

The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes

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Introduction

For decades, the National Collegiate Athletic Association’s (“NCAA”) amateurism rules have largely prevented NCAA athletes from commercializing their names, images, and likenesses (“NIL”).¹ The right to license and profit from one’s own image, often referred to as the “Right of Publicity,” is explicitly recognized by statute or common law in 35 states.² No federal Right of Publicity statute exists, but in 1977, the United States Supreme Court recognized the right.³ However, until 2021, NCAA athletes were precluded from benefiting from this right, as under the NCAA’s amateurism principle, “An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport ...” if he “[u]ses athletics skill (directly or indirectly) for pay in any form in that sport.”⁴ Prior to July 1, 2021, by becoming an NCAA athlete and complying with

¹ NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-2021 NCAA DIVISION I MANUAL, Op. Bylaws 12.1.2 (2020), available at <http://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx>.

² Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE NO. 1 (September 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/whats-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/#1 (last visited March 1, 2021).

³ *Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562 (1977).

⁴ *Id.* at 1.

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the NCAA's Bylaws to maintain eligibility, NCAA athletes gave up their right to benefit from their NIL while competing in NCAA athletics. This relinquishment put full commercial marketing control of the athlete, their team, and the college sport in the NCAA's hands. Research shows that despite the application of Title IX to sport in 1975, NCAA women's sports have not been commercially marketed in parity with NCAA men's sports, with NCAA men's sports experiencing significant publicity and sponsorship windfalls.⁵ This article examines the recent decision by the NCAA to allow NCAA athletes to benefit from their NIL, the potential Title IX implications of the decision, and how the decision could narrow the publicity gap between NCAA men's and women's sport athletes in furtherance of the plain language and intent of Title IX.⁶

The NCAA's amateurism bylaw, which up until 2021 forbade college athletes from benefitting from their NIL, has impacted both athletes' decisions to turn professional and their intercollegiate athletic eligibility. For many, these decisions had financial consequences, as they either required an athlete to forego securing sponsorship dollars to compete in NCAA athletics or completing their college education to pursue endorsement revenue. Take for instance the most decorated women's swimmer, Katie Ledecky, who has won seven Olympic gold medals and 15 World Championship gold medals.⁷ Following the 2016 Olympics in which she medaled more than any female swimming athlete at the Rio Games, Ledecky enrolled at Stanford University and joined its women's swimming and diving team.⁸ It is estimated that in choosing to compete in NCAA athletics

⁵ See Sally Jenkins, *The NCAA's shell game is the real women's basketball scandal*, THE WASHINGTON POST (March 25, 2021), <https://www.washingtonpost.com/sports/2021/03/25/ncaa-women-basketball-tournament-revenue/> (last visited July 7, 2021) (differentiating how the NCAA publicizes, markets and strategizes around NCAA Division I men's basketball versus NCAA Division I women's basketball); John Wall Street, *NCAA Sponsors Missing Out On Women's Tournament Opportunities*, Sportico (March 30, 2021), <https://www.sportico.com/business/sponsorship/2021/ncaa-sponsors-womens-basketball-tournament-1234625974/> (last visited July 7, 2021) (explaining that despite the NCAA being responsible for selling sponsorships for 90 National Championships across its three divisions, most sponsorships are directed toward men's sports).

⁶ Nat'l Collegiate Athletic Ass'n, *Taking Action Name, Image And Likeness*, [NCAA.org](https://www.ncaa.org/about/taking-action) (2021), <https://www.ncaa.org/about/taking-action> (last visited July 7, 2021) (highlighting the NCAA's interim policy allowing college athletes to benefit from their NIL); Pat Forde, *NCAA's New NIL Landscape Already Proving to Quell the Naysayers*, [SI.com](https://www.si.com/college/2021/07/01/ncaa-nil-reaction-criticism-athlete-benefits) (July 1, 2021), <https://www.si.com/college/2021/07/01/ncaa-nil-reaction-criticism-athlete-benefits> (last visited July 7, 2021) (discussing that although more has been invested in NCAA men's sports, through NIL, endorsers may create greater publicity opportunities for NCAA women athletes).

⁷ Katie Ledecky, *About Katie*, KATIE LEDECKY SWIM, <https://katieledeckyswim.com/> (last visited July 7, 2021).

⁸ See Karen Crouse, *When an Olympic Goes to College, Riches Stay out of Reach*, NEW YORK TIMES (April 16, 2016) <https://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html> (last visited July 7, 2021) (examining Ledecky's decision—and the cost—to pursue NCAA athletics).



rather than turn professional during the height of her Olympic success, Ledecy lost out on \$3–5 million in sponsorship dollars in 2015 *alone*.⁹ Compare this to Ledecy’s male counterpart, Michael Phelps, the most-decorated men’s swimmer of all time. Rather than pursue NCAA athletics, Phelps immediately turned professional when he reached international competition. Early in his career—before even winning an Olympic medal—Phelps secured notable sponsors such as Visa, which has sponsored him since 2002.¹⁰ Following winning eight medals during the 2004 Olympic Games, it was estimated Phelps earned \$5 million per year in sponsorships. After adding another eight medals to his collection during the 2008 Olympic Games, Phelps’ sponsorship valuation rose to as high as an estimated \$30 million per year.¹¹ That Ledecy’s estimated sponsorship earning potential was in the range Phelps secured ahead of his breakout performance one year before hers signals that the NCAA’s foreclosure of athletes benefiting from their NIL rights has negatively affected the earning potential of women’s intercollegiate sport athletes. This impact is exacerbated for women’s intercollegiate sport athletes, as they tend not to have the same professional opportunities as men’s intercollegiate sport athletes.¹²

This disparity arose in an NCAA landscape flush with revenue historically distributed more greatly to men’s sports than women’s sports.¹³ For instance, NCAA football and men’s basketball coaches are highly compensated, and in 40 states are the highest paid state employee.¹⁴ In addition to their compensation, these coaches—not subjected to the same NIL rules as NCAA athletes—freely profited off of their NIL rights. For example, University of Alabama football coach Nick Saban, who despite earning an annual salary of \$9.3 million, benefits

⁹ See Philip Hersh, *By turning pro, Katie Ledecy could be swimming in money*, CHICAGO TRIBUNE (August 8, 2015), <https://www.chicagotribune.com/sports/olympics/ct-swimmer-ledecy-losing-millions-of-dollars-20150808-column.html> (last visited July 7, 2021) (providing expert analysis of the sponsorship valuation Ledecy forewent to pursue NCAA athletics).

¹⁰ The New York Times, *Michael Phelps, the major advertising vehicle*, THE NEW YORK TIMES (August 18, 2008), <https://www.nytimes.com/2008/08/18/business/worldbusiness/18iht-sponsors.1.15385151.html> (last visited July 7, 2021) (detailing the sponsorship revenue Michael Phelps has generated throughout his career).

¹¹ *Id.*

¹² See NCAA, *Estimated probability of competing in professional athletics*, NCAA.org (2020), <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited July 13, 2021).

¹³ See Champion Women, *Is Your School Treating Female Athletes Fairly?*, TitleIXSchools.com (2021), <https://titleixschools.com/2020/06/23/ead-a-data/> (last visited July 7, 2021) (highlighting the disparities in the amount of revenue spent on men’s and women’s NCAA sports related to scholarships and recruiting).

¹⁴ See Charlotte Gibson, *Who’s Highest-Paid in Your State?*, ESPN.com, https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees (last visited Feb. 27, 2021).



from his NIL rights through endorsement deals with companies.¹⁵ Further, the NCAA—a non-profit organization—generates over \$1 billion in revenue annually.¹⁶ This revenue is above and beyond the multiple billions of dollars in revenue generated by its member associations’ athletics departments. Yet, in this lucrative college sport landscape, NCAA athletes were not allowed to monetize their NIL.¹⁷ That is, until the divide between what of monetary value NCAA athletes and all others associated with college sport, like coaches, could receive from the billion-dollar generating enterprise prompted increased public scrutiny of the NCAA’s amateurism model.¹⁸ Thereafter, numerous states passed legislation codifying that intercollegiate athletics associations—like the NCAA—could not create rules prohibiting college athletes from benefiting from their NIL.¹⁹ Similar bills sponsored by bipartisan legislators have been proposed at the federal level.²⁰ The flurry of bills was tipped off when the State of California enacted the first—Senate Bill 206—better known as the, “Fair Pay to Play Act.”

¹⁵ See Daniella Medina, *Nick Saban earns over \$10 million on season after Alabama win, including several bonuses*, TUSCALOOSA NEWS (Jan. 12, 2021), <https://www.tuscaloosaneews.com/story/sports/2021/01/12/nick-saban-salary-bonus-contract-alabama-win-national-champion-ship/6639830002/> (highlighting that Nick Saban’s annual salary was \$9.3 million) (last visited March 1, 2021); Reggie Wade, *Legendary coach Nick Saban teams with the Aflac duck for new ad campaign*, AOL (Aug. 20, 2019), <https://www.aol.com/news/legendary-coach-nick-saban-teams-with-the-aflac-duck-for-new-ad-campaign-040028054.html> (explaining that Nick Saban, would begin appearing in a commercial with a cartoon duck through an endorsement deal with insurance company, Aflac) (last visited March 1, 2021).

¹⁶ See Tim Daniels, *NCAA Surpasses \$1 Billion in Annual Revenue for 1st Time in Association History*, BLEACHER REPORT (March 7, 2018), <https://bleacherreport.com/articles/2763102-ncaa-surpasses-1-billion-in-annual-revenue-for-1st-time-in-association-history> (noting that for the first time in its history, the NCAA’s revenue exceeded \$1 billion in 2018) (last visited March 1, 2021); Mike Ozanian, *March Madness is Most Profitable Postseason TV Deal In Sports*, FORBES (March 19, 2019), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/> (highlighting that the NCAA brings in revenue of over \$750 million for the broadcast rights to the men’s basketball tournament alone) (last visited March 1, 2021).

¹⁷ *Id.* at 1.

¹⁸ See Tyrone Thomas, Keith Carroll, Randy K. Jones, & Aaron Fenton, *INSIGHT: A Crescendo of Calls for Student-Athletes’ Right to Play and Get Paid*, BLOOMBERG LAW (March 16, 2020), <https://news.bloomberglaw.com/us-law-week/insight-a-crescendo-of-calls-for-student-athletes-right-to-play-and-get-paid> (discussing various calls for the NCAA to allow NCAA athletes to benefit from their NIL) (last visited March 1, 2021).

¹⁹ See, e.g., California *infra* note 48, Florida *infra* note 54, Colorado *infra* note 62, Nebraska *infra* note 6, New Jersey *infra* note 64, & Michigan *infra* note 65.

²⁰ See Gregg E. Clifton, *Update: Sixth Federal NIL Bill Proposed by Senator Jerry Moran: Senator Booker Comment on Status of College Athlete Bill of Rights*, THE NATIONAL LAW REVIEW (March 1, 2021), <https://www.natlawreview.com/article/update-sixth-federal-nil-bill-proposed-kansas-senator-jerry-moran-senator-booker> (noting that a federal bill proposed by U.S. Senator Jerry Moran in March 2021 is the sixth federal bill proposed addressing the issue of NCAA athlete NIL compensation) (last visited March 1, 2021).



While politicians across both sides of the aisle aligned on the need for intercollegiate athletes to be able to benefit from their NIL, the NCAA was not as easily convinced. In response to the Fair Pay to Play Act, NCAA president Mark Emmert wrote an op-ed initially espousing the benefits of allowing NCAA athletes to profit from their NIL.²¹ However, the NCAA's subsequent actions undercut this immediate positive reaction, as the association spent nearly 18 months working to defeat legislative NIL attempts.²² In fact, as late as January 2021, the NCAA delayed voting on NIL-related amendments to its bylaws.²³ However, a separate legal case, *NCAA v. Alston*, which centered on what value NCAA athletes can receive from a university in exchange for access to their athleticism, was a linchpin in the NCAA relenting and allowing NCAA athletes to benefit from their NIL. In petitioning the Supreme Court for review of the case, the NCAA sought an antitrust exemption for its amateurism bylaw.²⁴ It is assumed that if it won at the Supreme Court and received said exemption, it would have bullishly defended against NIL laws. Thus, it is presumable that the NCAA's inaction in drafting NIL bylaws centered on its legal strategy in *NCAA v. Alston*.²⁵

On June 21, 2021, the United States Supreme Court ruled 9-0 against the NCAA in *NCAA v. Alston*, upholding a lower court ruling that its compensation

²¹ See Mark Emmert, *If college athletes could profit off their marketability, how much would they be worth? In some cases, millions*. USA TODAY (Oct. 9, 2019), <https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/> (last visited March 1, 2021) (describing how women's sport athletes could benefit from being able to profit off of their name, image and likeness).

²² See Dana Hunsinger Benbow, *NCAA president Mark Emmert says Fair Pay to Play Act turns student-athletes into employees*, INDY STAR (Oct. 3, 2019), <https://www.indystar.com/story/sports/college/2019/10/03/ncaa-president-mark-emmert-responds-california-fair-play-pay-act/3850522002/> (showcasing NCAA president Mark Emmert's initial renunciation of California's "Fair Pay to Play Act.") (last visited March 1, 2021); Pat Forde and Ross Dellenger, *NCAA's Name, Image, Likeness Legislation Proposal Revealed In Documents*, [SL.com](https://sl.com) (Oct. 12, 2020) (highlighting a change in course from the NCAA's initial stance, as demonstrated by the association proposing NIL legislation) (last visited March 1, 2021).

²³ See Dan Murphy and Adam Rittenberg, *NCAA delays vote to change college athlete compensation rules*, ESPN (Jan. 11, 2021), https://www.espn.com/college-sports/story/_/id/30694073/sources-ncaa-delays-vote-change-college-athlete-compensation-rules (noting that the NCAA's Division I Council "... decided to indefinitely delay a vote" on proposed NIL legislation) (last visited March 1, 2021).

²⁴ See Marc Edelman, *Supreme Court's Ruling Against NCAA In College Athlete Pay Case Rests On Decades Of Legal Precedent*, FORBES (June 21, 2021), <https://www.forbes.com/sites/marcedelman/2021/06/21/as-earlier-predicted-us-supreme-court-rules-against-ncaa-9-0/?sh=714d2b33824b> (discussing the NCAA's seeking of an antitrust exemption in *NCAA v. Alston*) (last visited July 13, 2021).

²⁵ See Alicia Jessop, *A Supreme Court case could give NCAA athletes more benefits. How could it affect women?*, THE LILY (April 3, 2021), <https://www.thelily.com/a-supreme-court-case-could-give-ncaa-athletes-more-benefits-how-could-it-affect-women/> (last visited July 13, 2021).



limits violate the Sherman Antitrust Act.²⁶ In so ruling, the Supreme Court stripped the NCAA of the plausibility it would secure an antitrust exemption through the Court. Thus, as the first effectuation date of states' NIL bills approached 10 days later on July 1, 2021, the NCAA hurriedly drafted an interim NIL policy, as now it was clear the highest court in the United States would not shield its amateurism standard from antitrust scrutiny. Despite the interim policy being published some 19 months after California enacted the Fair Pay to Play Act, the NCAA showed it had given little thought—or care—to how to effectuate NIL, as the interim policy provided little guidance other than iterating that NCAA athletes across all three divisions of competition can benefit from their NIL, so long as the benefit is not tied to pay-for-play or recruiting.²⁷

Now, as the NCAA considers a final NIL policy and states and the federal government examine their own NIL legislation, experts question whether allowing intercollegiate athletes to benefit from their NIL will lead to Title IX violations.²⁸ This article argues that allowing NCAA athletes to benefit from their NIL rights will further effectuate the plain language and intent of Title IX and its 1979 Policy Interpretation by giving women's sport athletes the ability to generate more equal publicity for their athletic efforts. Section I of the article provides an overview of Title IX and outlines what is required by NCAA athletics departments to comply with the statute. Section II provides an overview of selected individual state and federal bills that have been enacted or proposed related to intercollegiate athletes' NIL rights. The section also highlights portions of each bill that could cause Title IX-related concerns. Section III explains that because payments to NCAA athletes for use of their NIL would likely come from third-parties—and not federally funded educational settings—Title IX is not likely triggered. In the alternative, it posits the possible Title IX risks that could emerge as NCAA athletes are allowed to benefit from their NIL. Section IV makes the case for why restoring NCAA athletes' NIL rights will further

²⁶ *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

²⁷ Nat'l Collegiate Athletic Ass'n, *Taking Action Name, Image And Likeness*, [NCAA.org](https://www.ncaa.org/about/taking-action) (2021), <https://www.ncaa.org/about/taking-action> (last visited July 7, 2021) (highlighting the NCAA's interim policy allowing college athletes to benefit from their NIL).

²⁸ See Kristi Dosh, *Name, Image And Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (January 21, 2020), <https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=484f88487625> (last visited February 28, 2021) (setting forth arguments raised by several attorneys and professors who believe that Title IX could be thwarted if intercollegiate athletes' NIL rights are restored); Tanyon Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, XVII STAN. J. C.R. & C.L. 1 (2021) (arguing that Title IX will apply to compensation NCAA athletes secure from third-parties).



effectuate the legislative and regulatory intent of Title IX by providing women's sport athletes the opportunity to more fully ensure equal publicity of their athletic endeavors. Section V outlines recommendations for Congress and the NCAA to adopt to ensure that women's sport athletes' NIL rights are optimized to the level of men's sport athletes when their NIL rights are restored.

Section I. An Overview of Title IX as it Relates to Intercollegiate Athletics

On June 23, 1972, the United States Congress enacted Title IX of the Education Amendments of 1972. The law provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁹ The leading co-author of Title IX, former U.S. Congresswoman Patsy Mink, was motivated to write the bill over her experience being denied admission to numerous medical schools and inability to secure a job at a law firm after graduating from law school because she had a child.³⁰ Pursuing politics due to the foreclosure of other career opportunities, Mink—who was also the first woman of color to become a Congresswoman—used her position to enact legislation to address the harm she experienced as a woman of being held out of educational opportunities.³¹

The prompting to write the legislation that would become Title IX came at the insistence of a Women's Equity Action League employee named Bernice Sandler, who attained her Doctorate of Education in Counseling and Personnel Services after marrying and birthing two children. Sandler applied for and was denied full-time employment at her alma mater, the University of Maryland, numerous times. Finally, seeking insight into why she wasn't being hired, the decision-makers told her she “comes on too strong for a woman.” Rather than sulking, Sandler went to work, suing 250 schools for sex discrimination and filing a class-action lawsuit that named all U.S. universities as defendants. Over time, she would connect with Mink and the other two co-authors of Title IX—Congresswoman Edith Green and Senator Birch Bayh—to conduct research and

²⁹ Sex, 20 U.S.C.S. § 1681 (2020).

³⁰ See Kate Stringer, *No One Would Hire Her. So She Wrote Title IX and Changed History for Millions of Women. Meet Education Trailblazer Patsy Mink*, THE 74 MILLION (March 1, 2018), <https://www.the74million.org/article/no-one-would-hire-her-so-she-wrote-title-ix-and-changed-history-for-millions-of-women-meet-education-trailblazer-patsy-mink/> (last visited February 27, 2021) (highlighting the factors that led to Patsy Mink drafting the legislation that would become Title IX).

³¹ *Id.*



draft policy reports that would be used to develop the landmark anti-discrimination law.³²

Title IX was enacted at a time when stories like Mink's and Sandler's were not the exception, but the norm. Before Title IX, American girls and women were held out of opportunities across all levels of education—"[e]lementary school aged girls were not allowed to join safety patrol, high school girls were not allowed to take shop class, and some universities chose to exclude women as a whole."³³ In 1972, nearly two-thirds of all undergraduate students in the United States were male.³⁴ In graduate education, the disparity between male and female students was even greater. In 1972, only 9% of medical degrees were awarded to women, compared to 7% of law degrees and 1% of dental degrees.³⁵ In the Congressional record for Title IX, Senator Bayh remarked:

While the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.³⁶

Bayh was correct: Title IX was not a panacea. This was demonstrated with the enactment of the Education Amendments of 1974, which directed the Secretary of the Department of Health, Education and Welfare to:

... prepare and publish ... proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education

³² See Kerri Lee Alexander, *Bernice Sandler*, NATIONAL WOMEN'S HISTORY MUSEUM (2019), <https://www.womenshistory.org/education-resources/biographies/bernice-sandler#:~:text=Known%20as%20the%20%E2%80%9C%20of,matters%20into%20her%20own%20hands.> (last visited February 27, 2021) (highlighting the life of Bernice Sandler).

³³ See *Title IX: History, Influence and More*, PROTECT TITLE IX, <https://www.protecttitleix.com/history-1> (last visited February 27, 2021) (documenting the disparities faced by girls and women in American educational settings before the enactment of Title IX).

³⁴ See R. Shep Melnick, *The Strange Evolution of Title IX*, NATIONAL AFFAIRS (2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> (last visited February 27, 2021) (noting that, "[i]n 1972, 57% of college students were male and only 43% were female.").

³⁵ See *Indicators of Progress Toward Equal Educational Opportunity Since Title IX*, DEPARTMENT OF EDUCATION (1997), <https://www2.ed.gov/pubs/TitleIX/part2.html> (last visited February 27, 2021) (highlighting how opportunities in education expanded for women between 1972 through the mid-1990s).

³⁶ 118 Cong. Rec. 4953, 5812 (1972).



programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.³⁷

Thereafter in 1975, the Department of Health, Education and Welfare codified a federal regulation, which applied Title IX to athletics (the “1975 Regulation”).³⁸ Further, the 1975 Regulation set forth a standard of equal opportunity, whereby federally funded educational institutions must provide both sexes equal athletic opportunity.³⁹ Through a 1979 Policy Interpretation (the “1979 Policy Interpretation”), three areas in which federally funded educational settings must comply with Title IX as it relates to sport were delineated: student interests and abilities; athletic benefits and opportunities; and financial assistance.⁴⁰

Related to student interests and abilities, the 1979 Policy Interpretation specified that the 1975 Regulation “... requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.”⁴¹ Compliance with this requirement is assessed by examining: “(a) The determination of athletic interests and abilities of students; [and] (b) The selection of sports offered ...”⁴² A three-part test was developed for schools to show compliance. Schools can comply: (1) by showing “... intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or” (2) “[w]here the members of one sex have been and are underrepresented . . . , and the institution cannot show a continuing practice of program expansion ... that the interests and abilities of the members of that sex have been fully and effectively

³⁷ Provision Relating to Sex Discrimination, Pub. L. No. 93-380, § 844, 20 U.S.C. § 1961 (1974).

³⁸ Athletics, 34 C.F.R. § 106.41 (2020) (codifying, “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intermural athletics offered by a recipient and no recipient shall provide any such athletics separately on such basis.”).

³⁹ *Id.* (setting forth that the determination of whether an institution is providing equal athletic opportunities shall consider these and other factors: “(1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; (10) publicity.”).

⁴⁰ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 F.R. 71413 et seq. (Dec. 11, 1979).

⁴¹ *Id.*

⁴² *Id.*



accommodated by the present program; or” (3) “[w]here the members of one sex are underrepresented ... and the institution cannot show a continuing practice of program expansion ... that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”⁴³

Presently, the Office of Civil Rights’ Department of Education is the federal administrative agency responsible for enforcing Title IX.⁴⁴ In 1996, the Office of Civil Rights (OCR) issued a “Dear Colleague” letter providing schools with expanded insight into how the three-part test operates and compliance is determined. First, an institution can choose under which of the three parts it will show compliance. Thereafter, the government will assess if the school is in compliance with Title IX under the selected part. Related to Part 1, the 1996 “Dear Colleague” letter specified that exact proportionality is not required, but proportionality is determined “... on a case-by-case basis, rather than through use of a statistical test.” For Part 2, the 1996 “Dear Colleague” letter noted that a history of program expansion can be shown by factors, such as:

an institution’s record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; an institution’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and an institution’s affirmative response to requests by students or others for addition or elevation of sports.

For a school to show compliance with Part 3, the 1996 “Dear Colleague” letter specified that the Office of Civil Rights “... will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”⁴⁵ In a 2010 “Dear Colleague” letter, the Office of Civil Rights withdrew a 2005 prototype survey it distributed to schools to assess their compliance under Part 3. In doing so, it reaffirmed the factors and analysis process set forth in the 1996 “Dear Colleague” letter and provided schools with additional insight on how to apply the test.⁴⁶

⁴³ 44 F.R. 71418 (Dec. 11, 1979).

⁴⁴ See *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last visited February 27, 2021) (noting that the Office for Civil Rights’ Department of Education is responsible for enforcing Title IX).

⁴⁵ *Norma v. Cantu*, Asst. Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

⁴⁶ Russlynn Ali, Asst. Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Guidance on Accommodating Students’ Athletic Interests and Abilities: Standards for Part Three of the “Three-Part Test” (April 20, 2010).



To determine if an institution is providing equivalency in athletic benefits and opportunities, the 1996 “Dear Colleague” letter highlighted factors that the Department of Education can consider. These factors are not exhaustive, but demonstrative: “Provision and maintenance of equipment and supplies; scheduling of games and practice times; travel and per diem expenses; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of locker rooms, practice and competitive facilities; provision of medical and training services and facilities; provision of housing and dining services and facilities; and publicity.”⁴⁷

Related to financial assistance, schools “... must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”⁴⁸ Per the 1979 Policy Interpretation, neither the same number nor equal value of scholarships must be awarded to men and women.⁴⁹ The 1996 “Dear Colleague” letter provided guidance on how to calculate this, indicating that the Department of Education “... divid[es] the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results.” A school is “... in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors.” The Department set forth two legitimate nondiscriminatory factors: (1) “At public institutions, the higher costs of tuition for students from out-of-state ... [are] unevenly distributed between men’s and women’s programs ...” and (2) distribution of scholarships to further a sport’s program development. Notably, scholarships for men and women do not need to be equal in dollar value, but rather, scholarship aid must be “substantially proportionate” to men’s and women’s participation rates.⁵⁰ In a “Dear Colleague” letter, the Office for Civil Rights noted that “... the test for determining whether the two scholarship budgets are ‘substantially proportionate’ ... necessarily has a high threshold.” It further clarified that the use of statistical tests in assessing substantial proportionality is not appropriate. Rather, the Office for Civil Rights applies a case-by-case analysis when a disparity between the scholarship awards to male and female athletes arises to determine if legitimate, non-discriminatory factors for the disparity can be proven. If they can, a school will be in compliance with Title IX’s financial

⁴⁷ *Id.* at 36.

⁴⁸ Financial assistance, 34 C.F.R. § 106.37 (2020).

⁴⁹ *Id.* at 34.

⁵⁰ *Id.*



assistance requirement, despite differences in the awards of financial aid to the sexes existing. If they cannot, a Title IX violation will be deemed.⁵¹

Just as the enactment of Title IX led to increased enrollment of women in undergraduate and graduate programs, the application of Title IX to sports in federally funded educational settings has expanded athletic opportunities for women. Prior to 1972, only 4% of girls played sports.⁵² A 2019 study showed that 31.4% of girls between the ages of 6 to 12 played sports.⁵³ Despite these gains, research shows that still, “[g]irls have 1.3 million fewer opportunities to play high school sports than boys ...”⁵⁴ Further, publicity of women’s sports—including NCAA women’s sports—is paltry compared to that of men’s sports.⁵⁵ Thus, this data shows that the purpose of Title IX has not been fully effectuated and the legislation must still be utilized to create equal athletic opportunities for girls and women.

Section II. Examination of Individual State Statutes and Proposed Federal Legislation Restoring NCAA Athletes’ NIL Rights

Since California enacted the “Fair Pay to Play Act,” many other states have enacted statutes specifying that NCAA athletes can benefit from their NIL rights, and six similar bills have been proposed at the federal level.⁵⁶ The following section provides a summary of selected statutes and proposed bills to highlight how states and Congress are approaching the issue of intercollegiate athlete NIL.⁵⁷ Further, potential Title IX concerns within specific bills are identified.

⁵¹ Norma Cantu, Asst. Sec’y Office for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Funding of Athletic Scholarships (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html#bowlgrn1>.

⁵² See *Title IX and the Rise of Female Athletes in America*, WOMEN’S SPORTS FOUNDATION (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/> (last visited Feb. 27, 2021) (providing data on the number of girls who competed in sports before the enactment of Title IX).

⁵³ *Youth Sports Facts: Sports Participation And Physical Activity Rates*. The Aspen Institute.

⁵⁴ *Introduction: Why It Matters, Keep Girls in Sport*, <https://www.keepgirlsinsport.com/introduction-why-it-matters/#:~:text=Girls%20have%201.3%20million%20fewer,lives%20of%20your%20female%20athletes>. (last visited Feb. 27, 2021).

⁵⁵ See Andrew Zimbalist, *Female Athletes Are Undervalued, In Both Money And Media Terms*, FORBES (April 10, 2019), <https://www.forbes.com/sites/andrewzimbalist/2019/04/10/female-athletes-are-undervalued-in-both-money-and-media-terms/?sh=7826b1e413ed> (asserting that during March Madness 2019, 82 men’s basketball stories and 10 women’s basketball stories were published by USA Today) (last visited July 13, 2021).

⁵⁶ *Id.* at 12; *Id.* at 13.

⁵⁷ California *infra* note 48, Florida *infra* note 54, Colorado *infra* note 62, Nebraska *infra* note 6, New Jersey *infra* note 64, & Michigan *infra* note 65.



A. Selected State Statutes

1. *California Fair Pay to Play Act*⁵⁸

This act was introduced by California State Senators Nancy Skinner and Steven Bradford in February of 2019 and officially signed into law by California Governor Gavin Newsom in September 2019. While it was the first NIL law proposed and passed, it was not slated to go into effect until January 1, 2023.⁵⁹ This is one of the leanest pieces of legislation regarding NIL rights, but acted as a template for other states' laws. It provides that no institutions can uphold a rule or other limitation restricting the eligibility of a college athlete for earning NIL compensation.⁶⁰ It also prevents institutions from using NIL compensation as an opportunity to reduce or revoke scholarships,⁶¹ and doesn't allow athletes to pursue endorsement opportunities that would conflict with existing school sponsorship agreements.⁶² The bill allows for students to hire professional representation in regards to NIL compensation.⁶³

Notably, the bill prohibits institutions, conferences, and "other organizations with authority over intercollegiate athletics" from providing NIL compensation to prospective student-athletes. It does not contain an explicit statement prohibiting the same from providing NIL compensation to current student-athletes. Thus, it is possible that schools could direct NIL compensation to current student-athletes. Any NIL compensation paid directly by institutions to student-athletes would lend itself to a potential Title IX claim, if not done equitably among men's and women's sport athletes. Further, nothing in the law prohibits institutional employees or entities from acting as an athlete agent for NIL purposes.

2. *Florida's Intercollegiate Athlete Compensation and Rights Act*⁶⁴

This bill was proposed after the California law, but the Florida legislature operated on a more aggressive timeline, with the law going into effect July 1, 2021.⁶⁵ Slightly different from the California "Fair Pay to Play Act," this law specifically allows college athletes to earn NIL compensation.⁶⁶ It also prevents scholarship

⁵⁸ Cal. Educ. Code § 67456.

⁵⁹ *Id.* note 4 at (h).

⁶⁰ *Id.* at (a).

⁶¹ *Id.* at (d).

⁶² *Id.* at (e).

⁶³ *Id.* at (c).

⁶⁴ § 1006.74, Fla. Stat. (2020).

⁶⁵ *Id.* at §3.

⁶⁶ *Id.* at §1(2)(a).



reduction/revocation should an intercollegiate athlete earn NIL compensation.⁶⁷ It also disallows intercollegiate athletes from entering into endorsement contracts that conflict with their school's.⁶⁸ Under the bill, intercollegiate athletes can hire state licensed athlete agents for representation.⁶⁹ Nothing in Florida's athlete agent laws specifically prohibits a college or university employee from being a licensed agent.⁷⁰

The law provides that compensation may not be provided in exchange for athletic performance or as an inducement to attend a particular institution and may only be provided by a third party unaffiliated with the institution.⁷¹ The law also specifically prohibits institutions, athletic support foundations, or their employees from compensating or causing compensation to be directed to prospective and current athletes.

3. *Colorado's NIL Law*⁷²

This law takes effect January 1, 2023. It prevents intercollegiate athletes from entering into contracts conflicting with their schools', protects against scholarship revocations, and allows students to hire licensed attorneys for representation. The law allows institutions to hold on-campus interviews for potential athlete agents, but specifically states that athletes are free to meet off-campus with agents outside of such scheduled interviews.

4. *Nebraska Fair Pay to Play Act*⁷³

Nebraska's law goes into effect July 1, 2023. It is the least comprehensive and shortest law regarding intercollegiate athlete NIL rights. It prohibits intercollegiate athletes from entering into endorsement deals conflicting with their schools', and prevents scholarship offsets or revocation for intercollegiate athletes that secure an endorsement deal. It also specifically provides a right to civil action for any athlete wronged under the statute and includes damages, declaratory relief, and attorney's fees.

The law lacks specific language prohibiting schools or boosters from making NIL payments, or acting as agents or advisors for intercollegiate athletes. The possibility that direct payments for NIL rights could be secured by schools or

⁶⁷ *Id.* at §1(2)(h).

⁶⁸ *Id.* at §1(2)(e).

⁶⁹ *Id.* at §1(2)(d).

⁷⁰ § 468.453, Fla. Stat. (2012).

⁷¹ *Id.* note 23 at §1(2)(a).

⁷² Col. Rev. Stat. § 23-16-301 (Mar. 20, 2020).

⁷³ Neb. Rev. Stat. § 48-3601 (Jul. 24, 2020).



boosters or that schools could maintain direct control in seeking out sponsorship deals for intercollegiate athletes leaves schools in Nebraska susceptible to Title IX claims if both genders do not receive equal treatment in these endeavors.

5. *New Jersey Fair Play Act*⁷⁴

This law goes into effect “the 5th academic year following enactment,” meaning, 2026. It prohibits intercollegiate athletes from entering into endorsement deals conflicting with their schools’. It also prohibits schools from offsetting or revoking athletic scholarships if intercollegiate athletes enter into endorsement deals. It allows intercollegiate athletes to hire representation.

Notably, it addresses “sin sponsors” (i.e., adult entertainment, alcohol, tobacco, gambling, etc.) and allows for scholarship revocation if an athlete secures an endorsement deal from such a sponsor.

The law also specifically prohibits institutions from providing NIL compensation and prohibits an institution, any support organization (i.e., booster clubs), or any employee director or officer of either from providing compensation or causing compensation to be directed to current or prospective athletes. This language makes it such that a Title IX claim is unlikely. Interestingly, however, this law appears to allow schools, conferences, and the NCAA to use athlete NILs without providing them compensation.

6. *Michigan’s NIL Law*⁷⁵

This law goes into effect Dec. 31, 2022. The law allows intercollegiate athletes to hire professional representation to guide them in their NIL activities, and dictates that these agents must be licensed in the state, “as applicable.” Much like California’s “Fair Pay to Play Act,”⁷⁶ it only prohibits direct NIL payments from the school to prospective athletes, but is silent on current athletes. Of note, the law specifies that it does not require institutions to “create, facilitate, negotiate, or otherwise enable opportunities for a student to earn [NIL compensation].”⁷⁷

B. Proposed Federal Legislation

The following highlights relevant provisions of the six bills restoring intercollegiate athletes’ NIL rights, which to date have been proposed at the federal level.

⁷⁴ N.J. Rev. Stat. § C.18A:3B-86 (Sept. 14, 2020).

⁷⁵ Mich. Comp. Law § 390.1731 (Dec. 3, 2020).

⁷⁶ *Supra* note 48.

⁷⁷ *Supra* note 65 at § 10(1).



1. *Fairness in Collegiate Athletics Act*⁷⁸

This was the first proposed federal bill restoring intercollegiate athletes' NIL rights and was brought forth by Senator Marco Rubio (R-FL) in June 2020. It is the least comprehensive of all proposed bills. Most notably, it doesn't specifically create rules; it merely puts the burden on the NCAA to create new policies allowing intercollegiate athletes to earn compensation from third-parties for their NIL. Further, it allows the NCAA to create their own guardrails to preserve amateurism, ensure appropriate recruitment of prospective athletes, and prevent illegitimate activity. It does not mention boosters, but requires that NIL compensation come from third-parties, precluding schools from making NIL payments to athletes. The bill allows athletes to hire agents to assist in securing endorsements, but any agent must comply with the Sports Agent Responsibility and Trust Act ("SPARTA").⁷⁹ Nothing in the bill or in SPARTA prevents school employees from acting as an agent for intercollegiate athletes to help secure NIL endorsements, which could present Title IX claims if employees do not equally represent the interests of male and female intercollegiate athletes in this regard.

2. *Student Athlete Level Playing Field Act*⁸⁰

The Student Athlete Level Playing Field Act was introduced by Representative Anthony Gonzalez (R-OH) in September 2020. The act prohibits institutions from providing NIL compensation to athletes. It also prohibits payments from boosters to intercollegiate athletes if they are used as inducements to encourage the intercollegiate athlete to attend or remain enrolled at a specific institution. The bill contains a clause encouraging institutions to provide education and financial literacy to intercollegiate athletes regarding NIL rights. As discussed in the proceeding sections, several institutions have already announced the creation of such education programs. There are no specific prohibitions on who can act as an athlete agent, which would allow the schools to do so. Most interestingly, this is the only piece of legislation that specifically mentions Title IX, stating that nothing in the act may be construed to affect the rights of athletes under Title IX.

3. *Collegiate Athlete Compensation Rights Act*⁸¹

This bill, proposed by Senator Roger Wicker (R-MS), in December of 2020, prohibits direct payments from schools to current or prospective intercollegiate

⁷⁸ S. 4004, 116th Cong. (2020).

⁷⁹ 15 U.S.C. § 7802.

⁸⁰ H.R. 8382, 116th Cong. (2020).

⁸¹ S. 5003, 116th Cong. (2020).



athletes, and is the only proposed act to also specifically prohibit similar payments from schools to the family of prospective and current athletes. The bill also allows institutions to prevent booster involvement, but does not require them to actually do so, leaving the possibility open for boosters to be involved in providing intercollegiate athletes with NIL compensation.

4. *College Athlete Bill of Rights*⁸²

The College Athlete Bill of Rights was proposed by Senator Cory Booker (D-NJ) in December 2020. The most comprehensive of all bills proposed, the bill spans a robust 63 pages and extends far beyond NIL compensation. Its framework is the most susceptible for Title IX claims. This is due to the elaborate revenue-sharing system proposed in the bill, which would likely result in football and men’s basketball players receiving a share of the revenues they generate, while women’s sport athletes would be less likely to similarly benefit. There is no specific prohibition against schools making direct NIL payments, although schools are prohibited from acting as agents or “arranging” endorsements for intercollegiate athletes. The bill allows any source (e.g., boosters, institutions, conferences) to pay for certain things, which creates the possibility of inequitable treatment of the genders and a possible Title IX complaint. The bill also specifically states that this act does not limit or modify the enforcement of authority for the Department of Education, whose Office of Civil Rights is responsible for enforcing Title IX and investigating complaints.

5. *College Athlete Economic Freedom Act*⁸³

Introduced by Senator Chris Murphy (D-CT) in February of 2021, the College Athlete Economic Freedom Act contains fewer specific prohibitions than others regarding who can provide NIL compensation, and how it can be provided. It has a clause requiring equal access to any institutional support with respect to the marketing of NIL. While Title IX, at least in theory, already requires this, the clause adds an extra layer of enforceability and gives an athlete wronged by this act a private right to action in which they could recover significant monetary damages.

⁸² S. 5062, 116th Cong. (2020).

⁸³ S. 238, 117th Cong. (2021).



6. *Amateur Athlete Protection and Compensation Act of 2021*⁸⁴

As of the writing of this paper, this bill has not officially been introduced to either chamber of Congress, but merely announced by Senator Jerry Moran (R-KS).⁸⁵ The information and analysis provided in this section highlights text of the bill that was obtained by media outlets. The bill provides that NIL compensation may only be paid from a third party, meaning not an athletics department official, booster, or an individual affiliated with either. This is true for both current and prospective athletes. Of all of the aforementioned acts, this is the only one defining “booster,” specifying that a “booster” is anyone who has provided donations of \$5,000 or more or who has been requested by an institution to help recruit a student-athlete. The bill allows athletes to hire representation and requires that said representation be certified by a congressional entity that is created under the bill, called the Amateur Intercollegiate Athletics Corporation.

Section III. Allowing NCAA Athletes to Benefit From Their NIL Does Not Facially Trigger a Title IX Violation, but Litigation Opportunities Exist

As discussed in Section I, Title IX of the Education Amendments of 1972 prohibits sex-based discrimination by any educational institution receiving federal funds.⁸⁶ The 1979 Policy Interpretation set forth three areas that federally funded educational settings must comply with related to sport: student interests and abilities; athletic benefits and opportunities; and financial assistance.⁸⁷

It is difficult to imagine a scenario where NIL compensation provided to college athletes triggers a Title IX claim. Related to student interests and abilities and financial assistance, an intercollegiate athlete profiting off of their NIL right does not affect the number of athletic opportunities offered to each gender nor the amount of athletically-related financial aid spent on women’s and men’s athletes at a federally funded educational institution. Thus, it must be considered if the interests and abilities prong of Title IX could be violated. As discussed in Section I, to assess whether the athletic benefits and opportunities requirement is violated, 10 factors must be considered:

⁸⁴ S. ____ 117th Cong. (2021).

⁸⁵ Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24, 2021), <https://www.si.com/college/2021/02/24/ncaa-athlete-rights-compensation-congress-jerry-moran> (last visited July 13, 2021).

⁸⁶ Sex, 20 U.S.C.S. § 1681 (2020).

⁸⁷ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 F.R. 71413 et seq. (Dec. 11, 1979).



- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity⁸⁸

Related to the 10 factors, third-party payments made to athletes by corporations for the use of the athletes' NIL does not immediately trigger Title IX scrutiny. That is because third-party corporate sponsors are not required to uphold Title IX, since they are not federally funded educational settings. Thus, a Title IX claim would only emerge if an athletics department provided one gender of athletes with an NIL-related benefit that it did not provide the other gender, or provided the NIL benefit to one gender over the other gender at a non-equitable level.

Further, the face of the statutes enacted and bills proposed, discussed in Section II, would not necessarily counteract Title IX's athletic benefits and opportunities provision. That is because, as drafted, none of the legislation requires more spending to facilitate promotion of one gender's NIL rights over another gender's NIL rights. Nonetheless, it is this part of the three-part test that could pose the greatest possibility of being violated, as intercollegiate athletes benefit from their NIL rights, which will be discussed later.

The most likely practice that an athletics department could engage in surrounding the restoring of intercollegiate athletes' NIL rights that could prompt Title IX litigation is acting as agents for, helping procure endorsements for, or providing NIL-related education for one gender over the other.

Related to acting as agents for or helping procure endorsements for intercollegiate athletes, an athletics department's engagement in this practice could pose Title IX risks. That is because, if the athletics department secured greater endorsement compensation for one gender's athletes over the other gender's athletes, a violation of Title IX's equal athletic benefits and opportunities standard could be triggered. However, the procurement by an athletics department of more NIL revenue for one gender's athletes over the other gender's athletes would not

⁸⁸ 34 C.F.R. § 106.41(c).



in and of itself clearly amount to a violation of the standard. That is because, as discussed in Section I, the Department of Education weighs all 10 factors. Thus, an athletics department could presumptively offset any gain to one gender through the NIL revenue it secured for it by providing the other gender another, equal benefit. Regardless of this analysis, given the NCAA's long-existing amateurism standard and its desire to promote competitive balance, it is unlikely that NCAA-enacted legislation surrounding NIL rights will allow member institutions or their boosters to either directly compensate intercollegiate athletes for their NIL or assist them in securing endorsement deals.

Further, Title IX claims could arise if boosters are allowed to enter into endorsement deals with intercollegiate athletes. As referenced in Section II, some state bills are silent on whether boosters can enter into endorsement deals with intercollegiate athletes. The possibility exists that some boosters who are business owners will offer intercollegiate athletes of their respective school endorsement deals. This practice in and of itself would not violate Title IX, because a booster is not a federally funded educational setting. However, if an intercollegiate athlete could point to an athletics department as being a conduit to the booster-intercollegiate athlete relationship and funneling boosters in the direction of one gender of intercollegiate athletes over another, Title IX scrutiny could emerge. In this regard, it is important to consider precedent of Title IX being successfully invoked when resources provided by boosters were inequitably distributed among men's and women's programs. In a 2012 OCR compliance resolution letter regarding the unequal distribution of resources in a high school athletics department, the OCR stated:

School districts have a responsibility under Title IX to ensure that equivalent benefits and services are provided to members of both sexes in its athletics programs, regardless of their funding source(s) for these benefits and services. Thus, OCR considers benefits and services provided through the use of private funds, including booster club funding, in combination with all other benefits and services. Where booster clubs provide benefits or services that assist only teams of one sex, the district must ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.⁸⁹

⁸⁹ Thomas J. Habino, Reg. Dir., Office of Civil Rights, U.S. Dep't of Educ., Compliance Resolution: Hingham Public School District (Oct. 26, 2012), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01105003-a.html>.



Whether this analysis would apply to intercollegiate athletes and NIL compensation is unclear. However, it shows that the OCR has evaluated third-party funds benefitting student-athletes under the lens of Title IX. Projecting this analysis into the NIL compensation realm, it is possible that institutions would need to offset inequitable distribution of NIL compensation from boosters to men and women to comply with the law.

Finally, numerous intercollegiate athletics departments have announced the creation of NIL consulting and education programs for their intercollegiate athletes. The role and scope of these programs is not entirely clear. For instance, the University of Oklahoma announced a program called “The Foundry” in partnership with Culture Wins.⁹⁰ Culture Wins promotes itself as a company serving its clients to “unlock the potential of [their] people, teams and culture at scale ... [t]hrough strategic planning, consulting, coaching, and a data driven system called invincible.”⁹¹ Of the deal, University of Oklahoma Director of Athletics Joe Castiglione said, “Educating and preparing our student-athletes so they can maximize their NIL value is important to us, like it is to every school, but it can’t be ‘one size fits all.’”⁹² Other schools have partnered with similar companies, such as INFLCR and Opendorse, to provide education-related services aimed at assisting college athletes in optimizing their abilities to benefit from their NIL.⁹³

Any educational support or program provided by institutions would be evaluated under Title IX’s equal athletic benefits and opportunities standard. If one gender received greater education on monetizing their NIL rights from an athletics department, it would need to be seen if that benefit was offset by another benefit to the other gender. For instance, a recent announcement from the University of Miami athletics department specified that the program will assist the athletics department in “integrating greater education and support for Hurricanes football student-athletes.”⁹⁴ From this announcement, it is unclear if

⁹⁰ Oklahoma University Athletic Department Website, *OU To Forge Strong Futures With NIL Program*, <https://soonersports.com/news/2020/12/14/athletics-oklahoma-to-forge-strong-futures-with-nil-program.aspx> (last visited Feb. 27, 2021).

⁹¹ Culture Wins, <https://www.culturewins.co/> (last visited Feb. 27, 2021).

⁹² *Id.* at 80.

⁹³ See e.g. Kansas State University Athletic Department Website, *K-State Partners With Opendorse to Assist Student-Athletes with NIL* (last visited Feb. 27, 2021); West Virginia Athletic Department Website, *WVU Joins INFLCR as First College Football Program in NIL Data Services Pilot Product Offering*, <https://wvusports.com/news/2020/7/30/wvu-joins-inflcr-as-first-college-football-program-in-nil-data-services-pilot-product-offering.aspx> (last visited Feb. 27, 2021).

⁹⁴ University of Miami Athletic Department Website, Football Section, *Miami Football and INFLCR Launch NIL Program ‘Momentum’*, <https://miamihurricanes.com/news/2020/12/15/miami-football-and-inflcr-launch-nil-program-momentum/> (last visited Feb. 27, 2021).



the University of Miami athletics department is only providing paid NIL-related educational services to football intercollegiate athletes and no other sports' athletes. Doing so would necessarily preclude female intercollegiate athletes from receiving paid NIL-related educational services provided by the athletics department. Thus, unless the University of Miami demonstrates that it offset this benefit to male intercollegiate athletes by providing another benefit to female intercollegiate athletes, it could be at risk of violating Title IX.

Section IV. Allowing NCAA Athletes to Benefit from Their NIL Rights Will Expand Publicity of Women's Intercollegiate Sports and Athletes

Under Title IX, federally funded educational settings must provide equal athletic opportunity to both genders. As NCAA athletes are now allowed to benefit from their NIL, some fear that athletics departments' history of not providing equal publicity to men's and women's sport athletes could prompt Title IX complaints.⁹⁵ As specified in the 1979 Policy Interpretation, to comply with Title IX as it relates to sports, federally funded educational settings must provide equal athletic benefits and opportunities to athletes of both genders.⁹⁶ As discussed in Section I, a number of factors are weighed to assess whether a school is meeting this standard, one factor being publicity.⁹⁷ Thus, one expert argued:

Title IX policy interpretations clearly point to the need for equitable promotion/marketing for both men's and women's programs ... This lack of promotion or promotion that is not of the same quality for the women's teams could directly influence the NIL earnings women student-athletes receive. Those teams with more promotions and higher level promotions will be in essence providing additional opportunities for those athletes to be recognizable.⁹⁸

⁹⁵ See Kristi Dosh, *Name, Image And Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020), <https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=484f88487625> (last visited Feb. 28, 2021) (setting forth arguments raised by several attorneys and professors who believe that Title IX could be thwarted if intercollegiate athletes' name, image and likeness rights are restored).

⁹⁶ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 F.R. 71413 et seq. (Dec. 11, 1979).

⁹⁷ Athletics, 34 C.F.R. § 106.41 (2020) (codifying, "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intermural athletics offered by a recipient and no recipient shall provide any such athletics separately on such basis.").

⁹⁸ *Id.* at 85 (documenting a quote from Dr. Lindsey Darwin, an Assistant Professor at the State University of New York College at Cortland who researches Gender Equity).



This raises an important point: Athletics departments typically do not spend equal amounts publicizing men's sport athletes versus women's sport athletes or their respective teams.⁹⁹ Arguing that because of athletics departments' historically meager promotion of women's sport athletes, the disparity between publicity for men's and women's sport athletes will only grow if NCAA athletes can benefit from their NIL misses the forest for the trees. It does so because the argument presumes that women's sport athletes will attain equal publicity if the athletics department retains exclusive control of promotion. A mere review of data submitted by NCAA athletics departments under the Equity in Athletics Disclosure Act ("EADA"), discussed below, demonstrates the fallacy of this argument.

Under the EADA, Congress mandated federally funded schools' intercollegiate athletics programs to submit an annual report to the Department of Education, providing relevant data on their compliance with Title IX. This data includes the following annual financial data points: total athletically related student aid by gender; total recruiting expenses for each gender; operating expenses for each team and by gender; total expenses by team and gender; and total annual revenues by team and gender.¹⁰⁰ Notably, the EADA does not require the reporting of the amount spent to publicize sports within an intercollegiate athletics program, let alone how much money was spent publicizing men's sport teams versus women's sport teams.¹⁰¹ Rather, the amount spent by athletics departments on marketing and publicizing teams is aggregated into the reported total expenses figure.¹⁰² Thus, while the amount of money NCAA athletics departments spend marketing men's sport teams versus women's sport teams is not publicly available, based on the publicly available total expenses data reported under the EADA, it can be assumed that athletics departments spend significantly more promoting men's sport teams than women's sport teams. In the 2017-2018 fiscal year, NCAA Division I athletics departments' reported expenditures exceeded

⁹⁹ See Dr. Amy S. Wilson, *45 Years of Title IX: The Status of Women in Intercollegiate Athletics*, NCAA (2017), https://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf (last visited March 1, 2021) (documenting that 42% of NCAA Division I resources were spent on men's sport teams compared to 21% on women's sport teams and highlighting that across all three NCAA Divisions, more money is spent on men's sport teams than women's sport teams).

¹⁰⁰ Equity in Athletics Disclosure Act, 103 P.L. § 306(b) (2020).

¹⁰¹ *Id.*

¹⁰² Interview with former NCAA Division I FBS Associate Athletics Director of Finance (March 1, 2021) (telephone interview).



\$13 billion.¹⁰³ Reported expenditures on men's sport programs were more than double what was spent on women's programs.¹⁰⁴ Across NCAA Division II and Division III, programs also spent significantly greater amounts on men's sport teams than women's sport teams.¹⁰⁵ These figures align with marketing trends across American professional sport, wherein only 4% of media coverage and 1% of sponsorship dollars go to women's sports.¹⁰⁶

Title IX does not require NCAA member institutions to spend equally on promoting men's sport teams and women's sport teams.¹⁰⁷ This should come as a relief for NCAA member institutions, because over the nearly five decades since Title IX's enactment, they have spent drastically larger sums promoting men's sport teams than women's sport teams, especially on those that generate a positive net income, like men's basketball and football.¹⁰⁸ Reviewing the staff directories of NCAA Division I athletics departments demonstrates how spending more on men's sport teams—especially men's basketball and football—can lead to the hiring of more employees in roles focused on marketing these sports and

¹⁰³ See Ellen J. Staurowsky, Nicholas Watanabe, Joseph Cooper, Cheryl Cooky, Nancy Lough, Amanda Paule-Koba, Jennifer Pharr, Sarah Williams, Sarah Cummings, Karen Issokson-Silver, & Marjorie Snyder, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women*, WOMEN'S SPORTS FOUNDATION (January 2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf> (last visited Feb. 28, 2021) (explaining that Title IX's equal athletic benefits and opportunities standard does not require member institutions to spend equally on male and female athletes, but rather that "... the experiences of female athletes are of a quality similar to that of male athletes.").

¹⁰⁴ *Id.* (showing, "... at the NCAA Division I level in 2017-18, 45% was spent on men's programs (\$620+ million), 22% on women's programs (\$301+ million), and 32% (\$442+ million) to non-gender specific allocations.").

¹⁰⁵ *Id.* (finding, "[a]t the NCAA Division II level, schools spent nearly \$2 billion to support athletic programs in 2017-18 with 43% supporting men's programs (\$834 million), 34% supporting women's programs (\$664 million), and 30% being allocated to expenses not designated for either gender (\$229 million)." and at the Division III level, "... men's sports received 38% (\$488 million), women's sports received 28% (\$361 million), and 33% (\$127 million) was allocated to non-gender specific expenses.").

¹⁰⁶ See Alicia Jessop, *The factors that led to WNBA players receiving higher pay under the league's new CBA*, THE ATHLETIC (Jan. 17, 2020), <https://theathletic.com/1540258/2020/01/17/the-factors-that-led-to-wnba-players-receiving-higher-pay-under-the-leagues-new-cba/> (last visited March 1, 2021) (highlighting traditional disparities in how the WNBA was market and the new strategy adopted by WNBA commissioner, Cathy Engelbert).

¹⁰⁷ *Id.* at 103.

¹⁰⁸ *Id.*



their athletes.¹⁰⁹ Presumptively, the greater the number of employees assigned to market a sport, the greater the likelihood said sport receives publicity. Given the data presented in Table 1, it can be assumed that Division I Football Bowl Subdivision athletics departments typically expend more resources publicizing men's sports—especially revenue producing sports—than women's sports.

As Table 1 shows, the top 10 revenue-generating programs in NCAA Division I allocated more than six times as many sport-specific marketing roles to men's sport teams than women's sport teams. Some may argue this data demonstrates that allowing NCAA athletes to profit off of their NIL will only exacerbate the gap between men's and women's sport publicity, because men's sport athletes could benefit from the expanded marketing they have received from their respective athletics departments.¹¹⁰ One expert argued:

If these efforts are not equivalent, women student athletes could argue that their earning potential is in jeopardy ... Women student athletes would be required to work harder than the men student athlete counterparts to promote themselves in an effort to benefit from their NIL, if the institution will not do this for their programs.¹¹¹

The aforementioned argument assumes that women's sport athletes must wait for athletics departments to comply with the color of Title IX to fully benefit from the right to monetize their NILs and, in turn, generate more publicity for themselves and their teams. Recent strategies employed by the U.S. Women's

¹⁰⁹ See Steve Berkowitz, Matt Wynn, & Camille McManus, *NCAA Finances*, USA TODAY, <https://sports.usatoday.com/ncaa/finances/> (last visited Feb. 28, 2021) (listing the top revenue generating NCAA programs for the 2018-2019 fiscal year and showing that the University of Texas at Austin was the highest revenue generator, amassing \$223,879,781 in revenue. For this review, the top-ten revenue generating NCAA Division I athletics departments were identified using USA Today's *NCAA Finances* database. Thereafter, a web search was completed to locate each of the ten athletics department's staff directory. Within the staff directory, organizational charts for individual sports were identified and analyzed to identify and count marketing-related positions that were specific to that sport. Less money, time and energy are spent by NCAA athletics departments publicizing women's sport teams than men's sport teams. Only marketing roles that were listed within individual sport's organizational charts were counted, as it was not clear what percentage of an employee's job in a marketing role listed elsewhere within the staff directories was spent on a respective sport).

¹¹⁰ See Kristi Dosh, *Name, Image And Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020), <https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=484f88487625> (last visited Feb. 28, 2021) (noting how an athletics department distributes its marketing budget usually aligns with teams' revenue generation, meaning men's sport teams typically receive more marketing dollars than women's sport teams).

¹¹¹ *Id.*



National Soccer Team (“USWNT”) demonstrate the fallacy in this assumption. In 2017, the USWNT’s players, for the first time, negotiated back their group licensing rights from U.S. Soccer in collective bargaining.¹¹² The negotiation came after the USWNT attained tremendous success in the preceding years—securing gold at the 2012 Olympic Games and winning the 2015 Women’s World Cup.¹¹³

¹¹² See Alicia Jessop, *How NFL players are helping the USWNT in its fight for higher pay*, THE ATHLETIC (June 17, 2019), <https://theathletic.com/1028132/2019/06/17/uswnt-athletes-find-help-in-their-fight-for-higher-pay-from-nfl-players/> (last viewed Feb. 28, 2021) (discussing how USWNT members regained their group licensing rights from U.S. Soccer in collective bargaining).

¹¹³ See *U.S. Soccer Awards*, U.S. SOCCER, <https://www.ussoccer.com/history/awards/us-soccer-awards> (last visited Feb. 28, 2021) (highlighting championships won by the USWNT and USMNT).

Table 1: Team-Specific Marketing Positions by Gender[^]

University	Number of Men’s Sport-Specific Marketing Employees	Title(s) of Men’s Sport-Specific Marketing Employees	Number of Women’s Sport-Specific Marketing Employees	Title(s) of Women’s Sport-Specific Marketing Employees
University of Texas at Austin	4	Men’s Basketball: Social and Digital Media Producer Football: Lead Graphic Designer Football: Director of Creative Media Football: Director of Creative Services	0	N/A
Texas A&M	3	Men’s Basketball: Director of Creative Design and Branding Football: Recruiting Coordinator for Creative Content Football: Director of Graphic Design	1	Women’s Basketball: Director of Creative Design
Ohio State	4	Football: Creative Design & Branding Football: Director, Creative Media & Post Production Football: Assistant Director, Creative Media Football: Assistant Director, Design and Branding	0	N/A



University	Number of Men's Sport-Specific Marketing Employees	Title(s) of Men's Sport-Specific Marketing Employees	Number of Women's Sport-Specific Marketing Employees	Title(s) of Women's Sport-Specific Marketing Employees
Michigan	2	Football: Graphic Designer Football: Director of Football Creative Video	0	N/A
Georgia	3	Men's Basketball: Coordinator for Creative & Social Media Football: Co-Director of Football Creative Design Football: Assistant Director of Football Creative – Video	2	Women's Basketball: Creative Services Coordinator Gymnastics: Creative Services & Social Media Director
Penn State	3	Football: Graphic Designer Football: Creative Assistant Football: Director of Social Media	0	N/A
Alabama	3	Football: Director of Graphics Football: Assistant Director of Graphics Football: Coordinator of Football Marketing	1	Women's Basketball: Director of Video and Creative Content
Oklahoma	1	Football: Director of Creative Design	0	N/A
Florida	2	Football: Assistant Director of Creative Media Football: Assistant Director of Creative media	0	N/A
Louisiana State	0	N/A	0	N/A
	TOTAL 25		TOTAL 4	

^ See Staff Directory, Texas Sports, https://texassports.com/sports/2013/7/29/GEN_0729135557.aspx?path=general (last visited Feb. 28, 2021); Staff Directory, TEXAS A&M, <https://12thman.com/staff-directory> (last visited Feb. 28, 2021); Athletic Department Directory, OHIO STATE UNIVERSITY, <https://ohiostatebuckeyes.com/staff-directory/> (last visited Feb. 28, 2021); University of Michigan Athletic Department, UNIVERSITY OF MICHIGAN, <https://mgoblue.com/sports/2017/6/16/michigan-athletics.aspx> (last visited Feb. 28, 2021); Staff Directory, GEORGIA DOGS, <https://georgiadogs.com/staff-directory> (last visited Feb. 28, 2021); Staff Directory, Go PSU SPORTS, <https://gopsusports.com/staff-directory> (last visited Feb. 28, 2021); Staff Directory, ROLL TIDE, <https://rolltide.com/staff-directory> (last visited Feb. 28, 2021); Oklahoma Staff Directory, SOONER SPORTS, <https://soonersports.com/sports/2019/8/9/208803444.aspx> (last visited Feb. 28, 2021); Staff Directory, FLORIDA GATORS, <https://floridagators.com/staff-directory> (last visited Feb. 28, 2021); Staff Directory, LSU Sports, <https://lsusports.net/staff-directory> (last visited Feb. 28, 2021).



Despite tremendous success on the soccer pitch, there was one place the women didn't win: the pocketbook.

How U.S. Soccer marketed the USWNT surrounding the 2015 Women's World Cup demonstrates that women cannot depend on governing bodies to promote them. Rather, women must regain the power to market themselves if they want to see financial advancement in their marketing interests. The 2015 Women's World Cup championship match, featuring the USWNT versus Japan, was the most-watched soccer game—for either gender—in American history. The game amassed close to 23 million viewers and saw a 77% viewership increase over the 2011 Women's World Cup.¹¹⁴ One would not have expected this level of viewership success if they merely looked at how U.S. Soccer marketed the USWNT leading up to the 2015 Women's World Cup versus how it marketed the U.S. Men's National Team (“USMNT”) for the preceding year's 2014 World Cup. The 2014 World Cup saw the USMNT exit the tournament in the Round of 16 following a poor performance. Yet, \$529 million in advertising dollars were paid to ESPN. In contrast, only \$17 million was paid to Fox for the 2015 Women's World Cup.¹¹⁵ It wasn't only in securing advertising revenue that U.S. Soccer failed the USWNT, but also in negotiating group licensing deals. In 2015, despite their success on the pitch and across television, the USWNT earned \$0 in collective licensing revenue.¹¹⁶ In other words, U.S. Soccer did not negotiate *even one* group licensing deal for the USWNT athletes.

Comparing the paucity of revenue USWNT athletes earned when full marketing control of them rested in the hands of their governing body, U.S. Soccer, to how their earnings grew after they regained their group licensing rights shows

¹¹⁴ See *Women's World Cup Final Is Most-Watched Soccer Match In U.S. History*, U.S. SOCCER, <https://www.ussoccer.com/stories/2015/07/womens-world-cup-final-is-mostwatched-soccer-match-in-us-history> (last visited Feb. 28, 2021) (discussing viewership ratings for the 2015 Women's World Cup championship game).

¹¹⁵ See *Hasani Gittens and Carlo Dellaverson, U.S. Falls to Belgium in Overtime, Exits World Cup*, NBC NEWS (July 1, 2014), <https://www.nbcnews.com/storyline/world-cup/u-s-falls-belgium-overtime-exits-world-cup-n145666> (last visited Feb. 28, 2021) (highlighting the disappointing performance of the USMNT in the 2014 World Cup); Drew Harwell, *Why hardly anyone sponsored the most-watched soccer match in history*, THE WASHINGTON POST (July 6, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/06/the-sad-gender-economics-of-the-womens-world-cup/> (last visited Feb. 28, 2021) (documenting the disparity in sponsorship and marketing for the 2015 Women's World Cup and 2014 World Cup).

¹¹⁶ See Bill Shaikin, *NFLPA helps U.S. women tackle their licensing issue; Members of soccer team use football players' union blueprint to cash in*, LOS ANGELES TIMES (Aug. 2, 2019), <https://www.latimes.com/sports/soccer/story/2019-08-02/us-womens-soccer-marketing> (revealing that USWNT athletes earned \$0 in group licensing fees during 2015, despite winning the Women's World Cup).



how NCAA women's sport athletes stand to gain if they can obtain power to market themselves from athletics departments. After winning back their group licensing rights from U.S. Soccer in 2017, the USWNT assigned them to a group licensing arm of the NFL Players Association, R.E.P. Worldwide.¹¹⁷ In less than two years, R.E.P. Worldwide negotiated 19 group licensing deals for the USWNT.¹¹⁸ In 2019—despite not winning the Women's World Cup—the USWNT earned over \$1 million in group licensing revenue.¹¹⁹

The aforementioned example showcases how women's sport athletes can actually benefit—and attain greater equality of publicity through endorsement deals—when given full opportunity to market themselves instead of relying on their governing body or athletics department to do so. Free market economics is at the root of why this is the case. In *The Wealth of Nations*, the founder of modern free-market economics, Adam Smith, asserts:

But businesspeople naturally invest their capitals where they believe they can generate most value. Indeed, they are likely to be much better judges of this, understanding more about the local situation, than some distant regulator; and giving regulators such great economic power is dangerous in itself.¹²⁰

The Invisible Hand concept, derived from Smith's aforementioned quote, can be applied to understand how NCAA Division I athletics departments have chosen to expend more capital publicizing men's sport teams than women's sport teams. This is because the leaders of these athletics departments—who are predominantly male—“believe they can generate most value” by marketing men's

¹¹⁷ *Id.* at 103 (discussing how the USWNT assigned their group licensing rights to R.E.P. Worldwide).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 107 (noting that the USWNT was expected to earn over \$1 million in group licensing revenue in 2019).

¹²⁰ See Adam Smith, *THE WEALTH OF NATIONS*, BOOK IV, Chapter II, p. 456, para. 10; Eamonn Butler, *The Condensed Wealth of Nations and The Incredibly Condensed Theory of Moral Sentiments*, The Adam Smith Institute (2011), https://static1.squarespace.com/static/56edddde762cd9413e151ac92/t/56fbaba840261dc6fac3ceb6/1459334065124/Condensed_Wealth_of_Nations_ASI.pdf (last visited March 1, 2021) (explaining that the above cited quote is “[t]he only mention of the Invisible Hand in *The Wealth of Nations*. . .”).



sport teams.¹²¹ And that belief is, arguably, not unfounded because, “[w]hile the average school generates \$31.9 million in football revenue each year, the next 35 sports on average generate \$31.7 million *combined* each year.”¹²²

Arguably, marketing is a driver in Division I FBS football being the main revenue generator inside of an athletics department. However, as long as football continues to successfully generate meaningful revenue for athletics departments, applying Smith’s Invisible Hand, athletics directors “naturally invest their capitals” in marketing it.¹²³ Allowing intercollegiate women’s sport athletes to benefit from their NIL rights opens up the possibility that businesspeople will enter the marketplace and will, “invest their capitals where they believe they can generate the most value.”¹²⁴ Like the USWNT members were able to upon resecuring their group licensing rights, intercollegiate women’s sport athletes could enter the market and align themselves with companies, agencies, and representatives who want to invest their capital to generate the most value for the women’s sport athletes. Such an opportunity would allow women’s sport athletes to proactively manage their brands—and stop being forced to wait for athletics directors, who are mostly male—to recognize the value proposition their brands present.

The finite nature of an intercollegiate women’s sport athlete’s career necessitates that they quickly regain control of their NIL rights. Research shows that women have less opportunities to compete in professional sports than men.¹²⁵ Even NCAA president Mark Emmert alluded to this fact in a 2019 op-ed that

¹²¹ See Richard E. Lapchick, *The 2020 Racial and Gender Report Card: College Sport*, THE INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT (2020), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/8af738_3b5d1b6bdb10457ebe8d46cc5a2fcfd0.pdf (last visited March 1, 2021) (showing that in 2019-2020, 85.7% of NCAA Division I athletics directors were male); Cork Gaines and Mike Nudelman, *The average college football team makes more money than the next 35 college sports combined*, BUSINESS INSIDER (Oct. 5, 2017), <https://www.businessinsider.com/college-sports-football-revenue-2017-10> (demonstrating that athletics directors are not misguided in directing more marketing dollars to revenue producing men’s sports, like college football, because, “[w]hile the average school generates \$31.9 million in football revenue each year, the next 35 sports on average generate \$31.7 million *combined* each year.”).

¹²² *Id.*

¹²³ *Id.* at 111.

¹²⁴ *Id.*

¹²⁵ See NCAA, *Estimated probability of competing in professional athletics*, NCAA (April 8, 2020), <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited March 1, 2021) (showing that 0.8% of NCAA women’s basketball players move from the NCAA to professional basketball, compared to 1.2% of men’s basketball players); Nielsen Sports, *The Rise of Women’s Sports: Identifying and Maximizing the Opportunity*, NIELSEN (2018), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/the-rise-of-womens-sports.pdf> (noting, “There is an increasing number professional leagues around the world. . .” for women to compete in, highlighting that the professional opportunities for women to compete are not fully developed).



espoused the benefits to NCAA athletes in being able to benefit from their NIL.¹²⁶ In the op-ed, Emmert highlights the case of former Stanford University women's volleyball player Hayley Hodson.¹²⁷ A talented volleyball player who competed on the U.S. national team as young as 17 years old, after graduating high school, Hodson had to choose between competing professionally or at the NCAA level.¹²⁸ Choosing the latter, Hodson had to reject endorsement opportunities.¹²⁹ Her career was short lived, as she suffered two severe concussions, forcing her to retire from competition as a freshman.¹³⁰ On Hodson, who testified in support of California's Fair Pay to Play Act, Emmert wrote:

Hodson believes women's sports is an untapped market, and the California law might bring that to light. Women who compete in volleyball, gymnastics, soccer and more have large social media followings among youth participants in those sports, Hodson said. And that should be attractive to sponsors looking to move merchandise.¹³¹

Experts agree that their social media followings demonstrate that intercollegiate women's sport athletes could generate meaningful incomes from their NIL rights. In 2020, Sarah Fuller made history when she "... became the first woman to compete in a Power Five college football game ..."¹³² Had the Vanderbilt women's soccer player who stepped up to kick for the Vanderbilt football team among COVID-19-related absences been able to monetize her social media following during the experience, it is expected she could have earned \$160,000.00 annually

¹²⁶ See Mark Emmert, *If college athletes could profit off their marketability, how much would they be worth? In some cases, millions.* USA TODAY (Oct. 9, 2019), <https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/> (last visited March 1, 2021) (describing how women's sport athletes could benefit from being able to profit off of their name, image and likeness); Darren Heitner, *NCAA Should Be Scorned For Punting On Providing Athletes True NIL Rights*, ABOVE THE LAW (Jan. 15, 2021), <https://abovethelaw.com/2021/01/ncaa-should-be-scorned-for-punting-on-providing-athletes-true-nil-rights/> (last visited March 1, 2021) (discussing how despite the NCAA publicly espoused it would vote on legislation granting NCAA athletes the right to benefit from their names, images and likenesses, the NCAA indefinitely delayed a vote on the issue).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Dennis Dodd, *How one kick sent Sarah Fuller's social media value soaring as athletes wait for name, image, likeness rights*, CBSSPORTS (Dec. 1, 2020), <https://www.cbssports.com/college-football/news/how-one-kick-sent-sarah-fullers-social-media-value-soaring-as-athletes-wait-for-name-image-likeness-rights/> (last visited March 1, 2021) (highlighting female NCAA football kicker, Sarah Fuller, could have monetized her social media following if NCAA bylaws allowed doing so).



from social media posts alone.¹³³ Strong social media followings may allow women's sport athletes to benefit financially from their NIL rights.¹³⁴ While men's basketball and football players may benefit more in this space—in part due to the extra resources their athletics departments have expended to publicize their brands—women's sport athletes can still benefit. One expert said:

In most cases the more prominent sports will have athletes with greater social followings. We'd typically see this play out in football and basketball as they often benefit from the most outside media coverage ... With that said, we have seen various other individual athletes with great stories or those with Olympic participation, for example reach a higher degree of awareness and thus have increased brand partnership value.¹³⁵

Despite not having the same marketing resources as intercollegiate men's sport teams, intercollegiate women's sport athletes have been successful in building their social media followings. The UConn women's basketball team has won more championships (11) than any other NCAA Division I women's basketball team.¹³⁶ Despite the UConn men's basketball team having won only four national championships, during the 2018-2019 fiscal year, UConn spent nearly \$1.5 million more on its men's basketball team than its women's basketball team.¹³⁷ Nonetheless, some members of UConn's women's basketball roster have been able to amass Instagram followings greater than the Instagram following of the

¹³³ *Id.*

¹³⁴ See Kristi Dosh, *Marketers Bullish On Monetization Opportunities For NCAA Athletes With NIL Rights*, FORBES (Nov. 25, 2019), <https://www.forbes.com/sites/kristidosh/2019/11/25/marketers-bullish-on-monetization-opportunities-for-student-athletes-with-nil-rights/?sh=174c5af57aa4> (last visited March 1, 2021) (noting that digital agency owners seek “. . . to partner with student-athletes who have at least 10,000 followers on Instagram or average video views of at least 20,000 on YouTube.”).

¹³⁵ *Id.*

¹³⁶ See Andy Wittry, *UConn women's basketball: Players, stats, records, historic moments from the Huskies' dynasty*, NCAA (May 28, 2020), <https://www.ncaa.com/news/basketball-women/article/2020-05-28/uconn-womens-basketball-players-stats-records-historic-moments-huskies-dynasty> (last visited March 1, 2021) (highlighting the dominance of the UConn women's basketball team).

¹³⁷ See Andy Wittry, *UConn men's college basketball championships: Complete history*, NCAA (Aug. 29, 2020), <https://www.ncaa.com/basketball-men/d1/uconn-mens-college-basketball-championships-complete-history#:~:text=UConn's%20college%20basketball%20championships,Georgia%20Tech%2C%2082%2D73> (last visited March 1, 2021) (noting that UConn's men's basketball team has won four national championships); *Equity in Athletics Data Analysis*, DEPARTMENT OF EDUCATION, <https://ope.ed.gov/athletics/#/institution/details> (last visited March 1, 2021) (showing that during the 2018-2019 fiscal year, UConn spent \$9,325,922 on its men's basketball team and \$7,853,769 on its women's basketball team).



team’s official account. As of the date of writing, UConn’s women’s basketball team has 159,000 followers on Instagram.¹³⁸

As Figure 2 depicts, 58.3% of UConn women’s basketball players have more than 10,000 Instagram followers. This is relevant, because experts say NCAA athletes with more than 10,000 Instagram followers can monetize their accounts.¹³⁹ Further, one UConn women’s basketball player, Paige Bueckers, has four-times as many followers as the team’s official Instagram account, Bueckers’ following signals that intercollegiate women’s sport athletes can successfully market themselves without receiving the equal marketing efforts that their men’s sport counterparts receive from NCAA athletics departments.

Table 2: Number of Instagram Followers for UConn Women’s Basketball Players[^]

Autumn Chassion (@autumn.chassion2)	5,866
Aaliyah Edwards (@aaliyahedwards_24)	6,835
Saylor Poffenbarger (@saylor.poff)	15.7k
Paige Bueckers (@paigebueckers)	655,000
Nika Muhl (@nika.muhl)	11.9k
Mir McLean (@mirwitthe_gear)	4,509
Christyn Williams (@christyn2000)	31.7k
Olivia Nelson-Ododa (@olivianelson_17)	71.7k
Evina Westbrook (@evina_22)	23.3k
Anna Makurat (@a.makurat13)	7,231
Piath Gabriel (@piath_g)	4,902
Aubrey Griffin (@aubrey.griffin44)	14.4k

[^] A 2020-2021 UConn women’s basketball roster was obtained by visiting <https://uconnhuskies.com/sports/womens-basketball/roster>. Thereafter, each UConn women’s basketball player’s name was searched in Instagram to locate their respective public Instagram profile. Profiles were confirmed as belonging to the respective UConn women’s basketball player by cross-checking it with tagged pictures on the official UConn Women’s Basketball Instagram account. Follower numbers are reported as of March 1, 2021.

Title IX is a landmark piece of federal legislation meant to create equal educational opportunities for both genders.¹⁴⁰ Any assertion that its purposes could be thwarted or violated must be seriously considered. As the USWNT’s example shows, women stand to earn the greatest when they have full control over

¹³⁸ See <https://www.instagram.com/uconnwbb> (last visited March 1, 2021).

¹³⁹ *Id.* at 135.

¹⁴⁰ Sex, 20 U.S.C.S. § 1681 (2020).



how their rights are marketed. By restoring intercollegiate athletes' NIL rights, women's sport athletes will gain the opportunity to engage the marketplace and identify the people who will "... invest their capitals where they believe they can generate most value."¹⁴¹

Section V. Recommendations to Uphold Title IX's Requirements as NCAA Athletes Benefit from NIL

As the time it has taken to and the divergence in statutory approaches demonstrate, complexities abound in successfully allowing intercollegiate athletes to benefit from their NIL rights. The following are recommendations for Congress, the NCAA, and athletics departments to adopt so that the color of Title IX can be upheld.

A. Congress Should Amend the Equity in Athletics Disclosure Act to Require Intercollegiate Athletics Departments to Report How Much They Spend on Marketing Men's and Women's Sports

As discussed in Section I, the EADA requires NCAA athletics departments to report a series of financial and other data to the Department of Education to show compliance with Title IX. Notably, this law does not require athletics departments to report how much they spend marketing men's and women's sports, respectively, as individual line items. Rather, any amounts spent marketing either gender's sport teams are reported as an aggregated expense amount. Thus, as enacted, the EADA allows athletics departments to hide practices that tend to bias women's sport athletes.

Congress has an opportunity to help cure the disparities women's sport athletes have encountered due to the historic under-marketing of their programs by the athletics departments charged with supporting them. Requiring athletics departments to bring into the light the disparity in their marketing expenditures between men's and women's sports could lead to public awareness, and subsequent outcry against, these practices. Such outcry could serve as a catalyst, prompting

¹⁴¹ See Adam Smith, *The Wealth of Nations, Book IV*, Chapter II, p. 456, para. 10; Eamonn Butler, *The Condensed Wealth of Nations and The Incredibly Condensed Theory of Moral Sentiments*, THE ADAM SMITH INSTITUTE (2011), https://static1.squarespace.com/static/56edde762cd9413e151ac92/t/56fbaba840261dc6fac3ceb6/1459334065124/Condensed_Wealth_of_Nations_ASI.pdf (last visited March 1, 2021) (explaining that the above cited quote is "[t]he only mention of the Invisible Hand in *The Wealth of Nations*. . .").



athletics departments to consider more equitable spending in marketing men's versus women's sport teams.

As intercollegiate athletes' NIL rights are restored, this reporting requirement becomes more important, should intercollegiate athletics programs be allowed to market their intercollegiate athletes' NIL rights. Requiring athletics departments to report how much they spend per gender on such a practice to the federal government might dissuade any motivation to market one gender's NIL rights more heavily than the other gender's NIL rights.

B. The NCAA Should Require Athletics Departments to Specifically Report How Much They Spend on Marketing Men's and Women's Sports

Along with filing an annual report to the Department of Education under the EADA, NCAA member institutions also submit an annual report to the NCAA containing relevant financial data. Unlike the data from the report submitted to the Department of Education, this data is not publicly available. However, in an interview with a Power Five Conference Athletics Director for Finance, it was learned that the report highlights each athletics department's revenue and expenses. Similar to the EADA report, amounts spent on marketing are not listed as line items, but aggregated into the total expense amount. Further, marketing expenditures are not delineated by gender.

Like the EADA, this reporting practice allows athletics departments to hide biased and discriminatory practices in how women's sport teams are marketed. Should the NCAA wish to cure any disparity in how its women's sport teams are marketed, it must require member institutions to delineate the amount they spend marketing each team by gender as separate line items in the annual report.

Further, the NCAA should set benchmarks for the percentage of revenue generated by member institutions that must be directed to marketing women's sport teams to overcome any advantage men's sport athletes may enjoy in the valuation of their NIL rights due to the historic over-marketing of men's sport teams and under-marketing of women's sport teams. Such a benchmark could resemble the NCAA's Academic Progress Rate standard, under which if a team does not meet a certain minimum score, it faces the imposition of a portfolio of penalties that ramp up each year that the minimum score is not attained. Placing athletics departments under similar requirements related to marketing women's sport—and publicly reporting the data, like teams' APR scores—could quickly facilitate changing marketing practices.



C. Athletics Departments Must Provide Equal NIL-Related Benefits and Opportunities to Both Genders

As discussed in Sections III and IV, enactment of NIL legislation and entry into endorsement deals by intercollegiate athletes on their face do not necessarily trigger Title IX scrutiny. However, several potential pitfalls prompting the likelihood of Title IX claims being raised exist. Most of these claims center around an athletics department providing its services more heavily to one gender than the other gender to help in the securing of endorsement deals.

Most easily stated, the best recommendation for athletics departments in this regard is to treat one gender like the other. If staff members are facilitating the procurement of NIL deals for one gender's athletes, staff members should be hired or utilized to do the same for the other gender's athletes. If educational programming is provided to one gender, it should be provided to the other gender.

While athletics departments could defend against any Title IX claim raised under the aforementioned scenarios by arguing the benefit to one gender was offset by a different benefit to the other gender, they should reflect on the opportunity NIL legislation presents to finally fully effectuate the meaning of Title IX and provide both genders equal opportunity in athletics. Thus, any difference in treatment in terms of what NIL-related benefits are provided to either gender is not recommended.

Conclusion

Over 100-years into the NCAA's existence and in a period when its annual revenues exceed \$1 billion, intercollegiate athletes have resecured a right that was artificially stripped from them: the right to benefit from their own name, image, and likeness. This drastic shift in the right an intercollegiate athlete has to benefit from their unique talent and ability should be met with an attitude of possibility for what can emerge from it, rather than one of myopia. Instead of crying out that the "sky" for women's sport is falling, because of the possibility that at the outset of enactment of NIL bills men's sport athletes might earn more, women's sport advocates should recognize the possibility that NIL bills present for women's sport athletes to earn greater amounts of personal income than ever before. Further, through collaboration, education, and encouraging women's sport athletes to lean into and fully exploit their NIL rights, the publicity gap between men's and women's sport athletes could be narrowed, in furtherance of Title IX.

