (last visited Mar. 4, 2022).

⁷⁶ Michael Smith & John Ourand, Early money keys NCAA's new TV deal, Sports Business Journal (Apr. 18, 2016), <https://www.sportsbusinessjournal.com/Journal/Issues/2016/04/18/Media/NCAA-CBS-Turner.aspx>.

⁷⁷ See Christina Gough, NCAA Division I Conferences Revenue distribution, Statista (Mar. 1, 2021), <https://www.statista.com/statistics/219586/revenue-returned-to-its-members-by-the-ncaa>.

⁷⁸ See Jeff Borzella, Commission on College Basketball, ESPN (Apr. 25, 2018) https://www.espn.com/mens-college-basketball/story/_/id/23311712/commission-college-basketball-shares-recommendations-ncaa.

the revenue generated from football and men's basketball funds the non-revenue generating sports.⁷⁹ Football accounts for 70% of athletic departments' revenue at some universities.⁸⁰

IV. MEDIA RIGHTS AND SPONSORSHIP PRACTICES

The financing of college sports occurs through conferences and television broadcast rights.⁸¹ In the case of *NCAA v. Oklahoma*,⁸² College conferences won the ability to negotiate broadcasting contracts for their regular season and conference championship games in football and basketball.

In 2017, the Big Ten conference signed a six-year, \$2.46 billion broadcast rights agreement with Fox and ESPN/ABC to televise football and CBS to televise basketball.⁸³ Universities in the Big Ten earn more than \$51 million annually in conference payouts.⁸⁴ The Southern Eastern Conference (SEC) pens a deal with ABC/ESPN in 2020, increasing its annual payout for football television rights from \$55 million to more than \$300 million.⁸⁵

However, conferences are launching their television networks to generate additional revenue from monthly subscriber fees and advertisers.⁸⁶ In contract negotiations, conferences generally

⁷⁹ See Denise-Marie Ordway, Power Five colleges spend football, basketball revenue on money losing sports: Research, *The Journalist's Resource* (Sept. 10, 2020), <https://journalistsresource.org/economics/college-sports-power-five-revenue>.

⁸⁰ See Bill Plaschke, Column: How can college campuses be safe for athletes but not students? Put money on football, *Los Angeles Times* (May 27, 2020), <https://www.latimes.com/sports/usc/story/2020-05-27/college-football-return-by-bill-plaschke>.

⁸¹ Andy Staples, The future of college sports media rights: How will deals evolve with the landscape? Punt, Pass & Pork, *Sports Illustrated* (Mar. 28, 2016), <https://www.si.com/college/2016/03/28/how-are-college-sports-media-rights-deal-evolving>.

⁸² See *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 85 (1984).

⁸³ Teddy Greenstein, Big Ten announces six-year deal with ESPN, Fox Sports worth \$2.64 billion, *Chicago Tribune* (July 24, 2017, 9:18 PM), <https://www.chicagotribune.com/sports/college/ct-big-ten-espn-fox-sports-20170724-story.html>.

⁸⁴ See Brent Schrottenboer, Panic in the Pac-12 as conference quickly falls behind rivals, *USA Today* (June 12, 2018, 4:48 PM), <https://www.usatoday.com/story/sports/2018/06/12/panic-pac-12-conference-quickly-falls-behind-rivals/686880002/>.

⁸⁵ John Ourand, SEC focused on finalizing new TV package with ESPN/ABC, *Sports Business Journal* (Feb. 10, 2020), <https://www.sportsbusinessjournal.com/Journal/Issues/2020/02/10/Media/SEC.aspx>.

⁸⁶ See Staples, *supra* note 81.

control universities' television rights.⁸⁷ The “Big Twelve” is the only power five conferences without a network that allows its universities to retain rights to their games.⁸⁸

In addition to the NCAA and their conferences, university athletic programs generate revenue through sponsorships, tickets, and donations.⁸⁹ Many university sponsorships are between the university and a multi-media rights holder.⁹⁰ Learfield/IMG is the multi-media rights holder for most of the largest universities. In a typical contractual agreement, Learfield/IMG pays a university a guaranteed dollar amount for its multi-media rights.⁹¹ The multi-media rights holder sells sponsorships and advertising for local television, broadcasts games on the radio, and produces ancillary programs such as coaches' shows.⁹²

Multi-media rights holders can grow their business by expanding the roster of universities they represent.⁹³ The extension of media rights is considered leverage in negotiations with the university.⁹⁴ For instance, the University of California Los Angeles (UCLA) receives a reported \$14.4 million per year from Learfield/IMG.⁹⁵ The agreement with UCLA includes Learfield/IMG acquiring the ability to sell the naming rights to Pauley Pavilion, the University's Basketball Arena, and other

⁸⁷ See Jason Kersey, Exploring the history of college football media rights, *The Oklahoman* (Aug. 28, 2013, 9:00 AM), <https://www.oklahoman.com/article/3875459/exploring-the-history-of-college-football-media-rights>.

⁸⁸ Adam Rittenberg, Save the date: All eyes on 2023 for conference realignment, *ESPN* (June 27, 2017), https://www.espn.com/college-football/story/_/id/19743196/why-2023-next-big-date-conference-shuffling.

⁸⁹ See Chris Smith, College Football's Most Valuable Teams: Reigning Champs Clemson Tigers Claw Into Top 25, *Forbes* (Sept. 12, 2019, 6:00 AM), <https://www.forbes.com/sites/chris-smith/2019/09/12/college-football-most-valuable-clemson-texas-am/?sh=135b5972a2e7>.

⁹⁰ See AJ Maestas, Negotiating College Sports Multimedia Rights Deals, *Athletic Director U*, <https://www.athleticdirector.com/articles/negotiating-college-sports-multimedia-rights-deals/> (last visited Mar. 9, 2022).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Maestas, *supra* note 90; see generally David Millay, The College Multi-Media Rights Model is Broken, *EngageMint* (Aug. 14, 2019), <https://engagemintpartners.com/the-college-multi-media-rights-model-is-broken>.

⁹⁴ Maestas, *supra* note 90.

⁹⁵ See Eben Novy-Williams, Learfield IMG College, ELEVATE to Team up on NCAA Revenue Projects, *Sportico* (May 3, 2021, 7:00 AM), <https://www.sportico.com/business/commerce/2021/learfield-elevate-partnership-1234628775/#>.

buildings.⁹⁶ In negotiations with the University of Alabama, Learfield/IMG acquired concessions and pouring rights for soda and isotonic beverages.⁹⁷

Universities often retain lucrative uniform and equipment sponsorship rights.⁹⁸ For example, the University of Texas and Ohio State have contracts with Nike for more than \$250 Million spanning 15 years.⁹⁹ Uniform and equipment sponsorships are significant due to the strong brand recognition and exposure with team uniform logos.¹⁰⁰

Dual-brand exposure is also vital in structuring successful sponsorships and plays a critical role in name, image, and likeness implementation.¹⁰¹ Brand association, fused with NIL implementation, enhances product sponsorship of college sports teams.¹⁰² The benefits of brand association and product sponsorship significantly influence the decision-making in contract deals.¹⁰³

V. NAME, IMAGE, AND LIKENESS POLICY PROVISIONS

The parameters of NIL policy make it such that a completely unfettered marketplace allowing student-athletes to have no restrictions and receive unlimited compensation from any source

⁹⁶ *Id.*

⁹⁷ See UAB Announces Multimedia Rights Deal with Learfield IMG College, UAB Sports (June 10, 2019, 2:50 PM), <https://uabsports.com/news/2019/6/10/general-uab-announces-multimedia-rights-deal-with-learfield-img-college.aspx>.

⁹⁸ See Marina Nazario, 11 college teams that rake in tons of cash from Nike, Under Armour, and Adidas, *Business Insider* (Sep. 22, 2015, 10:36 AM), <https://www.businessinsider.com/biggest-ncaa-athletic-apparel-contracts-2015-9>.

⁹⁹ Ben Cohen & Sara Germano, Nike Reaches \$252 Million Deal to Extend Sponsorship at Ohio State, *Wall Street Journal* (Jan. 16, 2016, 1:21 PM), <https://www.wsj.com/articles/nike-reaches-252-million-deal-to-extend-sponsorship-at-ohio-state-1452811305>.

¹⁰⁰ See Carly Benjamin, The 65 Most Valuable College Sports Apparel Deals, *Forbes* (July 12, 2016), <https://www.forbes.com/sites/carlybenjamin/2016/07/12/the-65-most-valuable-college-sports-apparel-deals/?sh=438b0f37308f>.

¹⁰¹ See Simon Wright, How to ensure dual branding adds value, *POPSOP* (Mar. 11, 2015), <https://popsop.com/2015/03/how-to-ensure-dual-branding-adds-value/>.

¹⁰² See Casey Schmidt, How a memory becomes a sale: A guide to brand association, *Canto* (June 22, 2020), <https://www.canto.com/blog/brand-association/>.

¹⁰³ *Id.*; see generally Susan Friedman, Why Your Marketing Plan Should Include Sponsorship, *The Balance Small Business* (Jan. 7, 2021), <https://www.thebalancesmb.com/sponsorship-a-key-to-powerful-marketing-2295276>.

could succeed.¹⁰⁴ However, when a new regulation is needed, the question emerges: What restrictions should be a part of the policy?

The National College Players Association (NCPA) is an organization lobbying for California's *Fair Pay to Play Act* which advocates for an unfettered marketplace.¹⁰⁵ Ramogi Huma, NCPA's Executive Director, argues that 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.¹⁰⁶ Huma continues to claim that the NCAA "imposes second-class citizenship on college athletes in its pursuit to monopolize all commercial dollars generated from college athletes' NIL rights. It appears that NCAA colleges are impliedly complicit since they collectively adopt and maintain NCAA rules.

The NCAA wants a congressional grant of antitrust protection against litigation.¹⁰⁷ However, the NCAA will likely not receive an antitrust exemption after the ruling in *Alston*.¹⁰⁸ Justice Kavanaugh wrote in his concurring opinion, "the NCAA's business model would be flatly illegal in almost any other industry in America...the NCAA's current compensation regime raises serious questions under the antitrust laws."¹⁰⁹

VI. CONCLUSION AND RECOMMENDATIONS

Without the passage of federal law, states and universities will continue to craft the laws and policies surrounding NIL.¹¹⁰ Some

¹⁰⁴ See Murphy *supra* note 3; see also Michelle Brutlag Hosick, NCAA adopts interim name, image, and likeness policy, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

¹⁰⁵ See Matthew Impelli, NFLPA Wants to Help College Athletes Receive Compensation Following California's Fair Pay to Play Act, Newsweek (Oct. 28, 2019, 4:40 PM), <https://www.newsweek.com/nflpa-wants-help-college-athletes-receive-compensation-following-californias-fair-pay-play-act-1468232>.

¹⁰⁶ Name, Image, and Likeness: The Players' Plan for Economic Liberty and Rights: Hearing Before the Subcomm. on Manufacturing, Trade, and Consumer Protection (2020) (statement of Ramogi Huma), <https://www.commerce.senate.gov/services/files/259A1F0D-49EF-4D9C-A1AD-78A45DFAA620>.

¹⁰⁷ Laine Higgins & Louise Radnofsky, The NCAA's Athlete Endorsement Plan Comes with a Long-Shot Demand The Wall Street Journal (May 19, 2020, 9:33 AM), <https://www.wsj.com/articles/the-ncaas-athlete-endorsement-plan-comes-with-a-long-shot-demand-11589895230>.

¹⁰⁸ See *NCAA v. Alston*, 141 S. Ct. 2141.

¹⁰⁹ *Alston*, 141 S. Ct. at 2167.

¹¹⁰ See Murphy, *supra* note 3.

college sports officials deem inconsistent state laws potentially problematic in recruiting student-athletes.¹¹¹ Therefore, the NCAA could advocate for having each conference adopt its own set of rules as an acceptable solution with the support of most of its member institutions.¹¹² The infrastructure of developing state NIL policies should embody the theoretical principles of maximizing student-athlete economic opportunities.

The impact of judicial rulings on the NCAA appears to bring a sigh of relief to student-athletes across America.¹¹³ However, some experts have significant concerns that the implementation of NIL compensation will impose unforeseen financial burdens for unsavvy student-athletes and collegiate sports conferences.¹¹⁴

One solution to overcome sponsorship woes and the financial burdens of college conferences would be to develop a conference-driven approach. A conference-driven approach should offer compliance with the antitrust principles of a competitive marketplace while alleviating some concerns of one university obtaining a recruiting advantage due to NIL. However, a conference approach may create disparities within conferences based on varying state laws. Of course, a conference model could face legal challenges on antitrust grounds due to imperfect competition within the region. Nevertheless, influential brand association and exclusive sponsorship benefits should be integrated into future federal legislation to safeguard against unforeseen antitrust issues.

Another approach to overcoming the perceived financial woes of NIL on college sports is group licensing. A group licensing model for student-athletes appears to aid in generating sponsorship dollars because the university could negotiate a contract deal to include the university as a fictional legal person under the law. The

¹¹¹ See Lee Green, Top 10 Sports Law Issues Impacting School Athletics Programs, NFHS (May 20, 2015), <https://www.nfhs.org/articles/top-ten-sports-law-issues-impacting-school-athletics-programs>.

¹¹² See Steve Berkowitz, NCAA Council recommends name, image and likeness policies should be up to schools in states without law beginning Thursday, USA Today (June 29, 2021, 10:57 AM), <https://www.usatoday.com/story/sports/college/2021/06/28/name-image-likeness-ncaa-wants-schools-set-rules-if-state-didnt/7785176002/>.

¹¹³ See Jabari Young, The NCAA will allow athletes to profit from their name, image and likeness in a major shift for the organization, CNBC (Oct. 29, 2019, 1:50 PM), <https://www.cnbc.com/2019/10/29/ncaa-allows-athletes-to-be-compensated-for-names-images.html>.

¹¹⁴ See *NCAA v. Alston*, 135 Harv. L. Rev. 471 (Nov. 2021).

money generated from the group licensing deal can be directed back to the university.¹¹⁵ Mark Underwood, the Senior Vice President of One Team Partners, advocates for a group licensing model to increase value for student-athletes and the university.¹¹⁶ Some argue that this group licensing model combines university assets (logos, trademarks, facilities) with the marketability of the student-athletes in a way that is more attractive for sponsors.¹¹⁷ Casey Schwab, Althius Sports Partners' Chief Executive Officer, contends that student-athletes entering into deals with university partners would make sponsorships more attractive for a company and would increase revenue for both the universities and student-athletes.

In conclusion, debates about state-specific NIL provisions speak to the significant role of the economic structure in college sports.¹¹⁸ With states continually amending their legislation surrounding NIL issues, the collegiate sports environment's stability is only deteriorating.¹¹⁹ Clarity around NIL legal loopholes and public policy issues will only be accomplished with Congress's passing of uniform legislation.¹²⁰

¹¹⁵ See Aaron Beard, Group licensing: A new way for college athletes to cash in, ABC News (July 20, 2021, 2:43 PM), <https://abcnews.go.com/Sports/wireStory/grouplicensing-college-athletes-cash-78952821>.

¹¹⁶ Lawrence R. Cunningham & Malaika Underwood, The best first step for NIL: Group licensing, Sports Business Journal (May 24, 2021), <https://www.sportsbusinessjournal.com/Journal/Issues/2021/05/31/Opinion/CunninghamUnderwood.aspx>.

¹¹⁷ *Id.*

¹¹⁸ See Allen Kenney, Oklahoma Sooners Football: Thoughts on the NIL era, SBNation (Jan. 7, 2022, 8:23 AM), <https://www.crimsonandcreammachine.com/2022/1/7/22834837/oklahoma-sooners-football-name-image-likeness-rules-ncaa-endorsements-caleb-williams>.

¹¹⁹ Ross Dellenger, New Florida Bill Would Allow Schools to Facilitate NIL Deals, Sports Illustrated (Dec. 15, 2021), <https://www.si.com/college/2021/12/16/new-florida-nil-bill-schools-power>.

¹²⁰ See Lack of Governance Around NIL Concerns Leading Sports Business Professor, Sports Litigation Guide (Sept. 10, 2021), <https://sportslitigationalert.com/lack-of-governance-around-nil-concerns-leading-sports-business-professor/>.