



March 27, 2023

TO: Members, Subcommittee on Innovation, Data, and Commerce
FROM: Committee Majority Staff
RE: Hearing Entitled “Taking the Buzzer Beater to the Bank: Protecting College Athletes’ NIL Dealmaking Rights.”

I. INTRODUCTION

The Subcommittee on Innovation, Data, and Commerce will hold a hearing on March 29, 2023, at 10:30 a.m. (ET) in 2322 Rayburn House Office Building. The hearing is entitled, “Taking the Buzzer Beater to the Bank: Protecting College Athletes’ NIL Dealmaking Rights.”

II. WITNESSES

- Witness 1 – Jennifer Heppel, Commissioner, Patriot League
- Witness 2 – Dr. Makola M. Abdullah, Ph.D., President, Virginia State University
- Witness 3 – Trey Burton, Former National Football League player
- Witness 4 – Kaley Mudge, Student Athlete, Florida State University
- Witness 5 – Pat Chun, Director of Athletics, Washington State University
- Witness 6 – Jason Stahl, Executive Director and Founder, College Football Players Association

III. BACKGROUND

In the United States, college sports are rising in popularity, generating revenues of over \$1 billion year after year.¹ Despite this popularity, collegiate athletes have long been prohibited from receiving compensation for their name, image, and likeness (NIL). This rule, however, has been debated for decades, taking its form in the current question – should athletes be permitted to receive compensation for their NIL? A majority of U.S. adults think the answer is yes, and support allowing collegiate athletes to profit from brand partnerships (58%), licensed products (59%) and autograph signings (54%) under the National Collegiate Athletic Association’s (NCAA’s) updated NIL guidelines.²

¹ Associated Press, *NCAA earns \$1.15 billion in 2021 as revenue returns to normal*, ESPN (February 2, 2022), https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal.

² Ellyn Briggs et. al, *18 Months Into the NIL Era, Athletes, Fans and Brands Are Mostly Happy. But Messiness Remains*, Morning Consult (January 26, 2023), <https://morningconsult.com/2023/01/26/student-athletes-fans-brands-mostly-happy-with-nil/>.

A series of recent court cases have begun to answer this question in favor of the student athletes. In 2009, former UCLA basketball player Ed O'Bannon discovered that his image was being used without his consent. He sued the NCAA claiming the Association restrained trade under federal antitrust law by conspiring to deny collegiate athletes compensation for their NIL. The Ninth Circuit Court of Appeals agreed, holding that NCAA rules barring compensation to student-athletes for the use of their NIL were subject to antitrust laws.³ A few months later, Shawne Alston, a former West Virginia football player, subsequently filed a class-action lawsuit asserting that the NCAA and its colleges were profiting from the NIL of collegiate athletes in violation of federal antitrust law. This time, the Supreme Court unanimously ruled in favor of the athletes, confirming that the NCAA's prohibition on compensation for collegiate athletes violated federal antitrust law.⁴

While the courts were determining the legality of the NCAA's prohibition on NIL compensation, states legislatures were preparing to shape the debate. California became the first state in 2019 to legalize NIL payments to players, meaning any collegiate athlete from a California school could make money while playing.⁵

Less than 12 hours before implementation of state laws designed to challenge the NCAA's NIL rules, the NCAA updated its NIL policy, allowing collegiate athletes across the country to capitalize off their NIL.⁶ This policy change is widely viewed as one of the most significant changes in the Association's 115-year history.⁷

IV. REGULATORY UNCERTAINTY IS COSTING ATHLETES

Despite the spread of NIL deals in its first few years, clear rules of the road have not been established. Over half of the states have stepped in proposing and passing a patchwork of laws to regulate this new economic frontier.⁸ However well intentioned, each state has a different standard for compensation, healthcare, and revenue sharing, among other policy decisions that are getting wrapped into NIL policy, which has left athletes, universities, and conferences confused.

³ *O'Bannon v. NCAA*, D.C. No.4:09-cv-03329-CW, Opinion of the U.S. Ninth Circuit (September 30, 2015), <https://cdn.ca9.uscourts.gov/datastore/opinions/2015/09/30/14-16601.pdf>.

⁴ *NCAA v. Alston*, Harvard Law Review (November 10, 2021), <https://harvardlawreview.org/wp-content/uploads/2021/11/135-Harv.-L.-Rev.-471.pdf>.

⁵ J. Brady Mccollough, *Think NIL blew up college sports? California is going for the knockout with new bill*, Los Angeles Times (May 16, 2022), <https://www.latimes.com/sports/story/2022-05-16/nil-college-sports-california-bill-ncaa>.

⁶ Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

⁷ Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, The New York Times (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html>.

⁸ Braly Keller, *NIL Incoming: Comparing State Laws And Proposed Legislation*, Opendorse (January 31, 2023), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/>.

For example, the Florida NIL law restricted institutional staff and supporting entities involvement in NIL activities.⁹ However, Utah had no such law, which permitted Brigham Young University to broker a groundbreaking NIL deal for its entire team.¹⁰ This prompted Florida's state legislature to repeal its NIL law in an attempt to eliminate a competitive disadvantage.¹¹ Alabama infamously took a similar approach, repealing its NIL law not even one year after it had been enacted.¹²

Student athletes have raised concerns about navigating such a confusing, ambiguous, and turbulent regulatory environment, especially athletes that call one state their home and another state their home field. The interstate nature of college sports has made the patchwork of state laws unworkable.

V. THE NEED FOR FEDERAL ACTION – AREAS OF CONCERN

In Justice Gorsuch's majority opinion for all of the Justices in *NCAA v. Alston*, he emphasized that it is Congress' role to regulate commerce and thus rein in the NCAA's monopolistic restrictions on NIL.¹³ Given the competing State efforts and the economic uncertainty for athletes, Congress has been reviewing the following concerns:

a. FAIR MARKET VALUE & TRANSPARENCY

Fair Market Value (FMV) is the value of assets as determined by the marketplace or objective purchasers rather than as determined by a subjective individual.¹⁴ The NIL marketplace, and its empowerment of individual athletes from any sport, has opened a conversation around previous NCAA restrictive practices regarding setting FMV, how that history impacts NIL deals, and the general lack of transparency throughout the current NIL deal-making process.

⁹ Andrew Atterbury, *Florida lawmakers put name, image and likeness changes on the fast track*, Politico Pro (February 3, 2023), <https://subscriber.politicopro.com/article/2023/02/florida-lawmakers-put-name-image-and-likeness-changes-on-the-fast-track-00081150>.

¹⁰ Wilton Jackson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, Sports Illustrated (August 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar>.

¹¹ Andrea Adelson, *Florida updates NIL legislation to remove legal restrictions*, ESPN (February 16, 2023), https://www.espn.com/college-football/story/_/id/35673223/florida-updates-nil-legislation-remove-legal-restrictions.

¹² *Alabama and Florida Call an Audible on NIL Laws*, The National Law Review (March 8, 2022), <https://www.natlawreview.com/article/alabama-and-florida-call-audible-nil-laws>.

¹³ Justice Neil Gorsuch, *NCAA v. Alston*, U.S. Supreme Court (October Term 2020), https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.

¹⁴ Wex, *fair market value*, Cornell Law School Legal Information Institute (Accessed February 13, 2023), https://www.law.cornell.edu/wex/fair_market_value.

b. COLLECTIVES, BOOSTERS & COMPANIES

NIL Collectives are a third-party collection of fans and boosters who pool together capital to compensate athletes who play for a given school. Over 250 collectives have been formed nationwide and nearly one-third of collectives have a nonprofit status.¹⁵

Collectives negotiate agreements with athletes to pay them in exchange for the use of the athlete's NIL.¹⁶ Examples of such use include social media advertising, an appearance in a commercial, an autograph signing, or, in the case of collectives that have taken nonprofit status, an appearance at a charitable event. Collectives extend these offers with the hope that an athlete will pick and remain at a school. They often design contract language to push players in a school's direction without being explicit enough to run afoul of NCAA rules that still ban payments as recruiting inducements.¹⁷

In the absence of formal organizational rules and transparency requirements to ensure legitimacy, rouge NIL actors have seized the opportunity to earn money, victimizing student athletes in the process. For example, T.A. Cunningham, a high school football player from Georgia, was promised millions of dollars by an NIL company if he moved to California, where it was legal for high school athletes to earn money from NIL deals.¹⁸ He was also promised a place to live while in California and a place for his mother to live in Georgia as the family was on the brink of eviction. None of this materialized. Instead T.A. was deemed ineligible to play in California, left homeless when the man he was staying with in California was arrested on charges of sexually assaulting a minor, and his family in Georgia was evicted.¹⁹

c. RECRUITING, TRANSFER RULES & ROSTER SPOTS

Due to the potential earnings from NIL deals for top collegiate players, some are opting to return for additional years rather than enter professional sports and face the uncertainty of the draft. Armando Bacot, the University of North Carolina men's basketball center, is making more from his NIL deals than the maximum he could have made on an NBA two-way contract.²⁰ Drew Timme, Gonzaga's center, opted to stay as well, sharing NIL has given him the chance to

¹⁵ Alex Kirshner, *'Everything's on Fire': NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay*, Global Sport Matters (January 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/>.

¹⁶ Pete Nakos, *What are NIL Collectives and how do they operate?*, On3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>.

¹⁷ Amanda Christovich, *One Year of NIL: Controversial Collectives Aren't Going Away*, Front Office Sports (June 27, 2022), <https://frontofficesports.com/collectives-arent-going-away/>.

¹⁸ Andy Staples et al., *How a five-star prospect from Georgia ended up homeless, ineligible and 2,000 miles away*, The Athletic (September 19, 2022), <https://theathletic.com/3605831/2022/09/19/t-a-cunningham-eligibility-recruiting-nil/>. See generally, G. Allan Taylor, *How the \$13 million recruitment of Jaden Rashada for Florida fell apart*, The Athletic (January 13, 2023), <https://theathletic.com/4087681/2023/01/13/jaden-rashada-florida-gators-football/>.

¹⁹ Ibid.

²⁰ Jeff Eisenberg, *Should I stay or should I go? How NIL is making this The Year of the Big Man in college basketball*, Yahoo! Sports (November 10, 2022), <https://sports.yahoo.com/should-i-stay-or-should-i-go-how-nil-is-making-this-the-year-of-the-big-man-in-college-basketball-131150873.html>.

try new hobbies and see if any could materialize into something he could continue doing after college, like podcasting or sportscasting.²¹

Other athletes are entering the transfer portal in the hopes of receiving a lucrative NIL deal from a different school. Following the NCAA approval of NIL deals, the NCAA also changed its transfer rules presenting athletes with two windows to transfer that will not affect their ability to compete.²² This change has created a pay-for-play scheme where athletes can enter the transfer portal and wait to see who will offer them the best deal. University of Miami men's basketball guard, Isaiah Wong threatened to enter the transfer portal unless his NIL deal was increased.²³ Alternatively, Zay Flowers, Boston College's star wide receiver, received multiple six-figure offers via intermediaries from NIL companies to enter the portal and transfer.²⁴

The unforeseen consequences of the new transfer rules include the impact transferring can have on an athlete's academic trajectory as transferring presents challenges with academic credit transferring, which many athletes do not take into consideration. Additionally, high school students have been immensely impacted by the new transfer rules, as many college programs are waiting to see who comes through the transfer portal instead of recruiting students out of high school.²⁵

d. ENDANGERING FUTURE OLYMPIC COMPETITIVENESS

Unlike other countries around the world, the U.S Olympic programs depend on college programs for their talent pools and training regiments. Many Olympic sports are non-revenue generating, which means they are at risk of getting cut due to dwindling athletic department budgets at the hands of NIL deal redistribution of capital in the college ecosystem.²⁶ This will dramatically affect our competitiveness in many sports at upcoming Olympic competitions.

VI. RELEVANT COMMITTEE ACTION

²¹ Ibid.

²² Ross Dellenger, *'It's Going to Change the Landscape': The NCAA's Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide*, Sports Illustrated (April 14, 2021), <https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball>.

²³ Madison Williams, *Miami Star Isaiah Wong Threatening Transfer Over NIL Compensation*, Sports Illustrated (April 29, 2022), <https://www.si.com/college/2022/04/29/miami-isaiah-wong-basketball-threatening-transfer-portal-nil-compensation-nijel-pack-john-ruiz-lifewallet>.

²⁴ Pete Thamel, *Why Boston College football star Zay Flowers turned down big-money offers to transfer*, ESPN (May 5, 2022), https://www.espn.com/college-football/story/_/id/33860761/why-boston-college-football-star-zay-flowers-turned-big-money-offers-transfer.

²⁵ Shehan Jeyarajah, *Inside the chaotic transfer portal recruiting process consuming the college football offseason*, CBS (March 22, 2023), <https://www.cbssports.com/college-football/news/inside-the-chaotic-transfer-portal-recruiting-process-consuming-the-college-football-offseason/>.

²⁶ Bruce Pascoe, *Arizona athletic director Dave Heeke wary of NIL's impact*, Arizona Daily Star (May 6, 2022), https://tucson.com/sports/arizonawildcats/arizonas-dave-hecke-pac-12-wary-of-nil-morphing-into-existential-threat-to-college-sports/article_fafa626c-cc08-11ec-be22-5bcf1be001a8.html?mc_cid=e94c823ba9&mc_eid=4bf9b1df67.

On September 30th, 2021, the Subcommittee on Consumer Protection and Commerce held a hearing entitled “A Level Playing Field: College Athletes’ Rights to Their Name, Image, and Likeness.”

VII. ISSUES

- Should college athletics follow a different compensation model than professional sports?
- Who should be allowed to negotiate and coordinate NIL deals on behalf of athletes (such as conferences, the schools themselves, agents, other third parties)?
- How do we ensure recruiting rules promote fairness, encourage athletic competition, and protect students?
- What entity should be responsible for enforcing NIL laws?
- How is the lack of a national standard impacting competition and recruiting between universities in states with different or no NIL laws?
- How would small universities and conferences, such as Division 2 or 3, be impacted by new requirements for athlete education, compliance, and enforcement?
- How would a revenue sharing model impact the ability of a university to fund non-revenue generating sports?

VIII. STAFF CONTACTS

If you need more information, please call Tim Kurth or Lacey Strahm at (202) 225-3641.