IS NIL A LUXURY YOUR SCHOOL CAN AFFORD? BRINGING THE COMPETITIVE BALANCE "LUXURY" TAX MODEL TO COLLEGE SPORTS THROUGH COLLECTIVE BARGAINING

Payne Phillips[*]

ABSTRACT

College sports – more particularly, college football and basketball – are now in a state that is akin to professional sports. Across the country, student-athletes are now being paid millions of dollars thanks to name, image, and likeness (NIL) deals. These NIL deals are the product of antitrust litigation and state legislation that have repudiated various NCAA rules in recent years. Schools are now only at the discretion of state laws that determine student-athletes' rights to earn NIL compensation.

Because of this, NIL has enabled the wealthiest schools to assemble rosters of players that have individually signed millions of dollars in NIL deals. As a consequence, the competitive scale in college sports has tipped in favor of the schools with the deepest pockets. This imbalance in economic competition directly affects the athletic competition on the field, and if left unchecked, the nation's best-funded programs will continually dominate college sports, in turn negatively impacting fan engagement and ultimately the revenue these sports bring in.

The issue is no longer "whether student-athletes should receive compensation on their NIL," but it is now "how much compensation should schools be able to pay their student-athletes?" The NCAA and conferences could address this issue by implementing a luxury tax, which is essentially a penalty that a school will have to pay if its total payroll for its student-athletes exceeds an agreed-upon threshold. A luxury tax would prevent wealthy teams from overspending on their rosters, and this would better equip smaller schools to both recruit and maintain the top

talent in the nation. For student-athletes, the luxury tax would represent freedom from a salary cap while still offering the potential for unlimited compensation, while for institutions, the luxury tax would present an incentive to keep their spending down.

Before a luxury tax can be implemented, however, three events need to occur: student-athletes would have to be deemed employees of their institution, their conference, the NCAA, or a combination thereof; said student-athletes would have to form a union, and this union would have to enter into a collective bargaining agreement (CBA) with their respective conference or the NCAA. While all of this happening is much easier said than done, steps have been taken towards these events actually coming to reality, and this article purports to build on these steps and offer a solution for this newly-arisen issue.

Section II begins with a brief history of the NCAA, it explains how NIL came to prevalence, and it analyses the House Settlement. Section III explains the issue of competitive imbalance in college sports, and how NIL has amplified it. Section IV explores student-athletes' employee status, the principles of unionization and collective bargaining as they are used in professional sports, and how these principles would apply to college sports. Section V examines the luxury tax model and how it is used in professional sports, and it applies the luxury tax model to college sports.

"Not so fast, my friend!"

-Lee Corso[1]

I. INTRODUCTION

College sports have experienced many changes so far this century, and the most significant of these changes are name, image, and likeness (NIL) deals. NIL deals allow student-athletes to accept money and benefits from third parties in exchange for the use of their NIL, much like an endorsement in professional sports.[2] A good example of an NIL deal is the video game "College Football 25," produced by Electronic Arts (EA). In 2024, EA offered every athlete in Division I FBS, which is over 14,000 athletes, $600 and a copy of the new video game for the company to use the athletes' NIL in their game.[3] In turn, College Football 25 includes the athletes' names, it uses pictures of the athletes, and it replicates the athletes' likeness on the in-game players.

Beyond EA and College Football 25, NIL deals have enabled the wealthiest schools to assemble rosters of players that have signed millions of dollars in NIL deals.[4] As a consequence, the competitive scale in college sports has tipped in favor of the schools with the deepest pockets. This imbalance in economic competition for athletes directly affects the athletic competition on the field, and if left unchecked, the nation's best-funded programs will

---

[1] Lee Corso, *College Gameday* (ESPN television broadcast).

[2] *See* WILLIAM W. BERRY & DANIEL E. LUST, COLLEGE SPORTS LAW IN A NUTSHELL 107 (2024) ("Name, image, and likeness . . . refers to the ability of athletes to receive money from third parties for the use of their name, image, and likeness, typically to endorse a product.")

[3] Jason Wilson, *Year-End Awards: Best NIL Deal – EA Sports College Football 25*, STREET & SMITH'S SPORTS BUSINESS JOURNAL (Dec. 23, 2024), https://www.sportsbusinessjournal.com/Articles/2024/12/23/year-end-awards-best-nil-deal.

[4] *See, e.g.*, Patrick Engels, *Ohio State Athletic Director Ross Bjork Says School's NIL Collectives, Brand Affiliates Disbursed "Over 20 Million" To Football Players This Year*, BUCKEYE SPORTS BULLETIN (July 24, 2024), https://www.buckeyesports.com/ohio-state-athletic-director-ross-bjork-says-schools-nil-collectives-brand-affiliates-disbursed-over-20-million-to-football-players-this-year/; Kenneth Teape, *Texas A&M Aggies Announce Eye-Popping NIL Earnings for Athletes*, NIL DAILY ON SPORTS ILLUSTRATED (Aug. 11, 2024), https://www.si.com/fannation/name-image-likeness/nil-news/texas-a-m-aggies-announce-eye-popping-nil-earnings-for-athletes ("During the 2023-24 academic year, Aggies athletes brought in nearly $20 million, according to reports[.]").

continually dominate college sports, in turn negatively impacting fan engagement and ultimately the revenue these sports bring in.

Because of this, the issue is no longer "whether student-athletes should receive compensation on their NIL," but it is now "how much compensation should schools be able to pay their student-athletes?" This issue would be addressed if the NCAA and conferences would implement a luxury tax, which is essentially a penalty that a school will have to pay if its total payroll for its student-athletes exceeds an agreed-upon threshold.[5] A luxury tax would prevent wealthy teams from over-spending on their rosters, and this would give schools with less resources a better chance at recruiting the top talent in the nation. Before a luxury tax can be implemented, however, three events need to occur: student-athletes would have to be deemed employees of their school or its affiliated collective(s), their conference, the NCAA, or a combination thereof; said student-athletes would have to form a union, and this union would have to enter into a collective bargaining agreement (CBA) with their respective conference or the NCAA.

While all of this happening is much easier said than done, steps have been taken towards these events actually coming to reality, and this article purports to build on these steps and offer a solution for this newly-arisen issue. Section II begins with a brief history of the NCAA, it explains how NIL came to prevalence, and it analyzes the *House* Settlement. Section III explains the issue of competitive imbalance in college sports, and how NIL has amplified it. Section IV explores student-athletes' employee status, the principles of unionization and collective bargaining as they are used in professional sports, and how these principles would apply to college sports. Section V examines the luxury tax model and how it is used in professional sports, and it applies the luxury tax model to college sports.

---

[5] Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1617 (2004) ("[T]he luxury tax as it currently exists is a penalty imposed on teams that spend above a collectively bargained level.").

II. BACKGROUND

Historically, student-athletes could only be compensated with tuition, room, and board for their participation in college sports.[6] If they received anything above that, they would be subject to discipline by the National Collegiate Athletic Association (NCAA) and lose their eligibility to compete.[7] That is no longer the case because of recent antitrust lawsuits that have struck down NCAA regulations concerning student-athletes' ability to earn compensation.[8] This section begins with a brief introduction to the NCAA and amateurism, and then it examines the relevant litigation that has given rise to NIL in college sports.

A. The NCAA and Amateurism

The NCAA was originally founded as the Intercollegiate Athletic Association of the United States (IAAUS) in 1906 with the objective to clean up college football.[9] The IAAUS was renamed to the NCAA in 1910, and it has since served as the rulemaking authority over college sports and the organizers of its postseasons and national championships.[10] During this time, the NCAA hung its hat on the concept of "amateurism" to prevent student-athletes from earning compensation beyond tuition, room, and board.[11]

The NCAA used to explicitly define amateurism in its manual, as recently as its 2021-22 publication.[12] This definition could be

---

[6] Berry & Lust *supra* note 2, at 8.

[7] *Id*. ("Benefits provided beyond these categories violated NCAA rules and resulted in the athlete permanently losing eligibility to compete in college sports.").

[8] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 91-93 (2021); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1061-64 (9th Cir. 2015).

[9] *See History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Oct. 5, 2024) ("[O]n Dec. 28 in New York, 62 colleges and universities became charter members of the Intercollegiate Athletic Association of the United States, the precursor to the NCAA. The IAAUS officially was constituted as a rules-making body March 31, 1906 . . . .").

[10] *Id*. ("[I]n 1910 [the IAAUS] was renamed the National Collegiate Athletic Association. Just over a decade later, the Association expanded its focus to host its first national championship . . . .").

[11] *See* Alicia Jessop et. al., *Charting a New Path: Regulating College Athlete Name, Image and Likeness After NCAA v. Alston Through Collective Bargaining*, 37 J. SPORT MGMT. 307, 308 (2023) ("For more than a century, the NCAA has utilized the notion of amateurism to restrict college athletes from receiving any compensation beyond minor exceptions for the cost of tuition, room, and board." (citation omitted)).

[12] *See* 2021-22 NCAA Division I Manual, art. 2.9.

found in article 2.9 and was titled "The Principle of Amateurism."[13] It stated that "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived."[14] It further described student participation in college sports as an "avocation," or a hobby.[15] This language has since been stricken from the NCAA's manual.

The NCAA's efforts to create and enforce rules have resulted in extensive litigation, with cases being brought in both state and federal court. The first challenge to the NCAA's rulemaking authority to reach the United States Supreme Court came in 1984 with the Court's opinion in *NCAA v. Board of Regents*.[16] This case did not address the NCAA's amateurism rules, but the Court held that restrictions in the NCAA's television plan violated the Sherman Act.[17]

Further, *Board of Regents* is relevant to amateurism because it included dicta that the NCAA would use in its future arguments to defend its amateurism rules.[18] Specifically, this dicta comes from the Court's discussion on product differentiation between college and professional sports, and specifically, the Court stated as an example that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[19] Further, more dicta used to defend the NCAA's rules came in the Court's conclusion when it noted the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports."[20]

While amateurism rules were not at issue in *Board of Regents*, it set precedent that the NCAA's rules were subject to antitrust scrutiny. Since *Board of Regents*, The NCAA has been a party four times in the Supreme Court,[21] and an issue regarding student-athlete compensation was not brought to the Supreme Court until

---

[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] 468 U.S. 85 (1984).
[17] *Id*. at 86.
[18] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 91-93 (2021); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1061-64 (9th Cir. 2015).
[19] *Board of Regents*, 468 U.S. at 86.
[20] *Id*. at 120.

NCAA v. Alston was decided in 2021.[22] Before *Alston* is discussed, however, the Ninth Circuit's decision in *O'Bannon v. NCAA* must be addressed because it is the first case to give student-athletes the right to earn compensation on their NIL, and the events that followed *O'Bannon* essentially set the stage for *Alston*.[23]

B. NIL

1. O'Bannon

The Ninth Circuit decided *O'Bannon* in 2015, and it paved the way for NIL deals to enter college sports.[24] In 2014, former UCLA basketball star Ed O'Bannon and other similarly-situated athletes brought suit against the NCAA in federal court, claiming their likeness was used in an EA Sports basketball game without their permission or promise of compensation.[25] The district court concluded that the NCAA's compensation restraints violated antitrust law, and the NCAA appealed.[26]

The Ninth Circuit found that the NCAA's rules governing college athlete NIL were not exempt from Rule of Reason review and affirmed the district court's conclusion that the NCAA's rules that prohibited student-athletes from earning NIL compensation violated the Sherman Act.[27] The Circuit Court reversed the district court's remedy to allow students to be paid cash compensation of up to $5,000 per year.[28]

Following the *O'Bannon* decision, the State of California was the first state to pass legislation that enabled student-athletes to

---

[21] *See generally,* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding the NCAA was not a state actor); Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (holding the NCAA was not subject to Title IX on ground that it collects dues from its members which receive federal funds); New Jersey Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453 (2018) (holding that a state's act making it unlawful for a State to authorize sports gambling violates the anticommandeering doctrine).

[22] *See* Nat'l Collegiate Athletic Ass'n v. Alston, *supra* note 18.

[23] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

[24] *Id*.

[25] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

[26] *Id*. at 1009.

[27] O'Bannon v. Nat'l Collegiate Athletic Ass'n, *supra* note 23 at 1052-53.

[28] *Id*. at 1053.

receive compensation for the use of their NIL.[29] It passed the 2019 Fair Pay to Play Act, and as a result, other states followed California's lead, passing similar laws that were to go into effect at even earlier effective dates than California's law.[30]

2. Alston

Six years after the Ninth Circuit decided *O'Bannon*, the United States Supreme Court unanimously decided *NCAA v. Alston*.[31] *Alston* is yet another landmark case in college sports because it further expanded student athlete compensation to include "all costs related to education" beyond tuition, room, board, books, and cost of attendance.[32] While the court held that the compensation NCAA's rules violated the Sherman Act, particular attention was placed on Justice Kavanaugh's concurrence, which foreshadowed that the NCAA is increasingly losing its authority to regulate college sports.

Specifically, Justice Kavanaugh questioned whether any of the NCAA's remaining compensation rules could survive antitrust scrutiny.[33] He stated that "serious [antitrust] questions" are raised when examining the NCAA's business model of using unpaid student-athletes to generate billions of dollars in revenue for colleges every year.[34] He outright rejected the NCAA's amateurism argument and addressed the previously-mentioned dicta from *Board of Regents* that the NCAA has long used to defend its compensation rules.[35] He referred to this *Board of Regents* language as "decades-old stray comments about college sports and amateurism" and asserted that they were dicta and held no weight in determining whether the NCAA's compensation rules were lawful.[36]

Further, it is important to note that the *Alston* court also acknowledged a finding from the district court that consumer

---

[29] *See* Jodi S. Balsam, *False Start on Nil: Public and Private Law Should Treat College Athletes Like Any Other Student*, 11 TEX. A&M L. REV. 785, 809 (2024).

[30] *Id*.

[31] *See* Nat'l Collegiate Athletic Ass'n v. Alston, *supra* note 18.

[32] *Id*. at 108 (Kavanaugh, J., concurring).

[33] *Id*.

[34] *Id*. at 110 (Kavanaugh, J. concurring).

[35] *Id*.

[36] *Id*. (internal quotation marks omitted).

demand college sports could be affected by student-athletes' receiving "unlimited payments unrelated to education":

> At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits 'may have some effect in preserving consumer demand.' Specifically, the court found that rules aimed at ensuring 'student-athletes do not receive unlimited payments unrelated to education' could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics.[37]

After *Alston* was decided, on June 30, 2021, the NCAA adopted an interim NIL policy, and the following day, many states' NIL laws went into effect, and thus the "wild west" of NIL began.[38]

C. House Settlement

By way of litigation following *Alston*, schools will soon be able to share revenues with student-athletes in addition to compensation from third-parties through a $2.8 billion settlement reached in May 2024.[39] The NCAA and power conferences reached said settlement to remedy antitrust litigation regarding three consolidated class action lawsuits filed by former student-athletes.[40] Termed the "*House* Settlement," it is set to go into effect as soon as the 2025-26 school year.[41]

---

[37] *Id.* at 83-84 (citation omitted).

[38] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 6, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

[39] *See generally* House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021). *See also* Christopher P. Conniff et. al., *NCAA and power five conferences agree to $2.8 billion proposed antitrust settlement*, ROPES & GRAY (May 30, 2024), https://www.ropesgray.com/en/insights/alerts/2024/05/ncaa-and-power-five-conferences-agree-to-2-8-billion-proposed-settlement-of-antitrust-litigation.

[40] *Id.* ("[T]he Power Five college athletics conferences and the NCAA reached a $2.8 billion settlement in the consolidated antitrust litigation of three class action lawsuits filed by former student-athletes. . . . The proposed settlement covers three of the major class action lawsuits brought against the NCAA: House v. NCAA, Hubbard v. NCAA, and Carter v. NCAA." (footnote omitted)).

[41] Shehan Jeyarajah, *House v. NCAA settlement gains preliminary approval, moving college athletics closer to revenue sharing*, CBS SPORTS (Oct. 7, 2024), https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-gains-preliminary-approval-moving-college-athletics-closer-to-revenue-sharing/#:~:text=The%20NCAA's%20groundbreaking%20%242.8%20billion,the%202025%2D26%20school%20year.

Pending final approval on April 7, 2025, the *House* Settlement provides four significant changes to Division I (DI) athletics. In sum, these changes will: (1) require the NCAA to pay approximately $2.8 billion in back damages to all current and former student-athletes who participated in DI athletics from 2016 through 2024; (2) permit schools to "provide increased benefits to student-athletes," including NIL payments and "up to 22% of the average [Power 5] athletic media, ticket, and sponsorship revenue"; (3) eliminate scholarship limits and instead establish roster limits; and (4) require that "any third-party NIL compensation" valued over $600 to be disclosed to ensure transparency among institutions and the legitimacy of these NIL activities.[42] However, the settlement does not resolve the issues regarding the current "patchwork of state [NIL] laws," nor does it address the current efforts to establish student-athletes as employees of their schools under federal employment laws.[43]

Final approval of the House Settlement would mean billions of dollars in payments to both current and former student-athletes, but this only comes with a substantial redistribution of college athletics revenues. To pay the $2.8 billion in back damages, the NCAA will have to make payments over a ten-year span and fund $1.6 billion of the damages by withholding future distributions from DI member institutions.[44] These reductions in distributions will be divided into 40% of funds coming from defendant conferences and 60% coming from non-defendant conferences.[45] This decision resulted in "a flurry of upset commissioners and officials" from the

---

[42] *See* Brief on House v. NCAA Settlement, Knight Commission On Intercollegiate Athletics (Feb. 12, 2025), https://www.knightcommission.org/wp-content/uploads/KnightCommissionBrief_HousevNCAA_182025.pdf [hereinafter Knight Brief]. *See also* Michelle Brutlag Hosick, Settlement Documents Filed in College Athletics Class-Action Lawsuits, NCAA (July 26, 2024), https://www.ncaa.org/news/2024/7/26/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits.aspx. *See also Knight Brief*, *supra* note 43.

[43] *See* Hosick, *supra* note 44.

[44] *See* Pete Thamel, *Sources: NCAA Plan to Pay Off Settlement Irks Non-Power 5 Schools*, ESPN (May 17, 2024), https://www.espn.com/college-sports/story/_/id/40167617/ncaa-settlement-plan-house-v-ncaa-case-irks-non-power-5-schools ("The remaining $1.1 billion is expected to come from NCAA reserves, catastrophic insurance, new revenue and budget cuts[.]").

[45] *See id.* ("[N]early 300 schools would be paying for 60% of the settlement, whereas 68 power conference schools from the four major football leagues in 2024 would pay for nearly 40%").

non-defendant conferences, some asserting that they "don't have a voice in any of this[,]" and that the decision "is incredibly unfair and has a dramatic impact."[46]

Notwithstanding the immediate financial consequences stemming from the *House* Settlement, the new payments to student-athletes in addition to those previously permitted raises additional concerns regarding maintaining competitive balance within college athletics. To be more specific, the settlement will allow schools to pay their student-athletes 22% of the average athletic revenue of the power conference schools, and this "cap" is estimated to be $20.5 million for the 2025-26 season.[47] While this figure seems fair for the power conference schools because it is derived simply from their average revenue of over $100 million per year, this estimated cap is a far cry from Group of Five Conference schools' average athletic revenue, which is just under $11.5 million per year.[48]

To illustrate, the University of Nevada, Las Vegas (UNLV) is estimated to make nearly $30 million in athletic revenues for the 2025-26 fiscal year.[49] Even though this is the highest estimated athletic revenue in the Mountain West Conference, it is simply not economically feasible for UNLV to pay its student athletes anywhere near this $20 million cap. This fact puts UNLV and other similarly-situated schools at a significant disadvantage when competing with power conference schools in recruiting, which ultimately puts them at a significant disadvantage on the field or court. From an institutional standpoint, although this revenue sharing model is supposed to promote student-athletes earning

---

[46] *Id*. (internal quotation marks omitted.).

[47] See NCAA Revenue Sharing & NIL Estimates 2025, NCAA, https://nil-ncaa.com/ (last visited Mar. 28, 2025) (The estimated average athletic revenue per school by Power 5 conferences for 2025-26 is as follows: SEC, $122,170,753; Big Ten, $116,190,176; ACC, $85,546,578; Big 12, $66,210,685; Pac-12, $60,974,391.). *See Updated Question and Answer: The Impact of the Proposed Settlement on Division I Institutions*, NCAA (Dec. 9, 2024), https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/Dec2024D1Gov_PhaseTwoInstSetQuestionandAnswer.pdf.

[48] *See id*. (The estimated average athletic revenue per school by Group of 5 conferences for 2025-26 is as follows: Mountain West, $19,862,094; American Athletic, $13,597,219; Sun Belt, $9,187,681; Mid-American, $8,651,993; and Conference USA, $7,466,103.).

[49] *See NCAA Revenue Sharing & NIL Collectives – Mountain West Schools*, NCAA, https://nil-ncaa.com/mw/ (last visited Mar. 28, 2025).

potential, it will cause funds to be drawn from non-revenue sports, and this will negatively impact the programs that depend strongly on institutional support to function.

This leads to another implication, which is the decision schools in non-defendant conferences will have to make as to whether or not they should opt into the terms of the *House* Settlement. They have this option because only the NCAA and power conferences were named as defendants to the *House* litigation.[50] An institution opts in to the settlement if it provides any new payments or benefits to student-athletes beyond the "pre-*House*" limitations.[51] In addition, an institution could also opt in by providing scholarships beyond the 2024-25 NCAA (pre-*House*) scholarship limits.[52] If an institution does not opt in, it may still compensate its student-athletes with benefits related to education that are already permitted.[53] There are several key factors institutions should consider when choosing whether to opt in, including "the overall financial impact; Title IX compliance; potential loss of athlete opportunities[.]"[54] Given that all institutions in power conferences are bound by the terms of the *House* settlement, if institutions from non-defendant conferences do not opt in, then college athletics will have teams competing against each other who are playing by different rules, and this will cause the divide between high-resource and lower-resource institutions to grow further.

Beyond the immediate financial and competitive balance concerns raised by the *House* Settlement, significant legal and regulatory issues remain unresolved, particularly relating to antitrust law and Title IX compliance. From an antitrust standpoint, the settlement's revenue-sharing provisions could potentially expose institutions or conferences to litigation by either student-athletes or competing institutions, especially if revenue caps are perceived as unlawfully restricting athletes' earning potential or improperly coordinating institutional spending. Without collective bargaining, these provisions could continue to trigger antitrust challenges similar to those previously faced by the

---

[50] *See* Hosick, *supra* note 44.
[51] *See Knight Brief*, *supra* note 43.
[52] *Id.*
[53] *Id.*
[54] *Id.*

NCAA. Additionally, the *House* Settlement raises pressing Title IX concerns. While permitting increased financial benefits to student-athletes primarily in revenue-generating sports like football and men's basketball, institutions must carefully ensure they maintain equity across male and female athletic programs as mandated by Title IX. Failure to adequately balance these increased expenditures could lead to further litigation or regulatory scrutiny, potentially compromising institutions' federal funding and public standing. Thus, while the *House* Settlement addresses certain immediate financial demands from antitrust litigation, it simultaneously introduces complexities that will require proactive institutional compliance strategies to address these broader legal implications.

D. Additional NIL Developments

It is relevant for purposes of this paper to briefly explain NIL collectives. NIL collectives, or simply "collectives," are donor-driven organizations that pool money to fund NIL deals for student-athletes.[55] They are comprised of alumni and boosters "with ties to specific universities[,]" and now nearly every major institution has at least one.[56] Notwithstanding endorsement deals, collectives are the primary funding source for most NIL agreements that student-athletes enter into.

In February 2024, the U.S. District Court for the Eastern District of Tennessee granted a preliminary injunction against the NCAA's NIL-recruiting ban, which prohibited collectives from negotiating NIL deals with prospective or transfer student-athletes before their commitment to a school.[57] The court found that these restrictions violated the Sherman Act by suppressing competition and limiting student-athletes' ability to realize their market value.[58] Rejecting the NCAA's arguments that the ban preserved amateurism and competitive balance, the court held that these objectives could be achieved through "less restrictive rules already

---

[55] *See* James Finnegan, *The Only Ten I See: Why Congress Should Follow Tennessee's Lead and Pass Nil Legislation Allowing Collectives to Work Directly with Schools*, 54 SETON HALL L. REV. 855, 856 (2024).

[56] *Id*.

[57] *See* Tennessee v. NCAA, 718 F. Supp. 3d 756, 766 (E.D. Tenn. 2024).

[58] *Id*. at 762.

in place within the NCAA Bylaws[,]" such as "those prohibiting agreements without *quid pro quo*, athletic performance as consideration, and compensation directly from member institutions."[59] The ruling highlighted the NCAA's monopsony power over Division I athletics and its adverse impact on the NIL market.

Though subject to a potential appeal, this case represents a significant challenge to the NCAA's regulatory authority in the NIL era. By recognizing NIL agreements as commercial transactions subject to antitrust scrutiny, the decision further erodes the traditional concept of amateurism in college sports. This decision and the *House* Settlement underscore the need for the NCAA and the conferences to adopt a more flexible framework - potentially through collective bargaining with student-athlete unions - to address competitive disparities and align with modern antitrust principles.

III. THE ISSUE

Prior to NIL, schools would recruit student-athletes by building successful athletic programs or promising a quality education, but now, these considerations have taken a back seat to NIL money.[60] Consequently, it comes with no surprise that the schools that can offer the most NIL money are not only landing the top recruits out of high school, but also the best players from other schools through the transfer portal. This expands the already-existing disparity between large and small schools, and at the rate NIL is rapidly growing, this disparity will continue to grow. This section shows this disparity in practice and also examines other implications that arise from NIL. [61]

---

[59] *Id.* at 763.

[60] *See* Julie Owen & Ronald J. Rychlak, *Unanticipated Problems with the Transfer Portal*, 53 U. MEM. L. REV. 929, 934 (2023) ("In the past, recruitment of an athlete usually came with the promise of more playing time or an opportunity to win a championship. Today's recruiting is different. Current college athletes are being induced to change schools with the promise of large amounts of money" (footnote omitted)).

[61] Opendorse, a company that specializes in assisting student-athletes in the NIL marketplace, projects nearly $1.7 billion in NIL transactions in 2024-25, up from $917 million in 2021-22. *NIL at 3: The Annual Opendorse Report*, OPENDORSE (July 1, 2024), https://biz.opendorse.com/wp-content/uploads/2024/07/NIL-AT-3-The-Annual-Opendorse-Report-1.pdf.

Disparity Between Schools' NIL Markets

Through NIL, well-funded schools can pay their student-athletes millions of dollars, giving them the ability to out-bid smaller schools for top talent. Prominent figures in college sports have called for equal payments in college sports, specifically, legendary coach Nick Saban believes that the current model is "unsustainable," and that student-athletes should have a share of the revenue, but "it needs to be equal across the board so that a school that can afford more can't create an advantage for themselves just because they have more money to spend."[62] In an address to members of Congress, Saban referred to the current compensation model as "a pay-for-play system and a free agency system that has no guidelines," resulting in "no competitive balance."[63] Further, he expressed his concern that under this model, "the rich will get richer and the poor will get poorer and eventually fans will look at it and say, 'I don't really want to watch this game.'"[64]

Schools with smaller NIL markets find themselves at a significant disadvantage to recruit and maintain top talent, with their greatest difficulty being maintaining their athletes that have successful seasons.[65] These athletes will enter the transfer portal and go to schools that can offer more NIL money, essentially creating "free agency" like in professional sports.

---

[62] Jon Conahan, *Nick Saban Says NIL Should be 'Equal Across the Board'*, SPORTS ILLUSTRATED (Mar. 15, 2024), https://www.si.com/fannation/name-image-likeness/news/nick-saban-says-nil-should-be-equal-across-the-board-jon9. *See also* See Carter Bahns, Nick Saban Raises Concern Over 'Unsustainable' College Football Model, Cites NIL Disparities in Reform Plea, 247Sports (Jan. 21, 2024), https://247sports.com/article/nick-saban-raises-concern-over-unsustainable-college-football-model-cites-nil-disparities-in-reform-plea-244467257/ ("'The people out there need to know this model is unsustainable,' Saban said . . . . 'It's not good for players. I mean, people in Congress, I don't care who has to get off their butt and do something. Players need to get compensated. No doubt. But it has to be done in some kind of way — have competitive balance — that every school has the same thing. One school can't spend $30 million for players while another school's spending $3 million.'").

[63] James Parks, *Nick Saban Tells Congress How to Fix NIL in College Football*, SPORTS ILLUSTRATED (Mar. 12, 2024), https://www.si.com/fannation/college/cfb-hq/ncaa-football/nick-saban-nil-college-football-revenue-sharing-congress.

[64] *Id.*

NIL Spending and the College Football Playoffs

The disparity in NIL spending between well-funded and lesser-funded schools is particularly evident among teams that qualify for the College Football Playoffs (CFP). Wealthier programs with robust NIL markets have consistently dominated the CFP landscape in recent years, and even though the CFP expanded from four to twelve teams in the 2024-25 season, this disparity is still evident.

To illustrate, looking at a few of the top teams in the 2024-25 CFP, Ohio State, Texas, Georgia, and Oregon, each have some of the largest and most lucrative NIL budgets in the nation at their disposal.[66] According to Ohio State's athletic director, the Buckeyes spent "over $20 million" on their football roster for the 2024-25 season.[67] The Buckeyes brought in transfer players from other top schools such as quarterback Will Howard from Kansas State and running back Quinshon Judkins from Ole Miss, and the team ultimately went on to win the 2024-25 CFP National Championship.[68] Texas has long remained one of the best-supported programs in college football.[69] At the time of this

---

[65] Bryson Rea, *How NIL deals will affect small schools*, THE TIMES-DELPHIC (Apr. 23, 2024), https://timesdelphic.com/77286/relays-edition/how-nil-deals-will-affect-small-schools/.

[66] *See* Pete Nakos, *On3's Top 15 NIL Collectives in College Sports*, ON3 (Aug. 29, 2024), https://www.on3.com/nil/news/on3s-top-15-nil-collectives-in-college-sports/ (ranking Ohio State, Tennessee, Texas, and Oregon as the top four NIL collectives, respectively.).

[67] Jerod Smalley, *$20 Million Roster? Here's How Ohio State and its Collectives Built the 2024 Buckeyes*, YAHOO! SPORTS (Sept. 12, 2024), https://sports.yahoo.com/20-million-roster-ohio-state-023137836.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAGlsAGfzaciDpdQrVn4pmrhObpsNanmGQsVsnvS51Jmia9-XJMsn339qjXwY9BItZnpSzViAHdNm28DoP5KvGxgiMKX3jJrnECerehipk0zFhglOvhnWj7s3VJMAPucjYuSJXnU1OdvsbbA2uJn4GldKNdTENA88EH5oosjOKk_T.

[68] *See* Nick Bromberg, *College Football Playoff: Ohio State Gets First National Title in 10 Years with 34-23 Win Over Notre Dame*, YAHOO! SPORTS (Jan. 21, 2024), https://sports.yahoo.com/college-football-playoff-ohio-state-gets-first-national-title-in-10-years-with-34-23-win-over-notre-dame-040820844.html. *See also* John Talty, Who's Got the Money? Tiering the Eight Remaining College Football Playoff Teams by NIL Spending Power, CBS Sports (Dec. 30, 2024), https://www.cbssports.com/college-football/news/whos-got-the-money-tiering-the-eight-remaining-college-football-playoff-teams-by-nil-spending-power/.

[69] *See* Talty *supra* note 56 ("Texas has one of the best-funded operations in college football, according to multiple sources who have done deals on behalf of players."); *see*

writing, the Longhorns maintain the highest-paid student-athlete in the nation, *backup* quarterback Arch Manning, who touts a $6.6 million dollar NIL valuation, according to On3.[70]

Georgia's head coach Kirby Smart is reported to have made over $13 million in the 2024-25 season, which is the most of any head coach in all of college football.[71] Notwithstanding the Bulldogs' estimated $18.3 million NIL valuation, Smart's salary is more than $2 million higher than the second-highest paid head coach, Clemson's Dabo Swinney, whose team leads the ACC in estimated NIL valuation, won the ACC, and also made the 2024-25 CFP.[72] The Oregon Ducks boast an estimated $23 million NIL budget, with Nike co-founder and Oregon alum Phil Knight being the driving force for the Ducks to have "the biggest cash pipeline in college football[.]"[73] While these teams made the CFP, there are many other top-spending teams who failed to make the CFP, and under the current college football model, these teams will continue

---

also Brad Crawford, *College Football Collective Leaders for 2025: NCAA Estimates Nation's Top-25 Spenders*, 247SPORTS (Dec. 12, 2024), https://247sports.com/longformarticle/college-football-nil-collective-leaders-for-2025-ncaa-estimates-nations-top-25-spenders-241949240/ ("Always one of the nation's top revenue producers, there's not a program in college football who prints money at the rate of Texas. And after reaching the SEC Championship Game along with a return trip to the playoff this fall, that stronghold is expanding.")

[70] *On3 NIL Valuations*, ON3, https://www.on3.com/nil/rankings/player/nil-valuations/ (last visited Jan. 19, 2025).

[71] *See, e.g.*, Nate Cunningham, *12 Highest Paid College Football Coaches for the 2024 Season*, SPORTS ILLUSTRATED (Nov. 19, 2024), https://www.si.com/college-football/10-highest-paid-college-football-coaches-for-the-2024-season; Nick Kosko, *College Football Head Coach Salaries: USA Today Ranks Top 25 Highest-Paid Coaches*, ON3 (Oct. 16, 2024), https://www.on3.com/news/college-football-head-coach-salaries-usa-today-ranks-top-25-highest-paid-coaches/

[72] *See* Crawford *supra* note 58. *See also* Steve Holley, *Where Does Dabo Swinney Rank Among Highest-Paid College Football Coaches, Buyouts?*, Clemson Wire, USA TODAY SPORTS (Oct. 26, 2024), https://clemsonwire.usatoday.com/2024/10/16/dabo-swinney-salary-buyout-clemson-football/. *See* NCAA Revenue Sharing & NIL Collectives – ACC Schools, NCAA, https://nil-ncaa.com/acc/ (last visited Mar. 28, 2025).*See* David Hale, *Clemson Tops SMU, Wins ACC Title on Walk-Off 56-Yard Field Goal*, ESPN (Dec. 8, 2024), https://www.espn.com/college-football/story/_/id/42845075/clemson-tops-smu-wins-acc-title-walk-56-yard-field-goal ("The kick delivered Swinney his ninth ACC championship and his seventh berth in the College Football Playoff[.]").

[73] Arden Cravalho, *How Much NIL Money Built Oregon Ducks Current Football Roster?*, OREGON DUCKS ON SI, SPORTS ILLUSTRATED (Aug. 27, 2024), https://www.si.com/college/oregon/football/nil-money-built-oregon-ducks-current-football-roster-dan-lanning-dillon-gabriel-evan-stewart-phil-knight-nike-ohio-state

to top each other in NIL spending on their conquest for a National Championship.

March Madness and Other Implications

While college football has been the primary grounds for NIL deals, college basketball also needs to be addressed. The NCAA Division I Men's Basketball Tournament, also known as March Madness, is the NCAA's primary source of revenue, generating over $900 million in 2024.[74] This substantial income stems largely from lucrative television contracts. The advent of NIL has introduced a new dynamic to this landscape, allowing student-athletes to monetize their personal brands during high-visibility events like March Madness. While this empowers athletes financially, it also raises concerns about maintaining competitive balance, as disparities in NIL opportunities typically favor programs with greater resources, and this could impact the tournament's traditional unpredictability and the NCAA's overall revenue distribution model.

To illustrate how NIL has affected smaller schools in men's college basketball, look at the Florida Atlantic University (FAU) Owls. In the 2023 NCAA Tournament, FAU was a nine-seed and made a historical run to the Final Four, finishing their season with a 35-4 record.[75] Two years later, however, the Owls finished their season with a 18-16 record and a first-round loss in the NIT.[76] But multiple members of the 2023 FAU Final Four team are now playing for new schools, and as of the time of this writing, their teams are currently in the Sweet 16 of the 2025 NCAA.[77] The

---

[74] *See* Tim Parker, *How Much Does the NCAA Make from March Madness?*, INVESTOPEDIA (Mar. 24, 2025), https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp.

[75] *See* Ben Paul, *Florida Atlantic's Dream Season Ends on Buzzer Beater in Final Four*, FAU SPORTS (Apr. 1, 2023), https://fausports.com/news/2023/4/1/mens-basketball-florida-atlantics-dream-season-ends-on-buzzer-beater-in-final-four.aspx.

[76] *See* Ben Paul, *Florida Atlantic Defeated in First Round of NIT*, FAU SPORTS (Mar. 19, 2025), https://fausports.com/news/2025/3/19/mens-basketball-florida-atlantic-defeated-in-first-round-of-nit.aspx.

[77] *See* Dan Rorabaugh, *Former Owls Flying High! Stars from FAU Basketball Final Four Run Play in Sweet 16*, THE PALM BEACH POST (Mar. 27, 2025), https://www.palmbeachpost.com/story/sports/college/basketball/2025/03/27/fau-

following players were the Owls' three leading scorers in 2023: Johnell Davis, now playing at Arkansas; Alijah Martin, now playing at Florida; and Vladislav Goldin, now playing at Michigan. Notwithstanding the players that have left FAU, the school's 2023 head coach, Dusty May, is now coaching for Michigan.[78]

While FAU is only one example, other small schools have shared their own experiences, which further demonstrates that there is a significant issue regarding the competitive balance between schools that have seemingly unlimited resources, and those with substantially less.[79] Beyond March Madness, NIL spending could also deter schools from using donations from boosters to fund their academic or athletic programs, incentivizing them to pay the money directly to their student-athletes through NIL collectives. Ole Miss head football coach Lane Kiffin joked, "Go ahead and build facilities and these great weight rooms and training rooms, but you ain't gonna have any good players in them if you don't have NIL money."[80] This effect will also be realized with funds being drawn from educational departments and non-revenue sports under the new revenue-sharing model included in the *House* settlement. Student-athletes' heightened salaries could also hurt the schools' fans, with these costs potentially being rolled over to them through price increases to attend sporting events or

---

basketball-players-march-madness-alijah-martin-vladislav-goldin-johnell-davis/82671874007/.

[78] *See* Tim Reynolds, *Dusty May Takes Over at Michigan, Leaving Florida Atlantic After 6 Seasons and a Final Four Run*, ASSOCIATED PRESS (Mar. 24, 2024), https://apnews.com/article/dusty-may-michigan-fau-47967bbe9484eafa15e93fd98fe24570.

[79] *See, e.g.*, Kevin Martinez, *Walter Clayton Jr.'s Life-Changing Decision Which Led to Florida's Sweet 16 Berth*, ATHLON SPORTS (Mar. 26, 2025), https://athlonsports.com/college/florida-gators/florida-basketball-walter-clayton-jr-life-changing-decision-led-to-sweet-16-berth; see also Tony Paul, *'Mr. Oakland' Trey Townsend Grateful for Another Run in NCAAs with Arizona*, THE DETROIT NEWS (Mar. 26, 2025), https://www.detroitnews.com/story/sports/college/more-colleges/2025/03/26/mr-oakland-trey-townsend-grateful-for-another-run-in-ncaas-with-arizona/82678019007/ (Clayton Jr. currently leads Florida in scoring average per game and joined the Gators after playing two years at Iona University. Townsend played four years at Oakland University and wished to compete at a higher level and gain greater exposure, so he transferred to Arizona, who is another team currently in the 2025 Sweet 16.).

[80] John Macon Gillespie, *Kiffin: 'You Ain't Gonna Have Any Good Players If You Don't Have NIL Money'*, SPORTS ILLUSTRATED (Aug. 10, 2022), https://www.si.com/college/olemiss/football/rebels-kiffin-good-players-nil-money.

view games on television. As NIL continues to reshape the competitive landscape of college sports, the growing disparities between well-funded and resource-limited programs underscore the need for a solution, which can be realized through collective bargaining.

IV. DISCUSSION

The NCAA is increasingly losing its authority to regulate student-athletes' compensation with every antitrust suit brought against it. As previously mentioned, Justice Kavanaugh asserted in his *Alston* concurrence that there is a major question as to whether the NCAA's remaining compensation rules could survive antitrust scrutiny.[81] While it is likely that these remaining rules could be struck down, they would have to be challenged in court. To avoid any further antitrust litigation, the NCAA must regulate college sports through a collective bargaining process with a student-athlete union.

Unions are formed under the National Labor Relations Act (NLRA), but to form a union, student-athletes must first be considered employees under the act.[82] Arguments for student-athletes' employee status have been made under the broad definition of "employee" provided by the Fair Labor Standards Act (FLSA), and these arguments and their respective cases are introduced in the following subsections.

Student-Athletes as Employees

The easiest way that student-athletes could be deemed employees is for the NCAA and its member institutions to simply recognize student-athletes as employees and the schools, conferences, and the NCAA as joint employers.[83] While this is unlikely, it would enable student-athletes to unionize under the NLRA and ultimately collectively bargain for their rights and

---

[81] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J., concurring) ("[T]he NCAA's remaining compensation rules also raise serious questions under the antitrust laws.").

[82] *See* 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . .").

[83] *See* Joseph Sabin et. al., *'Entertaining' a New College Athlete Unionization Structure*, 34 J. LEGAL ASPECTS SPORT 26, 49 (2024).

league regulations.[84] For student-athletes to achieve employee status, there would have to be either (1) legislation passed by Congress, which is improbable, or (2) a favorable decision by the Supreme Court. Steps have been taken in the latter direction.

1. Early Steps Towards Employee Status

The earliest significant decision regarding the issue of student-athletes' employment status came in 1953 when the Colorado Supreme Court decided *University of Denver v. Nemeth*.[85] The athlete at issue played football at the University of Denver and also "receiv[ed] $50 per month from the University for certain work in and about the tennis court on its campus."[86] While practicing with the football team, he incurred an injury and claimed that he was an employee of the school entitled to workers' compensation benefits.[87] The University opposed, admitting that they employed Nemeth for his work around the tennis court, but not to play football.[88] The court reasoned that Nemeth's "employment at the University . . . was dependent on his playing football, and he could not retain his job without playing football."[89] Because of this, the court held that Nemeth was an employee and that his injury arose "out of and in the course of his employment."[90] Four years later, however, the Colorado Supreme Court decided another student-athlete employment case that reached an opposite result, because the student-athlete did not do any extracurricular work for the school besides football. [91] Since these early state cases, there have been few significant challenges to student-athletes' employee

---

[84] *See Id*.

[85] University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

[86] *Id*. at 424.

[87] *Id*.

[88] *See id*. at 425.

[89] *Id*. at 427.

[90] *Id*.

[91] *See* State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288 (1957); *See also* Ashlyn Hare, *The Playbook: A Guide to College Athlete Unionization in the Wake of Alston*, 26 U. DEN. SPORTS & ENT. L.J. 109, 113 (2023) ("[T]he Colorado Supreme Court found that Ray Herbert Dennison, a football player at Fort Lewis A&M College who tragically died during a game, was not an employee of the school. The court distinguished *Nemeth*, reasoning that Nemeth's employment as a tennis court maintenance worker depended on his participation on the football team, whereas Dennison was under no contractual obligation to play football" (footnote omitted)).

status. In recent years, however, claims brought by student-athletes appear to have feasible likelihoods of success given the constantly changing nature of college athletics. These cases have been heard in federal court under the FLSA.

2. Recent Developments

In 2017, the Seventh Circuit held in *Berger v. NCAA* that student-athletes were not employees under the FLSA.[92] In its holding, the court noted "the long tradition of amateurism in college sports" and that student-athletes participate in college sports "for reasons wholly unrelated to immediate compensation."[93] Two years later, the Ninth Circuit reached a similar holding in *Dawson v. NCAA*.[94] The court reasoned that neither the NCAA nor the conferences provided student-athletes with scholarships, had hiring or firing power, or supervised the athlete's activities.[95] While these cases may hold precedent in these respective Circuits, they were decided before NIL became commonplace in college sports.

In July 2024, the Third Circuit decided *Johnson v. NCAA*.[96] The court held that student-athletes can be considered employees under the FLSA when they: "(a) perform services for another party, (b) necessarily and primarily for the other party's benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits . . . ."[97] The court also held that student-athletes could not be barred from bringing FLSA claims simply because of the "revered tradition of amateurism" in college sports.[98]

The *Johnson* court distinguished its analysis from prior rulings, such as the Seventh Circuit's *Berger* decision.[99] Instead, the Third Circuit emphasized the "economic realities of the

---

[92] Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2017); *Id.* at 293.

[93] *Id.*

[94] Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019).

[95] *Id.* at 909-10.

[96] Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163 (3d Cir. 2024).

[97] *Id.* at 180 (citing Tennessee Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985)). (Citations and internal quotation marks omitted).

[98] *Id.* at 182.

[99] *Id.* at 181-82.

relationship" between student-athletes and their institutions.[100] It highlighted the significant control the NCAA and its member institutions exert over student-athletes' daily lives, the commercial benefits derived from their athletic performance, and both tangible and intangible compensation provided in return.[101] The court vacated and remanded the case, instructing the district court to apply a common-law agency analysis grounded in these principles.[102]

This decision marks a pivotal shift in the legal landscape, as it directly challenges the NCAA's reliance on amateurism as a defense against employee classification. By affirming that the FLSA's broad definitions of "employee" and "employer" encompass college athletes under certain conditions, the *Johnson* ruling underscores the growing legal recognition of student-athletes' rights in the NIL era. As litigation continues, this case could serve as a cornerstone for future efforts to establish collective bargaining rights and balanced compensation frameworks in college sports.

Moreover, the revenue-sharing model proposed in the *House* Settlement could strengthen the argument for student-athletes' employee status. Since institutions will be able to compensate student-athletes directly, the traditional amateurism model in college athletics will further erode in favor of an environment that is more like an employer-employee relationship. Direct payments from schools to athletes could reinforce claims under the FLSA, highlighting the "economic reality" that student-athletes now perform services primarily benefiting their institutions for compensation beyond educational benefits. By institutionalizing student-athlete compensation, a successful argument for student-athletes' as employees seems reasonably close, thus opening the door for unionization and collective bargaining in college sports.

Unionization and Collective Bargaining

Once student-athletes are deemed employees of their schools, conferences, the NCAA, or a combination thereof, they will be able to form unions through which they can collectively bargain with

---

[100] *Id.* at 179 (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991)).
[101] *Id.* at 177-78.
[102] *Supra* Note 96 at 182.

their employer(s). Every professional sports league has a players' union that it collectively bargains with.[103]

As previously stated, unions are formed under the NLRA.[104] Under § 7 of the NLRA, employees are given "the right to self-organiz[e], to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid in protection . . . ."[105] Further, unions are regulated by the National Labor Relations Board (NLRB), created by § 3 of the NLRA.[106] The NLRB has the discretion to assert jurisdiction over labor disputes unless "in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . ."[107]

Unionization in professional sports provides a framework for how student-athletes can negotiate collectively with their employers. For the purposes of this paper, the relationship between the National Football League (NFL) and the NFL Players Association (NFLPA) is the most relevant example of unionization and collective bargaining in professional sports. The NRLB recognized the NFLPA as the "exclusive bargaining representative" for all players in the NFL in 1968.[108] Later, the NFL and NFLPA entered into their first CBA, which has resulted in years of reasonable bargaining, litigation, lockouts, and strikes.[109]

To form a players' union, student-athletes must select an appropriate bargaining unit under which to petition the NRLB, and this unit must consist of employees who share common interests.[110]

---

[103] *See, e.g.*, NFLPA, https://nflpa.com/ (National Football League Players' Association); MLBPA, https://www.mlbplayers.com/ (Major League Baseball Players' Association); NBPA, https://nbpa.com/ (National Basketball Players' Association; and NHLPA, https://www.nhlpa.com/ (National Hockey League Players' Association).

[104] *See* 29 U.S.C. §§ 151-169 (2018).

[105] *Id. at* § 157.

[106] *Id. at* § 153(a).

[107] *Supra* Note 104 at § 164(c)(1).

[108] Brady v. Nat'l Football League, 644 F.3d 661, 663-64 (8th Cir. 2011).

[109] *See Id.* at 664.

[110] *See* Roberto L. Corrada, *College Athlete Unionization*, 11 TEX. A&M L. REV. 829, 853-54 (2024) ("In determining whether the petitioned-for unit is appropriate, the NLRB will inquire into whether the athletes in the petitioned-for bargaining unit share a community of interest. Employees have a community of interest if they share "substantial mutual interests in wages, hours, and other conditions of employment." (Internal quotation marks and footnote omitted)).

Generally, there are three units deemed appropriate for bargaining that student-athletes can choose from: team, league, or sport.[111] The NLRB typically prefers to choose the league or sport when determining the appropriate unit for collective bargaining.[112] As evidenced in the 2015 *Northwestern Football Case*, the NLRB has no inclination to extend its jurisdiction over a single-team unit.[113]

Looking at college sports, the best bargaining unit for a student-athlete union would likely be organized by sport *and* by conference (league). This is because in 2021-22, the number of student-athletes over all divisions in the NCAA was over 520,000, which would be nearly impossible to represent through one union. [114] To provide an example of a bargaining unit organized by conference and sport, Southeastern Conference (SEC) football would be an appropriate bargaining unit because there are sixteen schools in the SEC, with an average of 121 student-athletes on every roster.[115] While this figure is large, it varies from conference to conference, and is still larger than the total number of players in most professional sports leagues.

Through a players' union, athletes are given more power to negotiate critical issues including salaries, benefits, and working conditions.[116] A players' union also provides athletes with

---

[111] *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 18:2. COLLECTIVE BARGAINING (updated June 2024).

[112] *See Id*. ("In baseball, for example, it is the entire sport, not including the minor leagues. . . . As in professional soccer, the Board chose the entire league rather than a particular team as the appropriate unit for collective bargaining.")

[113] *See* Nw. Univ., 362 NLRB 1350, 1353-54 (2015) ("[L]abor issues directly involving only an individual team and its players would also affect the NCAA, the [conferences], and the other member institutions. Many terms applied to one team therefore would likely have ramifications for other teams. Consequently, it would be difficult to imagine any degree of stability in labor relations if we were to assert jurisdiction in this single-team case." (internal quotation marks and footnote omitted)).

[114] *See NCAA Student-Athletes surpass 520,000, Set New Record*, NCAA (Dec. 12, 2022), https://www.ncaa.org/news/2022/12/5/media-center-ncaa-student-athletes-surpass-520-000-set-new-record.aspx.

[115] *See* Pat Forde, *It's Time to Rethink College Football's Bloated Roster Sizes*, SPORTS ILLUSTRATED (June 4, 2024), https://www.si.com/college-football/its-time-to-rethink-college-footballs-bloated-roster-size. ("SEC teams (including the new members Texas Longhorns and Oklahoma [Sooners]) in 2023 averaged 121 players on the roster, according to their own websites. That ranged from a high of 137 (Alabama Crimson Tide) to a low of 105 (Missouri Tigers).").

[116] *Collective Bargaining Agreements in Sports Leagues & Their Legal Scope*, JUSTIA, https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/.

protections against unilateral changes by team owners or leagues, ensuring that any modifications to employment terms are subject to collective bargaining.[117]

Collective bargaining is the process through which players' unions negotiate with leagues and team owners to establish the terms and conditions of their employment.[118] These agreements are legally binding and enforceable, providing stability and clarity for athletes, leagues, and team owners. In professional sports, any rule that relates to "salary caps, free agency, luxury taxes, [or] revenue sharing" is negotiated between the players' union and the league through collective bargaining.[119] All of the player unions for major professional sports leagues in the United States have a CBA with the league and team owners.[120] By collectively bargaining with a student-athlete union, the NCAA would effectively secure a non-statutory antitrust exemption.[121] For student-athletes, collectively bargaining through a players' union would allow them to address their rights through rules concerning NIL compensation, revenue sharing, or a variety of other relevant factors that may affect their rights or opportunities.

(last visited Jan. 20, 2025). ("To curb [team owners'] power, professional athletes in most of the major American sports leagues have formed unions that devise collective bargaining agreements to protect the rights of athletes. . . . Some of the most notable issues include: Revenue sharing between teams and players[;] Salary caps and salary structures[;] Rules for transfers (trades), drafts, and free agency[;] Player discipline[;] Safety standards[;] Injury grievances[; and] Health benefits[.]").

[117] *See* Joshua A. Reece, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359, 393 (2010) ("Under the NLRA, a commissioner or the owners may not make unilateral changes that would affect the working conditions negotiated under the CBA."

[118] *See* Champion *supra* note 99 at § 18:2 ("Collective bargaining is the process under the National Labor Relations Act wherein management and employees, through their union, participate in a give-and-take, which produces a document, the collective bargaining agreement (c.b.a.) that establishes the rules and regulations of their relationship.").

[119] Matthew J. Parlow, *In Pursuit of Competitive Balance or Payroll Relief?*, 9 ARIZ. ST. SPORTS & ENT. L.J. 58, 68 (2020).

[120] *See, e.g.*, NFL CBA, https://nflpa.com/cba. MLB CBA, https://www.mlbplayers.com/cba.; NBA CBA, https://nbpa.com/cba/.; NHL CBA, https://www.nhlpa.com/the-pa/cba.

[121] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 237 (1996) ("[T]o allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.").

V. SOLUTION

To address the competitive imbalance in college sports caused by NIL, the NCAA and conferences should implement a luxury tax system through collective bargaining that is tailored to college sports. This section discusses the luxury tax model in greater detail, demonstrates how it is used in professional sports, shows how such a model could be structured in college sports, and explores the potential implications that could arise based on competitive balance and the overall benefit of college sports.

Luxury Tax Mechanics in Professional Sports

The luxury tax model has been successfully utilized in professional sports leagues such as Major League Baseball (MLB) and the National Basketball Association (NBA) to address disparities in team spending, while preserving player earning potential.[122] The luxury tax was first implemented through the 1997 MLB collective bargaining agreement, and it is now officially termed the "Competitive Balance Tax."[123] It has since been the league's only limitation on the amount teams can pay to their players. By employing the luxury tax model, MLB does not have an absolute cap on the amount clubs can pay their players, but clubs have the discretion to decide whether they want to spend more than the tax threshold and incur a financial penalty. This process is explained in more detail in this section.

Similarly, the NBA uses the luxury tax model under a "soft" salary cap system.[124] Unlike a hard cap, which imposes an absolute limit on team payrolls, the NBA's soft cap employs several exceptions that allow teams to exceed the threshold under specific conditions. For example, teams can spend above the tax threshold to re-sign their players without penalty under the "Larry Bird"

---

[122] *See* Kaplan *supra* note 5 at 1627.

[123] *Id.; See also Competitive Balance Tax, Glossary*, MLB, https://www.mlb.com/glossary/transactions/competitive-balance-tax (last visited Nov. 23, 2024).

[124] *See* Kaplan, *supra* note 5 at 1624 ("[T]he main feature of the NBA Team Cap is that it is "soft" (Soft Cap), meaning that there are a number of "exceptions" teams may employ to spend beyond the Team Cap.").

exception.[125] This soft salary cap allows teams to retain their core talent while promoting competitive balance across the league.

To examine how the luxury tax model functions, look to Article XXIII of MLB's current CBA, effective from 2022-2026.[126] The base tax threshold began at $230 million in 2022 and is scheduled to increase by approximately $3 to $4 million annually through 2026.[127] The tax is calculated by taking the difference between a team's payroll and the base tax threshold.[128] A team with a payroll less than or equal to the base tax threshold shall not incur a luxury tax penalty for that year.[129] If a team's payroll exceeds the base tax threshold, however, then that team is charged a "tax rate" percentage on every dollar that exceeds the threshold.[130]

This tax rate begins at 20% for a first-time offense; it then increases to 30% if a team exceeds the threshold for two consecutive years, and finally increases to 50% if a team exceeds the threshold for three consecutive years.[131] If a team is a first-time violator that spends below the threshold the following year, the tax resets to that of a first-time offense.

MLB's CBA also prescribes three "surcharge thresholds" that are $20 million over the base tax threshold, each of which has a different surcharge rate added to the base rate.[132] These surcharge thresholds can be expressed as ranges. For the first surcharge threshold, teams that exceed the base by $20 to $40 million incur a 12% surcharge on every dollar within the range.[133] If a team exceeds the threshold by $40 to $60 million, a 42.5% surcharge is incurred on every dollar in the range.[134] This rate increases to 45% for every consecutive year a team is within this range.[135] Finally, if

---

[125] *Id.*

[126] *See generally* 2022-26 MLB CBA, art. XXIII.

[127] *See id.* at B(2) ("The Base Tax Threshold shall be $230 million in the 2022 Contract Year, $233 million in the 2023 Contract Year, $237 million in the 2024 Contract Year, $241 million in the 2025 Contract Year, and $244 million in the 2026 Contract Year.").

[128] *See id.* at B(1).

[129] *See id.*

[130] *See id.* at B(3).

[131] *See id.* at B(3)(a).

[132] *Supra* Note 126 at B(4).

[133] *See id.* at B(4)(b)(i).

[134] *See supra* Note 126 at B(4)(b)(i).

[135] *See id.* at B(4)(b)(ii).

a team exceeds the base threshold by $60 million or more, they are charged a 60% surcharge on every dollar above this figure.[136]

The CBA provides a chart and an example to illustrate this concept.[137] For example, if a team in 2022 had paid the luxury tax for two consecutive years, the team would pay a 50% tax rate on its payroll between $230 million and $250 million; a 62% (50% plus 12%) tax rate on its payroll between $250 million and $270 million; a 95% (50% plus 45%) tax rate on its payroll between $270 million and $290 million; and a 110% (50% plus 60%) on its remaining payroll above $290 million. [138]

Section H of Article XXIII of the MLB CBA prescribes the uses of luxury tax proceeds.[139] The first $3.5 million of proceeds is used to "defray [team]s' funding obligations arising from the [MLB] Players Benefit Plan Agreements."[140] The remaining proceeds are divided in half, with one half being "used to fund contributions to the Players' individual retirement accounts," which are part of the MLB Players Benefit Plan Agreements.[141] The other half is put into the "Supplemental Commissioner's Discretionary Fund," which the MLB Commissioner can use to distribute funds to teams that are eligible to receive revenue-sharing money and have grown their "non-media local revenue."[142]

As previously mentioned, the NBA's luxury tax model is similar to MLB's in that it sets a spending threshold and penalizes teams for exceeding it. What differentiates it from MLB's is the inclusion of numerous exceptions that allow teams' payrolls to exceed the prescribed tax threshold, giving it the title of a "soft" salary cap.[143] Some of these exceptions are the aforementioned

---

136 *See id.* at B(4)(b)(iii).

137 *See id.*

138 *See id.*

139 *See generally id.* at H.

140 *See Supra* Note 126 at H(1); The MLB Players Benefit Plan is the league's pension plan for retired players. *See generally* Charlie Bevis, A Home Run by Any Measure: The Baseball Players' Pension Plan, Society for American Baseball Research (1992), https://sabr.org/research/article/a-home-run-by-any-measure-the-baseball-players-pension-plan/; see also Bill Harris, How Every Major League Baseball Player Can Qualify for the MLB Pension Plan, BIP Wealth (Mar. 21, 2024), https://bipwealth.com/mlb-pension-plan/ (both describing the MLB Pension Plan).

141 *See id.*. at H(2)(a).

142 *See id.* at H(2)(b).

143 *See generally 2023 NBA CBA*, art. VII § 6.

Larry Bird Exception; Mid-Level Exceptions (annual exceptions for teams above the cap to sign free agents without penalty); the Rookie Exception (which allows teams to sign first-round draft picks even if they exceed the cap); the Minimum Salary Exception (which gives teams the ability to sign players to a contract at the league minimum salary regardless of cap position); and the Disabled Player Exception (which allows a team to "sign or acquire a Replacement Player to replace a player who, as a result of a Disabling Injury or Illness" is unable to play; and others).[144] These exceptions protect both teams and players by allowing the team to go over the salary cap to acquire and retain players without penalty, allowing players greater flexibility in realizing their earning potential.

The NBA employs a salary cap and a "tax level," comparable to MLB's base tax threshold, which also utilizes a "minimum team salary" requirement that MLB does not. The minimum team salary is equal to 90% of that year's salary cap, and the tax level is equal to 121.5% of that year's salary cap.[145] For the 2024-25 season, the NBA's salary cap was set at $140.588 million, its tax level was set to $170.814 million, and its minimum team salary was $126.529 million.[146] NBA Teams can exceed the salary cap without penalty by using any of the aforementioned exceptions, but once they pass the tax level, they are subject to financial penalties through luxury tax payments.

Instead of "surcharge" thresholds for excessive spending over the base tax threshold, the NBA CBA provides for two "Apron Levels," which essentially restrict actions that teams can take when making roster moves.[147] Like MLB's surcharges, the Apron Levels are set at a certain dollar amount above the salary cap, and the NBA CBA employs a formula to calculate each level, using the

---

[144] *See supra* Note 143 at § 6(b-c); *See id*. at § 6(e-i) (Other exceptions in this section includes the: (b) Veteran Free Agent Exception; (d) Bi-annual Exception; (e) Non-Taxpayer Mid-Level Salary Exception; (f) Taxpayer Mid-Level Salary Exception; (g) Mid-Level Salary Exception for Room Teams; (j) Traded Player Exception; (k) Second Round Pick Exception; (l) Reinstatement).

[145] *See id*. at § 2(a)(4)(i)-(ii).

[146] *See NBA Salary Cap for 2024-25 Season Set at $140.588 Million*, NBA COMMUNICATIONS (June 30, 2024), https://pr.nba.com/2024-25-nba-season-salary-cap/ [hereinafter *NBA Salary Cap*].

[147] *See generally 2023 NBA CBA*, art. VII § 2(e).

applicable years' tax levels and salary caps.[148] For reference, for the 2024-25 season, the first Apron Level was set at $178.132 million, and the second Apron Level was set at $188.931 million.[149] When a team reaches the first Apron Level it cannot make certain types of trades or signings; it cannot take in more money than it sends out in a trade, and it is prohibited from using multiple of the exceptions to acquire players.[150] Teams that reach the second Apron Level are subject to the same restrictions as the first, but second Apron restrictions are far more severe.[151] Some of these restrictions include prohibition from using the mid-level exception, from trading multiple players in the same transaction, and from sending cash as a part of a trade.[152] They also include a penalty affecting future first round draft picks.[153] While there are other restrictions not mentioned under both Aprons, the Apron Levels present teams with more than just a financial incentive to not spend excessively more than the tax level.

Under both systems, collected tax revenue is either redistributed to lower-revenue teams or reinvested in league-wide initiatives, promoting competitive balance while maintaining flexibility for high-spending teams.[154] While these models have not entirely eliminated disparities, they have created mechanisms that curb excessive spending and redistribute resources, creating a valuable reference point for addressing NIL-driven imbalances in college sports.

Applying the Luxury Tax to College Sports

Adapting the luxury tax model to the collegiate landscape would require accounting for the unique structure of college sports, where schools, rather than franchises, are the primary entities, and student-athletes are compensated through NIL agreements rather than by salary. The rationale behind the luxury tax model is that

---

[148] *See id.* at § 2(a)(4)(iii).

[149] *See NBA Salary Cap*, *supra* note 160.

[150] *See 2023 NBA CBA*, art. VII § 2(e)(4).

[151] *See id.*

[152] *See id.*; *see also* Joseph Casciaro, *NBA's 2nd Apron Explained, and the Big Questions it Prompts*, THE SCORE (July 19, 2024), https://www.thescore.com/news/2940429.

[153] *See generally 2023 NBA CBA*, art. VII § 2(f).

[154] *See* Kaplan, *supra* note 5 at 1630, 1634-36.

"if teams are forced to pay back to the league - perhaps even to other teams - some percentage of what they pay their players,they will be better incentivized to evaluate the benefits of promising money to certain players.[155] This section proposes a luxury tax model that is a cross between MLB and the NBA's models, accommodating for the unique structure of college athletics.

For this model to function with transparency and legitimacy, schools would have to be required to disclose the amount of compensation their student-athletes are receiving and where it is coming from. This is similar to the reporting requirement for third-party NIL compensation that is included in the *House* settlement, but with the luxury tax model, all compensation provided by a school, its affiliated collectives, or local businesses would need to be reported. National endorsement deals with unrelated companies, such as Nike or Gatorade, however, should be excluded from payroll calculations to avoid penalizing individual success. This disclosure would equip both student-athletes and universities with a monetary figure to more accurately estimate an individual student-athlete's true NIL valuation.

Institutions would have to cooperate with the NCAA and the conferences to implement, monitor, and enforce the luxury tax model. To accomplish this objective, a commission would need to be formed that is composed of representatives from every institution and conference. This is so that the commission can have a point of contact at each individual institution for reporting and monitoring. Every conference would be represented and have a voice in matters concerning itself or one of its member institutions. This commission would work with the NCAA to create and enforce rules regarding the tax threshold, exceptions for exceeding the threshold without penalty, surcharge thresholds to discourage excessive overspending, tax penalty collections, and redistribution of collected tax penalties.

The tax threshold calculation would account for the conferences and the revenue-producing sports. Each conference would be considered, so that competition within individual conferences is uniform and balanced. This is meant to complement the *House* Settlement's revenue-sharing model, which is only

---

[155] *Id.* at 1628 (footnote omitted).

binding for institutions in the Power conferences. The threshold should only consider the compensation paid to student-athletes playing the major revenue-producing sports (football and men's basketball), because student-athletes who participate in these sports have a far greater probability to be compensated through *House*'s revenue-sharing model than those competing in non-revenue producing sports. This would prevent placing restrictions on non-revenue sports' ability to compensate student-athletes fairly.

In practice, the tax threshold would have to consider the *House* revenue-sharing cap, 22% of the average power conference institution's annual athletic revenue (the "*House* cap"). The *House* cap, however, only accounts for compensation paid to student-athlete's belonging to an institution, and it does not account for NIL compensation paid by third-parties. As a result, the tax threshold would have to include these deals in addition to the *House* cap. The rationale behind considering third-party compensation in addition to the *House* cap is that this threshold would account for *all* financial contributions made to student-athletes at a certain institution. This is necessary because, although the *House* settlement purports to eliminate illegitimate NIL deals, boosters and collectives will find creative solutions to legitimize these deals, allowing them to spend over *House*'s 22% cap.

This third-party NIL compensation can be expressed in the tax threshold as either a dollar amount in addition to the *House* cap or as a percentage of the *House* cap. Through either method, by increasing this limit to include third-party NIL compensation, non-power conference schools who do not produce power conference-level athletic revenues will be able to compensate their student-athletes through third-parties, such as collectives or local businesses, in lieu of using the athletics revenue they depends on to continue functioning. To illustrate this, look at the 2025-26 projected *House* cap of $20.5 million. Top power conference schools such as Georgia or Ohio State will easily reach this limit every year, but there are institutions that simply do not generate enough athletic revenue to feasibly reach this cap. Though these larger schools will also have access to this heightened limit, by including third-party NIL contributions in addition to the *House* cap, smaller institutions could access alternative funding, which would enable

them to remain competitive without spending core athletic revenue, while also ensuring a model that applies equally to all institutions.

Once a spending threshold is established, institutions who exceed the threshold would incur financial penalties based on the extent of the overage. This penalty would be expressed as a tax applied to every dollar that an institution spends over the threshold. For example, consider that during the 2025-26 season the spending threshold was set to $27.5 million (the $20.5 million *House* cap plus $7 million in allowed third-party compensation). An institution maxes out the *House* cap and its student-athletes are compensated $9.5 million in third-party NIL deals through the school's collective and local businesses. The institution would be responsible for paying luxury taxes on the $2.5 million in overages. Following MLB's luxury tax model, a tax rate would be applied to any overages. Building on this example, at a hypothetical rate of 50%, the institution would be charged $1.25 million in luxury taxes for spending over the threshold. Further mirroring MLB's model, these taxes would increase progressively for repeat violations, adding a percentage (in addition to the initial tax rate) for every year that an institution spends above the established threshold.

Similar to the NBA's luxury tax model, however, there should be exceptions that allow institutions to exceed the cap, either at a reduced penalty or no penalty at all. Like the NBA's exceptions, they would give institutions greater flexibility to sign student-athletes out of high school or the transfer portal and to retain their current student-athletes. This would promote greater competitive balance within collegiate sports, causing less student-athlete turnover and ensuring greater team stability. Certain exceptions, however, should be subject to limitations, such as a cap on the number of times an institution can exercise an exception, or a prohibition on their usage in the event that an institution is already a certain dollar amount above the tax threshold.

One exception could be similar to the NBA's "Larry Bird Exception," where an institution may exceed the threshold without penalty (or at a reduced rate) if it is in the interest of re-signing one of its student-athletes. Such an exception would benefit both the institution and the student-athlete. The institution would benefit because it would be enabled to retain student-athletes, instead of losing them to other institutions through the transfer portal. The

student-athlete would benefit because they would be able to realize their true NIL value without having to transfer schools. Another exception could be modeled after the NBA's "Mid-Level-Exception," which would allow an institution to go over the tax threshold to sign a student-athlete coming in as a transfer or high school recruit.

There could also be a "Freshmen Signing Exception," that functions similarly to the NBA's "Rookie Scale Exception." This exception would allow institutions to sign a predetermined number of incoming freshmen without incurring tax penalties. The exception could also function as an aggregate dollar amount that an institution can spend on incoming freshmen without penalty, rather than simply the number of freshmen. Likewise, there could be an exception that would allow institutions to exceed the tax threshold to sign senior or graduate student-athletes without penalty (or at a reduced penalty), functioning in a similar manner as the NBA's "Veteran Minimum Exception."

Further, an exception comparable to the NBA's "Minimum Salary Exception," would allow institutions to exceed the tax threshold pay student-athletes a basic NIL deal (e.g. a stipend for $500-$1,000) or a full cost-of-attendance scholarship without penalty. Finally, the NBA's "Disabled Player Exception" could be adapted to allow institutions to exceed the tax threshold without penalty (or at a reduced penalty) to temporarily replace a student-athlete who suffers a significant injury or medical hardship, ensuring the institution's ability to maintain competitive roster depth and safeguard the welfare of its student-athletes.

Like MLB's surcharge thresholds and the NBA's Apron Levels, there should be two thresholds that are a certain percentage above the spending threshold. These thresholds would include a percentage increase to the tax rate, and could also regulate exceptions used to sign players depending on which threshold an institution has met. For instance, institutions that exceed the first surcharge threshold might lose the ability to use certain exceptions (e.g., mid-level or freshmen signing exceptions) in subsequent recruiting cycles, or they could face limitations on transfer portal acquisitions. At the second surcharge threshold, the restrictions could intensify – perhaps even triggering an automatic review by the luxury tax oversight committee to determine whether further sanctions, such as temporary scholarship reductions or public

transparency mandates, are warranted. These disincentives would not only elevate the financial consequences of overspending but would also introduce procedural friction that teams would be inclined to avoid.

Funds collected through the luxury tax would be collected and managed by the proposed committee that would oversee and enforce the luxury tax model. A small percentage of collected funds from all institutions would be pooled into a NCAA-wide fund for the purpose of supporting growth of both low-revenue conferences and other non-revenue sports that require funding. These funds could be used to subsidize facilities, academic support services, or Title IX compliance initiatives in underfunded athletic departments. This would ensure that the system advances not only competitive balance, but overall development throughout college athletics. A larger percentage of collected taxes would be retained and redistributed within the conference from which they are collected from. This would operate as a reverse-weighted model, where distributions favor institutions that fall furthest below the tax threshold. This would create incentives for prudent financial management while helping schools build competitive programs through enhanced recruiting budgets, staff retention initiatives, and student-athlete wellness programs – all without having to overspend on NIL.

Other benefits that a collegiate luxury tax would create include (1) slowing down player turnover in the transfer portal, (2) reducing the gap between high-earning players and lower-earning players, improving the dynamic of the team, and (3) preventing institutions from committing large amounts of funding to NIL when that funding could be used for academic purposes or go to the development of their athletic facilities.

Implementing a luxury tax in college sports would not be without challenges. Schools may resist transparency requirements, and disparities in the current "patchwork" condition of state NIL laws would likely complicate enforcement. Moreover, the system's success would depend on robust collective bargaining agreements between the NCAA or the conferences and student-athlete unions to ensure that the rules are balanced and legally defensible.

VI. CONCLUSION

By penalizing excessive NIL spending, a collegiate luxury tax model would discourage wealthier schools from monopolizing top talent, narrowing the gap between high-resource and low-resource programs. This would foster greater parity on the field, enhancing fan engagement and preserving the integrity of college sports. Unlike the NFL's hard salary cap, the luxury tax model would allow student-athletes to continue earning market-driven NIL deals, aligning with antitrust principles and the trend of expanding the rights of student-athletes. For lower-resource institutions, receiving tax distributions would provide them with additional resources to invest in facilities, coaching, and recruitment, ultimately leveling the playing field and ensuring that all programs have a realistic chance to compete.

By collectively bargaining with student-athlete unions and implementing a luxury tax, the NCAA and conferences can curtail the "pay to win" aspect of college sports without putting an absolute cap on the amount an individual student-athlete can be compensated. By doing this, schools with lower revenues and NIL markets will be better suited to compete for talent with larger schools that have more resources, further evening the playing field and promoting both a competitive and an economic balance in college sports.