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CHANGE OR BE CHANGED:
A PROPOSAL FOR THE NCAA TO COMBAT
CORRUPTION AND UNFAIRNESS BY PROACTIVELY
REFORMING ITS REGULATION OF ATHLETE
PUBLICITY RIGHTS

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This Article addresses the black market for college athlete services that results from the NCAA's restrictions on athlete compensation based on the purported need to preserve amateurism. Specifically, this Article focuses on the NCAA's name, image, and likeness (NIL) restrictions that prevent college athletes from making use of their own reputations for commercial purpose. The Article examines the relevant litigation on the subject of athlete publicity rights and amateurism and concludes that the NCAA's NIL restrictions serve no legitimate purpose. The NCAA is in the process of changing its NIL rules to afford athletes more freedom to benefit from the commercial use of their NILs. The specific rules that formulate the NCAA's new policy have not yet been revealed and probably have not yet been developed. Proposed within this Article is a modest suggestion that the NCAA address the

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recent scandals involving corruption of its amateur model for intercollegiate athletics by removing its restrictions on athlete NIL use. The proposal in this Article includes specific suggestions for how the NCAA should lift the restrictions. Our proposal is also a response to recent litigation and proposed legislation on the subject of amateurism and college athlete NIL restrictions. The NCAA is in a precarious position in that its NIL restrictions are now exposed and vulnerable to antitrust challenge. We suggest for the NCAA to break trend and take a proactive approach to addressing corruption and unfairness by adopting our proposal for materially changing the way it regulates athlete NIL use.

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INTRODUCTION

In the opening minutes of a college basketball game against archrival North Carolina, Zion Williamson from Duke University, the future number one pick in the 2019 National Basketball Association (NBA) draft,¹ sprained his right knee after his shoe “broke.”² Fortunately, the shoe’s failure only resulted in a knee sprain rather than a career-threatening injury.³ Williamson wore Nikes because Duke has a multimillion-dollar deal with the shoe manufacturer that requires the school’s college athletes to wear Nike apparel during competitions.⁴ Williamson earns nothing from his school’s arrangement with Nike because the National Collegiate Athletic Association (NCAA) prohibits college athletes like Williamson from profiting from the commercial use of their names, images, and likenesses (NILs).⁵ The NCAA’s NIL restrictions are part of its amateurism model for intercollegiate athletics—a model that purports to protect college athletes from commercial exploitation.⁶

Instead of protecting its athletes, the NCAA’s NIL restrictions actually facilitate exploitation by preventing college athletes from receiving their fair share from the multi-billion dollar industry of intercollegiate athletics.⁷ The NCAA is even

¹ Jim Eichenhofer, *2019 NBA Draft Profile: Zion Williamson*, NBA.COM (June 3, 2019), <https://www.nba.com/pelicans/2019-nba-draft-profile-zion-williamson> (Zion has been the unchallenged first overall pick for a lengthy period of time).

² Mark Tracy & Kevin Draper, *A Star’s Shoe Breaks, Putting College Basketball Under a Microscope*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/sports/zion-nike-shoe-ncaa.html> (Former President Barak Obama was in attendance at the game and tweeted, “His shoe broke” after witnessing the product failure and resulting injury.).

³ Ryan McGee, *Duke Loses Zion Williamson to Mild Knee Sprain When Shoe Blows Out*, ESPN.COM (Feb. 21, 2019), <http://www.espn.com/mens-college-basketball/story/id/26042130/duke-loses-zion-williamson-mild-knee-sprain-shoe-blows-out>.

⁴ Luke Decock, *If the Shoe Splits, Repair It: Nike Execs Fly for Impromptu Talks at Duke*, NEWS & OBSERVER (Feb. 21, 2019), <https://www.newsobserver.com/sports/spt-columns-blogs/luke-decock/article226605384.html> (noting that Nike and Duke have had this arrangement for twenty-seven years).

⁵ See Tracy & Draper, *supra* note 2. For more on the unfairness of the NCAA’s amateurism rules, see Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.workplacebullying.org/multi/pdf/branch.pdf>; Kurt Helin, *Zion Williamson signs shoe deal with Nike’s Jordan Brand*, NBCSPORTS (July 23, 2019), <https://nba.nbcsports.com/2019/07/23/zion-williamson-signs-shoe-deal-with-nikes-jordan-brand> (Upon being drafted, Williamson went on to sign a reported seven-year, \$75 million deal with Nike’s Jordan brand, the second largest shoe deal ever for a rookie NBA player).

⁶ See generally Branch, *supra* note 5.

⁷ Thomas Baker, *Arike Ogunbowale’s ‘Dancing With the Stars’ Should Set The Stage For NCAA Rule Changes*, FORBES (Apr. 30, 2018),

in on the exploitation with its \$8 billion media deal with CBS and Turner Broadcasting for media rights to the Division I Men's Basketball Tournament.⁸ The “gross commercialization” of intercollegiate sports has substantially intensified the demand for schools to recruit the best talent to their respective campuses.⁹ The NCAA's amateurism model, however, manipulates the market for college athlete services by capping the amounts that college athletes can receive to an amount that is supposed to reflect the cost it takes to attend their universities.¹⁰ As a result, a black market for athlete services developed in which NCAA member institutions and their business partners seduce college athletes to their schools with payments and other benefits that are exchanged in violation of NCAA rules.¹¹

To address the black market for college athlete services the Department of Justice (DOJ) launched an investigation into the corruption in college basketball that led to the arrest of ten individuals on claims of fraud and corruption.¹² The list of those arrested included the names of four basketball coaches at Division I NCAA programs and a senior executive at Adidas.¹³ In commenting on the results of the investigation, acting U.S. Attorney Joon H. Kim stated, “[t]he picture of college basketball painted by the charges is not a pretty one—coaches at some of the nation's top programs taking cash bribes, managers and advisors circling blue-chip prospects like coyotes, and employees of a global sportswear company funneling cash to families of high school recruits.”¹⁴

In response to the DOJ's investigation, the NCAA created the Commission on College Basketball (hereinafter referred to as the “Commission”) to investigate fraud in college basketball and deliver a report with recommendations for what the NCAA

<https://www.forbes.com/sites/thomasbaker/2018/04/30/ogunbowales-dancing-with-stars-should-set-the-stage-for-ncaa-rule-changes/>.

⁸ *Id.*

⁹ Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 345 (2016).

¹⁰ *Id.*

¹¹ Thomas Baker, *Why the Latest NCAA Lawsuit Is Unlikely to Change Its Amateurism Rules—But Should*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/thomasbaker/2018/09/11/the-economics-of-amateurism-breaking-down-the-latest-lawsuit-against-the-ncaa/>.

¹² U.S. Dep't of Justice, U.S. Attorney Announced the Arrest of 10 Individuals, Including Four Division I Coaches, For College Basketball Fraud and Corruption Schemes, (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college>.

¹³ *Id.*

¹⁴ *Id.*

should do to address corruption.¹⁵ Former United States Secretary of State Dr. Condoleezza Rice led the Commission, and in her remarks on its recommendations, she noted her personal hope that student-athletes would be permitted “more room” by the NCAA to use their NILs.¹⁶ Dr. Rice’s hope echoes sentiments and suggestions asserted by Professor Gabe Feldman in the White Paper he proposed to the Knight Commission on Intercollegiate Athletics.¹⁷

Professor Feldman presented his proposal to the Knight Commission in 2016, and in it, he suggested for the NCAA to permit student-athletes to use their NILs for “non-game related” commercial activities.¹⁸ Professor Feldman suggested relaxing NIL rules as a means to relieve some of the perceived “exploitative, unethical, unfair, inequitable, and unnecessary” rules that have invited criticism and litigation directed at the NCAA from student-athletes and those who defend their rights.¹⁹ Two years after the release of the White Paper, the NCAA did something unexpected by relaxing its NIL restrictions to permit a waiver so that Notre Dame women’s basketball player Arike Ogunbowale could participate on the popular reality show “Dancing With The Stars” (DWTS).²⁰ The Ogunbowale waiver provision was so unprecedented that it seemingly signaled a possible willingness from the NCAA to either grant more waivers or possibly even change its NIL policy to reflect what Professor Feldman first proposed in his groundbreaking White Paper.²¹ Some

¹⁵ NCAA, COMMISSION ON COLLEGE BASKETBALL CHARTER, <http://www.ncaa.org/governance/commission-college-basketball-charter> (last visited Dec. 19, 2019).

¹⁶ Condoleezza Rice, *Independent Commission on College Basketball Presents Formal Recommendations* (Apr. 25, 2018), http://www.ncaa.org/sites/default/files/2018CCBRemarksFinal_webv2.pdf. See also RECOMMENDATIONS TO NCAA BOARD OF GOVERNORS, DIVISION I BOARD OF DIRECTORS AND NCAA PRESIDENT EMMERT, COMMISSION ON COLLEGE BASKETBALL (Apr. 2018), http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf.

¹⁷ GABE FELDMAN, WHITE PAPER: THE NCAA AND “NON-GAME RELATED” STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS, PREPARED FOR THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jacob Bogage, *Arike Ogunbowale on ‘Dancing with the Stars’ Forces NCAA into Tricky Two-Step*, WASH. POST (Apr. 19, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/04/19/arike-ogunbowale-on-dancing-with-the-stars-forces-ncaa-into-tricky-two-step/?utm_term=.16980e4f320a.

²¹ See Baker, *supra* note 7; see also Bogage, *supra* note 20; Nick Martin, *Arike Ogunbowale’s Appearance on Dancing With The Stars Will Be A “Personal Growth Experience” To Fit Dumb NCAA Rules*, DEADSPIN (Apr. 19, 2018), <https://deadspin.com/arike-ogunbowales-appearance-on-dancing-with-the-stars-1825389789>.

pundits have asserted that Professor Feldman's proposal, if adopted, could serve as a less restrictive alternative that would allow reviewing courts to preserve the "revered tradition of amateurism" while also reducing its anti-competitive effect.²²

Unfortunately, the NCAA has not been proactive in expanding athlete rights within its regulation of intercollegiate athletics.²³ As a result, external pressures in the form of litigation and legislation have forced the NCAA to adjust its policies.²⁴ This pressure is evident by the recent unanimous passing of the California Fair Pay to Play Act, a law that makes it illegal for a university to revoke an athletic scholarship or eligibility for benefiting from one's NIL.²⁵ And California is not alone because similar legislation has been proposed in states that include Washington,²⁶ South Carolina,²⁷ and New York.²⁸ Legislation is also pending in Congress²⁹ that, if passed, would affect the NCAA's regulation of college athlete NILs. In response to these legislative acts, the NCAA has since announced that it will develop a new NIL

²² See Baker, *supra* note 7; Mark Tracy, *NCAA Panel Proposes Reforms Including End To 'One and Done,' in Wake of Federal Corruption Charges*, N.Y. TIMES (Apr. 25, 2018); see also Bogage, *supra* note 20; Martin, *supra* note 21. See generally Marc Edelman, *9 Reasons to Allow College Athletes to License Their Names, Images and Likenesses*, FORBES (May 11, 2018), <https://www.forbes.com/sites/marcedelman/2018/05/11/9-reasons-to-allow-college-athletes-to-license-their-names-images-and-likenesses/>.

²³ See generally Dennis Dodd, *NCAA makes interesting decision to address moving target of name, image and likeness*, CBS SPORTS (May 14, 2019), <https://www.cbssports.com/college-football/news/ncaa-makes-interesting-decision-to-address-moving-target-of-name-image-and-likeness>.

²⁴ Thomas Baker, *5 Issues To Keep An Eye On With The NCAA's New NIL Policy*, FORBES (Nov. 1, 2019), <https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/#5340ab2a7591>.

²⁵ The Fair Pay to Play Act would make it illegal for colleges and universities in California to take away an athlete's scholarship or eligibility as a punishment for that athlete profiting from his or her name, image or likeness. The new law will go into effect in January 2023. See Dan Murphy, *California bill to pay NCAA athletes takes another step*, ESPN.COM (Sept. 9, 2019), <http://www.espn.com/espnw/sports/article/27582269/calif-bill-pay-ncaa-athletes-takes-another-step>.

²⁶ See H.B. 1084, 66th Legis. (Wash. 2019), <http://lawfilesexp.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/1084.pdf>.

²⁷ Jenna West, *South Carolina Lawmakers to File Proposal Similar to California's Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sept. 13, 2019), <https://www.si.com/college-football/2019/09/13/south-carolina-proposal-pay-college-athletes-fair-pay-play-act>.

²⁸ S.B. 206, Cal. Legis. (Ca. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206. (coauthored by California Senators Nancy Skinner and Steven Bradford).

²⁹ Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 1 (2019), <https://www.scribd.com/document/401306067/Mark-Walker-bill>.

policy.³⁰ This may seem like a big win for college athletes, but the shape of that policy will not be known until the new NIL rules are released in 2021.³¹ In its announcement, however, the NCAA stated that its new policy will comply with its model for amateur athletics.³²

In addition to the NIL legislation at the state and federal levels, the NCAA's amateurism rules were found to violate antitrust law in two recent federal district court decisions.³³ While the NCAA may desire to develop NIL rules that perpetuate the current model, the NCAA must instead accept that the deference once afforded to its amateurism model by legislators, courts, and the general public has eroded. Yet, the NCAA still stands behind its amateurism rules, and until the NCAA's new NIL policy is released in advance of its 2021 implementation, we have no way of knowing just how much freedom college athletes will be afforded by the NCAA for the commercial use of their own identities.

This article serves the important purpose of examining the extent of NCAA's NIL restrictions, legal challenges to those restrictions, as well as proposals for changing them ahead of 2021. The results of our examination led us to conclude that the window for compromise has passed, and the only way to confront corruption in college sports is to remove the NCAA's restrictions on athlete compensation that prevent them from profiting off of the commercial use of their NILs. We found that modest changes to the NCAA's amateurism model that relax current standards for NIL use will benefit only a limited number of college athletes and will not remove corruption from the billion-dollar industry of intercollegiate sports. Furthermore, we advise against a case-by-case use of waivers to allow for more NIL use like Ogunbowale's because it is untenable to consistently enforce a policy that permits *some* "non-game related" commercial use by athletes of their own NILs. Our investigation led us to conclude that expanded use by the NCAA of NIL waivers would result in arbitrary and confusing standards that generate, rather than correct, unfairness.

Part I of this article examines the corruption in college athletics and recent investigation, as well as the NCAA's response. Part II briefly reviews the history of

³⁰ *Board of Governors starts process to enhance name, image and likeness opportunities*, NCAA (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>.

³¹ *Id.*

³² *Id.*

³³ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW (N.D. Cal. 2019) [*Grant-In-Aid*].

the legal challenges against the NCAA. Part III reviews the publicity rights of college athletes. Part IV assesses current proposals to alter the NCAA rules. Part V discusses the current proposal limitations, including college athlete “star power” and NCAA oversight ability. Part VI calls for meaningful change to the NCAA rules and proposes to remove the NIL restrictions completely. Part VII concludes by emphasizing the benefits of allowing college athletes a free market to be compensated for their NIL.

I

CORRUPTION IN COLLEGE ATHLETICS

Ironically, the NCAA was first formed to combat perceived corruption in college football that cost the lives of athletes by making football more dangerous than necessary.³⁴ In an attempt to capitalize³⁵ off of consumer interest in college football, many of the first universities to field squads skirted what few rules existed by hiring “ringers” to pretend to be students and play on teams alongside legitimate students.³⁶ The ringers were recruited to campus through offers of food, trips, and money.³⁷ The ringers were far more physical than their fellow (student) competitors, and the inclusion of these professional players made college football dangerous to the point that then President Theodore Roosevelt threatened the schools to either address the situation or expect government intervention.³⁸ In response to the

³⁴ ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS: WITH A NEW POSTSCRIPT BY THE AUTHOR 8 (2001).

³⁵ Marc Edelman, *The Future of Amateurism after Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1023 (2014); see also ZIMBALIST, *supra* note 36, at 7 (“[I]n the 1880s Yale had a slush fund of \$100,000 to aid football.”).

³⁶ JOSEPH CROWLEY, THE NCAA’S FIRST CENTURY: IN THE ARENA 4 (2006) (“In 1894, Indiana believed Purdue to be recruiting the Hoosiers’ football captain from the year before and to have made a financial offer to enhance its chances of success. Indiana tried to retain the player, but he ended up at Michigan. In 1893, according to coach Stagg, the Wolverines had seven football players who were not enrolled in classes. This use of ringers . . . was duplicated in most colleges at that or earlier periods.”).

³⁷ ZIMBALIST, *supra* note 34, at 8 (“Yale lured tackle James Hogan by offering him free meals and tuition, a suite in Vanderbilt Hall, a trip to Cuba, a monopoly on the sale of game scorecards, and a job as a cigarette agent for the American Tobacco Company.”).

³⁸ Edelman, *supra* note 37, at 1025.

President's mandate, the organization that would grow into what we now recognize as the NCAA was formed.³⁹

Initially, the NCAA was created as an attempt to bring public respectability and safety to the industry of college athletics.⁴⁰ One of the NCAA's earliest initiatives for making college sports safer and more respectable involved the implementation of the requirements that athletes must be enrolled as students and may not receive any form of compensation from the school.⁴¹ With this move, the NCAA defined its products as "amateur" and for those who participate "in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."⁴² The creation of the NCAA, however, legitimized college football for consumers around the country, which resulted in commercialization of the game by schools that built large stadia on their campuses to attract more fans and their money.⁴³ Schools needed to keep those new stadia filled with consumers and to do this some ignored the NCAA's amateurism rules and paid the best students to play for their teams.⁴⁴ In its nascence, the NCAA lacked the punitive power to enforce its amateurism rules against cheating institutions.⁴⁵ In 1929, the Carnegie Commission created a report on the landscape of college athletics and determined that three-quarters of the 112 universities studied

³⁹ *Id.* ("From these meetings came the charter of the National Collegiate Athletic Association as a trade association designed to devise formal game rules, promote safety, and give college athletics some degree of public respectability.").

⁴⁰ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054 (9th Cir. 2015) ("President C.A. Richmond of Union College commented in 1921 that the competition among colleges to acquire the best players had come to resemble the contest in dreadnoughts that had led to World War I, and the NCAA sought to curb this problem by restricting eligibility for college sports to athletes who received no compensation whatsoever.") (footnotes omitted).

⁴¹ *Id.*

⁴² Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007) (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE 33-34 (1998) (quoting Nat'l Collegiate Athletic Ass'n, Proceedings of the Eleventh Annual Convention 118 (1916)) (In 1922, the NCAA redefined the amateur athlete as "one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is *nothing more than an avocation.*").

⁴³ ZIMBALIST, *supra* note 34, at 8.

⁴⁴ Lazaroff, *supra* note 42, at 332.

⁴⁵ See ZIMBALIST, *supra* note 34, at 8-9.

were in violation of the NCAA rules.⁴⁶ The Carnegie Commission determined that “the heart of the problem facing college sports was commercialization.”⁴⁷

The commercialization of college football intensified despite the fact that the U.S. was going through its Great Depression, and some athletes were well compensated for playing college football.⁴⁸ In response to what it identified as “corruption,” the NCAA adopted the “Sanity Code,” which provided the NCAA with the authority to sanction schools or terminate membership based on rule violations.⁴⁹ The Sanity Code also restricted financial aid to athletes by requiring them to go through “normal channels” that non-athletes were compelled to follow.⁵⁰ These new rules led to other problems in the NCAA, when five University of Kentucky basketball players were convicted of point fixing.⁵¹ Judge Streit, who presided over the point fixing case, wrote in his opinion that the University of Kentucky athletics program was “the acme of commercialism and overemphasis, [including] undeniable evidence of covert subsidization of players, ruthless exploitation of athletes, cribbing on examinations, illegal recruiting, a reckless disregard for players’ physical welfare, matriculation of unqualified students, demoralization [corruption] of the athletes by the coaches, the alumni, and the townspeople.”⁵²

Unable to rid corruption from college sports, the NCAA’s Sanity Code did not last two years,⁵³ before being replaced with a new amateurism model for college athletics that permitted schools to provide scholarships in exchange for athletic participation.⁵⁴ The modern era of college athletics brought with it new technological

⁴⁶ *Id.*

⁴⁷ *Id.* (explaining that commercialization consisted of “an interlocking network that included expanded press coverage, public interest, alumni involvement and recruiting abuses.” This was such a deep-rooted problem, that two years later a survey by the *New York Times* revealed that no college had altered its code of conduct to adhere to the NCAA rules.).

⁴⁸ *See id.* at 9 (noting that the University of Oklahoma had a payroll of nearly \$200,000 (equivalent of \$2,581,000 in 2019 based on inflation)).

⁴⁹ *See Lazaroff, supra* note 42, at 332-33.

⁵⁰ *Id.* at 333.

⁵¹ ZIMBALIST, *supra* note 34, at 8. This was during their two championship runs between 1948-1950.

⁵² *Id.* at 10 (quoting Murray Sperber, *Onward to Victory*, 340 (1998)).

⁵³ Lazaroff, *supra* note 42, at 333.

⁵⁴ *Id.* at 333-34 (“During the 1950s, the NCAA developed new regulations governing financial aid to athletes, and economic support could now be given without regard to financial need or ‘remarkable academic ability.’ In essence, financial inducements could be used to entice gifted athletes to participate in sports and the original amateur ideal had been replaced with a significantly different model. Notwithstanding this liberalization of the criteria for financial aid to athletes,

advancements like radio and television, and the NCAA capitalized by leveraging the sale of media rights to its products.⁵⁵ Initially, however, not all member institutions were in favor of increased commercialization, and the NCAA addressed concerns by imposing limits on the number of televised broadcasts for college football and the number of times that schools could appear on national television.⁵⁶ In 1984, the limits on broadcasts were removed by the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma (Board of Regents)*.⁵⁷ During the three decades following the Court's decision in *Board of Regents*, the industry of big-time intercollegiate sports ballooned into a billion-dollar business.⁵⁸

The tremendous commercialization of intercollegiate sports coupled with caps on athlete compensation resulted in the inflation of an "arms race" in which schools invested substantially in facilities and on coaching salaries as means for attracting the best talent.⁵⁹ NCAA amateurism rules prohibit schools from spending more on a student athlete than what it costs to attend a university, so the schools had to spend on something else in order to attract the students away from rival institutions.⁶⁰ When

schools began a 'spending spree' to buy winning teams. Despite 'ever more detailed regulations,' and increased enforcement efforts by the NCAA, schools throughout the nation 'devised new ways to pay their athletes on the side.' The increased commercialization of intercollegiate sports and the opportunity to reap vast amounts of revenue from successful football and basketball programs created significant incentives for schools to do whatever they could to maximize athletic success. The NCAA, with a revised enforcement mechanism and rules addressing student-athlete eligibility, 'capping' financial inducements, limiting transfers, and penalizing 'under-the-table payments,' created the foundation for 'today's corporate college sport.'").

⁵⁵ See Edelman, *supra* note 35, at 1030 (noting that the first major media deal was valued at \$1 million).

⁵⁶ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 90 (1984)

⁵⁷ See *id.* at 120.

⁵⁸ See Edelman, *supra* note 35, at 1030.

⁵⁹ Baker & Brison, *supra* note 9. For an example, in 2017, Clemson University opened the doors to a \$55 million football-only facility that was designed for recruiting purposes and includes an indoor slide, bowling alleys, and even a miniature golf course. Clemson has won two out of the last three College Football Playoff championships, including the 2019 championship. See Cork Gaines, *Clemson's \$55 Million Football Complex Shows How Swanky College Football Facilities Have Become For The Top Programs*, BUS. INSIDER (Jan. 8, 2019), <https://www.businessinsider.com/photos-clemsons-football-facility-2017-10>; for information on the escalation of coaching salaries (e.g., football coaching salaries), see generally Richard Johnson, *A History of Skyrocketing College Football Salaries From Walter Camp to Nick Saban*, SBATION (Oct. 4, 2018), <https://www.sbnation.com/college-football/2018/6/4/17390394/college-football-coach-salaries-history-highest>.

⁶⁰ Prior to 2015, athletes were limited to grant-in-aid, an amount set to cover the basic components of educational expenses (e.g., tuition, fees, books, and room and board).

all other forms of spending failed in this regard, coaches and others who were involved with and facilitated the programs were left with only one other recruiting lure—pay students under the table in violation of NCAA rules.⁶¹

The black market for college athlete services is, perhaps, best evidenced by recent investigations surrounding men’s basketball programs at major NCAA institutions. For example, the 2013 national championship won by the University of Louisville’s men’s basketball team has been sullied by reports that escorts were hired by coaches to seduce recruits to campus from 2010-2014.⁶² In 2010, the University of North Carolina (“UNC”) was also subject to an investigation surrounding their use of fake classes—for 18 years—to ensure that college athletes would remain eligible to participate in their sports.⁶³ During this span of time, UNC won three college basketball national championships.⁶⁴ Most recently, the NCAA handed down sanctions against the University of Missouri (“Mizzou”) and their athletic program, because they allegedly employed a tutor to complete the majority of work for several of their athletes.⁶⁵ This finding followed a 2016 investigation that also found several impermissible benefits provided to Mizzou basketball players.⁶⁶

The corruption problem in college basketball reached a tipping point in 2017 when the Federal Bureau of Investigation (“FBI”) announced arrests of individuals for allegedly making payments to high-school basketball recruits.⁶⁷ Some of those arrested were college coaches, but representatives from Adidas were also arrested for participating in student payment so that athletes would select schools with

⁶¹ See Ricky O’Donnell, *Brian Bowen’s FBI Scandal Shows the Many Ways a College Basketball Recruit Can Get Paid*, SBNATION (Oct. 5, 2018), <https://www.sbnation.com/college-basketball/2018/10/5/17941060/brian-bowen-fbi-scandal-offers-creighton-texas-arizona-louisville-nike-adidas>.

⁶² Associated Press, *NCAA Takes Away a Louisville Title Over Stripper Parties*, N.Y. POST (Feb. 20, 2018), <https://nypost.com/2018/02/20/ncaa-takes-away-a-louisville-title-over-stripper-parties>.

⁶³ Sara Ganim & Devon Sayers, *UNC Athletics Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014), <https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html>.

⁶⁴ *NCAA Basketball Tournament History*, ESPN.COM, http://www.espn.com/mens-college-basketball/tournament/history/_/team1/7739 (last visited Mar. 4, 2019).

⁶⁵ See Alex Kirshner, *12 Things to Know About the 29-Page NCAA Report That Led to Mizzou’s Bowl Ban*, SBNATION (Feb. 1, 2019), <https://www.sbnation.com/college-football/2019/2/1/18206252/missouri-ncaa-sanctions-bowl-ban>.

⁶⁶ *Id.*

⁶⁷ See Harry Lyles Jr., *The FBI’s Investigation of College Basketball Corruption, Explained*, SBNATION (Sept. 27, 2017), <https://www.sbnation.com/college-basketball/2017/9/27/16366056/college-basketball-scandal-corruption-fbi>.

licensing arrangements with Adidas.⁶⁸ Product brands like Adidas, Nike, and Under Armour have all contracted with NCAA member institutions to outfit athletes and coaches with gear.⁶⁹ The product brands pay the schools and the coaches per these arrangements,⁷⁰ but the athletes are not permitted to profit off of the deals due to the NCAA's amateurism rules.⁷¹ Allegedly, Adidas representatives participated in illicit payments to sway recruits to "Adidas schools" as a means for building relationships with college players that could result in licensing deals with those same players when they turned professional.⁷²

As the FBI's investigation unfolded, it became apparent that the underlying issues were not limited to Adidas-related schools.⁷³ The FBI was involved in phone calls and meetings where money was swapped between parties and intended for the parents of recruits.⁷⁴ The phone calls often mentioned the bidding war that was proceeding between rival companies for certain high-profile recruits and even mentioned parents of recruits wanting to be paid.⁷⁵ Christian Dawkins, a former

⁶⁸ See *United States v. Gatto*, 295 F. Supp. 3d 336 (S.D.N.Y. 2018).

⁶⁹ See Daniel Kleinman, *The Most Valuable College Apparel Deals 2018*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/danielkleinman/2018/09/11/the-most-valuable-college-apparel-deals-2018/#2116e6db4be9>.

⁷⁰ See Matthew Kish, *How Nike Funnels Money to College Football Coaches*, BIZ JOURNALS (Sept. 3, 2013), https://www.bizjournals.com/portland/blog/threads_and_laces/2013/09/how-nike-funnels-money-football-coaches.html.

⁷¹ See NAT'L COLLEGIATE ATHLETIC ASS'N, 2018-19 NCAA DIVISION I MANUAL 4, §2.9 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx> ("Student-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. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.").

⁷² *Gatto*, 295 F. Supp. 3d at 340.

⁷³ See Matt Norlander, *How Maryland, Under Armour Were Roped into FBI Investigation of Kansas Recruit*, CBS SPORTS (Apr. 11, 2018), <https://www.cbssports.com/college-basketball/news/how-maryland-under-armour-were-roped-into-fbi-investigation-of-kansas-recruit/>.

⁷⁴ See Will Hobson, *How College Hoops Corruption Became a Federal Investigation, and Why It Might Get Bigger*, WASH. POST (Sept. 27, 2017), https://www.washingtonpost.com/sports/colleges/how-college-hoops-corruption-became-a-federal-investigation-and-why-it-might-get-bigger/2017/09/27/dfdfa6e0-a3d6-11e7-ade1-76d061d56efa_story.html?utm_term=.0744ccbcd765.

⁷⁵ See *id.*

athlete agent who was indicted by the FBI for his role in the scheme,⁷⁶ was recorded on one call as saying “[y]ou can make millions off of one kid.”⁷⁷ With so much to be made from potential licensing deals, payments to students were often in the six-figure range and came with the promise that the high school recruit would attend a certain university to play their college basketball career.⁷⁸ In describing the FBI’s findings, acting Manhattan U.S. Attorney Joon H. Kim said,

The picture of college basketball painted by the charges is not a pretty one—coaches at some of the nation’s top programs taking cash bribes, managers and advisors circling blue-chip prospects like coyotes, and employees of a global sportswear company funneling cash to families of high school recruits. For the ten charged men, the madness of college basketball went well beyond the Big Dance in March. Month after month, the defendants allegedly exploited the hoop dreams of student-athletes around the country, treating them as little more than opportunities to enrich themselves through bribery and fraud schemes. The defendants’ alleged criminal conduct not only sullied the spirit of amateur athletics, but showed contempt for the thousands of players and coaches who follow the rules, and play the game the right way.⁷⁹

During the trial, however, it became clear that the corruption and exploitation extended beyond Adidas and its licensing partner institutions to include coaches and Amateur Athletic Union (AAU) teams and high schools.⁸⁰ For example, Brian Bowen Sr., the father of a recruit, testified that an AAU coach paid him for his son, Brian Bowen Jr., to play for the high school team.⁸¹ The trial ended with a guilty verdict on all counts being handed down for all three defendants. Afterward, United

⁷⁶ *Three Men Convicted in Hoops Corruption Scandal*, REUTERS (Oct. 24, 2018), <https://www.reuters.com/article/us-basketball-ncaa-verdicts/three-men-convicted-in-hoops-corruption-scandal-idUSKCN1MZ0AM>.

⁷⁷ Hobson, *supra* note 74.

⁷⁸ *See id.*

⁷⁹ U.S. Dep’t of Justice, *supra* note 12.

⁸⁰ *See* Kyle Boone, *Jay Williams Admitted His Former Sports Agency Paid Kevin Love’s AAU Coach \$250K*, CBS SPORTS (Sept. 28, 2017), <https://www.cbssports.com/college-basketball/news/jay-williams-admitted-his-former-sports-agency-paid-kevin-loves-aau-coach-250k/> (last visited Feb. 11, 2019).

⁸¹ Tim Whelan Jr., *Brian Bowen Sr. Testifies that Then-La Lumiere Coach Paid to Lure Son to School*, USA TODAY HIGH SCH. SPORTS (Oct. 7, 2018), <https://usatodayhss.com/2018/brian-bowen-sr-testifies-that-then-la-lumiere-coach-paid-to-lure-son-to-school>. Brian Bowen Sr. also confirmed that multiple college basketball programs made financial offers for Bowen Jr. to play for them. *Id.*

States Attorney Robert S. Khuzami released a statement: “Today’s convictions expose an underground culture of illicit payments, deception and corruption in the world of college basketball. . . .These defendants now stand convicted of not simply flouting the rules but breaking the law for their own personal gain.”⁸²

In response to the DOJ’s investigation, the NCAA formed the Commission on College Basketball (hereinafter referred to as the “Commission”) to independently assess the current landscape of collegiate athletics—specifically basketball.⁸³ Beyond addressing the deep-seated corruption and exploitation that has been present in college basketball for years, the Commission, led by Former United States Secretary of State Dr. Condoleezza Rice, was tasked with evaluating the relationship between the NCAA national offices, member institutions, student-athletes, and coaches with outside entities as well as the NCAA’s relationship with the NBA.⁸⁴

Following its investigation, the Commission issued a report to NCAA President Mark Emmert stating that, “[t]he levels of corruption and deception are now at a point that they threaten the very survival of the college game as we know it.”⁸⁵ In addition to issues they were tasked with evaluating, the Commission brought to attention the legal challenges the NCAA was in the midst of facing regarding the use of college athlete NILs.⁸⁶ They felt that the NCAA’s amateurism rules should be cleared up or removed completely due to their confusing nature.⁸⁷ However, the existence of pending cases that challenged the legality of the NCAA’s amateurism led the Commission to caution against drastic change to the amateurism rules and the suggestion for the NCAA to focus on other ways for addressing the charges of “player exploitation.”⁸⁸

In her own report, Dr. Rice, provided the following personal statement: “[I]t is hard for the public, and frankly for me, to understand what can be allowed within the college model—for the life of me I don’t understand the difference between Olympic payments and participation in Dancing with the Stars—and what can’t be

⁸² *Adidas Executive And Two Others Convicted Of Defrauding Adidas-Sponsored Universities In Connection With Athletic Scholarships*, U.S. DEP’T OF JUSTICE (Oct. 24, 2018), <https://www.justice.gov/usao-sdny/pr/adidas-executive-and-two-others-convicted-defrauding-adidas-sponsored-universities>.

⁸³ See RECOMMENDATIONS TO NCAA BOARD OF GOVERNORS, *supra* note 16, at 1.

⁸⁴ *Commission on College Basketball Charter*, *supra* note 15.

⁸⁵ RECOMMENDATIONS TO NCAA BOARD OF GOVERNORS, *supra* note 16, at 1.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.*

⁸⁸ *Id.*

allowed without opening the door to professionalizing college basketball.”⁸⁹ Dr. Rice’s comments evidence the complicated state of intercollegiate athletics for sports that have been commercialized to the point of corruption.⁹⁰ It is important to also note that her comments were made in response to the DOJ’s investigation of the corruption in college basketball that consisted of little more than conduct that violated NCAA policies.⁹¹ In essence, the DOJ weaponized the FBI to enforce the NCAA’s amateurism rules—the very same rules that have and continued to be challenged based on antitrust law.⁹²

II

AMATEURISM AND THE LAW

The NCAA is battle-tested when it comes to defending its amateurism rules in litigation. For the most part, the Sherman Antitrust Act⁹³ has provided the foothold for plaintiffs challenging the NCAA’s amateurism restrictions on the basis that they impose unreasonable restraints on trade.⁹⁴ Yet it wasn’t until the 1980s that an antitrust attack on the NCAA’s version of amateurism reached the appellate level.⁹⁵ Until then, district courts rejected plaintiff claims on the basis that the NCAA’s version of amateur athletics did not involve interstate commerce, meaning that any and all NCAA’s rules were found to fall outside of the Sherman Act’s reach.⁹⁶ First,

⁸⁹ *Id.* at 5.

⁹⁰ *See, e.g.*, Marc Edelman, *Corruption Will Continue in NCAA College Basketball Until Schools Can Openly Pay Their Players*, FORBES (Sept. 27, 2017), <https://www.forbes.com/sites/marcedelman/2017/09/27/corruption-will-continue-in-ncaa-college-basketball>.

⁹¹ Ori Oren, *How the NCAA Has Created Criminality*, COLUM. BUS. L. REV. ONLINE (Aug. 13, 2019), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/146>.

⁹² *Id.*

⁹³ Sherman Act, 15 U.S.C. §§ 1-7 (2006).

⁹⁴ Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 819 (2016).

⁹⁵ Bd. of Regents of Univ. of Okla. v. Nat. Collegiate Athletic Ass’n, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85, (1984).

⁹⁶ *See* College Athletic Placement Serv., Inc. v. Nat’l Collegiate Athletic Ass’n, 506 F.2d 1050 (3d Cir. 1974); *see also* Jones v. Nat’l Collegiate Athletic Ass’n, 392 F. Supp. 295 (1975) (concerning a Northeastern college hockey player who was declared ineligible for violating the NCAA Principle of Amateurism, a rule that one is no longer an amateur if they have been paid to play the sport they desire to participate in at the collegiate level. Jones sought to prevent the NCAA from declaring him ineligible and from enforcing punishment on Northeastern if they were to allow him to play by alleging the rules were arbitrarily applied to his case. Ultimately, the court sided with the NCAA and found Jones did not have a substantial likelihood of success under the Sherman Act since NCAA rules were designed to protect amateurism, not to form a monopoly.); NAT’L

Section A is going to look at how the NCAA's treatment under antitrust changed dramatically with the Court's decision in *Board of Regents*. Then, Section B will go over each of the plaintiffs' claims in *O'Bannon*, the first case to overcome the procompetitive presumption of validity that the NCAA had been afforded in courts. Next, Section C will review *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, the most recent successful antitrust challenge against the NCAA. Finally, Section D narrows in on how these cases demonstrate that amateurism is not the primary driver of consumer interest in college athletics and why a change in approach is needed.

A. *NCAA v. Board of Regents*

The plaintiffs in *Board of Regents*, the Universities of Oklahoma and Georgia, brought the case on behalf of the members of the College Football Alliance, based on their desire to lift limits on college football broadcasts that were imposed by the NCAA.⁹⁷ The plaintiffs alleged that the NCAA's broadcast restrictions were anticompetitive and therefore violated the Sherman Antitrust Act.⁹⁸ Ultimately, the Court agreed with the plaintiffs and found that the NCAA's restrictions operated as an illegal restraint on trade within the live television broadcast market for college football.⁹⁹ The Court's decision was the first to recognize that the NCAA engaged in commercial activity and was also the first to subject any NCAA regulations to antitrust scrutiny.¹⁰⁰

Justice John Paul Stevens wrote for the majority in *Board of Regents*, and in the opinion he recognized that horizontal price fixing and output limitations like those created in the NCAA's television plan are "ordinarily condemned" under

COLLEGIATE ATHLETIC ASS'N, 2018-19 NCAA DIVISION I MANUAL 4, § 2.9 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx>.

⁹⁷ See *Bd. of Regents of Univ. of Okla. v. Nat. Collegiate Athletic Ass'n*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

⁹⁸ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 94 (1984) ("[The current plan] limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no member of the NCAA is permitted to make any sale of television rights except in accordance with the plan.").

⁹⁹ *Id.* at 96-99 (finding that competition in the relevant market, which it defined as "live college football television," had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football").

¹⁰⁰ *Id.*

antitrust law as “illegal *per se*.”¹⁰¹ Yet, Justice Stevens likened the NCAA markets to that of a professional sports league (i.e., a joint venture) and in doing so he noted that league-wide rules require some horizontal restraints to create the product.¹⁰² To better elaborate his argument, Justice Stevens provided examples of the “myriad of rules” that defined the competition marketed by the NCAA.¹⁰³ First up, Justice Stevens pointed to the constitutive rules for play (e.g., size of the field, number of players on a team).¹⁰⁴ Next, Justice Stevens identified the NCAA’s particular brand of football as having an academic tradition that differentiated it from professional sports.¹⁰⁵ He found that the academic tradition consisted of rules needed to preserve the “character and quality” of the NCAA’s products.¹⁰⁶ For Justice Stevens, the “academic tradition” consisted of rules that students attend class and that they “not be paid.”¹⁰⁷

On that point, Justice Stevens, in dictum, used the NCAA’s amateurism rules as an analogy for the type of horizontal activity that *can* produce a net procompetitive effect by widening consumer choice through the creation of an amateur option for football consumption.¹⁰⁸ Justice Stevens’ dicta in *Board of Regents* included the statement that “[t]here can be no question but that [the NCAA] needs ample latitude [to regulate amateurism], or that preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”¹⁰⁹

¹⁰¹ *Id.* at 100.

¹⁰² *Id.* at 101-02.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 101.

¹⁰⁵ *Id.* at 101-02.

¹⁰⁶ *Id.* at 102.

¹⁰⁷ *Id.*

¹⁰⁸ If the NCAA were not permitted to enforce rules that regulated amateurism in college football, the member institutions would pay players and doing so would impair the consumer interest. *See, e.g., id.* at 117 (“It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”).

¹⁰⁹ *Id.* at 120.

In the wake of *Board of Regents*, a line of cases followed that challenged the NCAA's amateurism rules in the Third,¹¹⁰ Fifth,¹¹¹ Sixth,¹¹² and Seventh Circuits.¹¹³ The decisions from those four circuits can be read together as crafting a procompetitive presumption (quasi-exemption) that fortifies NCAA amateurism rules from rule of reason review on the basis that they serve a procompetitive purpose in preserving the nature and character of the NCAA's intercollegiate

¹¹⁰ *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998). *Smith* involved a challenge to the NCAA's transfer policies rather than its amateurism rules. Specifically, the plaintiff in *Smith* challenged the NCAA's post-baccalaureate bylaw that prevented students with remaining eligibility from finishing out their college athletic careers at graduate institutions. This rule no longer exists, but what is important in *Smith* is that the Third Circuit extended Justice Stevens' dicta to include this bylaw even though the student selected the graduate school based on educational program opportunity. Even though the plaintiff in *Smith* seemingly embodied the "academic tradition" that Justice Stevens celebrated in *Board of Regents*, the Third Circuit still found that the bylaw at issue furthered the NCAA's purpose of maintaining survival of intercollegiate athletics. *Id.* at 187.

¹¹¹ *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (*McCormack* was the first of the federal circuit court opinions to apply Justice Stevens' dicta from *Board of Regents* in a case involving a challenge to NCAA regulation of student-athlete compensation limits). The plaintiff in *McCormack* filed an antitrust challenge to the NCAA's enforcement of its amateurism rules against Southern Methodist University after it was discovered that the school compensated football players in violation of NCAA policy. The court in *McCormack* cited to Justice Stevens' dicta in *Board of Regents* in concluding that the NCAA's eligibility rules "allowed [for college football's] survival in the face of commercializing pressures." *Id.* at 1345 (citing *Bd. of Regents* at 102).

¹¹² *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426 (6th Cir. 2008). In *Bassett*, a former basketball coach attacked the NCAA's enforcement of amateurism rules on the grounds that they violated antitrust law by costing him his coaching career. The majority found that enforcement of NCAA amateurism rules was "anti-commercial" and therefore outside of the Sherman Act's reach so long as the enforcement strategy was "reasonably and rationally related to the rules themselves." *Id.* at 433.

¹¹³ *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992). In *Banks v. NCAA*, the court cited *Board of Regents* in finding that the NCAA's rules prohibiting college players from entering professional drafts and being represented by agents were necessary in order to preserve the character of the NCAA's products. Judge Flaum wrote a partial dissent in *Banks* in which he described the NCAA's version of amateurism as "chimerical." *Id.* at 1099. The Seventh Circuit also heard *Agnew v. NCAA*, in which Judge Flaum wrote for the majority in upholding a motion to dismiss the plaintiff's antitrust attack on the NCAA bylaws that limit scholarships to one year and prevent schools from offering multi-year scholarships. 683 F.3d 328 (7th Cir. 2012). The majority in *Banks* rejected the notion that the NCAA's regulation of college athletes was not commercial, but failed to find a relevant market asserted by the plaintiffs in their complaint. *Id.* at 343-45.

products.¹¹⁴ The procompetitive presumption of validity for NCAA amateurism restrictions held firm, for the most part, until *O'Bannon v. NCAA*.¹¹⁵

B. *O'Bannon v. NCAA*

The first case to overcome the procompetitive presumption of validity that courts afforded the NCAA's regulation of amateurism was brought by Ed O'Bannon, a former All-American University of California Los Angeles collegiate basketball player.¹¹⁶ O'Bannon filed his action on behalf of a class of current and former student-athletes and against the NCAA and Collegiate Licensing Company (CLC) after he recognized the unauthorized use of his depiction in the Electronic Arts (EA) video game March Madness.¹¹⁷ O'Bannon alleged that the NCAA rules governing amateurism were an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1, as they prevented student-athletes from being compensated for use of their NIL in the video games produced by EA and television broadcasts.¹¹⁸

At the district court level, Judge Claudia Ann Wilken rejected the idea that *Board of Regents* insulated the NCAA's rules from the rule of reason and found that the NCAA's regulation of student-athlete NILs violated antitrust by restricting athlete compensation more than what was needed to preserve consumer interest in amateurism.¹¹⁹ Actually, Judge Wilken was skeptical of the degree of interest in amateurism that the NCAA assigned to its consumers.¹²⁰ Although skeptical,¹²¹ Judge Wilken accepted the preservation of amateurism as one of two procompetitive

¹¹⁴ Baker & Brison, *supra* note 9, at 349 (“[T]he Ninth Circuit singled out *Agnew* as the only one from the three that came “close to agreeing with the NCAA’s interpretation of *Board of Regents*.”) (quoting *O'Bannon*, 802 F.3d at 1064).

¹¹⁵ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

¹¹⁶ *Id.*

¹¹⁷ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

¹¹⁸ Around this same time, *Keller* had been filed, and during pretrial, the courts consolidated the cases. Plaintiffs moved for class certification, and after it was granted, plaintiffs voluntarily dismissed their claims—settling with EA and CLC. *O'Bannon* and *Keller* were then deconsolidated. As mentioned before, *Keller* proceeded and was successful with the right of publicity claims. Now, we are looking at *O'Bannon* regarding the Sherman Act claims. *See O'Bannon*, 802 F.3d at 1055.

¹¹⁹ *Id.* at 1056 (“After a fourteen-day bench trial, the district court entered judgment for the plaintiffs, concluding that the NCAA’s rules prohibiting student-athletes from receiving compensation for their NILs violate Section 1 of the Sherman Act.”).

¹²⁰ *See O'Bannon*, 7 F. Supp. 3d at 1000.

¹²¹ *Id.*

justifications.¹²² Further, Judge Wilken accepted two less restrictive alternatives in: (1) allowing student-athletes to receive stipends equal to the full cost of attendance, and (2) allowing schools to hold a portion of their NIL licensing revenue, \$5,000 per student-athlete, in trust, to be distributed after graduation.¹²³ On appeal to the Ninth Circuit, the NCAA alleged plaintiffs' Sherman Act claim failed on the merits, but also argued that (1) *NCAA v. Board of Regents* amateurism rules are "valid as a matter of law," (2) the compensation rules at issue are not governed by the Sherman Act because they do not regulate commercial activity, and (3) the plaintiffs did not have standing under the Sherman Act.¹²⁴

1. *The Ninth Circuit Rejects the Presumption of Validity*

The NCAA argued that Justice Stevens' dicta in *Board of Regents* built around its amateurism rules a procompetitive presumption of validity that effectively rendered them as quasi-exempt under antitrust law, but the Ninth Circuit disagreed.¹²⁵ The Ninth Circuit correctly interpreted Justice Stevens' dicta as explaining why the NCAA rules should be analyzed under the rule of reason scrutiny.¹²⁶

In reaching this conclusion, the Ninth Circuit diverged from the way its sister circuits interpreted *Board of Regents*.¹²⁷ The court in *O'Bannon* specifically took

¹²² The integration of athletes into their academic environments was the second procompetitive justification accepted. See *O'Bannon*, 802 F.3d at 1058.

¹²³ *O'Bannon*, 802 F.3d at 1061 ("The court also held that it would be permissible for the NCAA to prohibit schools from funding these stipends or trusts with anything other than revenue derived from the use of players' NILs.").

¹²⁴ *Id.*

¹²⁵ *Id.* at 1063-64. ("The Court's opinion supports the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue, but the NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny. Nothing in *Board of Regents* supports such an exemption. To say that the NCAA's amateurism rules are procompetitive, as *Board of Regents* did, is not to say that they are automatically lawful.").

¹²⁶ *Id.* at 1063. ("The *Board of Regents* Court certainly discussed the NCAA's amateurism rules at great length, but it did not do so in order to pass upon the rules' merits, given that they were not before the Court. Rather, the Court discussed the amateurism rules for a different and particular purpose: to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se.").

¹²⁷ *Id.* at 1064 ("Only one—the Seventh Circuit's decision in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012)—comes close to agreeing with the NCAA's interpretation of *Board of Regents*, and we find it unpersuasive."); see *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

time to distinguish its approach from the Seventh Circuit's in *Agnew v. NCAA*.¹²⁸ The Ninth Circuit found that the Seventh Circuit in *Agnew* read *Board of Regents* too broadly by determining that when an NCAA rule is clearly designed to protect amateurism it should be "presumed procompetitive."¹²⁹ The Ninth Circuit stated that it was a "dubious" proposition to interpret *Board of Regents* as a decision that "blessed" NCAA rules by removing them from antitrust scrutiny.¹³⁰ The Ninth Circuit paid deferential respect to Justice Stevens' dicta in *Board of Regents*, but held that the NCAA amateurism rule's validity must be proven, not presumed.¹³¹ In making that ruling, the Ninth Circuit became the first to subject the NCAA's regulation of amateurism to rule of reason review.¹³²

Beyond asserting the procompetitive presumption of validity based on *Board of Regents*, the NCAA had two other rationalizations as to why the rules restricting NIL compensation should be validated by the court without resort to rule of reason review. First, the NCAA claimed that the compensation rules did not regulate commercial activity, treating them as "eligibility rules."¹³³ In addressing this defense, the Ninth Circuit referenced *Agnew* for correctly finding that it is undeniable that college programs expect an economic gain by recruiting high school athletes and thus these rules "clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools."¹³⁴ Important in this analysis is the fact that the Ninth Circuit rejected the use of a creative wordplay ("eligibility rules") to circumvent antitrust law.¹³⁵

¹²⁸*Agnew* examined the loss of scholarships for two injured college football players. *Agnew*, 683 F.3d at 332. They alleged that the NCAA bylaw restricting members from providing scholarships for more than one year was an illegal horizontal trade agreement to restrict prices in the market, and therefore should be illegal under the Sherman Act. *Id.* However, the plaintiffs failed to support their argument that a market existed in their complaint. *Id.* The court said that it was important to protect amateurism and to extend the reach of bylaws as far as they protect the NCAA's "revered tradition of amateurism." *Id.* at 342.

¹²⁹ *O'Bannon*, 802 F.3d at 1064.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *Baker & Brison*, *supra* note 9, at 352.

¹³³ *O'Bannon*, 802 F.3d at 1064-65.

¹³⁴ *Id.* ("[A] school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated." *Id.* See also *Agnew*, 683 F.3d at 340 ("No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.")).

¹³⁵ *Agnew*, 683 F.3d at 343-44; see also *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21-22 (1964) ("[A]ntitrust laws prevent calling the 'consignment' an agency, for then the end result . . .

Second, the NCAA asserted that the plaintiffs lacked standing because they failed to show an “antitrust” injury—an injury that antitrust laws were designed to prevent from occurring.¹³⁶ Agreeing with the district court, the Ninth Circuit confirmed that the plaintiffs incurred injury by not being able to negotiate their compensation in a free market for their services.¹³⁷ The court in *O’Bannon* rightly recognized that, if it were not for the restrictions, the schools and their business partners (e.g., EA) would negotiate directly with the student-athletes for use of their NILs.¹³⁸

2. *The Market for College Athletes*

In *O’Bannon*, the Ninth Circuit acknowledged that the NCAA’s amateurism rules fixed the price for athlete services within a relevant college education market.¹³⁹ At the district court level, Judge Wilken found an additional market for student-athlete NILs, but the Ninth Circuit ignored that market and instead focused all of its analysis on the education market.¹⁴⁰ In regards to that market, the Ninth Circuit looked to the evidence in the record regarding the competition for student services.¹⁴¹ The Ninth Circuit, however, did not view the schools as buyers, but instead treated them as sellers of educational services in the marketplace for potential college athletes.¹⁴² While the Ninth Circuit warrants accolades for being the first to find a relevant market for college athletes, it also deserves demerits for pushing past Judge Wilken’s recognition of a relevant market for athlete NILs.¹⁴³ However, the court in this case was charged with conducting an examination of the NCAA’s compensation

would be avoided merely by clever manipulation of words, not by differences in substance.” (internal citation omitted)).

¹³⁶ *O’Bannon*, 802 F.3d at 1066-67 (quoting *Glen Holly Entm’t, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007-08 (9th Cir. 2003) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).

¹³⁷ *Id.* at 1067.

¹³⁸ *Id.* at 1067-68.

¹³⁹ *Id.* at 1070.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1071-72.

¹⁴² Although the Ninth Circuit’s analysis of the market is belied by the reality that the schools providing the most prestigious academic opportunities rarely field the best intercollegiate sports teams. *Id.* at 1057-58 (“The rules prohibiting compensation for the use of student-athletes’ NILs are thus a price-fixing agreement: recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the ‘sellers’ of these bundles—the colleges—collectively ‘agree to value [NILs] at zero.’ Under this theory, colleges and universities behave as a cartel—a group of sellers who have colluded to fix the price of their product.” (alternation in original) (internal citation omitted)).

¹⁴³ *Id.*

limits and did not need to address the legality of the NCAA's rules that restrict the use of athlete NILs.

3. *The Procompetitive Presumption*

The Ninth Circuit rejected a reading of *Board of Regents* that provided the NCAA with a quasi-exemption in the way of a procompetitive presumption of validity for its amateurism rules.¹⁴⁴ However, the court in *O'Bannon* had no problem citing to Justice Stevens' dicta in *Board of Regents* in finding a procompetitive justification in the preservation of amateurism.¹⁴⁵ The Ninth Circuit had no market-based evidence in the record to support its finding that consumer interest in intercollegiate athletics demanded the existence of rules that prohibit college athletes from being adequately compensated for their efforts.¹⁴⁶ Nevertheless, the Ninth Circuit found a "concrete procompetitive effect" in preserving the NCAA's version of amateurism based on the concept's appeal to consumers.¹⁴⁷ That effect provided the Ninth Circuit with a basis for agreeing with the district court's decision that preservation of amateurism and the integration of athletics and academics justified some restraints imposed by the NCAA's amateurism model.¹⁴⁸

There are two critical points worth noting in the Ninth Circuit's reasoning that preserving amateurism and athlete integration produce net procompetitive effects when balanced against the economic harms resulting from the NCAA's amateurism restraints.¹⁴⁹ The first involves the fact that in reaching this conclusion the Ninth Circuit dismissed Judge Wilken's skepticism regarding the degree of interest consumers place on the role of amateurism in making the NCAA's products.¹⁵⁰ In her opinion, Judge Wilken questioned whether amateurism acted as a primary driver of consumer interest and instead found that what attracts consumers to college sports were aspects unrelated to amateurism, "such as loyalty to their alma mater or affinity for the school in their region of the country."¹⁵¹ Yet, the only mention from the majority of Judge Wilken's skepticism came in the comment that she "probably underestimated the NCAA's commitment to amateurism."¹⁵² There is no questioning

¹⁴⁴ *Id.* at 1072-73.

¹⁴⁵ *Id.* at 1073.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1073.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1059 (citing *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 977-78 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)).

¹⁵² *Id.* at 1073.

that the NCAA is committed to preserving an appearance of amateurism in its products, but the frequency of rule violations and scandals involving breaches of the amateurism model by member institutions, their business partners, and the athletes unquestionably undermines the value of amateurism in intercollegiate athletics.

The other point worth noting involves the notion that the nature of intercollegiate athletics is preserved by NCAA rules that restrict athlete compensation and the use of their NILs as means for facilitating athlete integration into their academic communities.¹⁵³ As with the mission of preserving amateurism, there is also no market-based evidence for the notion that integrating athletes into classrooms serves as a core component of the NCAA's products and is justified by compensation limits and NIL restrictions.¹⁵⁴ In actuality, the athlete integration justification defies common sense and contradicts the Ninth Circuit's own reasoning in *O'Bannon*.¹⁵⁵

In regards to the conflict with common sense, the Ninth Circuit ignored examples involving former college athletes like Johnny Manziel who had to stop attending live classes because of his celebrity, which was built as a college athlete.¹⁵⁶ The NCAA permits college athlete NIL use in commercial broadcasts that are viewed by millions of people around the world.¹⁵⁷ Further, the NCAA allows member institutions to market college athletes for prestigious awards like the Heisman Trophy.¹⁵⁸ If athlete integration were a sincere and paramount concern for the NCAA, it would not participate in or tolerate the business of promoting and profiting off of the use of college athletes' NILs in the media. Turning back to the example of Johnny Manziel, the NCAA's only concern regarding their "integration"

¹⁵³ *Id.* at 1072.

¹⁵⁴ *Id.* at 1075.

¹⁵⁵ *See id.* at 1079.

¹⁵⁶ *See* Michael Middlehurst-Schwartz, *Johnny Manziel Taking Only Online Classes at Texas A&M*, USA TODAY (Feb. 18, 2013), <https://www.usatoday.com/story/gameon/2013/02/18/johnny-manziel-texas-am-online-classes/1929057/>.

¹⁵⁷ *See* Alex Kirshner, *Don't Miss the Point About NCAA Tournament Money*, SBINATION (Mar. 7, 2018), <https://www.sbnation.com/college-basketball/2018/3/7/17093112/ncaa-tournament-revenue-tv-athletes-2018>.

¹⁵⁸ *See* Alex Kirshner, *The Best and Weirdest School Heisman Trophy Campaigns*, SBINATION (Aug. 15, 2018), <https://www.sbnation.com/college-football/2018/8/3/17625796/heisman-trophy-campaigns-best>.

resulted not from his removal from classroom settings, but from Manziel's alleged involvement in the selling of his autographs.¹⁵⁹

The Ninth Circuit was also inconsistent in its justification of athlete integration in *O'Bannon*.¹⁶⁰ The NCAA argued that any relaxing of its amateurism rules would deprive college athletes of choice by removing an amateur and educational option for their athletic pursuits.¹⁶¹ The majority in *O'Bannon* rejected the NCAA's reasoning and instead found that abandonment or loosening of NCAA compensation limits might actually enhance academic opportunities for college athletes by affording them the resources to stay in school longer.¹⁶²

The court's recognition on that point is important because the reasoning should extend to include the reality that not all students come from the same economic settings. Some students come from wealth and privilege while others grew up in depressed economic conditions.¹⁶³ This reality exists even when there are no athletes in the classroom. Restricting financial resources for college athletes does not make them like everybody else; it actually makes them very different from other students who are permitted to use any celebrity built into their reputations to their advantage.¹⁶⁴ Similarly, the schools and the NCAA already make commercial use of

¹⁵⁹ See Peter Berkes, *Johnny Manziel Briefly Suspended, Ending NCAA Autographs Investigation*, SBATION (Aug. 28, 2013), <https://www.sbnation.com/college-football/2013/8/28/4668634/johnny-manziel-suspended-texas-a-m>.

¹⁶⁰ *O'Bannon*, 802 F.3d at 1075.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1073 (“Indeed, if anything, loosening or abandoning the compensation rules might be the best way to ‘widen’ recruits’ range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school.”).

¹⁶³ See Landon T. Huffman & Coyte G. Cooper, *I'm Taking my Talents to . . . An Examination of Hometown Socio-Economic Status on the College-Choice Factors of Football Student-Athletes at a Southeastern University*, 5 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 226 (2012).

¹⁶⁴ See Njororai Wycliffe & W. Simiyu, *Individual and Institutional Challenges Facing Student Athletes on U.S. College Campuses*, 1 J. PHYSICAL EDUC. & SPORTS MGMT. 16, 16-24 (2010) (“Student athletes face challenges of individual nature including their personal involvement in academic oriented activities, time constraints, class attendance, personal goal setting and career choices, physical and emotional fatigue, transition to college environment and academic grades, as well as external ones such as coach demands, institutional policies, discrimination; marginalization from college mainstream activities; college mission and learning environment, and eligibility demands from National Collegiate Athletic Association and National Association of Intercollegiate Athletics.”). See generally *For Student-Athletes' Mental Health: A More Educated Approach*, NCAA, <http://www.ncaa.org/about/student-athletes-mental-health-more-educated-approach> (last visited Feb. 20, 2019).

athlete NILs, so how could additional use by the athletes impair their integration? If anything, a relaxed NIL regime that permits college athletes to profit from their identities may afford athletes the opportunity to extend their college education. Unfortunately, the Ninth Circuit's inconsistencies on the integration justification were overshadowed by the flaws in the court's findings following its application of the less restrictive alternative test.

4. *The Ninth Circuit's Less Restrictive Alternative*

The Ninth Circuit confirmed that the district court did not err in allowing grants-in-aid up to the full cost of attendance, as it would be substantially less restrictive.¹⁶⁵ Quoting from Mark Emmert, President of the NCAA, these payments would be allowed without violating NCAA amateurism principles because they would cover "legitimate costs" to attend school.¹⁶⁶ Further, none of the evidence on the record showed that this higher payment would alter consumer interest in the NCAA product, or impede the integration of student-athletes into their academic communities.¹⁶⁷ However, the Ninth Circuit felt the district court erred when it relied on the opinion of NCAA's witness, a former television executive, Neal Pilson.¹⁶⁸ The NCAA proffered up Pilson as an expert on consumer interest in college athletics and his "expertise" led him to suggest that consumers would not be bothered if student-athletes were compensated \$5,000 a year.¹⁶⁹ The court disagreed with that testimony and considered it to be nothing more than an "offhand comment."¹⁷⁰ Instead, the Ninth Circuit viewed any payment not tethered to educational expenses as a "quantum leap."¹⁷¹

The finding that cost-of-attendance stipends are a less restrictive means based on their purported tether to education is in error. The majority in *O'Bannon* warned that paying athletes "any" amount of money that is not tethered to educational expenses would impair consumer interest in the NCAA's products.¹⁷² Yet, the cost-of-attendance payments are not connected to the educational expenses

¹⁶⁵ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1073 (9th Cir. 2015).

¹⁶⁶ *Id.* at 1075.

¹⁶⁷ *Id.* at 1064.

¹⁶⁸ *Id.* at 1078.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1078-79.

required by the school.¹⁷³ Instead, they are estimates by each institution that include various expenses one may incur while attending a university.¹⁷⁴ The member institutions do not control the use of cost-of-attendance stipends by athletes, who can spend the money as they see fit.¹⁷⁵ Since 2015, college athletes have been paid cost-of-attendance stipends that make them nothing more than “poorly-paid professionals.”¹⁷⁶ The fact that the word “attendance” is used by the matrix for estimating the amount schools provide does not transform the compensation into an education-related expense.¹⁷⁷ In this regard, the use of terminology to tether the payments to education is no different from the NCAA’s classification of its regulations as “eligibility rules.”¹⁷⁸ Accordingly, if the Ninth Circuit’s reasoning on consumer interest in *O’Bannon* held true, consumers would have lost interest in the NCAA’s products, but that has not happened.¹⁷⁹ Instead, another set of antitrust actions resulted from *O’Bannon* in *Alston v. NCAA* and *Jenkins v. NCAA*, which were consolidated into *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation (Grant-in-Aid)*.¹⁸⁰ On March 8, 2019, on the brink of “March Madness,” Judge Wilken delivered her decision in *Grant-in-Aid*, which was her second ruling against the NCAA’s amateurism rules.¹⁸¹

C. In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation (Grant-in-Aid)

Grant-in-Aid involved an antitrust action brought by and on behalf of current and former student-athletes who played Division I football, as well as men’s and women’s college basketball, against the NCAA and eleven of their conferences.¹⁸² The claims in *Grant-in-Aid* alleged that the defendants violated the Sherman Act

¹⁷³ See Thomas A. Baker, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 683 (2018).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 679, 699.

¹⁷⁷ *Id.* at 683.

¹⁷⁸ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1065 (9th Cir. 2015).

¹⁷⁹ See Baker *supra* note 173, at 697.

¹⁸⁰ *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1065 n. 5 (N.D. Cal. 2019).

¹⁸¹ See *O’Bannon*, 802 F.3d at 1051, 1054-55.

¹⁸² The conferences include: American Athletic Conference, Atlantic Coast Conference, Big 12, Big Ten, Conference USA, FBS Independents, Mid-American, Mountain West, Pac-12, Southeastern Conference, and Sun Belt. See *College Football Conferences*, ESPN.COM, <http://www.espn.com/college-football/conferences> (last visited Mar 15, 2019).

through the imposition of a cap on athlete compensation.¹⁸³ In their complaint, the plaintiffs alleged that the cap on their compensation was set well below what they would otherwise receive in exchange for their athletic participation from an unrestrained market.¹⁸⁴ Their claims built on Judge Wilken's and the Ninth Circuit's rulings in *O'Bannon*.

Similarly, the NCAA's defense in *Grant-in-Aid* also tracked the findings in *O'Bannon* by asserting that the caps on athlete compensation served the procompetitive purposes of preserving consumer interest in amateurism¹⁸⁵ and promoting athletes' integration into their educational communities.¹⁸⁶ In her district court decision, Judge Wilken recognized that extending compensation to cover the cost-of-attendance did not impair consumer demand for the NCAA's intercollegiate products.¹⁸⁷ Furthermore, she recognized that the commercial deals brokered by the NCAA since 2015 have been some of the most valuable and long-term deals ever leveraged for media rights in college sports.¹⁸⁸ Judge Wilken accepted the testimony of plaintiffs' expert Dr. Daniel Rascher that the NCAA's compensation rules did not serve the purpose of preserving amateurism.¹⁸⁹ He cited to his own studies for the position that consumer demand in college sports is not influenced by caps on athlete compensation.¹⁹⁰ Judge Wilken also determined that the NCAA failed to proffer credible evidence for the position that the caps were needed to maintain consumer interest in its products.¹⁹¹ Additionally, Judge Wilken found that the caps did not integrate student-athletes into their educational communities.¹⁹²

The court in *Grant-in-Aid* did recognize the role of amateurism in protecting the distinction between college and professional athletics.¹⁹³ Yet, the court did not

¹⁸³ *Grant-in-Aid*, 375 F. Supp. 3d at 1058.

¹⁸⁴ *Id.* at 1062.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1099-1100.

¹⁸⁸ *Id.* at 1077; see, e.g., Rodger Sherman, *The NCAA's New March Madness TV Deal Will Make Them A Billion Dollars A Year*, SBNATION (Apr. 12, 2016), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner> ("The NCAA Tournament will be broadcast on CBS/Turner through 2032. The companies signed an eight-year, \$8.8 billion extension with the NCAA for the broadcast rights to March Madness, putting the tournament's yearly TV value at over a billion dollars for the first time.").

¹⁸⁹ *Grant-in-Aid*, 375 F. Supp. 3d at 1076-77.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1080.

¹⁹² *Id.* at 1102.

¹⁹³ *Id.* at 1089.

accept that caps imposed by the NCAA were necessary.¹⁹⁴ Instead, Judge Wilken held that the goals of protecting amateurism and academic integration could be done through less restrictive means.¹⁹⁵ Siding with the plaintiffs' proposal, the court found that limits could be imposed on non-educational expenses, but not educational-related expenses that were paid out by the schools.¹⁹⁶ Accordingly, the court removed the NCAA's ability to limit athlete compensation and left to the athletic conferences the responsibility to set their own limits, so long as those limits were not created in collaboration with other conferences.¹⁹⁷

Judge Wilken's decision effectively stripped the NCAA of its power to limit athlete compensation for costs tethered to athlete education.¹⁹⁸ In making this determination, Judge Wilken borrowed the "tether" terminology used by the Ninth Circuit in *O'Bannon*, but this time the term worked against the NCAA's interests in maintaining control over athlete compensation.¹⁹⁹ While there was nothing in the *Grant-in-Aid* decision that directly speaks to the NCAA's ability to restrict athlete NIL use, the decision serves as another in a series of serious paper cuts that have hurt the NCAA's ability to restrict athlete compensation. Since the NCAA can no longer cap athlete compensation from its members, how can it restrict athlete compensation from those willing to sponsor athletes for the use of their NILs?

D. Amateurism Is Not the Primary Driver of College Athletics Consumer Success

In *O'Bannon*, the Ninth Circuit deviated from the district court when it ruled that the NCAA's amateurism rules serve the procompetitive purpose of preserving the popularity of collegiate athletics.²⁰⁰ In making this ruling, the Ninth Circuit circles back to *Board of Regents* and Justice Stevens' statement that amateurism is required for collegiate athletics to be successful.²⁰¹ However, in *O'Bannon* the Ninth Circuit viewed amateurism as a procompetitive purpose in their analysis, instead of

¹⁹⁴ *Id.* at 1083 (limiting the unlimited payments that are found in professional sports is procompetitive compared to no restriction at all).

¹⁹⁵ *Id.* at 1062.

¹⁹⁶ *Id.* at 1087 ("It would be less restrictive than the current compensation rules, allowing for additional compensation and benefits related to education. It would therefore be less harmful to competition in the relevant market, but would not provide a vehicle for unlimited cash payments, unrelated to education.").

¹⁹⁷ *Id.* at 1109.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1105.

²⁰⁰ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1073 (9th Cir. 2015).

²⁰¹ *Id.* at 1074.

being valid as a rule of law.²⁰² In making their opinion, the district court did not believe that amateurism was the primary driver for collegiate athletics success; instead they theorized that other factors such as “loyalty to their alma mater or affinity for the school in their region of the country” were more indicative of success.²⁰³

Since *O’Bannon* allowed for stipends unrelated to educational expenses to be paid to student-athletes, experts have been able to study whether a relationship between payments to student-athletes and college athletics popularity exists.²⁰⁴ By evaluating live game attendance and television attendance before and after stipend payments in the amount of cost of attendance began, researchers determined there was no relationship between stipend payments to student-athletes and the popularity of the institutions.²⁰⁵ Instead, the data pointed to team performance as the main driver of popularity in game attendance.²⁰⁶ This study demonstrates that the Ninth Circuit in *O’Bannon* was incorrect, and payments to the student-athletes for their NILs would not irreparably harm the NCAA.²⁰⁷

While the Ninth Circuit said payments unrelated to education would ignore what makes the NCAA what it is today—amateurs participating in a sport while earning an education—they did not evaluate which payments would comprise the cost of attendance.²⁰⁸ Schools are able to use the cost of attendance payments as a recruiting tool, raising them as needed.²⁰⁹ Without oversight of the composition of the cost-of-attendance payments, the NCAA allows for payments to be made to players for their on-field performance.²¹⁰ This creates a further imbalance between the member institutions, since universities with higher revenues are able to offer greater cost-of-attendance payments.²¹¹ The knowledge of how the cost of

²⁰² *Id.* at 1064.

²⁰³ *Id.* at 1059

²⁰⁴ See Baker, *supra* note 173, at 688.

²⁰⁵ *Id.* at 694.

²⁰⁶ *Id.* at 696.

²⁰⁷ *Id.* at 700.

²⁰⁸ *O’Bannon*, 802 F.3d at 1076-77.

²⁰⁹ See Baker, *supra* note 173, at 683-84.

²¹⁰ See *id.* at 678.

²¹¹ For example, Texas A&M paid out \$6,294 per student in 2018, or a total of \$1.6 million between all students—they had a highest total revenue in college of \$148 million. While Texas Tech, who ranked 25th in total revenue at \$60 million, offered each of their student-athletes a stipend of \$4,820, for a total of \$899,224. See Carter Karels, *Three Years in Cost of Attendance Stipends Paying Off*, SAN ANTONIO EXPRESS NEWS (Aug. 4, 2018), <https://www.expressnews.com/sports/article/Three-years-in-cost-of-attendance-stipends-paying->

attendance payments are being exploited by member institutions, and the proof that they have not decreased collegiate athletics popularity, show that the *O'Bannon* court was incorrect in saying that allowing payments to college athletes would be a “quantum leap” in removing amateurism from the NCAA.²¹²

Compensating college athletes for their NILs would be within the current scope of how amateurism is currently defined since the payments would not come from the member institutions. Given this fact, alteration or removal of the NIL restrictions seems like the logical solution to remove the current recruiting black market.

III

COLLEGE ATHLETE PUBLICITY RIGHTS

Ed O'Bannon wasn't the only former college athlete to challenge the legal use of athlete NILs in EA's NCAA-based sport video games. Two former NCAA quarterbacks, Sam Keller and Ryan Hart, both filed actions around the same time as O'Bannon, except that they based their claims on the right of publicity.²¹³ Keller filed his action in a Ninth Circuit jurisdiction, and his case was eventually consolidated with O'Bannon's, creating *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Name & Likeness)*.²¹⁴ Hart's case was filed in a Third Circuit jurisdiction.²¹⁵ The *Name & Likeness* and *Hart* cases were nearly identical in both the claims that were made and in the way the courts resolved them.

In both *Name & Likeness* and *Hart*, former student-athletes asserted their right to manage their celebrity and control the commercial use of their identities through legal actions, claiming they owned a right of publicity.²¹⁶ Derived from the right of

13132632.php; Chris Smith, *College Football's Most Valuable Teams: Texas A&M Jumps To No. 1*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/chris-smith/2018/09/11/college-football-most-valuable-teams/#c93317d6c647>.

²¹² *O'Bannon*, 802 at 1078.

²¹³ See Complaint at 17, *Keller v. Elec. Arts, Inc.*, No. 09-1967 (N.D. Cal. 2009). See generally *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

²¹⁴ See *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

²¹⁵ *Hart*, 717 F.3d at 141.

²¹⁶ See *Student-Athlete Names & Likeness Litig.*, 724 F.3d at 1273 (“EA did not contest before the district court and does not contest here that Keller has stated a right-of-publicity claim under California common and statutory law. Instead, EA raises four affirmative defenses derived from the First Amendment.”) (internal citations omitted); see also *Hart*, 717 F.3d at 153 n.14. The court acknowledged that the right of publicity is a right for athletes and rejected the notion that athletes are already compensated for their image.

privacy,²¹⁷ the right of publicity recognizes and protects an individual's economic interest in their NIL.²¹⁸ Grounded in state common law doctrine and reinforced by legislation in twenty-two states,²¹⁹ the right of publicity is now recognized as an independent right.²²⁰ The right of publicity was first conceptualized as an independent right in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,²²¹ a

²¹⁷ Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 38 (2010) (“The doctrine is closely associated with the right to privacy because it extends the privacy right that people have in protecting their identity and controlling its use in a commercial setting.”).

²¹⁸ Thomas A. Baker III, et al., *Simplifying the Transformative Use Doctrine: Analyzing Transformative Expression in EA's NCAA Football Sport Video Games*, 7 ELON L. REV. 467, 490 (2015) (quoting Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, SYRACUSE L. REV. 227, 231 (2013)) (“While there is no uniform source of legal authority on the right of publicity, section 46 of the Restatement (Third) of Unfair Competition provides the ‘best summary’ for how the right is generally understood to work. Section 46 states that ‘one who appropriates the commercial value of a person’s identity by using it without consent the person’s name, likeness, or other indicia of identity for the purposes of trade is subject to liability.’” (footnote omitted)). See also Thomas Glenn Martin, Jr., *Comment, Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California’s Antiquated Right of Publicity* 4 UCLA ENT. L. REV. 99, 110 (1996) (“Courts seem to agree that the right of publicity is the right of an individual, especially a public figure or celebrity, to control the commercial use of his or her name or likeness.”). The Ninth Circuit Court of Appeals, interpreting California law, has expanded the scope of the right of publicity from an individual’s specific attributes, such as name, likeness, voice, signature or photograph, to embrace an individual’s identity or persona, thereby employing an “identifiability” test to prove infringement of an individual’s right of publicity. See, e.g., *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993), cert. denied, 113 S. Ct. 2443 (1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), cert. denied, 113 S. Ct. 1047 (1993); *Midler v. Young & Rubicam, Inc.*, 944 F.2d 909 (9th Cir. 1991) (unpublished opinion), cert. denied, 503 U.S. 951 (1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

²¹⁹ Matthew G. Matzkin, *Gettin’ Played: How the Video Game Industry Violates College Athletes’ Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 229 (2001).

²²⁰ See *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Mar. 17, 2019).

²²¹ See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953). The plaintiff entered into a contract with a professional baseball player for the exclusive right to use their image on baseball cards that were included in packs of plaintiff’s chewing gum. Defendant induced the professional baseball player to allow use of player’s image on/ within their packs of chewing gum, during the plaintiff’s contract with player. Defendant argues that plaintiff’s contract with player was no more than a release of their right of privacy, which without the plaintiff would have incurred liability for use of image. Furthermore, defendant states that the right of privacy is personal and not assignable. Therefore, player did not transfer any “property” right to the plaintiff. The majority of the court rejected defendant’s contention. They acknowledged that one has value

case in which two chewing gum manufacturers fought over the use of a professional baseball player's likeness. The court in *Haelan* constructed the right of publicity on its finding that celebrities should have the right to control the commercial use of their identities.²²² This independent right of publicity was confirmed in the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting*,²²³ which was also the first case to test this new right against the First Amendment.²²⁴ The court in *Zacchini* acknowledged an inherent tension between the First Amendment and the right of publicity, given that the latter often infringes upon expressions covered by the former.²²⁵ The *Zacchini* court held that the state's right for celebrities to protect the use of their identities must be balanced against the First Amendment; however, the court left open the means for balancing these competing interests.²²⁶

Following *Zacchini*,²²⁷ several balancing tests were developed, but the test that has since gained the most influence and traction in terms of use is the "transformative" test, which was borrowed from intellectual property law.²²⁸ The

in their photograph and without a right of publicity over their image they are deprived of that value. Therefore, player should be granted the "right of publicity" over their image, and thus have the exclusive right to determine the use of their picture.

²²² *See id.* at 868.

²²³ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (Plaintiff sought compensation for the television network's appropriation of his entire human-cannonball performance. The court recognized that Plaintiff had a "proprietary" interest in controlling commercialization of his act, as it is how he made his livelihood. The defense argued that, as a television station company, they have the privilege to report matters of public interest, as granted by the First and Fourteenth Amendments in the United States Constitution. The majority of the *Zacchini* court rejected the defense that plaintiff's performance was of public interest, which would have afforded defendant use. Instead, the court made clear that there is a commercial value to the plaintiff's right of publicity regarding the performance, thus it deserves protection.).

²²⁴ *See id.*

²²⁵ *Id.* at 576.

²²⁶ *Id.* at 577-79.

²²⁷ *Baker et al.*, *supra* note 218, at 473 ("In *Zacchini*, the Court cautioned against the chilling of free expression by requiring courts to balance the public's interest in the challenged expression against the individual's right to prevent unjust enrichment.").

²²⁸ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)) ("As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.' This inquiry into whether a work is 'transformative' appears to us to be

California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*²²⁹ (*Comedy III*) was the first to use the transformative test to balance the right of publicity against the First Amendment.²³⁰ An expression is transformative when “the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”²³¹ In answering this question, the reviewing court must discern whether the celebrity’s NILs were used as raw materials in the creation of a new and expressive creation.²³²

The transformative test evaluates the value associated with a good and the source from which it is derived.²³³ A perfect example of value derivation analysis can be found in *No Doubt v. Activision Publishing, Inc.*, a case involving the unauthorized use of NILs belonging to a rock band (No Doubt) and its members.²³⁴ Initially, the band agreed to the use of their NILs in the game, but later retracted that authorization when they learned that their avatars were playing songs by other artists.²³⁵ The game producer defendant argued that the use of No Doubt within the video game was transformative, and protectable under the First Amendment as an artistic work, because those who played the game could alter the avatars and manipulate the music they played.²³⁶ The Court determined that since No Doubt was a band that sang and played instruments, the avatars in the video game were exactly replicating No Doubt’s real life activities.²³⁷ Thus, the defendants featured the band

necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment. As the above quotation suggests, both the First Amendment and copyright law have a common goal of encouragement of free expression and creativity, the former by protecting such expression from government interference, the latter by protecting the creative fruits of intellectual and artistic labor.”) (internal citations omitted).

²²⁹ See generally *id.* at 800-01 (plaintiff alleging a misappropriation of deceased celebrity likeness by defendant on lithographs and t-shirts in violation of their right of publicity).

²³⁰ *Id.* at 808 (“[W]hen a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. As has been observed, works of parody or other distortions of the celebrity figure are not, from the celebrity fan’s viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.”).

²³¹ *Id.* at 799.

²³² Cianfrone & Baker, *supra* note 217, at 53 (quoting *Comedy III Prods.*, 21 P.3d at 809 (Cal. 2001)).

²³³ *Comedy III Productions*, 21 P.3d at 810.

²³⁴ See *No Doubt v. Activision Pub’g, Inc.*, 192 Cal. App. 4th 1018 (2011).

²³⁵ *Id.* at 1024.

²³⁶ *Id.* at 1034.

²³⁷ *Id.*

in its game in the same setting from which the band derived its fame.²³⁸ The court added that the alterations that game players could make to the avatars did not add enough transformative expression to qualify for First Amendment protection.²³⁹ Both the Ninth Circuit in *Name & Likeness* and the Third Circuit in *Hart* relied heavily on the facts and reasoning in *No Doubt* in resolving their respective cases.²⁴⁰

The controversy at the center of both *Name & Likeness* and *Hart* involved a franchise of video games (*NCAA Football* and *NCAA Basketball*) that began in 1998 and continued until the conclusion of the two cases.²⁴¹ The sport video games (SVGs) were produced to replicate the sports of men's basketball and football in a video game. Within the games were replications of stadia, mascots, and fight songs from real NCAA sports teams.²⁴² The problem with the SVGs was that in EA's attempt to make sure that the games replicated real-life NCAA games, EA also incorporated the identities of active NCAA players.²⁴³ These identities were reflected in the jersey numbers, skill sets, and just about all noticeable physical characteristics.²⁴⁴ Players could even activate a feature hidden within the game by uploading player rosters.²⁴⁵ Real rosters could be found in a file-sharing forum and once uploaded, the game announcers would say the names of specific players.²⁴⁶ In its initial answer, EA asserted an affirmative defense to Keller's complaint with the assertion that the NCAA had granted EA the licensed right to use athlete NILs in the games.²⁴⁷ Keller's complaint was amended to answer EA's affirmative defense that

²³⁸ *Id.*

²³⁹ The court disagreed with the defenses because *No Doubt* was being used to play songs and sing, just as they do in real life. Being allowed to change the main character's voice to sing as a male was not transformative enough. *See id.* ("That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of *No Doubt*'s members doing exactly what they do as celebrities.").

²⁴⁰ *In re NCAA Student-Athlete Name & Likeness Litig.*, 724 F.3d 1268, 1279 (9th Cir. 2013) ("Like the majority in *Hart*, we rely substantially on *No Doubt*, and believe we are correct to do so."); *see also Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

²⁴¹ Chris Smith, *NCAA Football Video Game Is Worth Over \$75,000 Per Year For Top Teams*, FORBES (Aug. 22, 2013), <https://www.forbes.com/sites/chris-smith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-for-top-teams/#300c49bb26d4>.

²⁴² Complaint at 3, *Keller v. Elec. Arts, Inc.*, No. 09-1967 (N.D. Cal. 2009).

²⁴³ *Id.*

²⁴⁴ *Id.* at 4.

²⁴⁵ *Id.* at 9.

²⁴⁶ *Id.*

²⁴⁷ *See Electronic Arts Inc.'s Answer to Antitrust Allegations in Second Consolidated Amended Class Action Complaint* at 63, *In re Student-Athlete Name & Likeness Litig.*, No. C 09-

it did not really use player NILs.²⁴⁸ Meanwhile, the NCAA managed to get itself dismissed from the *Name & Likeness* case, leaving its business partners EA and CLC left to defend the obvious use of player NILs in their games.²⁴⁹ In fact, the district court in *Name & Likeness* rejected EA's claim that it did not use player NILs when it dismissed EA's motion for judgment on the pleadings.²⁵⁰

Both the *Name & Likeness* and *Hart* cases reached their respective Circuits on appeals that focused on whether the incorporation of college athlete NILs into EA's NCAA SVGs was transformative enough for First Amendment protection.²⁵¹ The Ninth Circuit in *Name & Likeness* and the Third Circuit in *Hart* both found that EA intended to mimic student-athletes' appearances within the video game so that they could be identified.²⁵² Following the reasoning in *No Doubt*, both Circuit Courts found that college athlete NILs were replicated in the SVGs in the exact sports settings for which athletes were known.²⁵³ Both Circuit Courts determined that the ability to transform an avatar that is purposely created to display a player's likeness is insufficient to be considered transformative.²⁵⁴ Addressing the transformative nature of game altering features, the Third Circuit in *Hart* found that where "unaltered likeness is central to the core of the game experience, we are disinclined to credit users' ability to alter the digital avatars in our application of the transformative use test to this case."²⁵⁵

The *Name & Likeness* and *Hart* decisions serve as important warnings for those who partner with the NCAA in commercial use of college athlete NILs. The NCAA was well aware that its business partner, EA, made use of college athlete

01967 CW, 2011 WL 3565064 (N.D. Cal. Aug. 11, 2011) (noting as Electronic Arts' fourteenth affirmative defense that "[p]laintiffs' claims are barred, in whole or in part, by the doctrine of license, because some Antitrust Plaintiffs and putative class members have licensed the right to use their Names, Images, and/or Likenesses").

²⁴⁸ Complaint at 4, *Keller*, No. 09-1967.

²⁴⁹ Order on Defendants' Motion to Dismiss at 1, *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom. In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

²⁵⁰ *Id.* at 10.

²⁵¹ See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 165 (3d Cir. 2013); *Name & Likeness*, 724 F.3d at 1272-73.

²⁵² See *Hart*, 717 F.3d at 166; *Name & Likeness*, 724 F.3d at 1276.

²⁵³ See *Hart*, 717 F.3d at 166; *Name & Likeness*, 724 F.3d at 1276.

²⁵⁴ *Hart*, 717 F.3d at 167 ("If the mere presence of the feature were enough, video game companies could commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likenesses."); *Name & Likeness*, 724 F.3d at 1276.

²⁵⁵ *Hart*, 717 F.3d at 168.

likeness in its products.²⁵⁶ In fact, NCAA member institutions provided EA with athlete biographical information and images for incorporation into the games.²⁵⁷ If not for *Name & Likeness* and *Hart*, the NCAA likely would have continued its relationship with EA, and SVGs production would be ongoing today.²⁵⁸ Still, the plaintiffs in *Name & Likeness* and *Hart* should not be credited with killing the highly-successful NCAA Basketball and Football SVGs. That dishonor belongs to the NCAA, its members, and their conferences, because EA expressed its desire to continue production and compensate the college athletes for the use of their NILs.²⁵⁹ Instead, the game fell victim to NCAA bylaw section 12.4.1.1, which prohibits athletes from receiving compensation for third parties' use of their likeness in commercial products.²⁶⁰ The sincerity of that bylaw and its function are undermined, however, by the recognition that commercial broadcasts of NCAA-sponsored events are, in fact, products that make use of college athlete NILs.²⁶¹ Once that fact is acknowledged, we are left with the realization that the NCAA's NIL restrictions seemingly exist only to prevent college athletes from profiting off of the use of their NILs.

The hypocrisy and unfairness produced of the NCAA's NIL restrictions is not lost on some influential lawmakers, who have proposed federal and state legislation

²⁵⁶ Jon Solomon, *NCAA Knew EA Sports Video Games Used Real Players, E-Mails From Ed O'Bannon Lawsuit Show*, AL.COM (Nov. 13, 2012), https://www.al.com/sports/2012/11/ncaa_knew_ea_sports_video_game.html.

²⁵⁷ Complaint at 8, *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom. In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

²⁵⁸ *See generally id.*

²⁵⁹ Jon Solomon, *Ed O'Bannon Lawyers: EA Will Testify it Wanted to Pay Players*, CBS SPORTS (June 4, 2014), <https://www.cbssports.com/college-football/news/ed-obannon-lawyers-ea-will-testify-it-wanted-to-pay-players/> (discussing how plaintiffs in the *O'Bannon v. National Collegiate Athletic Ass'n* trial planned to show documentary evidence from an EA executive describing how EA "wanted to obtain the rights for more precise likenesses and the names of every college athlete on each roster, for which EA was willing to pay more to the NCAA and the college athletes themselves").

²⁶⁰ Nat'l Collegiate Athletic Ass'n, *supra* note 71, at 72, §12.4.1.1 ("Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.").

²⁶¹ This free advertising allows for the multibillion-dollar industry to continue to prosper while the student-athletes receive nothing. Furthermore, the universities force the student-athletes with any knowledge of someone using their NIL to stop them or risk losing their eligibility.

that aims to protect college athletes' publicity rights.²⁶² Most recently, California state lawmakers unanimously passed the Fair Pay to Play Act,²⁶³ which will come into effect on January 1, 2023.²⁶⁴ The Fair Pay to Play Act makes it illegal for a college or university²⁶⁵ to remove an athlete's scholarship—or declare them ineligible—if they make any money off of their NIL.²⁶⁶ Further, U.S. Rep. Mark Walker of North Carolina introduced a bill in the House of Representatives on March 14, 2019 that, if passed, would modify the definition of Qualified Amateur Sports Organizations within the Internal Revenue Code as a means for pressuring the NCAA to lift its restrictions on college athlete NILs.²⁶⁷ In defense of his bill, Rep. Walker stated that “[s]igning on with a university, if you’re a student-athlete, should not be [a] moratorium on your rights as an individual. This is the time and the moment to be able to push back and defend the rights of these young adults.”²⁶⁸ Walker, who was a college athlete and is now vice chair of the Republican House conference,²⁶⁹ added that his bill would not force the NCAA or its members to compensate college athletes for their NIL use, but instead seeks to lift restrictions on college athlete use of their own NILs.²⁷⁰ Bills proffered in South Carolina and New

²⁶² See, e.g., Brian Murphy, *NCAA Must Allow Players to Profit from Name and Image, NC Republican's New Bill Says*, NEWS & OBSERVER (Mar. 7, 2019), <https://www.newsobserver.com/sports/article227181209.html>; see also Jenna West, *South Carolina Lawmakers to File Proposal Similar to California's Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sept. 13, 2019), <https://www.si.com/college-football/2019/09/13/south-carolina-proposal-pay-college-athletes-fair-pay-play-act>; Charlotte Carroll, *N.Y. State Senator Proposes Bill to Pay College Athletes Directly*, SPORTS ILLUSTRATED (Sept. 18, 2019), <https://www.si.com/college-football/2019/09/18/ny-senator-kevin-parker-proposes-bill-pay-college-athletes>.

²⁶³ S.B. 206, 2019 Leg., Reg. Sess. (CA 2019), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206 (enacted) (coauthored by State Sen. Nancy Skinner and Steven Bradford and approved by the California Governor on Sept. 30, 2019, to take effect on Jan. 1, 2023.)

²⁶⁴ *Id.*

²⁶⁵ *Id.* (This law will apply to all intercollegiate athletic programs in California that make an average of \$10,000,000 or more in media rights.)

²⁶⁶ After the unanimous passing of the Fair Pay to Play Act in California, South Carolina lawmakers signaled their intent to introduce a similar bill in January 2020, and New York lawmakers have announced their plan to propose a similar bill as well. See West, *supra* note 262; Carroll, *supra* note 262; see also Steve Berkowitz (@ByBerkowitz), TWITTER (Sept. 4, 2019) <https://twitter.com/ByBerkowitz/status/1169275190842449921> (The bill has a clause that prohibits athletes to have sponsorship deals that conflict with school sponsorship deals.)

²⁶⁷ Murphy, *supra* note 262.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

York follow the reasoning found in Rep. Walker’s bill by making it illegal under state law for schools to revoke scholarships of college athletes who collect income from their NILs.²⁷¹ In Washington state, another bill is pending that would allow student-athletes to earn compensation for their NILs and permit them to retain the services of sports agents.²⁷² The Washington bill would add a new section to chapter 19.86 Revised Code of Washington (“RCW”)—Unfair Business Practices.²⁷³ The existence of these legislative acts demonstrates the vulnerability of the NCAA’s NIL restrictions and reflect the reality that the NCAA should change its rules or risk legal intervention. The next section addresses proposals for change that the NCAA should strongly consider before it is legislatively forced to change.

IV PROPOSALS FOR CHANGING NCAA NIL RULES

This section addresses a previous proposal that the NCAA might refer to when creating its new NIL policy through the process of rule creation. While there is no way of knowing exactly what the NCAA will roll out when it unveils the new and improved approach to regulating college athlete NILs, the policies covered in this section represent realistic options that the NCAA may adopt, either in whole or in part.

In 2016, Professor Gabe Feldman proffered his White Paper, a seminal and (at the time) pioneering proposal for changing the NCAA’s NIL rules, to the Knight Commission of Athletics.²⁷⁴ Professor Feldman’s thoughtful proposal sought to balance college athlete interest in controlling the use of their NILs with the NCAA’s interest in preserving its amateurism model for intercollegiate athletics.²⁷⁵

²⁷¹ *See generally id.*

²⁷² H.B. 1084, 66th Leg., Reg. Sess. (WA 2019), <http://lawfilesextra.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/1084.pdf>.

²⁷³ *Id.*

²⁷⁴ *About The Knight Commission*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, <https://www.knightcommission.org/about-knight-commission/> (last visited Feb. 20, 2019) (“The Knight Commission on Intercollegiate Athletics is an independent group with a legacy of promoting reforms that support and strengthen the educational mission of college sports...The Knight Commission was formed by the John S. and James L. Knight Foundation in October 1989 to recommend a reform agenda in response to highly visible athletics scandals and low graduation rates for college football and men’s basketball players that threatened the integrity of higher education.”).

²⁷⁵ *See generally id.*

A. *Preserving Amateurism*

While acknowledging the NCAA's interest in maintaining the (illusory) line between professional and amateur athletics and the argument that paying athletes would alter the nature of the NCAA's products,²⁷⁶ Professor Feldman distinguished game-related NIL use from college-athlete use of their NILs.²⁷⁷ Professor Feldman suggested lifting NIL restrictions for non-game related activities as a means for preserving the purported line of demarcation between amateur and professional sports within the NCAA.²⁷⁸ Professor Feldman believed that an approach that relaxed NCAA NIL rules so that college athletes had the freedom to commodify and market their reputations would not offend the revered tradition of amateurism so long as the athletes are not paid directly by the schools for their athletic performance and remain enrolled as students in pursuit of a "legitimate college education."²⁷⁹

B. *The NCAA's Educational Mission*

Regarding the NCAA's claims that its NIL restrictions further its educational mission,²⁸⁰ Professor Feldman asserted that education would not be compromised by his proposal. Instead, college athletes should be permitted to benefit from participating in the same commercial markets to which all other students have access.²⁸¹ Professor Feldman was right in his observation that there is no real nexus between NIL restrictions and college athlete education. Otherwise, why wouldn't similar restrictions exist for all students attending NCAA institutions? The NCAA's claim that its rules prevent the creation of a social wedge between athletes and other students is not supported by relevant literature or by common sense.²⁸² If anything,

²⁷⁶ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015).

²⁷⁷ Feldman, *supra* note 17, at 4; *see also O'Bannon*, 802 F.3d at 1077.

²⁷⁸ Feldman, *supra* note 17, at 4.

²⁷⁹ Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 870-71 (2016).

²⁸⁰ *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984); *O'Bannon*, 802 F.3d at 1075.

²⁸¹ Feldman, *supra* note 17, at 5-6.

²⁸² *See generally Simiyu, supra* note 164, at 16-24 ("Student athletes face challenges of individual nature including their personal involvement in academic oriented activities, time constraints, class attendance, personal goal setting and career choices, physical and emotional fatigue, transition to college environment and academic grades, as well as external ones such as coach demands, institutional policies, discrimination; marginalization from college mainstream activities; college mission and learning environment, and eligibility demands from National Collegiate Athletic Association and National Association of Intercollegiate Athletics.").

a wedge exists as a result of the disparate treatment of college athletes that results from NCAA rules that distinguish athletes from other members of the student body.

C. Over-Commercialization

Commercial exploitation of college athletes is a purported concern of the NCAA. However, the sincerity of that concern is belied by the NCAA's own profiteering from the commercial use of college athlete NILs in building the billion-dollar industry of intercollegiate athletics.²⁸³ As Professor Feldman wrote:

The NCAA has long conceded that commercialization and amateurism can co-exist, just not with respect to student-athletes. The perceived—and actual—unfairness in this arrangement grows with each new television deal, coaching contract, and facility renovation, while the selective and blanket restrictions on student-athletes are maintained.²⁸⁴

This imbalance is intensified by the fact that most college athletes do not go onto lucrative careers in professional sports, and this limits their ability to profit off of their NILs once they are no longer competing on their collegiate teams.²⁸⁵ Professor Feldman recognized the urgency for college athletes to capitalize on their opportunities as college athletes and suggested that relaxing NIL rules might reduce some of the demand that results in the black market for college athlete services.²⁸⁶ He added that with less need to monitor for NIL infractions, the NCAA and its members could focus more on working with college athletes in their efforts to grow their personal brands in a way that assists them when their college careers come to a close.²⁸⁷

D. Fearmongering

Defenders of the NCAA's NIL limits often defend them on the basis that relaxing the rules would open the door to a flood of attacks on amateurism principles.²⁸⁸ However, Professor Feldman believes this is an ill-advised argument,

²⁸³ Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 336 (2003) (“[T]he NCAA has strict guidelines regulating the exploitation by commercial entities of its member’s student-athletes.”).

²⁸⁴ Feldman, *supra* note 17, at 6.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 7.

²⁸⁸ Sheetz, *supra* note 279, at 881.

as legal attacks on the NCAA are more likely when there are blanket restrictions.²⁸⁹ The decisions in both *O'Bannon* and *Grant-in-Aid* demonstrate that courts, within the Ninth Circuit at least, are willing to subject the NCAA's regulation of college athletes to rule of reason review.²⁹⁰ The existence of blanket NIL restrictions invites college athletes to challenge the reasonableness of those restrictions and the existence of less restrictive alternatives to them. To this end, Professor Feldman smartly recognized that efforts from the NCAA to assist athletes in the use of their NILs might actually prevent lawsuits rather than create more.²⁹¹ He stated that, "[u]ntil the rights of student-athletes are better protected or respected, it appears inevitable that they and others will continue to seek judicial or legislative alternatives that present a greater threat to the NCAA's amateurism foundation."²⁹²

E. Proposal Specifics

Professor Feldman's proposal would have allowed for college athletes to earn compensation related to use of their non-game related NILs.²⁹³ In order for this to occur, he laid out specific measures that the NCAA should take to ensure that college athletes were acting within the NCAA's educational mission and other core goals.²⁹⁴ One of the more basic components of his proposal required college athletes to seek out permission before representing the institution in any advertisements.²⁹⁵ Feldman grounded this requirement in contract law and the need for a license in order to display a member institution's trademarks.²⁹⁶

Next, Professor Feldman suggested that the NCAA and its member institutions should be notified of all NIL agreements and have final approval.²⁹⁷ In addition, he recommended that the NCAA should not allow the institutions to provide any assistance in finding NIL agreements for their athletes.²⁹⁸ Constraining institutions from assisting with sponsorship deals seemed to be an attempt to ensure that the institutions were not compensating college athletes for their on-field

²⁸⁹ Feldman, *supra* note 17, at 7.

²⁹⁰ See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2018).

²⁹¹ Feldman, *supra* note 17, at 8.

²⁹² *Id.*

²⁹³ *Id.* at 8-9.

²⁹⁴ *Id.* at 5-6.

²⁹⁵ *Id.* at 9-10.

²⁹⁶ See generally *id.*

²⁹⁷ *Id.* at 9-12.

²⁹⁸ *Id.*

production.²⁹⁹ Professor Feldman also added a requirement for college athletes to be in good academic standing as a condition to permitted NIL use.³⁰⁰ By adding an academic eligibility component Professor Feldman infused within his proposal a measure for motivating athlete success in the classroom.

Next, Professor Feldman addressed the oversight of the potential NIL agreements by proposing that the NCAA form a NIL committee to govern the approval process.³⁰¹ The proposed committee would be responsible for creating objective standards to evaluate the agreements. Suggested considerations for the committee included determining an appropriate level of compensation, the appropriateness of required activities under the NIL agreement, the character and integrity of third-parties who want to use college athlete NILs, demands made on athlete involvement, and any educational benefits that flow from the NIL agreement.³⁰² Professor Feldman also suggested that the NCAA adopt a standard NIL agreement form for college athletes and a group licensing agreement.³⁰³ The standard NIL forms would be provided by institutions and used by college athletes to ensure that agreements adhered to the NCAA's missions and that there would be minimal interference with the student-athlete's educational pursuits.³⁰⁴ The standard NIL would also include a "reverse moral clause,"³⁰⁵ allowing the athlete to terminate a contract if the company were subject to an event that created a negative public perception.

Turning next to Feldman's proposal of a model group licensing agreement, he suggested that this document would need to allow for the institution to use the non-game related NILs of all college athletes in groups for commercial products like SVGs.³⁰⁶ The oversight and standard form agreements would provide the NCAA control over most aspects of the group licensing agreements.³⁰⁷ The NCAA would be able to limit who could sign group licensing deals and the composition of those

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 11 ("will terminate the agreement based on any conduct that brings the third party into public dispute").

³⁰⁶ *Id.* ("[R]evenue... will be shared between the institution and student-athletes.").

³⁰⁷ *Id.*

contractual arrangements so that the organization could maintain its interest in protecting athlete education.³⁰⁸

In order to ensure that all of the above could be accomplished in accordance with the NCAA's mission, Professor Feldman suggested that the NCAA and its members set forth guidelines before NIL agreements were effectuated.³⁰⁹ He found that oversight might include reasonable restrictions in the form of a "signing period" for NIL agreements and for requirements that third parties register with the NCAA prior to engaging with college athletes for the use of their NILs.³¹⁰ He also suggested the possibility of creating a trust fund for college athletes that would hold monies mined from NIL use until the athlete graduates or terminates their eligibility.³¹¹

Finally, Professor Feldman suggested that the NCAA should allow college athletes to hire an agent to handle the fundamentals that come along with pursuing, evaluating, and negotiating the NIL agreements.³¹² Depending on how the NCAA would alter the bylaws regarding agents, this may be the only role the agent would be allowed to take on for the college athletes.³¹³

Professor Feldman's proposal was made in 2016, but his suggestions seemingly fit comments made by Dr. Rice in her personal statements on the Commission's final report.³¹⁴ Dr. Rice stated that she personally believed that college athletes should be permitted more flexibility to build their brand while not losing the opportunity to play at the collegiate level.³¹⁵ Professor Feldman's proposal balanced the line of maintaining hard limits against game related compensation while also permitting athletes to benefit from the commercial value that is inherent to their identities.³¹⁶ In this regard, Dr. Rice's statements in her report echo what Professor Feldman proposed in his White Paper.³¹⁷ While the authors of this article applaud both Professor Feldman and Dr. Rice and urge the NCAA to adopt the

³⁰⁸ *Id.* at 5.

³⁰⁹ *Id.* at 10.

³¹⁰ A signing period would ensure student-athletes are focused on their education during the semesters and not distracted by business opportunities. *See id.* at 11 (Professor Feldman continues to propose a weekly cap on number of hours a student-athlete can devote to their NIL contracts.).

³¹¹ *Id.* at 12.

³¹² *Id.*

³¹³ *See generally id.*

³¹⁴ *See generally Rice, supra* note 16.

³¹⁵ *Id.*

³¹⁶ Feldman, *supra* note 17, at 10-12.

³¹⁷ *See Rice, supra* note 16, at 1.

suggestions made in the White Paper, we do so with a cautioned recognition that the proposal is not a cure for the NCAA's corruption problem.

V

PROPOSAL LIMITATIONS

It's probable that the White Paper represented the best possible proposal that could have been put forth by Professor Feldman under the circumstances. The proposals within the White Paper were judicious in their care for advancing college athlete rights in ways that did not threaten the NCAA's amateurism model. The Knight Commission did not embrace Professor Feldman's proposal for a legitimate reason—it did not go far enough in regards to protecting the NIL interests of *all* college athletes.³¹⁸ Before addressing that point, it is important to note that the NCAA indicated that it might be willing to relax its NIL restrictions, to some degree, with the way it handled the waiver request for Ogunbowale to appear on DWTS.³¹⁹ The NCAA's reasoning in permitting her appearance on the hit reality show reflected a possible shift in policy to afford waivers to allow college athletes to utilize their NILs in ways similar to those Professor Feldman proposed in his White Paper.³²⁰ Professor Feldman also proposed a case-by-case approach to permitting college athletes to use their waivers and an NIL Committee for deciding cases and factors for consideration.³²¹ The Ogunbowale example, however, also evidences enforcement problems with a relaxation of policy that would permit waivers for NIL use on a case-by-case basis. The possibility of enforcement problems become more pronounced when the Ogunbowale example is juxtaposed with another example, that of Donald De La Haye. The University of Central Florida (UCF) enforced NCAA NIL restrictions to pressure former college athlete Donald De La Haye to either suspend a YouTube channel he created and profited from or end his involvement on the football team.³²²

³¹⁸ *Knight Commission Calls for NCAA to Transform its Guidelines for March Madness Revenues to Better Support College Athletes and Protect Financial Integrity*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 10, 2016), <https://www.knightcommission.org/2016/05/knight-commission-calls-for-ncaa-to-transform-its-guidelines-for-march-madness-revenues-to-better-support-college-athletes-and-protect-financial-integrity-2/>.

³¹⁹ Baker, *supra* note 7.

³²⁰ *Id.*

³²¹ Feldman, *supra* note 17, at 10-11.

³²² Richard Johnson, *UCF Says its Kicker Can't Make Money Off of YouTube Videos Because . . . NCAA*, SBATION (last updated June 16, 2017), <https://www.sbnation.com/college-football/2017/6/12/15785390/ucf-kicker-youtube-donald-de-la-haye>.

A. Ogunbowale and DWTS

On March 30, 2018, the University of Notre Dame trailed the favored University of Connecticut in the final seconds of overtime in their NCAA Women's Basketball Final Four game.³²³ As time ran out, Arike Ogunbowale made an 18-foot step-back jumper to win the game.³²⁴ Two days later, in the NCAA Women's Basketball Championship game, Ogunbowale repeated the feat with another heroic winning shot as time expired, this time 23-feet from the basket, in the corner.³²⁵ Almost instantaneously, Ogunbowale rose to superstar status with opportunities to hang out with celebrity athletes like Kobe Bryant and appear as Ellen DeGeneres' guest on her talk show.³²⁶ As part of her newfound fame, Ogunbowale received an invitation to participate on the athlete edition of DWTS.³²⁷

DWTS is a ballroom dancing competition involving "stars" in the form of celebrities from film, television, and music industries such as Melissa Joan Hart, Steve-O, and Master P.³²⁸ The show has a record of casting "stars" who were/are celebrity athletes, such as former heavyweight boxing champion Evander Holyfield and Olympic gold medal winning figure skater Kristi Yamaguchi.³²⁹ Participants are paid for appearing on DWTS on a sliding scale with everyone making (at least) \$125,000 and all having the potential to earn more with weekly payments made depending how far they advance in the competition.³³⁰

Merely by agreeing to participate on the show, Ogunbowale should have been set to earn \$125,000, and this is where the NCAA's enforcement dilemma began.³³¹ Without a waiver, Ogunbowale's involvement on DWTS would have violated the

³²³ Jeré Longman, *Notre Dame, a UConn Nemesis, Topples the Huskies in a Final Four Thriller*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/30/sports/uconn-notre-dame-women-final-four.html>.

³²⁴ Ben Baskin, *Inside Arike Ogunbowale's Time as an Overnight Celebrity*, SPORTS ILLUSTRATED (Nov. 1, 2018), <https://www.si.com/college-basketball/2018/11/01/notre-dame-irish-women-arike-ogunbowale>.

³²⁵ *Id.*

³²⁶ TheEllenShow, *Kobe Bryant Surprises NCAA Champ Arike Ogunbowale*, YouTube (Apr. 6, 2018) <https://www.youtube.com/watch?v=SmlhE0vTRds>.

³²⁷ Baskin, *supra* note 324.

³²⁸ *Watch Dancing with the Stars TV Show*, ABC, <https://abc.go.com/shows/dancing-with-the-stars> (last visited Dec. 28, 2018).

³²⁹ *Id.*

³³⁰ Brian Moylan, *How Much Money Will the Stars Make on Dancing with the Stars?*, GAWKER (Sept. 1, 2010), <https://gawker.com/5627611/how-much-money-will-the-stars-make-on-dancing-with-the-stars>.

³³¹ *Id.*

NCAA's bylaw that prohibits athletes from financially benefitting from their "publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."³³² By granting Ogunbowale a waiver, the NCAA allowed her to appear on DWTS and keep what she earned because those payments resulted from her dancing abilities—not her basketball skills. In effect, the Ogunbowale waiver process played out just as Professor Feldman would have envisioned if the proposals in his White Paper had become policy within the NCAA.

The waiver by the NCAA allowed Ogunbowale to bypass bylaw 12.4.1, which states that athlete "compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."³³³ The NCAA permitted the waiver in this case because it determined that Ogunbowale's invitation to participate on DWTS did not result from her athletic ability.³³⁴ That determination is undermined by Ogunbowale's profile on the DWTS website:

Arike Ogunbowale is a junior at Notre Dame and member of the women's basketball team, who recently won the 2018 NCAA Division I Women's Basketball Tournament. She was also named the tournament's Most Valuable Player this year. During her college career, Ogunbowale has earned multiple honors, including: Naismith Trophy Top-30, NCAA Regional Most Outstanding Performer, NCAA All-Regional Team, WBCA All-Region Team, ACC All-Tournament First-Team, EspnW National Player of the Week (11/21/16), Preseason WNIT Tournament MVP and ACC Player of the Week (11/14/16). She is a five-time USA Basketball medalist with four gold and one silver. Ogunbowale graduated from Divine Savior Holy Angels High School in Milwaukee, WI, where she scored 2,240 points in her career, making her sixth on the Wisconsin all-time scoring list. She is the youngest of three children in an athletically talented family. Her older brother Dare was a running back at the University of Wisconsin, her mother Yolanda was a softball pitcher at DePaul University and her father Gregory played soccer and rugby. Her first name means "something that you see and you cherish" in her father's native Nigeria.³³⁵

³³² NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 71, at 72, §12.4.1.

³³³ *Id.*

³³⁴ Bogage, *supra* note 20.

³³⁵ *Arike Ogunbowale | Dancing with the Stars*, ABC, <https://abc.go.com/shows/dancing-with-the-stars/cast/arike-ogunbowale> (last visited Jan. 3, 2019).

It's evident from Ogunbowale's profile that DWTS intended to build off of the college athlete's accomplishments as a basketball player at Notre Dame. If Ogunbowale had not sunk those game-winning baskets in the Tournament, she likely would not have been involved in that season of DWTS. And it is in this recognition that a serious enforcement problem is revealed with any waiver process that decides athlete NIL use on a case-by-case basis and requires that the use not be linked to athletic success. Such an approach will result in arbitrary and capricious enforcement decisions similar to UCF's with Donald De La Haye's request to continue production of a YouTube channel that he started before he ever set foot on a collegiate field.³³⁶

B. *De La Haye and YouTube*

YouTube is an online platform of user-created videos that are uploaded and shared with the world.³³⁷ The users can follow one another and the most popular users are paid based on ads, chosen by YouTube, that are displayed on or during their videos—this is also called “monetizing.”³³⁸ Under the user name Deestroying, De La Haye started a channel by uploading videos at the same time he was preparing to launch his academic and athletic career at UCF as a freshman kicker for their Division I college football team.³³⁹ During his freshman campaign at UCF, De La Haye appeared in ten games and was used mostly for kickoffs.³⁴⁰ De La Haye averaged 61.6 yards for the 33 kicks he made that season, and he also made one extra point attempt.³⁴¹ In his sophomore season, De La Haye returned to UCF and once again was used as a kickoff specialist.³⁴² At no point in time did De La Haye's performance as a kickoff specialist for UCF make him a local, regional, or national celebrity.

³³⁶ *Deestroying*, YOUTUBE, https://www.youtube.com/channel/UC4mLIRa_dezwvvtudo9s1sw (last visited Dec. 20, 2018).

³³⁷ *About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/> (last visited Dec. 20, 2018).

³³⁸ *Monetization YouTube*, YOUTUBE, https://www.youtube.com/account_monetization (last visited Dec. 20, 2018).

³³⁹ *Donald Delahaye Bio*, UCF KNIGHTS, http://ucfknight.com/ViewArticle.dbml?ATCLID=211760364&DB_OEM_ID=34100 (last visited Dec. 18, 2018).

³⁴⁰ *Donald Delahaye*, SPORTS-REFERENCE, <https://www.sports-reference.com/cfb/players/donald-delahaye-1.html> (last visited Dec. 18, 2018).

³⁴¹ *Id.*

³⁴² *Donald De La Haye Statistics*, WASH. POST, <http://stats.washingtonpost.com/cfb/players.asp?id=258980&team=210> (last visited Dec. 18, 2018).

De La Haye managed to grow his YouTube channel to attract an impressive amount of subscribers (a little more than 50,000)³⁴³ who likely followed him for reasons that had absolutely nothing to do with UCF football.³⁴⁴ Yet on June 10, 2017, De La Haye surprised his subscribers with a new post to the channel titled “Quit College Sports or Quit YouTube?”³⁴⁵ In the video, De La Haye announced that his channel was under investigation for potentially violating NCAA rules due to his making a modest amount of money off of the YouTube channel.³⁴⁶ De La Haye stated in the video that he was scheduled to meet with UCF and the NCAA to find a way to continue to produce videos without forfeiting his NCAA eligibility.³⁴⁷ About a month later, UCF submitted a request for an NIL waiver on behalf of De La Haye that sought permission for the athlete with his channel on YouTube.³⁴⁸ The NCAA approved the waiver, but did so with restrictions.³⁴⁹ In a video posted to his channel, De La Haye read the conditions for his waiver:

Institution had to submit waiver on your behalf asking for release of the legislation. NCAA approved the waiver in which you can use his picture, name, and likeness to continue your self-employment business, however it is **with conditions**: videos cannot reference your status as a student athlete, nothing UCF related—gear, facilities, other student athlete... videos cannot depict your football or athletic skills or abilities, including anything specific to the sport of football—pass a football, kick a football, talk about quarterbacks... videos that do not satisfy these conditions will have to be removed from the monetized

³⁴³ Johnson, *supra* note 322.

³⁴⁴ UCF was far from a national football powerhouse. They went 6-7 in the American Athletic Conference—which included a 51-14 point loss to Michigan. *See 2016 UCF Knights Schedule and Results*, SPORTS-REFERENCE, <https://www.sports-reference.com/cfb/schools/central-florida/2016-schedule.html> (last visited Dec. 18, 2018).

³⁴⁵ Deestroying, *Quit College Sports or Quit Youtube?*, YOUTUBE (June 10, 2017), <https://www.youtube.com/watch?v=k3gdVzq3nm4>.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Tyler Graddy, *A Timeline: UCF Kicker Donald De La Haye Declared Ineligible By Youtube Revenue Stream*, KNIGHT NEWS (Aug. 1, 2017), <http://knightnews.com/2017/08/a-timeline-ucf-kicker-donald-de-la-haye-declared-ineligible-by-youtube-revenue-stream/>.

³⁴⁹ Deestroying, *The REAL Reason I Lost My Full D1 Scholarship Because of My YouTube Channel.. (FULL STORY)*, YOUTUBE (Aug. 7, 2017), <https://www.youtube.com/watch?v=-hxceaFvVog>.

account and the funds generated from these videos will have to be donated to a charity of your choice.³⁵⁰

This waiver by the NCAA granted De La Haye permission to continue to make the videos as long as he did not mention or refer to his athletic status, thereby following NCAA bylaw 12.4.1.1³⁵¹ and bylaw 12.4.4.³⁵² De La Haye did not initially sign the proposed waiver, but instead propositioned an amendment asking to be allowed to continue posting videos as he was, but demonetize them so that he would not generate any revenue from them.³⁵³ Through communication with the UCF compliance office he was notified that his amendment was denied and the waiver conditions would not change.³⁵⁴ In an official statement, the NCAA said, “De La Haye could continue to profit from any of his video activity as long as it was not based on his athletics reputation, prestige or ability.”³⁵⁵

On July 31, 2017, UCF released a statement regarding De La Haye’s eligibility.³⁵⁶ UCF wrote that the waiver the NCAA approved, regarding De La Haye, allowed him to continue to “create videos that referenced his status as a student-athlete or depict his football skill or ability if they were posted to a non-monetized account.”³⁵⁷ However, UCF said, “De La Haye chose not to accept the conditions of the waiver and has therefore been ruled ineligible to compete in NCAA-sanctioned competition. UCF Athletics wishes him the best in his future endeavors.”³⁵⁸ UCF took action to suspend De La Haye prior to the NCAA, so to ensure that there would

³⁵⁰ *Id.*

³⁵¹ Inside the NCAA (@InsidetheNCAA), TWITTER (July 31, 2017, 1:40 PM), <https://twitter.com/insidethencaa/status/892122868355657728?lang=en> (NCAA statement regarding Donald De La Haye).

³⁵² It would be impossible to run a video account by yourself featuring yourself as the focal point and be allowed to earn money from it according to bylaw 12.4.4 which states: “A student-athlete may establish his or her own business, provided the student-athlete’s name, photograph, appearance or athletics reputation are not used to promote the business.” See NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 71, at 73, §12.4.4.

³⁵³ Deestroying, *supra* note 349.

³⁵⁴ *Id.*

³⁵⁵ Nick Martin, *UCF Kicker Ruled Ineligible After Rejecting NCAA’s Demand To Stop Making Sports YouTube Videos*, DEADSPIN (July 31, 2017), <https://deadspin.com/ucf-kicker-ruled-ineligible-after-rejecting-ncaas-deman-1797411213>.

³⁵⁶ Sam Cooper, *Opting Not to Comply with NCAA Conditions for YouTube Channel, UCF’s Donald De La Haye Ruled Ineligible*, YAHOO! SPORTS (July 31, 2017), <https://sports.yahoo.com/opting-not-comply-ncaa-conditions-youtube-channel-ucfs-donald-de-la-haye-ruled-ineligible-211526569.html>.

³⁵⁷ Graddy, *supra* note 348.

³⁵⁸ *Id.*

not be repercussions against UCF for allowing a non-sanctioned player to participate.³⁵⁹ The NCAA released a statement, through Twitter, the same day, that affirmed UCF's statement and added that "although Donald De La Haye has chosen not to compete any longer as a UCF student-athlete, he could have continued playing football for the university and earn money from non-athletic YouTube videos, based on a waiver the NCAA granted on July 14."³⁶⁰

Later that same day, De La Haye responded with a new video titled "I lost my full D1 scholarship because of my Youtube [sic] channel..[sic]," in which he spoke about the decision by the NCAA and mentioned how UCF and the NCAA requested for him to remove his videos and demonetize the account in order to stay eligible.³⁶¹ Since he was ruled ineligible, De La Haye lost the scholarship that covered his tuition at UCF.³⁶² In the description box of the video, De La Haye opened a GoFundMe account and asked for those who could to donate so that he could afford to finish his degree: "I am passionate about youtube [sic] and still will work relentlessly to get my degree but I don't have the funds necessary to do so. Please help out, even if its [sic] just \$1!"³⁶³ Shortly after the decision to rule De La Haye ineligible became public, his YouTube channel subscriber count jumped to over 89,000.³⁶⁴

The NCAA determined that De La Haye violated bylaw 12.4.4, which provides that a college athlete "may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business."³⁶⁵ This bylaw falls underneath the overarching rule 12.4.1.1: "compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."³⁶⁶

However, it seems very improbable and illogical that De La Haye's status as a backup kicker at a struggling football program that rarely played on national television served as the driver for attracting more than 50,000 subscribers to his

³⁵⁹ Iliana Limón Romero & Matt Murschel, *UCF Kicker Donald De La Haye Ruled Ineligible for Taking YouTube Revenue*, ORLANDO SENTINEL (July 31, 2017), <https://www.orlandosentinel.com/sports/ucf-knights/knights-notepad/os-sp-ucf-kicker-ineligible-20170731-story.html>.

³⁶⁰ *Inside the NCAA*, *supra* note 351.

³⁶¹ Deestroying, *supra* note 349.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Romero & Murschel, *supra* note 359.

³⁶⁵ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 71, at 73, § 12.4.4.

³⁶⁶ See *id.* at 72, § 12.4.1.1

YouTube channel. In fact, the conclusion that De La Haye's following grew out of his NCAA athletic involvement seems as arbitrary as the conclusion reached by the NCAA in Ogunbowale's case. Recall that the NCAA determined that Ogunbowale's opportunity to appear on DWTS had nothing to do with her sinking last-second baskets to win her school a national championship on national television just a week or so before she received her invitation to join the show. The Ogunbowale and De La Haye cases demonstrate that the "based on athletics" standard for resolving NIL waivers is impossible to apply consistently and will lead to arbitrary applications. Unlike De La Haye at UCF, Ogunbowale did not have a platform for fame prior to her athletic performances at Notre Dame. Yet, she was permitted a waiver that allowed DWTS to promote the fact that she was a college basketball star whereas De La Haye couldn't even mention his status as a student at UCF. These two cases highlight the problems with discerning stardom and its source when it comes to college athletes. Underscored by the Ogunbowale example is also the reality that most college athletes are not celebrities and have little reputational value built into their NILs unless they do something extraordinary while representing their schools in a competitive play.

C. Identifying Celebrity

A "celebrity"³⁶⁷ is someone who is well-known/famous within a relevant community, and their reputation provides them with the potential to serve as brand endorsers—those who leverage their NILs in the promotion and advertisement for commercial product brands.³⁶⁸ Brands build off of celebrity endorsements by "cutting through the clutter" and in constructing a link between the brand and the endorser that creates a path in the minds of consumers through which positive

³⁶⁷ Jessica R. Braunstein & James J. Zhang, *Dimensions of Athletic Star Power Associated With Generation Y Sports Consumption*, 6 INT'L J. OF SPORTS MARKETING & SPONSORSHIP 242, 243 (2005) ("[A] celebrity is an individual whose name attracts one's attention and interest while having the ability to generate a profit."); see also Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 315 (1989) ("Celebrities draw these powerful meanings from the roles they assume in their television, movie, military, athletic, and other careers"); DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA*, 57 (1961) ("The celebrity is a person who is well-known for their well-knownness. Fabricated on purpose to satisfy our exaggerated expectations of human greatness. . . . This statement not only determines the problem of finding a suitable definition of celebrity but also commissions to give thought to the meaning of "well-knownness.").

³⁶⁸ McCracken, *supra* note 367, at 310 (This definition uses the term "commercial format" because it is meant to encompass all formats of endorsements, "the explicit mode ("I endorse this product"), the implicit mode ("I use this product"), the imperative mode ("You should use this product"), and the copresent mode (i.e., in which the celebrity merely appears with the product).).

meanings associated with the endorser transfer to the product brand.³⁶⁹ The literature is uniform in the finding that brands can benefit from celebrity endorsements by improving their brand image in ways that positively influence consumer purchase behaviors.³⁷⁰ Professional athletes are often used as endorsers because they are among the most recognizable, revered, and imitated celebrities.³⁷¹ Athletes are also viewed as highly attractive and considered as experts by consumers, which are two major factors for brands in selecting endorsers.³⁷²

However, landing a lucrative endorsement deal is not easy for most professional athletes because only the most influential members of society are capable of promoting a product brand based on their “source credibility.”³⁷³ Source credibility is linked to the athlete’s fame and reputation.³⁷⁴ Researchers have conceptualized the core component for determining whether an athlete has the source credibility needed to cut through the marketing clutter and have identified this construct as “star power.”³⁷⁵

³⁶⁹ See generally McCracken, *supra* note 367.

³⁷⁰ Thomas C. Boyd & Matthew D. Shank, *Athletes as Product Endorsers: The Effect of Gender and Product Relatedness*, 13 SPORT MARKETING Q. 82 (2004).

³⁷¹ William L. Shanklin & Alan R. Miciak, *Selecting Sports Personalities as Celebrity Endorsers*, 4 J. PROMOTION MGMT. 1 (1997).

³⁷² Boyd & Shank, *supra* note 370, at 91.

³⁷³ Thilo Kunkel, Matthew Walker & Courtney M. Hodge, *The Influence of Advertising Appeals on Consumer Perceptions of Athlete Endorser Brand Image*, EUR. SPORT MGMT. Q. 1, 4 (2018) (Source credibility is “determined by four endorser characteristics: (1) expertise, (2) attractiveness, (3) trustworthiness, and (4) likeability These variables represent the combined image of the athlete, in his/her role as an endorser, and have a significant effect on brand attitudes, attitude towards the ad and purchase intentions.”).

³⁷⁴ *Id.*

³⁷⁵ Akiko Arai, Yong Jae Ko & Stephen Ross, *Branding Athletes: Exploration and Conceptualization of Athlete Brand Image*, 17 SPORT MGMT. REV. 97-98 (2014) (“Athletes are considered not only as vehicles for advertisements or product endorsement, but also as cultural products that can be sold as ‘brands.’ In fact, there are numerous sport agencies currently in existence that provide a vast range of client level services. In this highly competitive industry, managing brands for athletes is becoming an essential task for agents. For example, IMG, the world’s largest sport agency announced their mission statement: ‘Today, we help hundreds of elite athletes, coaches, industry executives and prestigious sports organizations maximize their earnings potential and build strong personal brands...the advantage of viewing athletes as a brand...there are a growing number of distribution opportunities available, the athlete has the potential to enter into a variety of sectors and use his or her sports career as a platform for other endeavors.’” (internal citations omitted)).

D. Star Power and College Athletes

“Star power” is the ability and unique characteristics that make an individual a credible source of consumer confidence.³⁷⁶ The characteristics found to influence star power include: (a) professional trustworthiness, (b) likeability in personality, (c) athletic expertise, (d) social attractiveness, and (e) style.³⁷⁷ Most professional athletes do not possess enough of the attributes needed to qualify as “stars,” even if they are well respected and compensated for playing their respective sports.³⁷⁸ This reality is reflected in the difficulty that athletes have in securing major endorsement deals.³⁷⁹ For example, the National Football League is the most popular professional sports league in the U.S., but even most of its athletes struggle in attracting major endorsement contracts.³⁸⁰ Currently, there are 1,696 professional football players across the 32 active rosters in the NFL.³⁸¹ Of these players, it is estimated that (at most) three to five players per team earn six-figures from endorsement deals,³⁸² which means that roughly 10%, or about 160 players, are able to earn more than \$100,000 off of the field.³⁸³ Out of those 160 players, 32 are quarterbacks for their

³⁷⁶ *Id.* at 100.

³⁷⁷ Braunstein & Zhang, *supra* note 367, at 244-46.

³⁷⁸ *Id.* at 243.

³⁷⁹ Jack Behta, *The NFL Endorsement Market*, NAT'L FOOTBALL POST (2013), <https://nationalfootballpost.com/the-nfl-endorsement-market/> (last visited Jan. 9, 2019).

³⁸⁰ *Id.*

³⁸¹ Each team can have up to 53 players eligible to play in a game, plus a ten-member practice squad and players who have been designated as out for an extended time due to injury or other reasons. *See 2018-19 NFL Important Dates*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/football-ops/league-governance/2018-19-important-nfl-dates/> (last visited Feb. 12, 2019). The NCAA estimates that only 1.6% of student-athletes playing football will turn pro and play in the NFL. *See Estimated Probability of Competing in Professional Athletics*, NCAA (2018), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [hereinafter *Estimated Probability*].

³⁸² Jack Behta, *Difficulty of Earning an NFL Endorsement—Interview* (2019). Jack Behta is an NFL Players Association Certified Advisor who has been representing players full-time since 1991 under the entity JB Sports, Inc. He limits his player roster to 20-25 per year intentionally so he can provide the best service to each of his clients. JB Sports is one of the most recognized and respected agencies in the world. Jack took time out of his busy schedule to speak about the difficulty NFL players have earning endorsement deals.

³⁸³ *Id.* (“Only about 50% have earned any income from endorsements, appearances, or autograph and memorabilia signings. Of the 256 first year players drafted into the NFL out of college, it is estimated that only 50% earn any endorsement income, while only the top picks earn national level deals.”); *see also* Kurt Badenhausen, *The NFL's Highest-Paid Players 2017*, FORBES (Sept. 18, 2017), <https://www.forbes.com/sites/kurtbadenhausen/2017/09/18/the-nfls-highest-paid-players-2017/#5cdf1844130e>, (“Most NFL players make do with less than

teams,³⁸⁴ and this leaves about 128 position players, or four per team, with the capability to earn a decent amount of money from sponsorship deals.

The endorsement constraints for NFL players demonstrate how difficult it is even for professional athletes to cultivate enough “star power” to attract a major endorsement deal. The monetization of reputational value requires the work of industry professionals who specialize in placing athletes in the right marketing position.³⁸⁵ Professional athletes within the NFL have access to branding experts, and even most of them are unable to land lucrative deals.³⁸⁶ College athletes face even more complications in terms of cultivating the level of reputational value needed to secure a national or international endorsement deal.³⁸⁷

Whereas the NFL provided the basis for the example for how difficult it is to secure major media deals for professionals, its college counterpart (the most popular NCAA sport) will serve as the example for why it is more difficult for college athletes. Currently, there are 73,063 college football athletes governed by the NCAA.³⁸⁸ The overwhelming majority lack any meaningful star power in their personal reputations.³⁸⁹ For evidence on this point, Dr. Thilo Kunkel looked to social media and evaluated the number of followers for college athletes as an indicator for fame.³⁹⁰ Dr. Kunkel and his research team collected and analyzed data from more than 4,000 Division I college football athletes and found that: (a) only 8.3% had more than 10,000 followers, (b) 1.9% had more than 50,000 followers, and (c) only .025% had 100,000 followers or more.³⁹¹ Based on those findings, Dr. Kunkel

\$100,000 in endorsement income, but a few top-tier NFL QBs can generate eight figures in off-field income.”).

³⁸⁴ Bechta, *supra* note 382.

³⁸⁵ Mark Morse & Darren Glover, *Athletes Are Often Lagging Compared to Celebs in Creating a Stand-Out Brand on Social Media*, ADWEEK.COM (Feb. 5, 2019), <https://www.adweek.com/brand-marketing/athletes-are-often-lagging-compared-to-celebs-in-creating-a-stand-out-brand-on-social-media/>.

³⁸⁶ *Id.*; see also Bechta, *supra* note 382.

³⁸⁷ *Id.* (“Of the 256 first year players drafted into the NFL out of college, it is estimated that only 50% earn any endorsement income, while only the top picks earn national level deals.”).

³⁸⁸ *Estimated Probability*, *supra* note 381.

³⁸⁹ Thilo Kunkel, *College Athletes Marketability—Interview* (2019) (“Social media followers is a good indication for the level of fan interest and subsequently the marketability of the athlete to sell national sponsorships.”).

³⁹⁰ *Id.*

³⁹¹ *Id.*

determined that less than 1.9% of college athletes currently have enough star power to earn a national endorsement deal.³⁹²

The NCAA was correct when it claimed in *Name & Likeness* that the majority of its athletes are not celebrities.³⁹³ Yet, some athletes do have the potential to secure a national marketing deal, and many others could probably land a local or regional sponsorship relationship (e.g., local grocery store or car dealership). This potential is reflected in the number of local or regional endorsement deals that college coaches enjoy, even for smaller programs.³⁹⁴ Any marketability, however, would more than likely be linked to the athlete's athletic accomplishments.³⁹⁵ The irony inherent in the Ogunbowale/De La Haye determinations is that De La Haye was unique in that he built a following despite the fact that he wasn't a very successful and high-profile college athlete. Yet, the NCAA restricted his references to UCF in his own, personal creations while tolerating the very direct reference to Ogunbowale's athletic accomplishments by DWTS.³⁹⁶

VI

A CALL FOR MEANINGFUL CHANGE

The lack of star power in intercollegiate athletics signifies that there is minimal value in college athletes' likeness, especially on an individual level, which would effectively offset the demand to accept impermissible payment from boosters, agents, and appeal companies. Furthermore, the Ogunbowale and De La Haye examples demonstrate the administrative nightmare of distinguishing demand for athlete publicity that is not linked to NCAA competition. What the NCAA needs right now is a full overhaul of the NIL restrictions—this is the only way that they will be able to combat the illegal activity and ensure that all athletes are treated fairly and without bias when it comes to earning compensation for their NIL. The meaningful change that is required is a complete removal of restrictions on compensation surrounding the use of an athlete's NILs. Neither of those justifications or the reasoning supporting them apply to restraints that prevent college athletes from using their own NILs however they like.

³⁹² This further supports the numbers provided by Jack Bechta—only the top prospects earn national level deals as a rookie. 1.9% of the 256 rookies drafted last year would provide 4.8 NFL rookie players with national level deals. *See also* Bechta, *supra* note 382.

³⁹³ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1279 (9th Cir. 2013).

³⁹⁴ Kunkel, *supra* note 389.

³⁹⁵ *Id.*

³⁹⁶ Baker, *supra* note 7.

A. No Reasonable Justification Exists for the NCAA's NIL Restrictions

There is no reason in law or common sense for the NCAA's NIL restrictions, which are ripe for judicial review following the decisions in both *Grant-in-Aid*³⁹⁷ and *O'Bannon*.³⁹⁸ Both decisions found procompetitive justifications for protecting the NCAA's amateurism model. In *Grant-in-Aid*, the NCAA's restrictions that capped compensation were found to violate antitrust law while in *O'Bannon*, the Ninth Circuit held that the NCAA's limits were necessary to preserve consumer interest in its products.³⁹⁹ Both decisions also found justification for NCAA rules that facilitate athlete integration into their classroom settings.⁴⁰⁰

First, there can be no credible claim that the NIL restrictions are needed to preserve consumer interest in the NCAA's version of intercollegiate athletics. The NCAA has never, ever, proffered evidence that college athlete publicity impairs consumer interest in its products. Actually, the NCAA and its members already publicize college athletes and market their NILs in commercial broadcasts, advertisements, and through other types of promotions.⁴⁰¹ Accordingly, the NCAA and its members use college athlete NILs to attract consumers to their events. Thus, any assertion that the NCAA's NIL rules are needed to preserve consumer interest is intellectually dishonest. Second, the commercialization of college athlete NILs by the NCAA and its members also negates any argument from them that college athlete use of their own NILs will impair their academic integration. Most college athletes lack the star power needed to land major endorsements and the NCAA and its members already commercialize athlete NILs.⁴⁰² Therefore, the procompetitive justifications recognized by the courts in *Grant-in-Aid* and *O'Bannon* do not provide basis for the NCAA's NIL restrictions, and the lack of a procompetitive purpose for them make the rules ripe for rule of reason scrutiny if/when challenged.

B. The NCAA Should Adopt A Modified Version of the Proposal from Professor Feldman's White Paper

Like Professor Feldman, we propose a model that would permit college athletes to earn compensation from their use of their own NILs. The value inherent

³⁹⁷ *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

³⁹⁸ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

³⁹⁹ *Compare Grant-In-Aid*, 375 F. Supp. 3d 1058 *with O'Bannon*, 802 F.3d 1049.

⁴⁰⁰ *See Grant-In-Aid*, 375 F. Supp. 3d 1085; *O'Bannon*, 802 F.3d 1049 at 1072.

⁴⁰¹ E.g., NCAA member institutions regularly feature college athletes on billboards, posters, and other promotions for attracting students and others to events.

⁴⁰² Kunkel, *supra* note 389.

to their NILs belong to the college athletes, and it stems from reputations that they cultivated through their own hard work and accomplishments. Similar to what was proposed in the White Paper, our proposal would constrain the institutions from assisting in locating sponsorships for college athletes. To offset that restriction, we would demand that the NCAA lift its regulation on athlete interaction with agent representatives. The college athletes should be free to market themselves for sponsorships, but there is no legitimate reason for why the schools should participate in the process, and their involvement could create a possibility for abuse. Similarly, agent involvement in this could result in abuse, so the NCAA should create an agency certification process that ensures that only reputable agents represent NCAA athletes. In this regard, the process would not be much different from what exists within the professional sports leagues. College athletes should be part of this process and representation at the table in deciding the constraints imposed on those who represent them.

We also build off of Professor Feldman's proposal by requiring athletes to seek out permission from their schools and the NCAA before representing the institution or the NCAA in any advertisements. This requirement would reflect what exists within professional sports and is grounded in the institution and the NCAA's right to control the use of their intellectual property (trademarks). Instead of the standardized NIL form suggested by Feldman, we propose that the NCAA create a model NIL agreement that satisfies its requirements as well as those of its member institutions. The reason for this is not to limit college athletes in their efforts to secure marketing deals and use their NILs as they see fit, but to protect them by incorporating clauses like a "reverse moral clause" that permits athletes to terminate endorsement relationships with controversial brands. Finally, our compromised proposal includes Professor Feldman's academic eligibility requirement so long as the same requirement exists for their continued involvement in commercial use of their NILs by the member institutions. The anticompetitive nature of this restraint is moderated by the school's interest in making sure that athletes are also students who are in good academic standing. The eligibility restraint also serves an important purpose of promoting athlete success in the classroom.

Our compromised proposal, however, deviates from what Professor Feldman suggested on some key issues. First, our proposal does not include the "non-game related" constraint on college athlete NIL use. The Ogunbowale and De La Haye examples demonstrate the arbitrariness of this requirement because there is no way to consistently discern whether the sponsorship stems from the athlete's involvement in NCAA athletics or is based on the athlete's own good will. Additionally, there is no legitimate basis for imposing a "non-game related" requirement because the NCAA and its members already use college athlete NILs in "game-related" uses.

The NCAA and its members should not be able to do with college athlete NILs what the athletes may not.

What we propose also does not adopt Professor Feldman's call for oversight in the form of an approval process from either the NCAA or its members prior to athlete NIL use. The only interest that either the NCAA or its members have in regard to its athletes and how they choose to use their NILs involves the use of intellectual property belonging to either the NCAA or its members. There is already recourse for member institutions in the case that an athlete is involved with a controversial brand to protect against the transfer of negative information from the brand to the school. That protection is found in the fact that the school does not have to renew the athlete's scholarship at the close of the academic year. Our proposal also deviates from Professor Feldman's in that it does not include a group licensing component. College athletes deserve their fair share of the monies mined by the NCAA and its members from media right management. Thus, our proposal is a compromise because it does not call for group licensing that shares revenues from extant and future media deals with the athletes. We advocate for and support college athlete efforts to demand fair compensation from the NCAA and its members. However, lifting the NIL restrictions would be a modest step in the right direction.

CONCLUSION

Drastic changes to the NCAA's NIL policy are on the way, and the NCAA needs them to protect its underlying mission. Currently, there is an illegal money laundering scheme occurring behind doors because the NCAA is restricting college athletes from the ability to receive compensation from their NILs.⁴⁰³ Right of publicity cases, such as *Name & Likeness*, make it clear that the athletes own their NILs.⁴⁰⁴ However, outdated NCAA bylaws prevent college athletes from profiting from their reputations.⁴⁰⁵ If college athletes were able to benefit from their own use of NILs, secret deals with companies would no longer be necessary. Instead, athletes would be able to be directly compensated from the apparel company for their NILs.

Lifting the NIL restrictions may also help further the educational mission of the NCAA. In 2017, only 82% of college basketball and 78% of college football athletes received their degree,⁴⁰⁶ and the average athlete graduation rate was 87%

⁴⁰³ Baker, *supra* note 11.

⁴⁰⁴ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

⁴⁰⁵ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 71.

⁴⁰⁶ NAT'L COLLEGIATE ATHLETIC ASS'N, TRENDS IN GRADUATION SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS NCAA RESEARCH

(the highest recorded average graduation rate).⁴⁰⁷ The difference could be traced back to the high number of college athletes attempting to turn professional in order to legally earn money for their NILs.⁴⁰⁸ If the restriction were removed, it provides an opportunity for college athletes who are not quite ready for the professional leagues to stay in college while also providing for themselves and their families. No athlete should be economically pressured to leave school early when that pressure could be relieved to a significant degree by the athlete's use of their own brand equity. Another educational benefit would result from the athlete's involvement with sponsor brands. College athletes would gain first-hand experience and knowledge of complex contract negotiations and the life lessons learned from entering commercial markets.

For those reasons we conclude that the NCAA should abandon the idea of instituting a modest change to its NIL policy and instead adopt what we propose in this article. We believe that our proposal draws the best aspects from Professor Feldman's (at the time) innovative proposal, but is different in how it expands what is permitted to comport with the recent decisions in *Grant-in-Aid* and *O'Bannon* and what has been proposed in recent legislation at state and federal levels. The NCAA no longer enjoys the substantial deference once afforded to it by the courts, lawmakers, and the general public.⁴⁰⁹ The deference that once fortified the NCAA's amateurism model from scrutiny has eroded to the point that material change to college athlete regulations is inevitable. The NCAA must now choose whether it wants to lead in the creation of change to its regulation of college athletes, or be led.

PRESENTATION, 17 (2017), https://web3.ncaa.org/aprsearch/public_reports/instAggr2017/Fed_and_GSR_Trends_2017_Final.pdf.

⁴⁰⁷ *Id.* at 18.

⁴⁰⁸ *See generally id.*

⁴⁰⁹ *See generally* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).