

# COLLEGE ATHLETE DESTRUCTION ACT

*Mary Grace Cordtz*

“I think that revenue-sharing on the surface would be great because players are getting paid and it’s coming from the money they are helping make the university. But, again, I kind of try to think things through, and the other things that happen when you do something, just like when everybody is like, we have this NIL, it’s great, and this portal, it’s great...And I’m not saying I was the only one saying it. Whoa, this is a disaster coming...”<sup>1</sup>

## INTRODUCTION

Collegiate athletics are changing rapidly. From NIL to the deregulation of the transfer portal, each year seems to introduce new rules that are altering the playing field. This past season alone, the influence of money, NIL deals, and collectives has settled into the game. The changes highlight areas that student-athletes believed were unfair.

As the money being put into collegiate athletics has skyrocketed, student-athletes are increasingly looking for their share of the pot of revenue. A revenue-sharing model is the next mighty feat that the college athletics world seeks to amend. There are arguments on both sides: some advocate for athletes to receive a portion of the revenue they directly generate for their institutions through such models, while others fear this could undermine the very foundation of college athletics. The critical question is whether it is possible to implement a revenue-sharing model that supports student-athletes without compromising the integrity of collegiate sports. This article contends that the ways lawmakers are thinking about the revenue-sharing models would devastate the current

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<sup>1</sup> Steve Barnes, *Lane Kiffin Delivers Economic State of the Union at SEC Media Days: Ole Miss head coach talks NIL, Pay-for-Play, and Transfer Portal*, THE REBEL WALK, (Jul. 20, 2023), <https://therebelwalk.com/2023/07/lane-kiffin-delivers-economic-state-of-the-union-at-sec-media-days-ole-miss-head-coach-talks-nil-pay-for-play-and-transfer-portal/>.

environment that exists. It specifically focuses on the bill introduced in California that would create a revenue-sharing platform for California schools. The argument put forth is that California should adopt an alternative model, like the NBA revenue-sharing model, to share revenue from sports with student-athletes and the current athletic programs.

Part I of this article describes the College Athlete Protection Act and its propositions while highlighting the key reasons that groups are not supporting this bill. Part II of this article advances the proposal of a new revenue-sharing model that has not been discussed in the college athletics arena and how California could implement it. Part III of this article discusses the benefits that the proposed model would have on college athletics in California and goes on to address the legal issues, such as anti-trust issues, that may arise through a revenue-sharing model being implemented. Part IV of this article addresses how California's model could impact future Federal Legislation regarding revenue sharing and why this model would help more student-athletes.

## I. THE COLLEGE ATHLETE PROTECTION ACT

### *The Bill*

Assemblyman Chris Holden introduced Assembly Bill 252 in 2023, a bill that would create the College Athlete Protection Act (CAP). This bill would require colleges to participate in a revenue-sharing platform with their athletes and allow for direct payments from the school to the athletes. The bill would require specific California schools to create a degree completion fund for college athletes, and each graduating student-athlete would be able to access these funds.<sup>2</sup> The bill allows institutions to pay a maximum of \$25,000 to football and basketball student-athletes in the degree completion funds, with an additional 50% of athletics revenue going to student-athletes.<sup>3</sup> The payments would depend on a revenue-sharing formula based on revenue the schools report annually.<sup>4</sup> Additionally, the bill would create a Panel of appointed individuals

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<sup>2</sup> College Athlete Protection Act, 2023 Cal. Stat. 252 § 67462(c).

<sup>3</sup> Evan Symon, *NCAA Student Athlete Revenue Sharing Bill Passes to Senate*, CALIFORNIA GLOBE, (June 6, 2023, 12:01 PM), <https://californiaglobe.com/fr/ncaa-student-athlete-revenue-sharing-bill-passes-to-senate/>.

responsible for the administration of the CAP Act and reviewing any violations of the act by member schools.<sup>5</sup>

### *Impact On Women's Sports*

If the Collegiate Athlete Protection Act were to pass, women's sports would likely be the first to be cut while readjusting budgets. Moreover, Title IX concerns would arise, forcing schools to have to find funding in other places to continue to have women's sports. Title IX mandates that schools provide equal benefits to male and female athletes. For example, if schools make payments to the athletes, men's and women's programs will need to receive a similar amount to comply with Title IX.<sup>6</sup>

The CAP Act could lead universities to significantly cut women's sports to compensate for revenue-generating differences between sports, preserving only the bare minimum they need for Title IX compliance. Proponents argue the legislation, with the additional protections of Title IX, will protect women's sports, but it is difficult to grasp exactly how this will function in practice. The way the bill is drafted makes it challenging to imagine a school's justifying excess financial support for women's sports that generate no revenue at the expense of the revenue-generating sports.

### *Impact on Olympic Sports*

Additionally, Olympic sports are at risk of being cut if this law goes into effect. In the collegiate athletics model, "no Olympic sport [at] any school is cash flow positive...[and] the problem with commercialization [of collegiate sports] is [that] Olympic sports don't fit into it."<sup>7</sup>

As with women's sports, it is unlikely that universities will justify funding these programs with money that comes from revenue-generating sports if they are already distributing a sizeable percentage of this revenue to individual athletes. Revenue-generating sports have survived cuts and, instead, cuts are going to

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<sup>4</sup> College Athlete Protection Act, 2023 Cal. Stat. 252 § 67463.

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

<sup>6</sup> Education Amendments Act of 1972, 20 U.S.C. §§ 1681 - 1688 (2018).

<sup>7</sup> James Sutherland, *NCAA President: No Olympic Sports Are Profitable At Any University*, SWIMSWAM, (Dec. 8, 2021), <https://swimswam.com/ncaa-president-no-olympic-sports-are-profitable-at-any-university/>.

Olympic sports.<sup>8</sup> These programs are already experiencing cuts, even without considering the potential impact of a significant reduction in university athletic program revenue.

The CAP Act poses a risk for sports like track and field, rowing, fencing, soccer, golf, gymnastics, field hockey, wrestling, swimming, diving, water polo, tennis, and volleyball to be on the chopping block for athletic departments looking to save money.<sup>9</sup> This will exacerbate inequities that exist within college sports, with “students in revenue sports [receiving] anywhere from \$5,000–\$25,000 per year, with students in non-revenue sports receiving much less, and maybe nothing in some cases.”<sup>10</sup>

If Universities cut Olympic sports, Team USA’s success on the international stage is bound to decrease. Many US Olympic athletes come from university sports programs, “[so] when college programs are cut, there are dominoes related to those cuts.”<sup>11</sup> If colleges abandon these programs, the training and talent pool that the United States has developed will decrease immensely, leading to less success in the upcoming Olympic games.<sup>12</sup> Without the NCAA Olympic sports programs, which provide “coaching, facilities, nutritionists, [and] sports psychologists...at hundreds of campuses”, the current pace of Olympic athlete development could not be sustained.<sup>13</sup> It is worth it to note that California schools have historically produced the most Olympic athletes, especially in recent Olympic years. The CAP Act, therefore, poses a significant threat to all Olympic sport athletes at California universities.<sup>14</sup>

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<sup>8</sup> David Wharton, *Will this be the last time Americans dominate the Olympics?*, LA TIMES, (June 6, 2021), <https://www.latimes.com/sports/olympics/story/2021-06-06/will-american-olympic-dominance>. “Today, instead, “the ax has fallen...on such sports as the Summer Games trinity of track, swimming, and gymnastics, which operate at a deficit.”

<sup>9</sup> Karen Weaver, *Changes in 2024 Olympic Sports Portfolio Should Add Further Disruption to College Non-Revenue Sports*, FORBES, (Feb. 25, 2021), <https://www.forbes.com/sites/karenweaver/2021/02/25/changes-in-2024-olympic-sports-portfolio-should-add-further-disruption-to-college-non-revenue-sports/?sh=681359e76eaa>.

<sup>10</sup> William W. Berry III, *Amending Amateurism Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551, 574 (2016).

<sup>11</sup> See, Wharton, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Nick Zaccardi, *Study shows which colleges produce most U.S. Olympians*, NBC SPORTS, (Sept. 21, 2017), <https://www.nbcsports.com/olympics/news/college-most-olympians-team-usa>. At the University of Arizona, the athletic director noted that non-

Olympic sports are essential to collegiate athletes who participate in them. For example, Stanford University once planned to eliminate 11 Olympic sports, including fencing, field hockey, rowing, sailing, squash, synchronized swimming, men's volleyball, and wrestling.<sup>15</sup> The cuts were contemplated because of the financial challenges in supporting all these programs that were not making money for the school. The school ultimately reversed its decision to eliminate these sports due to backlash and lawsuits from the affected athletes.<sup>16</sup> Stanford announced that "changed circumstances including newly galvanized philanthropic interest have provided a new path to support the 11 sports."<sup>17</sup> Stanford and its students must rely on private funding for these programs, which is unfortunately unavailable for other collegiate programs. Similar legal challenges could arise from the cuts necessitated by this bill, with issues such as sex discrimination also coming into play.

This occurred without a revenue-sharing model in place, instead arising due to setbacks in athletic budgets because of COVID-19. One could only imagine what would occur if all schools grappled with these issues due to the implementation of revenue-sharing models. Most schools would be unable to justify maintaining these programs that lose money which would cause the demise of Olympic sports in the collegiate arena. While this bill claims to protect women and Olympic sports, it is unclear how it

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revenue sports, like swimming, would need to be completely restructured or destroyed if the collegiate athletics world continues to develop like it is, especially with the NIL or revenue-sharing platforms. Heeke stated, "...if you really take NILs and everything to the extreme, there is not room for all these other programs beyond football and basketball...there just isn't." See also Riley Overend, *Is NIL Really Threatening Olympic Sports Like Swimming?*, SWIMSWAM, (May 11, 2022), <https://swimswam.com/is-nil-really-threatening-olympic-sports-like-swimming/>.

<sup>15</sup> Gabriel Fernandez, *Stanford reverses decision to cut 11 of its varsity sports programs*, CBS SPORTS, (May 18, 2021), <https://www.cbssports.com/general/news/stanford-reverses-decision-to-cut-11-of-its-varsity-sports-programs-per-report/#:~:text=Stanford%20University%20has%20reversed%20the,picture%20with%20increased%20fundraising%20potential.%22>.

<sup>16</sup> *Id.* See also John Woolfolk and Elliot Almond, *Athletes sue Stanford over plan to eliminate 11 sports by end of the school year*, THE MERCURY NEWS, (May 12, 2021), <https://www.mercurynews.com/2021/05/12/athletes-sue-stanford-over-plan-to-eliminate-11-sports-by-end-of-school-year/>.

<sup>17</sup> Stanford Athletics, *Stanford Announces the Continuation of 11 Varsity Athletic Teams*, GO STANFORD, (May 18, 2021), <https://gostanford.com/news/2021/5/18/stanford-announces-the-continuation-of-11-varsity-athletics-teams.aspx>.

would support them. It would likely only cause more issues for athletics departments when trying to figure out how they will support all these athletes.

### *Government Panel*

The bill creates a panel of government-appointed members that would be responsible for its administration. The board will be made up of “eleven members appointed by the Governor...Five members appointed by the Speaker of the Assembly...[and] Five members appointed by the Senate Committee on Rules, [with] at least four former college athletes with experience in college athlete protection advocacy.”<sup>18</sup> The panel is given extraordinary power over the athletes and universities.<sup>19</sup>

Government-appointed officials would have wide discretion and control over the collegiate sports in this state. The government control and regulation of collegiate sports would destroy the current athletic landscape that exists today.

## II. A MODEL TO PROTECT ALL ATHLETES IN CALIFORNIA

California should not allow for the enactment of the College Athlete Protection Act. The adoption of this bill risks severely impacting Olympic and women’s sports, which often do not generate profit and operate on account of the revenue generated from larger sports such as football and men’s basketball. The bill, despite its commendable intentions to protect student-athletes, protects the few against the many, only truly favoring the athletes

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<sup>18</sup> College Athlete Protection Act § 67465

<sup>19</sup> *Id.* at § 67465. “An institution of higher education that reports twenty million dollars (\$20,000,000) or more in annual revenue to the United States Department of Education shall be financially responsible for the out-of-pocket sports-related medical expenses of each college athlete at the institution, and during the two-year period beginning on the date on which the college athlete officially becomes a former college athlete....b) (1) An institution of higher education that reports fifty million dollars (\$50,000,000) or more in annual revenue to the United States Department of Education shall comply with both of the following: (A) Offer nationally portable primary medical insurance to each college athlete who is enrolled at the institution...paid for by the institution. The institution shall not discourage a college athlete from accepting this insurance[and] Pay the out-of-pocket sports-related medical expenses of each college athlete at the institution and during the four-year period beginning on the date the college athlete officially becomes a former college athlete”

who are making the school money. With a revenue-sharing model that pulls profits from the sports that generate revenue, schools will likely have to reduce the athletic programs provided depending on financial constraints.

California should adopt the National Basketball Association's (NBA) revenue-sharing model.<sup>20</sup> Such a plan would not only allow players to make money off the revenue they generate for the school, albeit on a smaller scale, but would equally protect women's and non-revenue-generating programs. This approach could help maintain the current landscape of college athletics and foster a level of amateurism that preserves the existing state of collegiate sports.

### *NBA Revenue Sharing Model*

The current NBA revenue-sharing model redistributes the money generated from the high-revenue teams to lower-revenue, smaller market teams.<sup>21</sup> In this model, all teams contribute roughly 50% of their annual revenue into the revenue-sharing pool.<sup>22</sup> Any team that contributes less than the average NBA team payroll receives an allocation of the money, whereas teams that contribute more than the average team payroll do not receive allocations and instead help to finance the revenue-sharing mechanism.<sup>23</sup>

While teams want to retain their profits, members of the program recognize that this revenue-sharing model fosters "...a league with teams that are economically viable so that every team

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<sup>20</sup> The NBA revenue-sharing model is a better choice than the NFL or MLB revenue-sharing model because it supports teams that are not making as much money. The NFL model focuses on sharing the revenue between the coaches and the players, which would not help struggling programs. The MLB model pools their revenue and then splits it evenly and would also not help programs that are falling behind as much. The NBA model is the best option for colleges to implement.

<sup>21</sup> John Lombardo, *Inside NBA's revenue sharing*, SPORTS BUSINESS JOURNAL, (Jan. 23, 2012), <https://www.sportsbusinessjournal.com/Journal/Issues/2012/01/23/Leagues-and-Governing-Bodies/NBA-revenue.aspx>.

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

<sup>23</sup> *Id.* For example, one high-revenue team could contribute 50% of its total revenue, minus certain expenses, for a total of \$70 million put into the pool. A low-revenue team could contribute a total revenue of \$45 million. After allocating to both teams the average team payroll of \$58 million, the low-revenue team would receive \$13 million in revenue-sharing to make up the difference between its pooled revenue from the league's average payroll. The high-revenue team would be contributing \$12 million to be distributed among receiving teams, adding financial balance between the markets.

has the opportunity to compete.”<sup>24</sup> The lower revenue-generating teams that receive the benefits of the revenue-sharing pool can then invest in their programs, gradually enabling them to compete more evenly with the higher revenue teams as each year progresses.

Additionally, the NBA’s revenue-sharing model incorporates a luxury tax, penalizing teams for allocating excessive salaries to players.<sup>25</sup> This mechanism activates when a team exceeds the agreed salary cap, incurring a penalty. The funds collected from these penalties are then distributed to benefit all other teams within the league. So, a program that can afford to reward players over the salary cap can do so, while simultaneously supporting the broader ecosystem of teams. This approach helps maintain a balanced competitive landscape.

### *The Model in Practice*

The NBA’s revenue-sharing model includes incentives for all teams to actively pursue revenue generation. If a team merely relies on the shared revenue without making efforts to produce its own, it will receive less money from the pool than it would have had it actively sought to generate revenue.<sup>26</sup> The threshold for the NBA model is that all teams must generate at least 70% of the average league revenue to stay in the pool.<sup>27</sup>

Additionally, the NBA’s revenue-sharing model is further reinforced by a collective bargaining agreement, ensuring that all teams, programs, and players agree to the terms of money distribution.<sup>28</sup> Thanks to this model and the accompanying CBA, NBA teams can remain profitable regardless of their seasonal

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

<sup>25</sup> Sam Jarden, *What is the NBA luxury tax? Explaining the penalties for high-spending teams*, THE SPORTING NEWS, (June 30, 2023), <https://www.sportingnews.com/us/nba/news/what-nba-luxury-tax-explained-penalties-high-spending-teams/p1sspaedfmsit20rqewn9d7#:~:text=The%20exact%20fees%20are%20determined,below%2C%20per%20HoopsRumors.com.&text=%2415%2D20%20million%20above%20tax,increase%20by%20%240.50%20per%20dollar>.

<sup>26</sup> Pranav Divakar, *#6 How do NBA Teams make money*, LINKEDIN, (Aug. 16, 2023), <https://www.linkedin.com/pulse/6-how-do-nba-teams-make-money-pranav-divakar/>

<sup>27</sup> Aliyaho Pierce, *NBA Revenue Sharing: Small-Market Teams to Benefit from New Sharing Structure*, BLEACHER REP. (Jan. 25, 2012) <https://bleacherreport.com/articles/1039092-nba-revenue-sharing-small-market-teams-to-benefit-from-new-sharing-structure>.



performance, contributing to the league's overall prosperity and growth. This system not only fosters financial stability across the league but also encourages competitive balance, allowing the NBA to flourish as an organization.

In 2021-2022, 10 teams paid into the revenue-sharing pool and 20 teams received money.<sup>29</sup> In one year alone, two-thirds of the NBA was able to benefit and grow from the revenue-sharing model, with 10 teams helping to bolster the rest of the league. Rather than allowing two-thirds of the league to lag financially, this model ensures that all teams have the opportunity to compete on a more level playing field.

### *California's Implementation*

California Colleges could easily implement a revenue-sharing model like the NBA's, tailored to the collegiate sports environment, in a way that maintains amateurism and the overall integrity of college sports. In such a model, each school in California would take a specific portion of the revenue their programs generate and would contribute it into a pool designed to support programs that generate less revenue. This system would still permit schools to distribute a portion of the revenue directly to athletes. Programs with lower revenue could then use these funds to enhance their competitiveness and infrastructure, potentially increasing their ability to generate revenue in the future. So, instead of all the revenue going directly to the athletes, a portion of the revenue would go to the programs to make improvements and bolster the sport.

Universities could adopt this revenue-sharing model directly, or they could adapt it to suit their specific needs and circumstances. This adaptability would allow the schools to decide how they would

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<sup>28</sup> Matt Netti, *Breaking Down the NBA CBA*, CONDUCT DETRIMENTAL, <https://www.conductdetrimental.com/post/breaking-down-the-nba-cba#:~:text=Revenue%20Sharing,rising%20tide%20lifts%20all%20ships>.

<sup>29</sup> Tony East, *Report: Indiana Pacers receive the most from NBA revenue sharing for 2021-22 season*, FAN NATION, (Mar. 18, 2023), <https://www.si.com/nba/pacers/news/report-indiana-pacers-receive-the-most-from-nba-revenue-sharing-for-2021-22-season#:~:text=Revenue%20sharing%20in%20the%20NBA,big%20and%20small%20market%20teams>.

split the revenues between all the sports in ways that work best for the school individually.

Even if a sport were required to contribute 25% of its revenue to a shared pot, there would still be ample money to pay athletes a reasonable amount while allowing other programs to reap the benefits of the revenue. Given the substantial revenue generated from television and media deals at each school, there's a considerable financial pool available to both compensate players and support various athletic programs. By giving 25% of yearly revenue to a sharing pot, 75% of the revenue would still be available to pay the athletes and cover the costs of coaching and facilities. The collected pot of money could then be distributed to the less economically viable teams, enabling them to pay their athletes, enhance facilities, and improve overall performance. This approach promotes a more inclusive support system that benefits all student-athletes across the university, not just those in high-profile sports.

Additionally, the full payout to the student should be contingent on graduation. Under this model, the student-athlete would receive 50% of the funds available to them each year, with the other 50% of the yearly payout reserved until graduation. Athletes in non-revenue sports are more likely to stay and graduate rather than go to a professional league. Conversely, it addresses the trend of basketball and football players leaving school early for professional leagues by holding half of their earnings in escrow until graduation. This ensures that the school is getting the full performance for the athlete competing for their school, as opposed to having a student use the school as a steppingstone to a professional team. Unclaimed funds, resulting from students who either do not graduate or transfer, would revert to their respective sports programs, further supporting the financial health and development of these teams.

For example, in 2022, UC Berkley's football team generated \$10 million in revenue, while their basketball team generated about \$1 million.<sup>30</sup> Should 25% of this combined revenue be allocated to a revenue-sharing pot, it would amount to \$2.75 million available for

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<sup>30</sup> See *College Athletic Departments Financial Database*, SPORTICO, <https://www.sportico.com/business/commerce/2023/college-sports-finances-database-intercollegiate-1234646029/>.

distribution to other athletic programs at the university. Meanwhile, over \$8 million would remain to be divided among the athletes in these revenue-generating sports.<sup>31</sup>

Adopting this model would categorize student-athletes as employees, affording them protections like those proposed in other models, with a significant distinction: it also supports and safeguards non-revenue sports and programs, which would otherwise be at risk under different models. This approach protects the current environment of college athletics, while giving a bonus those who balance their roles as a student-athlete-employee.

### III. IMPLEMENTATION ON A COLLIGATE LEVEL

#### *In Practice*

The proposed NBA-like model ensures that non-revenue-generating sports are not overlooked in the conversation of how to pay athletes. An athlete would rather attend a school that not only offers financial incentives but also boast successful athletics programs across a range of sports, rather than institutions that support only the financially viable ones due to budget constraints. This was the whole mindset of college sports in the first place. The non-revenue sports do more for the school in the long run than they do in the short term, which is why they are critical for the school to support.<sup>32</sup>

The model, like in the NBA, would allow the school to have teams that are economically viable so that they may have the opportunity to compete. All the programs would be able to excel on a level playing field that would protect non-revenue sports and Title-IX concerns, while compensating players who help generate the revenue. Although the payouts to athletes might not match the full amounts proposed by current legislative efforts, they would nonetheless represent significant compensation, particularly when

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<sup>31</sup> The amount that other non-revenue generating sports could influence this as well, as the non-sport specific revenue from Cal in 2022 generated around \$16 million. This shows that in practice, other teams would be putting money into the pot as well, not just football and basketball.

<sup>32</sup> Emma Healy, *The Hidden Revenue Behind Non-Revenue Sports*, BC HEIGHTS, (Feb. 8, 2021), <https://www.bcheights.com/2021/02/08/importance-of-non-revenue-sports/>.

added to the educational benefits already offered to student-athletes by universities. Schools would still have to adjust with the restructuring of college athletics, but not cuts that would destroy all sports other than football and basketball.

Schools could decide on how they would like to divide their money by using a collective bargaining agreement like the one used in the NBA model. Athletes and administrators would be able to partake in these negotiations so that all sides will be represented equally. By having the school and athletes work together to represent the athletic department and distribute the shared revenue across all programs, the agreements would be more beneficial for all student-athletes and institutions alike.

The schools participating in a collective bargaining agreement would bypass the government oversight proposed in the CAPA bill. This would allow the school and the athletes to exercise direct control over their decisions.

Additionally, schools could incorporate provisions in their revenue-sharing agreements that protect the student-athletes from medical issues. A specific portion of the generated revenue could be earmarked annually for a separate fund accessible to student-athletes facing medical challenges. The school could work with the athletes that they have in all their programs and decide on an amount of revenue to contribute to this fund. This arrangement would foster a supportive community among athletes, ensuring protection and ongoing support for those who might suffer injuries. Unlike a government-mandated figure tied to the athletic programs' revenue, the amount allocated to this fund could be decided collaboratively by the schools and athletes.

### *Benefits to the School*

Under the proposed model, schools would directly benefit in numerous ways beyond if they just gave money to revenue-generating athletes. By bolstering all athletic programs and ensuring athletes are compensated where necessary, schools will witness enhanced competition across their athletics programs.

With an NBA-like revenue pool model, universities will experience heightened competition in sports beyond football and basketball. Schools with robust swimming programs, for example, will be able to provide additional benefits to the swimmers and

recruit better athletes. Colleges will be able to enhance their national notability by investing in their programs, which could generate revenue in the future through successful competition.

With an increase in competition, there's potential for television deals to expand to include sports that traditionally don't generate significant revenue. For example, a highly ranked gymnastics competition between UCLA and UC Berkeley could attract more viewership. As these programs gain prominence, schools could negotiate with television networks to broadcast these sports, thereby generating additional revenue. This development could elevate historically non-revenue sports to a status closer to that of the main revenue-generating sports. More television exposure for these programs not only enhances the school's visibility in a national marketplace for prospective students and athletes but could also lead to increased financial support for teams that currently do not generate significant revenue.

More competition and strong sports programs will also cause an increase in attendance and applications to schools. Competitive athletic programs will entice students and athletes alike to attend the school. While financial gains from college football might seem paramount, many institutions with exceptional non-revenue sports programs boast NCAA titles and championships. These student-athletes generally achieve higher GPAs, admissions tests scores, and graduation rates within the athletics programs.<sup>33</sup> As schools recruit and support high-performing athletes, the academic standing and rankings of institutions are likely to improve. Therefore, it makes sense to continue enhancing programs that foster academic success and contribute to the overall advancement of the college. Given that California universities produce most Olympic athletes, the NBA-like model would increase the number of athletes the schools could develop for the United States.<sup>34</sup> The CAPA model would force Olympic hopefuls to seek programs outside the state, such as divers opting for Purdue over USC for better training opportunities. This would result in California not only losing potential students and revenue but also directing top athletes to other states that continue to support their sports

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<sup>33</sup> James E. Johnson, Roger D. Wessel & David Pierce, *Reexamining Student-Athlete GPA: Traditional vs. Athletic Variables*, 3 J. OF INTERCOLLEGIATE SPORT 236 (2010).

<sup>34</sup> See note 14.

programs. The alternative NBA model discussed would help retain these student-athletes within California universities by providing the necessary support and resources for their training.

The recent announcement by the Olympic Committee to include sports like baseball, softball, lacrosse, and squash in the 2028 Summer Olympics highlights the importance of a revenue-sharing model that supports the development of these programs.<sup>35</sup> This model would enable schools to cultivate talent in sports that might not be traditional revenue generators, fostering the growth of more athletes while providing them with a top-tier education. By passing a revenue-sharing model that supports all athletes, California schools would have an extremely competitive advantage for recruiting student-athletes. As pioneers in adopting such a model, these schools could attract more athletes by offering benefits beyond those available elsewhere. Implementing the proposed NBA model, instead of the CAPA model, allows these schools to extend competitive advantages to all students, enhancing the appeal for athletes in non-revenue or Olympic sports. This broad approach incentivizes a wider range of student-athletes to choose these institutions, thereby elevating competition, improving athlete quality, and boosting enrollment.

By offering all athletes, not just those in football and basketball, the opportunity to make money off their performance, California schools will attract top talent, while expanding their community of alumni and supporters.

Some argue that it's challenging enough to support non-revenue sports within a tight budget, even before considering a revenue-sharing model that includes athlete payments. However, the NBA-like sharing model, is designed to improve all sports, not just the revenue-generating ones, benefiting the entire athletic department. While schools focusing revenue sharing solely on profitable teams may face drastic program cuts, spreading revenues more equitably could reduce disparities between sports.<sup>36</sup>

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<sup>35</sup> *IOC Session Approves LA28's Proposal for Five Additional Sports* (Oct. 16, 2023), <https://olympics.com/ioc/news/ioc-session-approves-la28-s-proposal-for-five-additional-sports>.

<sup>36</sup> Even in the current model proposed in California, only 50% of the revenue is going to students, after the amount spent on scholarships is taken out.

*Antitrust Issues*

Revenue sharing in college sports could raise legal concerns regarding federal antitrust statutes. Courts regularly apply the Rule of Reason for antitrust cases to determine if agreements or rules are restricting competition within a market. This involves examining both competitive and anticompetitive effects of business agreements to see if they contravene the Sherman Act (15 U.S.C. § 1).<sup>37</sup> Should the court identify a violation through the Rule of Reason analysis, the implicated restrictions would be deemed in breach of the Sherman Act, highlighting the intricate balance between fostering competition and ensuring fair revenue distribution. The Court analyzes the Rule of Reason test in three parts. First, the Plaintiff must prove that the rule or restriction has an anti-competitive effect on the market.<sup>38</sup> Second, the Defendant must show that the rule offers procompetitive purposes.<sup>39</sup> Third, the court must decide whether the procompetitive purposes are not restrictive, and that the Defendant could not use a less restrictive alternative to the rules in place<sup>40</sup>. The test is a burden-shifting analysis.<sup>41</sup>

If antitrust litigation arose from the adoption of the NBA model in California, it would arguably be simple to prove that these rules and regulations promote procompetitive purposes, making it a less restrictive option. By creating a revenue-sharing model, the schools completely avoid antitrust concerns by offering students a broad spectrum of opportunities, from academic to economic benefits. By compensating athletes, schools engage in healthy competition to attract talent, thereby supporting both their athletes and non-revenue sports through a system that encourages competition while providing comprehensive support.

Adopting this model enables schools and athletes to negotiate compensation based on sports-generated revenue, sidestepping salary cap debates akin to those in *House v. NCAA* over price-fixing conspiracies.<sup>42</sup> This model advocates for a more flexible market in college sports, preserving elements like non-revenue sports that

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<sup>37</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

<sup>38</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1057 (9th Cir. 2015).

<sup>39</sup> *Id.* at 1058.

<sup>40</sup> *Id.* at 1060.

<sup>41</sup> *Nat'l Collegiate Athletic Ass'n v. Alston*, S. Ct. 2141, 2160 (2021).

thrive on amateurism, offering a potential resolution to issues in *House* by fostering a freer market while maintaining the spirit of college athletics..

Implementing the NBA revenue-sharing model could address antitrust concerns outside the non-statutory labor exemption by fostering competitive effects in the least restrictive manner. This approach suggests that such a model would align with federal antitrust statutes by promoting competition and providing a balanced framework for revenue distribution among college athletes, potentially offering a legal and equitable solution within the context of collegiate sports.

### *Unionization*

One potential resolution to concerns about revenue-sharing models in college sports and their compatibility with antitrust laws is to permit college athletes to unionize. Allowing athletes to form unions, alongside implementing a revenue-sharing model, would alleviate antitrust issues, as collective bargaining agreements provide a structured framework for compensation.<sup>43</sup>

In this proposed NBA-style revenue-sharing model, the union would encompass all student-athletes across schools, recognizing their integral role within the system.<sup>44</sup> This differs from a model that would share the revenue between only revenue sports as a union; that model would just be made up of students who would be considered “employees”. Allowing unionization within this framework ensures that the collective voices and concerns of all student-athletes are acknowledged and addressed in negotiations with universities, promoting a more equitable and comprehensive representation of athlete interests.

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<sup>42</sup> *Grant House v. Nat’l Collegiate Athletic Ass’n*, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

<sup>43</sup> See Geoffrey Christopher Rapp, *Can College Sports Unions Save College Sports and Save Unions?*, 5:1 MISSISSIPPI SPORTS L. REV. 16, 17 (2015) “The NCAA does not need to convince Congress to grant it an antitrust exemption—the courts have already created one that the NCAA simply needs to adopt. As the public came to appreciate most recently in *Brady v. NFL*, the non-statutory labor exemption from antitrust law protects from scrutiny multi-employer bargaining units (to a degree that may differ from one appellate circuit to another). If the NCAA accepted unions, its O’Bannon problem would go away.”

<sup>44</sup> See *supra* note 10. They could also split this up by sport if they want.



## IV. IMPACT ON A NATIONAL LEVEL

Adopting the NBA model in California could set a precedent influencing national policy. When California laid the groundwork for the Name, Image, and Likeness (“NIL”) legislation, the federal government quickly followed to nationalize NIL deals for all student-athletes.<sup>45</sup> If the past predicts anything, Congress may attempt to implement a national revenue-sharing bill as well. The proposed model would support sports programs across the nation while financially benefiting the players.

If Congress implemented a bill like CAPA nationally, universities would have to eliminate numerous sports due to additional financial constraints within athletic departments, a situation similar to potential outcomes for California schools if such legislation were passed. The impact on a national level would severely affect non-revenue generating sports, leading to the elimination of Olympic sports and women’s sports across U.S. colleges. Justice Kavanaugh highlighted this issue in his concurrence in *Alston*. Kavanaugh emphasized the burning question proposed here: “How would paying greater compensation to student-athletes affect non-revenue-raising sports? Could student-athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX?”<sup>46</sup> Even the United States Supreme Court recognizes the issues involved with applying California’s CAPA model nationally. If such legislation were adopted across the country, the concerns Kavanaugh highlighted could become widespread.

Adopting the NBA model in California could serve as a blueprint for national college sports reform. Athletes would still receive portions of the money they generate for the school, while supporting the other programs that colleges offer. Congress could then follow California’s lead again and attempt to make this model work on a national level. This would, just like in California, increase the competition of all sports, not just football or basketball, and allow for more sports programs to potentially become

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<sup>45</sup> J. Brady McCollough, *Think NIL blew up college sports? California is going for the knockout with new bill*, LOS ANGELES TIMES, (May 16, 2022), <https://www.latimes.com/sports/story/2022-05-16/nil-college-sports-california-bill-ncaa>.

<sup>46</sup> *Alston*, 141 S. Ct. 2141, 2168 (Kavanaugh, J., concurring).

revenue-generating. Such a shift could replicate the positive outcomes discussed in this article on a broader scale, benefiting the NCAA ecosystem nationwide.

#### CONCLUSION

California's proposed CAPA bill will not protect and reward student-athletes, but instead favor a select few while dismantling many programs. California should not allow the current bill to pass as it will destroy women's and Olympic athletic programs that contribute significantly to the world of college athletics. If California is looking to immediately implement some type of revenue-sharing model, it should instead adopt a model akin to the NBA revenue-sharing model. This would reward students for bringing in revenue, while bolstering the entire school's athletic programs. This approach would better preserve the spirit of amateurism by protecting non-revenue athletes, like Olympic athletes and student-athletes who will not pursue professional sports careers.

The debate on implementing a revenue-sharing model in universities is complex and fraught with potential unintended consequences. The urgency to legislate protections for athletes must be balanced with caution, as hasty decisions could significantly impact various athletic programs. While in the future of California is unknown, if "big-time revenue-generating college athletics are moving more and more towards an employment-like model and there is a lot of political pressure being placed on this issue by all sides (unions, athletes, agents, universities, NCAA, etc.) so nobody knows what the final score will be."<sup>47</sup> It's essential for lawmakers and college sports supporters to proceed with caution, carefully deliberating on the introduction of revenue-sharing models. They should avoid hastily moving forward with legislation that might lead the college sports community down an uncertain and risky track, much like a train speeding into unexplored territory without knowing what lies ahead.

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<sup>47</sup> *Collegiate Athletes to Share in Sports Revenue in California?*, CALIFORNIA LABOR & EMPLOYMENT LAW BLOG, (June 14, 2023), <https://www.callaborlaw.com/entry/collegiate-athletes-to-share-in-sports-revenue-in-california>.

