

STATEMENT OF MATTHEW J. MITTEN
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

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Introduction

I am a Professor of Law and the Executive Director of the National Sports Law Institute and the LL.M. in Sports Law program for foreign lawyers at Marquette University Law School in Milwaukee, Wisconsin. I served as the Law School's Associate Dean for Academic Affairs from July 2002 to June 2004. I currently teach Amateur Sports Law, Professional Sports Law, Sports Sponsorship Legal and Business Issues Workshop, Antitrust Law, and Torts. I am the author of *Sports Law in the United States* (Wolters Kluwer 2011, 2d. ed. 2014, 3d. ed. 2017) and co-author a law school textbook, *Sports Law and Regulation: Cases, Materials, and Problems* (Aspen/Wolters Kluwer 2005, 2d. ed. 2009, 3d. ed. 2013, 4th ed. 2017, 5th ed. 2020), and *Sports Law: Governance and Regulation* (Wolters Kluwer 2013, 2d. ed. 2016, 3d. ed. 2020), an undergraduate and graduate text.

I formerly served on the NCAA Scholarly Colloquium on College Sports' Advisory Board (October 2006-January 2011) and the *Journal of Intercollegiate Sport's* editorial board (January 2007-January 2011). I was a member of the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports (CSMAS) from August 1999-July 2005 and chaired this committee from September 2002-July 2005.

I served as the president of the Sports Lawyers Association from May 2015-May 2017 and am a member of its Board of Directors who co-presents the Year in Review summary of current legal developments at its annual conference. My bio and CV, which have been submitted to the Committee, include additional information about my general sports law background and experience as an antitrust and intellectual property law attorney before my academic career.

As a sports law professor, I have been studying and writing about various college sports issues for over 30 years, including several articles focusing on NCAA internal governance and external legal regulation, particularly antitrust issues. My individual and co-authored scholarship has implications and provides guidance for Congressional determination of the appropriate permissible scope of and limitations on intercollegiate student-athletes' licensing of their names, images, and likenesses (NIL) and important related matters. *See, e.g., Why and How the Supreme Court Should Have Decided O'Bannon v. NCAA*, 62 Antitrust Bulletin 62 (2017); *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 Ore. L. Rev. 837 (2014) (with Stephen F. Ross); *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 San Diego L. Rev. 779 (2010) (with James L.

Musselman & Bruce W. Burton); *Regulate, Don't Litigate, Change in College Sports*, Inside Higher Ed, June 10, 2014 (with Stephen F. Ross).

Based on my prior conversations with both Democratic and Republican Senate staff members, I understand that both parties have been working diligently to draft bipartisan federal NIL rights legislation for the benefit of students who participate in intercollegiate athletics for colleges and universities that are members of the NCAA, National Association of Intercollegiate Athletics (NAIA), and National Junior College Athletic Association (NJCAA), among others. I applaud your efforts and strongly support the enactment of a federal NIL rights law because uniform rules applicable to all athletes and teams that compete against each other are an essential characteristic of fair sports competition, which requires all participants to play by the same rules. In my opinion, Congressional enactment of a federal NIL rights law would be as important to American intercollegiate athletics stakeholders, particularly intercollegiate athletes, as the promulgation of the World Anti-doping Code (WADC) has been to the Olympic Movement and its athletes. Prior to the 2003 adoption of the WADC, which provides the basis of the International Convention Against Doping in Sport that was ratified by the Senate in 2008, international antidoping efforts were seriously balkanized because of differences in approach among the various Olympic sports and across national legal systems resulting in unfair and unjustified “hometown” favoritism.

As I explained in my testimony during a July 22, 2020 U.S. Senate Judiciary Committee hearing regarding “*Protecting the Integrity of Intercollegiate Athletics*,” “a nationally uniform law regulating intercollegiate student-athletes’ licensing of their NIL rights is required to provide consistency; to prevent the development of conflicting state laws; and to avoid the dangers of professionalizing college sports and creating competitive balance inequities if different states enact different NIL laws for their respective colleges and universities.”

I strongly support a federal NIL rights law with the following three provisions that are necessary to achieve those objectives: (1) preemption of state intercollegiate athletes NIL laws, which are establishing different and conflicting rules, to create one nationally uniform that benefits all U.S. intercollegiate athletes equally; (2) a very narrow antitrust exemption or safe harbor protecting national intercollegiate sports governing bodies and their member athletic conferences and educational institutions from prospective and retroactive federal or state antitrust liability for adopting and enforcing rules consistent with the provisions of a federal NIL law as well as their prior rules prohibiting college athletes from exercising any NIL rights to maintain eligibility to participate in intercollegiate sports; and (3) explicit clarification that, consistent with the clear weight of judicial precedent, this federal legislation does not create or define college athletes’ NIL rights to encompass or include the use of their names or any other aspects of their individual persona in media broadcasts of games or athletic events in which they participate.

1) Uniform Federal NIL Law and Preemption of State Intercollegiate Athlete NIL Laws

The U.S. college sports system, which is the product of a unique cooperative endeavor among hundreds of institutions of higher education that does not exist anywhere else in the world, provides access to college education opportunities for athletically-gifted persons of all socioeconomic backgrounds, offers a very popular distinctive brand of sports entertainment, and cross-subsidizes athletic participation opportunities for women. This amateur/educational model of intercollegiate sports competition originated from and is justified by the common educational mission of American universities and creates important co-curricular activities that provide opportunities for development of leadership, teamwork, and other interpersonal skills outside the classroom. *See generally* Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 Rutgers L. J. 269 (1994).

At most universities, the only sports that produce net revenues are football and men's basketball, which typically are used to subsidize other intercollegiate sports and, in some instances, academic programs. The cross-subsidization of sports within the athletic department is similar to, and consistent with, the historical cross-subsidization of academic programs within a university; for example, net revenues generated by law and business schools may subsidize the humanities and other academic programs. Regardless of whether each individually generates net revenues, all university academic programs and intercollegiate sports are an important part of its overall educational mission.

In April 2020, to provide intercollegiate athletes with the same rights as other college students, the NCAA Board of Governors directed Divisions I, II, and III to modify their respective eligibility rules “to allow student-athletes to receive compensation for third-party endorsements both related to and separate from athletics” with appropriate “guardrails” to ensure it does not become “pay for play” and professionalize college sports. *Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions*, available at <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.

This is a significant departure from the current NCAA rules prohibiting student-athletes, as a condition of being eligible to participate in intercollegiate sports, from earning any money from third parties authorized to use their individual NIL rights. It is important to recognize that courts previously ruled that these rules are a valid means of maintaining the NCAA's unique, non-professional brand of intercollegiate athletics (*Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004)), which does not violate federal antitrust law. *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 1008 (N.D. Cal. 2014) (“Nothing in the injunction will preclude the NCAA from continuing to enforce . . . its rules prohibiting student-athletes from endorsing commercial products”).

General NIL rights (also known as the “right of publicity”) for all individual persons historically have been established and defined by individual state laws, either by common law or statute. *See generally* 1 J. Thomas McCarthy, *Rights of Publicity and Privacy* (2d ed.) §§6:2-6:6 (Westlaw 2019). As of May 28, 2021, 17 states have enacted specific legislation providing intercollegiate athletes with NIL rights, and NIL legislation has been introduced in 16 other states in 2021. Intercollegiate athlete NIL laws will become effective on July 1, 2021 in at least five states (Alabama, Florida, Georgia, Mississippi, and New Mexico). “The trend among the states reveals that not only are many more states introducing bills that are swiftly moving through committee, but also indicate a willingness among states to enact earlier effective dates.” The Drake Group, Inc., *State-by-State NILS Executive Summary* (May 28, 2021) available at [May-28-Update-Exec-Summary-and-DB.pdf \(thedrakegroup.org\)](https://www.thedrakegroup.org/updates/2021/05/28/State-by-State-NILS-Executive-Summary-and-DB.pdf).

The Drake Group summary shows that the numerous and various state intercollegiate athlete NIL laws and bills are different and, in many instances, conflicting. “Many of the bills’ provisions indicate a willingness to provide additional benefits and funds seemingly to achieve a competitive recruiting advantage whereby states are saying to athletes: ‘come here and you can have NIL rights now.’” “More ‘outlier’ bills have included more aggressive provisions in terms of the nature of compensation provided for college athletes and how athlete compensation is treated. Prior bills such as South Carolina’s previous 2020 HB 4031 created a pay-for-play scenario in the form of trust funds and stipends payable to athletes only for revenue sports under which most women athletes wouldn’t qualify. Other bills have provided for annuity funds for college athletes.” This summary notes the “looming conflict of state and uniform law efforts with existing NCAA policy regarding amateurism and athlete benefits” and “the urgent need for a national solution to a national issue.”

Like national professional sports leagues, a national intercollegiate sports association needs uniform legal regulation to produce its unique brand of athletic competition. There are, however, important differences between intercollegiate sports and professional sports that should not be blurred or eliminated by student-athletes’ exercise of NIL rights. The U.S. Supreme Court’s majority opinion in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), recognized that an “academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable, such as for example, minor league baseball” as well as the importance of the “preservation of the student-athlete in higher education.” It also recognizes the NCAA’s “critical role in the maintenance of a revered tradition of amateurism in college sports;” its need for “ample latitude to play that role;” and that “the 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.” The dissenting opinion written by Justice Byron White, who played college football at the University of Colorado and finished second in the 1937 Heisman Trophy balloting, strongly cautioned against “treating intercollegiate athletics . . . as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits.”

Only Congress has the authority and ability to enact a nationally uniform college athletes NIL rights law that achieves these objectives. Only the Congressional legislative process enables a broad national public policy consideration of multiple societal goals in connection with intercollegiate athletics (e.g., maximizing college sports participation opportunities and scholarships, advancing Title IX gender equity) as well as the interests of all affected constituencies (e.g., student-athletes who play other intercollegiate sports, college sports fans, etc.).

The *NCAA v. Alston* case, which is pending before the U.S. Supreme Court, will resolve only the issue of whether NCAA rules limiting the education-related benefits that its member educational institutions may provide to their student-athletes to their respective costs of attendance and other reasonably necessary support for their participation in the school's academic and athletic programs comply with federal antitrust law. The Supreme Court's *Alston* ruling will not address whether the NCAA's current student-athlete eligibility rules prohibiting NIL compensation are consistent with antitrust law. Nor will the Court establish reasonable NIL rights for intercollegiate athletes, which pertain only to compensation they could receive from third parties other than their respective colleges or universities, that will achieve the foregoing objectives.

Neither the NCAA nor its Divisions I, II, or III, whose respective member educational institutions (collectively numbering approximately 1,200 colleges and universities) are located throughout the country in all 50 states, can establish nationally uniform NIL rights rules for intercollegiate athletes that are certain to comply with all existing and future state NIL laws. If all NCAA divisional NIL rules are required to comply with different and multiple state NIL laws (some of which may conflict and/or require or permit in-state student-athletes to receive "pay for play"), Divisions I, II, and III are effectively precluded from establishing nationally uniform divisional NIL rules for all intercollegiate athletes who participate in sports for their respective member schools.

The current and developing patchwork of varying individual state NIL rights law for intercollegiate athletes invites Dormant Commerce Clause litigation. In *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the Ninth Circuit held that a Nevada statute requiring the NCAA to provide certain procedural due process protections to Nevada universities in its rules enforcement proceedings violates the Dormant Commerce Clause because of its effective extraterritorial reach. The court determined that this state statute "would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules," thereby resulting in impermissible state control of "interstate commerce that occurs wholly outside of Nevada's borders." It also ruled that the Nevada statute's "extraterritorial reach also violates the [Dormant] Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions." *Id.* at 639-40. It is therefore essential that Congress preempt (i.e., prohibit) any state from enacting or continuing in effect any law governing or regulating the rights of intercollegiate athletes to receive compensation for the use of their names, images, or likenesses.

Federal preemption of state intercollegiate athlete NIL laws also would foreclose any current or future state legislation that would subvert current law generally holding that participating athletes do not have NIL or publicity rights in the broadcasts of games or sports events. For example, in *Marshall v. ESPN*, 111 F. Supp.3d 815 (M.D. Tenn. 2015), *aff'd*, 668 Fed. Appx. 155 (6th Cir. 2016), the district court found “no Tennessee authority for the proposition that participants in sporting events have a right to publicity under the common law, which “is unsurprising since it appears virtually all courts in jurisdictions that have decided the matter under their respective laws have held to the contrary for a variety of reasons.” It also ruled that the Tennessee Personal Rights Protection Act (TPRPA) “clearly confers no right of publicity in [a] sports broadcast.” The TPRPA expressly states: “[i]t is deemed a fair use and no violation of an individual's rights shall be found . . . if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.”

On appeal, the Sixth Circuit affirmed in its opinion that reads in full as follows:

“To state the plaintiffs' theory in this case is nearly to refute it. The theory begins with the assertion that college football and basketball players have a property interest in their names and images as they appear in television broadcasts of games in which the players are participants. Thus, the plaintiffs conclude, those broadcasts are illegal unless licensed by every player on each team. Whether referees, assistant coaches, and perhaps even spectators have the same rights as putative licensors is unclear from the plaintiffs' briefs (and, by all appearances, to the plaintiffs themselves). In any event, the plaintiffs seek to assert claims under Tennessee law, the Sherman Act, and the Lanham Act on behalf of a putative class of collegiate players nationwide. The defendants—various college athletic conferences and television networks, among others—responded in the district court with a motion to dismiss, which the court granted in a notably sound and thorough opinion.

To that opinion we have little to add. The plaintiffs claim that, under Tennessee statutory and common law, college players have a ‘right of publicity’ in their names and images as they might appear in television broadcasts of football or basketball games in which the plaintiffs participate. But that argument is a legal fantasy. Specifically, the plaintiffs' statutory claim under the Tennessee Personal Rights Protection Act is meritless because that Act expressly permits the use of any player’s name or likeness in connection with any ‘sports broadcast.’ Tenn. Code Ann. § 47–25–1107(a). And the plaintiffs' common-law claim is meritless, as the district court rather patiently explained, because the Tennessee courts have never recognized any such right and because, in the meantime, the Tennessee legislature has spoken to the issue directly.

The plaintiffs' case goes downhill from there. Their claim under the Sherman Act is that the various defendants have engaged in a horizontal scheme to fix at zero the price of the plaintiffs' putative rights to license broadcasts of sporting events in which the plaintiffs participate. That claim is meritless because, as shown above, those putative rights do not exist. That leaves the plaintiffs' claim under the Lanham Act, whose relevant provision bars the unauthorized use of a person's name or likeness in commerce when doing so 'is likely to cause confusion' as to whether the person endorses a product. 15 U.S.C. § 1125(a)(1)(A). The theory here is that if, say, ESPN shows a banner for "Tostitos" at the bottom of the screen during a football game, then consumers might become confused as to whether all the players on the screen endorse Tostitos. Suffice it to say that ordinary consumers have more sense than the theory itself does.

The district court's judgment is affirmed."

668 Fed. Appx. 155 (6th Cir. 2016).

As a sports law professor and former intellectual property attorney, I strongly believe the *Marshall* case was decided correctly by both the Tennessee federal district court and Sixth Circuit. If state laws were to extend intercollegiate athletes' NIL rights to a broadcast sports event in which he or she participates, numerous practical problems recognized by the Sixth Circuit as well as a host of legal issues would arise under First Amendment and federal copyright law. For many years, most courts have ruled that the Copyright Act preempts professional athletes' claims that broadcasts of games or athletic competitions in which they participated violates their NIL or publicity rights. See, e.g., *Dryer v. NFL*, 814 F.3d 938 (8th Cir. 2016); *Ray v. ESPN*, 783 F.3d 1140 (8th Cir. 2015); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *Somerson v. McMahon*, 956 F. Supp.2d 1345 (N.D. Ga. 2012).

2) Very Narrow Antitrust Immunity/Safe Harbor

In my Senate Judiciary Committee testimony, I also suggested that "very narrow antitrust immunity" (i.e., a safe harbor) is necessary to protect the NCAA and its member athletic conferences and educational institutions from liability "for adopting and enforcing rules consistent with the provisions of a federal NIL law." As I said then and reiterate now: "To be absolutely clear, I am not advocating or suggesting a broad antitrust exemption from the Sherman Act similar to Major League Baseball's common law antitrust immunity (see *Flood v. Kuhn*, 407 U.S. 258 (1972)) that would immunize the NCAA, athletic conferences, and universities from antitrust liability for any and all anticompetitive conduct in connection with their governance of intercollegiate athletics." Without this very limited prospective immunity from federal and state antitrust law liability, Congressional determinations regarding the appropriate scope of and limits on student-athletes' NIL rights could be subject to antitrust

challenges and judicial resolution on a case-by-case determination with unpredictable results and potential treble damages liability (if successful).

Congress should establish fair and uniform rules that the college sports governing bodies and their member conferences and educational institutions must follow – and then ensure that those rules are not undermined by antitrust litigation. Otherwise, Congressional policy decisions reflected in federal legislation, which by necessity will include rules that define (and therefore necessarily limit) the scope of NIL rights and compensation opportunities for student-athletes, could be challenged as anticompetitive restraints of trade under the Sherman Act. In this regard, it is important to note that courts applying antitrust law consider only procompetitive economic justifications for alleged anticompetitive conduct and have routinely rejected evidence concerning the impact of their decisions on Title IX goals, non-revenue sports, and the number of scholarships available for student-athletes.

A narrow express antitrust exemption as part of a federal NIL law benefitting intercollegiate athletes is both appropriate and necessary to preclude future antitrust challenges to Congressionally permissible regulation by college sports governing bodies such as the NCAA, *inter alia*, “to prevent NIL opportunities from infecting recruiting, distracting [student-athletes] from their educational obligations, providing external economic pressure for playing time, press availability.” Separate Statement of Commissioner Harvey Perlman at pages 1-2 in connection with June 15, 2020 Final Report and Recommendation for a Uniform State Law Drafting Committee by the Study Committee on College Athlete Name, Image, and Likeness Issues. It would provide the substantial benefit of legal certainty that a federal NIL rights law cannot be used as a sword by plaintiffs against the NCAA or its member athletic conferences and educational institutions in antitrust litigation.

Even though the weight of judicial precedent is consistent with *Marshall* in its rejection of athletes’ claimed NIL rights in sports broadcasts and the *O’Bannon* district court permitted the NCAA to continue enforcing its rules prohibiting student-athletes from endorsing commercial products, plaintiffs continue to advocate for contrary results in pending antitrust litigation. *House v. NCAA* and *Oliver v. NCAA*, two cases filed in 2020 that are pending in California federal district court, assert antitrust claims based on college athletes’ alleged NIL rights in broadcast sports competitions between NCAA member universities in which they participated. The complaints filed in these cases allege that the mere consideration of internal NIL legislation by NCAA Divisions I, II, and III, which was directed by the NCAA Board of Governors and precipitated by the enactment of various state intercollegiate athlete NIL laws, is evidence that the NCAA and its member educational institutions have abandoned their historical commitment to the amateur/educational model of intercollegiate sports.

This antitrust litigation creates the risk of potentially hundreds of millions of dollars in damages awards against the NCAA and its member conferences based on the current NCAA rules

prohibiting student-athletes from receiving any NIL compensation, even though *O'Bannon* validated these rules. To date, rather than following the foregoing well-reasoned legal precedents and granting defendants' motions to dismiss plaintiffs' claims, the California federal district court has ordered costly and time-consuming discovery to go forward in those cases.

The on-going defense of antitrust litigation against the NCAA and its athletic conferences based on the *House* and *Oliver* plaintiffs' continuing unfounded allegations that intercollegiate athletes have such broad NIL rights is time-consuming and economically wasteful, thereby diverting resources that would be better devoted to their member schools' intercollegiate athletic programs and other socially beneficial components of the broad educational missions of American universities. Therefore, my suggested limited immunity or safe harbor from federal and state antitrust law liability also should be retroactive.

To prevent the achievement of socially legitimate objectives from being thwarted by private antitrust litigation, Congress previously granted limited immunity from federal antitrust law to professional sports leagues (e.g., Sports Broadcasting Act of 1961, 15 U.S.C. §1291 et seq.), educational institutions (e.g., Improving America's Schools Act of 1994), and other unique industries (e.g., 2004 Medical Resident Matching Program Exemption, 15 U.S.C. § 37b). The most similar Congressional express antitrust exemption is the "Need Based Aid Act of 1992," which permitted higher education institutions to agree to award financial aid to students based only on demonstrated financial need. It was enacted in response to a 1991 United States government antitrust suit alleging that a group of 23 elite and mid-level colleges and universities agreed to provide only need-based financial aid to undergraduate students and to jointly determine a single amount that all of the institutions would offer commonly admitted students. Although the original Act expired on September 30, 1994, the limited express antitrust immunity that it provided to colleges and universities remains in effect pursuant to the "Improving America's Schools Act of 1994" and "Need Based Educational Aid Act of 2015," respectively. S.1482 - Need-Based Educational Aid Act of 2015 available at <https://www.congress.gov/bill/114th-congress/senate-bill/1482>.

Without an express antitrust exemption, it is possible that courts might judicially create some form of implied antitrust immunity that would prevent a federal NIL rights law from being used as the basis of alleged federal or state antitrust law claims against the NCAA and/or its member athletic conferences and educational institutions. But this is clearly a second-best option that is fraught with uncertainty and unpredictability, which would require litigation to answer this question. Because the Amateur Sports Act (ASA) provides the United States Olympic and Paralympic Committee (USOPC) with "exclusive jurisdiction . . . over all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games," the Tenth Circuit held that the USOPC and its National Governing Body (NGB) members for the various Olympic and Paralympic sports have implied immunity from antitrust claims arising out of an athlete's ineligibility to participate in an Olympic sport. *Behagen v.*

Amateur Basketball Ass'n, 884 F.2d 524 (10th Cir. 1989). The Ninth Circuit held that USOPC and NGB rules restricting commercial advertising on athlete apparel during Olympic trials are immune from antitrust challenge because the rules facilitate the generation of sponsorship revenues to support U.S. teams' participation in the foregoing and other international sports competitions. *Gold Medal LLC v. USA Track & Field*, 899 F.3d 712 (9th Cir. 2018).

It is very difficult to predict whether courts would find that a federal NIL and publicity rights law provides the basis for any implied immunity from antitrust law claims against the NCAA and its member athletic conferences and educational institutions, and even if so, the likely judicial scope of any implied immunity. Judicially created implied antitrust law immunity generally is disfavored, and a federal NIL rights law probably would not provide the NCAA and its athletic conferences with the same broad and plenary authority to govern intercollegiate athletics that the ASA conferred on the USOPC and its NGBs regarding Olympic sports. Therefore, the specific language and provisions of the enacted federal NIL rights law would be critically important and probably dispositive factors in a court's consideration of whether or not to create any implied antitrust immunity. Its legislative history also would be given significant weight by courts. By choosing to provide an express very narrow scope of antitrust immunity or a safe harbor as suggested above, Congress would provide legal certainty and predictability, thereby avoiding the need for courts to resolve these issues in future litigation.

3) College Athletes' NIL Rights Do Not Encompass Use of Their Names or Persona in Media Broadcasts of Games or Athletic Events

As illustrated by the *House* and *Oliver* cases, the issue of whether college athletes should have NIL rights in sports broadcasts continues to be re-litigated in antitrust cases against the NCAA and Division I athletic conferences that are seeking millions of dollars in treble damages and attorneys' fees for plaintiffs' lawyers. If successful, these cases as well as others with similar allegations that may be filed in the future, would deprive NCAA member educational institutions of much needed revenues to support athletic programs in which approximately 460,000 female and male student-athletes participate in 23 sports (or at least did so prior to the Covid-19 pandemic). Therefore, it would be prudent for Congress to definitively determine that college athletes' NIL rights do not encompass the use of their names or any other aspects of their individual persona in media broadcasts of games or athletic events in which they participate. Federal legislative codification of the clear majority judicial view regarding this issue would create the necessary legal certainty and national uniformity, while also effectively precluding future litigation of this issue on a case-by-case basis in various courts throughout the country.

Clear Congressional language providing this clarification also would prevent federal NIL legislation benefitting intercollegiate athletes from being used to professionalize college sports by effectively prohibiting their receipt of "pay for play," which would be consistent with existing federal antitrust, employment, and labor laws and their respective underlying policies. *See, e.g.,*

NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984) (“athletes must not be paid” to differentiate college sports from comparable professional sports such as minor league baseball); *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019) (dismissing Fair Labor Standards Act and California Labor Code claims asserting college football players should be paid minimum wages and overtime because they are not employees); *Northwestern University and College Athletes Players Ass’n*, Case 13-RC-121359 (2015) (because it will not effectuate federal labor law policies, NLRB refuses to assert jurisdiction over attempted unionization of Northwestern University football players).

Concluding Summary

Only Congress has the authority and ability to enact a nationally uniform law establishing the appropriate parameters of NIL rights for college athletes, which is necessary to prevent the continuing development of a conflicting and differing patchwork of state NIL laws resulting in at least two significant adverse effects: 1) competitive balance inequities if different states enact different NIL laws; and 2) the professionalism of college sports if some states permit or require college athletes to receive game and sports event media rights income by defining their NIL rights too broadly.

To protect the national intercollegiate sports governing bodies and their member athletic conferences and educational institutions from prospective and retroactive federal or state antitrust liability for adopting and enforcing rules consistent with the provisions of a federal NIL law, it is necessary for this landmark legislation to provide them with a “very narrow” scope of antitrust immunity.

To establish national uniformity consistent with the well-reasoned majority judicial view; to prevent future litigation that could result in court rulings that conflict with this judicial precedent; and to preserve college sports as a unique brand distinguishable from professional sports by prohibiting “pay for play”; federal NIL legislation should clearly clarify that college athletes’ NIL rights are not violated by their use in media broadcasts of intercollegiate games or athletic events.