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College Athlete Name, Image, and Likeness
Vital Considerations Regarding Federal Legislation

July 22, 2020

Dear Chairman Graham, Ranking Member Feinstein, and members of the US Senate Judiciary Committee,

Thank you very much for inviting me to participate in the "Protecting Integrity in College Athletics" hearing on Wednesday, July 22, 2020. This discussion encompasses important economic rights and freedoms that college athletes should be afforded. The National College Players Association (NCPA) is a co-sponsor of California SB 206 known as The Fair Pay to Play Act, served as the primary advocate for the Florida NIL law, and is providing information and support to 12 of an estimated 28 other states pursuing similar legislation.

Please accept this letter, the attached documents, and the list of topics and links at the end of this letter to be entered as my written testimony.

NCAA sports seeks to operate above the law while legally sentencing college athletes, many of whom are Black athletes from underprivileged households, into second class citizenship. Separate is not equal in education and college athletes should have equal rights and freedoms afforded to other students and Americans. NCAA sports is asking Congress to eliminate college athletes' protection under both antitrust and labor law in return for tinkering with just a sliver of the racially discriminatory economic exploitation inflicted upon college athletes.

College athlete name, image, and likeness (NIL) pay is the smoke that hovers above the raging fire of injustices at the core of NCAA sports. College athletes' economic, academic, and physical well-being continue to be consumed by an insatiable greed and a mentality that treats players as property rather than people.

America has not seen so many college athletes in modern times voice opposition to racial discrimination in policing, on campus, and elsewhere. Their anger over racial injustice has finally outweighed their fear of coaches who have sought to silence them. It would be a travesty that, in the midst of college athletes finding their voice, Congress gives legal cover and protections to cement the devastating racial discrimination that exists in NCAA sports.

Equal Rights

Instead of excluding college athletes from antitrust protections, Congress can address certain restraints on trade directly through legislation. For instance, Congress can prevent NIL agreements from being used as inducements to lure high school recruits and college transfers to a particular

college. Congress does not need to give the NCAA an antitrust exemption to accomplish these things.

Similarly, Congress does not need to proactively exclude college athletes from rights under the National Labor Relations Act or state labor laws. The NIL pay in question does not have implications on employee status so there is no compelling reason for Congress to address the issue. Though college athletes have yet to prove that they are employees, this could change in the future. Plenty of students are university employees – including those who work in the student store, dining halls, and libraries. Congress should not block an avenue that could help college athletes address a host of critical issues such as health and safety and degree completion.

Ignore the Competitive Equity Myth

NIL arrangements with boosters, alumni, and college sponsors should not be banned in the name of competitive equity because competitive equity does not exist in college sports. These same sources already give athletic programs money that is used to recruit the best recruits, win the most games, and generate the biggest TV deals that allow rich athletic programs to continue their dominance. In their most recent report to the Department of Education, Ohio State reported $209 million dollars in athletic revenue while Ohio University reported only $28 million in athletic revenue. They are both in the FBS Division. How can anyone suggest that these two colleges compete on an equal playing field? How can colleges, conferences, and the NCAA justify denying college athletes economic freedoms in the name of competitive equity when this severe disparity among colleges exists and is held up as the system that should be preserved? Colleges, conferences, and the NCAA have not moved to address these inequities – they haven't banned booster payments to colleges and they don't share athletics revenue equally among colleges in the name of competitive equity. In addition, other leagues do not ban 3rd party NIL deals with fan clubs and those leagues operate very well.

Federal legislation should not sacrifice college athletes' freedoms so that NCAA sports can pretend that competitive equity exists. Additionally, roster and scholarship limits keep the inequity from "getting worse". There is a finite number of recruits each year and the top recruits already flow to the Power 5 Conferences. If fair legislation inadvertently changes recruiting migrations to where some of the top recruits begin to flow away from some of the Power 5 Conferences, it would actually increase competitive equity compared to where it is today.

Developments

Since my testimony in the US Senate Subcommittee on Manufacturing, Trade, and Consumer Protection's "Name, Image and Likeness: The State of Intercollegiate Athletic Compensation" hearing on February 11, 2020, there has been several significant developments related to possible federal legislation on this issue.

One recent development exposes as false claims that the NCAA, conferences, and colleges would be unable to withstand competitive inequities or navigate around a patchwork of state name, image, and likeness (NIL) laws. The vigor and support these same entities have for complying with everchanging state, county, and city COVID-19 orders related to the return of college sports makes clear that they are capable of complying with an array of different laws – just as other businesses involved in interstate commerce must do. Disturbingly, the return to college sports is taking place without the enforcement of COVID-19 health and safety standards while higher rates of obesity, high blood pressure, and sickle cell put college football players at higher risk of COVID-19 complications. College athletes lack information about such risks, are being required to sign liability waivers at many campuses, are subject to inadequate testing, and often have little to no information about how many teammates may have COVID.

Competitive equity will be affected as some of the COVID-19 orders may limit or even prevent some teams from returning to sports this season. This situation will have a significant impact on athletics revenue and recruiting, which are the primary factors when considering competitive equity. Nonetheless, the NCAA, conferences, and colleges are demonstrating that state and local laws that will have stark impacts on competitive equity is compatible with "The Collegiate Model".

To date, many athletes from football teams across the nation have players who have tested positive for COVID-19. Some outbreaks have been so severe that athletic activities have been suspended on some campuses, and entire seasons have been postponed or cancelled at many other colleges. If NCAA sports is willing to risk the health and safety of their college athletes, their families, and communities in pursuit of billions of dollars in football revenue, it can surely withstand inconveniences that allow college athletes economic freedoms associated with NIL compensation.

Additionally, the state of Florida has adopted name, image, and likeness legislation similar to California SB 206. In total, approximately 28 states are pursuing NIL freedoms for their college athletes. Federal legislation is not necessary to preserve college sports or ensure college athletes gain NIL compensation freedoms.

I would also like to inform you that the National Association of Intercollegiate Athletics (NAIA), an intercollegiate athletic association comprised of more than 250 colleges and 65,000 college athletes, announced a NIL proposal that mirrors the pillars of California SB 206 and virtually all of the other proposed state NIL legislation. The proposal would allow college athletes to secure representation and receive NIL compensation. This is significant. This proposal undercuts the NCAA's notion that "The Collegiate Model" must impose overbearing restrictions and exclude various economic freedoms that the states are pursuing.

Another development is that on May 18th, 2020, the 9th Circuit Court of Appeals ruled in favor of plaintiffs who sued the NCAA over illegally price-fixing college athlete compensation. This is yet another instance of the NCAA breaking federal antitrust laws, laws for which they are currently seeking an exemption from. This ruling includes prohibiting the NCAA from restricting compensation and benefits related to a college education. As I stated in my previous Senate Commerce Committee testimony, each antitrust action against the NCAA has resulted in benefits for countless college athletes.

Finally, another antitrust lawsuit was filed on June 15, 2020 against the NCAA for its rules that prohibit college athlete NIL compensation. The NCAA's claims in an earlier NIL case (O'Bannon v. NCAA) that NIL pay would destroy college athletics will ring hollow now that California and Florida have passed NIL laws; and NCAA leaders and conference commissioners now say players should have some NIL freedoms. Notably, this lawsuit seeks to open NIL compensation related to TV broadcast revenue, which is an important aspect of gaining economic equity for college athletes.

Congressional Action

It would be especially unjust for Congress to turn a blind eye on critical aspects of college athlete well-being and economic equity that are much more important than narrow NIL compensation.

Today, the NCAA says it has no duty to protect college athletes and refuses to enforce health and safety standards despite negligent deaths during workouts, sexual assaults against hundreds of college athletes, and athletic trainer surveys finding rampant mistreatment of concussions and other serious injuries nationwide. The NCAA says it has no duty to ensure a quality education for college athletes while football and basketball players' federal graduation rates hover around 50% and many

college athletes are pushed into classes and majors that they do not want to take for athletic eligibility purposes.

Economic equity for college athletes is inextricably tied to not only college athlete NIL freedoms and ensuring they receive a significant portion of commercial revenue that their talents generate, but it is tied to their freedom from medical expenses, freedom from preventable sports-related injury and abuse, freedom from serious obstacles that impede degree completion, freedom to transfer once without punishment in pursuit of better academic and athletic opportunities, freedom from unfair athletic association investigations that can harm their economic stability and future, and freedom from illegal, cartel activity that stifles their economic opportunities.

The NCPA is asking Congress to decline NCAA sports' request for narrow and unjust NIL legislation. Instead, the NCPA is asking Congress to pursue broad-based reform that is critical to college athletes' well-being. The NCPA has background information and well as a roadmap for legislative provisions that will provide critical freedoms and protections for college athletes. I ask for a continued dialogue with each of your offices so that we can work together to bring forth a fair and just arrangement for college athletes.

The NCPA strongly opposes the following athlete NIL restrictions proposed by the NCAA and the Power 5 Conferences that would roll back protections and freedoms guaranteed by California, Florida, and being pursued in other states:

- A federal ban on direct compensation to college athletes from colleges, conferences, or athletic associations – opposed.
  No other student or American faces such a threat to or restriction of their rights. This provision would impose second class citizenship on college athletes, many of whom are Black athletes from low-income households. This is a shameful attempt to legalize NCAA sports' racially discriminatory system that pays lavish salaries to predominantly white coaches, athletic directors, and commissioners, off the backs of disproportionately Black athletes in revenue sports. Players should receive an equitable portion of athletic revenue they help generate.

- Antitrust and litigation exemptions - opposed.
  The very narrow areas where restraint of trade are justified such as prohibiting NIL deals to be used as inducements for prospective college athletes should be enacted directly by Congress. The NCPA has assisted antitrust lawsuits and investigations that have led to important advancements for college athletes such as the elimination of an NCAA prohibition on medical coverage during summer workouts (*White v. NCAA* antitrust lawsuit settlement), removing the NCAA's 1-year scholarship limit (US DOJ Antitrust Investigation), eliminating the NCAA's ban on player stipends to cover basic necessities (*O'Bannon v. NCAA* NIL antitrust ruling), and, assuming the US Supreme Court will allow the 9th Circuit's *Alston v. NCAA* antitrust ruling to stand, the option for colleges to pay athletes educational related compensation including up to $14,000 per year in academic achievement awards. If the NCAA already had an antitrust exemption, these gains would never had been made and the states would have never had the ability to adopt NIL laws at the core of this hearing.

- Prohibiting employee status for college athletes – opposed.
  Targeting and stripping college athletes of rights under labor laws is unethical and racially discriminatory. Plenty of regular students are university employees and this exclusion would have a disperate impact on thousands of college athletes from protected classes. Third party NIL reform does not invoke employee status so there is no need for Congress to address this issue at all.

- Denying college athletes the ability to secure representation and earn NIL pay for a semester – opposed.
  This is simply an unjustifiable and needless attack on college athletes' rights. Other students work long hours to put themselves through college and do not face such prohibitions in the name of academics. As compared to traditional student employment, NIL deals can require very little time demand. If there is true concern about having the appropriate balance of time demands, NCAA sports should reduce athletic time demands. NCAA surveys found that Division I athletes spend 32 hrs/week in their sport alone (42 hrs/week in football) despite the NCAA's 20 hr/week limit on athletics participation. Reducing athletic time demands to give players more time to exercise their economic freedom is a fair way to address this issue.

- Punishment of college athletes who do not publicly expose their NIL deals – opposed.
  This would prevent opportunities in which college athletes could otherwise start a small business or enter into NIL deals with businesses that need to protect trade secrets. The right to secure proper representation and financial skills development will help ensure players are informed about agreements that may enter into.

- Prohibiting NIL deals with athletic boosters and companies/competitors contracting with colleges – opposed.
  Players are people not university property. Universities deals should not dictate whether or not players are free to earn compensation from their own name, image, and likeness rights. And again, competitive equity does not exist in college sports. Athletic booster donations and corporate sponsorships already inhibit competitive equity. It is unjust to allow booster payments and sponsorship money to continue to athletic programs while excluding players from NIL deals with these same sources. Such restraints of trade would significantly harm players' economic freedom and opportunities.

- Prohibition on group licensing – oppose.
  The NCAA's claim that college athlete group licensing could only take place with a union is false. For instance, One Team is a group licensing entity that services a number of professional athletes and is not a union.

- Enlisting the Federal Trade Commission (FTC) to handle agent certification - opposed.
  Agent certification in pro sports is operated by players unions. While no such union exists in college, Congress should create player-led oversight commission for this function. The FTC has no experience in college athlete NIL and cannot be expected to properly fulfill this role.

- Preemption of state laws – opposed.
  There has been no reasonable federal legislation introduced that would ensure equitable economic terms for college athletes to warrant preventing states from addressing these issues.

Thank you again for the opportunity to participate in this hearing and I am committed to working with you in continuing discussions on this issue and other issues concerning college athletes' well-being.

Sincerely,

Ramogi Huma
NCPA Executive Director

Attachments to be included as part of written testimony:

- "Comments from Professor Len Simon on Name, Image, and Likeness Bills" – Len Simon, lawyer and Professor of Sports Law
- "Madness Inc.: How everyone is getting rich off college sports – except the players" – US Senator Chris Murphy
- "2019 Racial and Gender Report Card: College Sport" by the Institute of Diversity and Ethics in Sport
- 2018-19 NCAA "Coach and Student-Athlete Demographics by Sport" (Division I Men's Basketball)
- 2018-19 NCAA "Coach and Student-Athlete Demographics by Sport" (Division I FBS Football Autonomy)
- 2018-19 NCAA "Coach and Student-Athlete Demographics by Sport" (Division I FBS Football Non-Autonomy)
- "2019 Adjusted Graduation Gap Report: NCAA FBS Football" by The College Sport Research Institute
- "2019 Adjusted Graduation Gap Report: NCAA Division I Basketball" by The College Sport Research Institute

Links to be included as part of written testimony:

NCAA Sports' Racially Discriminatory System

"Four Years a Student-Athlete" https://www.vice.com/en_us/article/ezexjp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sports

Civil Rights Historian Taylor Branch in The Atlantic: The Shame of College Sports" https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/

Players Can be Stuck With Sports-Related Medical Expenses

https://www.nytimes.com/2009/07/16/sports/16athletes.html

https://abcnews.go.com/Health/kevin-wares-injury-draws-attention-ncaa-healthcare-debate/story?id=18889697

https://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html

https://www.forbes.com/sites/karenweaver/2020/01/18/add-this-to-your-list-of-ncaa-to-dos-medical-expenses/#53b92d8e752f

The NCPA sponsored a 2012 Athletes Bill of Rights in California that requires colleges with high media revenues to pay for players' out-of-pocket sports related medical expenses as well as premiums for low income college athletes. It also prohibits colleges from refusing to renew scholarships due to permanent injury:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1525

Power 5 Conferences (65 of 351 Division I colleges) adopted a rule aimed at covering players' sports-related medical expenses for up to two years, and the Pac-12 adopted a rule requiring colleges to pay up to 4 years of sports-related medical expenses. However, conferences have not demonstrated enforcement. For instance, Stanford's policy states such expenses are covered only between 12-24 months.
Stanford's SA Handbook (p. 66):
https://s3.amazonaws.com/sidearm.sites/gostanford.com/documents/2019/10/29/2019_20_Student_Athlete_Handbook.pdf

Power 5 4-year medical expense (unenforced?) commitment: https://swimswam.com/power-5-conferences-vote-extend-medical-care-student-athletes/

Lack of Enforced Health & Safety

- Health and safety standards are not enforced in college sports - NCAA says colleges “self-police”, can choose not to follow NCAA guidelines, including those related to COVID-19.

http://a.espncdn.com/ncf/news/2001/0816/1240463.html

COVID-19 “Guidance” not mandatory… http://www.ncaa.org/sport-science-institute/resocialization-collegiate-sport-action-plan-considerations
https://deadspin.com/ncaa-lets-michigan-state-off-the-hook-in-nassar-case-1828719733
https://www.washingtonpost.com/sports/oregon-football-workouts-sent-players-to-hospital-who-will-stand-up-for-them/2017/01/17/1c0d7fae-dcf7-11e6-918c-99ede3c8cafa_story.html
https://www.insidehighered.com/news/2016/09/01/advocates-say-uncs-hiring-coach-accused-abuse-points-lack-ncaa-oversight

- NCAA holds it has no duty to protect college athletes.

https://www.cbssports.com/general/news/ncaa-denies-legal-duty-to-protect-student-athletes-court-filing-says/
https://www.ocregister.com/2020/06/02/ncaa-argues-in-sex-abuse-case-it-has-no-legal-duty-to-protect-athletes/

- Athletic staff’s sexual and physical assaults against college athletes, and injuring or killing an athlete in a negligent workout are not against NCAA rules.
- Countless sexual assaults by athletic personnel against college athletes led to no NCAA sanctions.

- NCAA study: 50% of college athletic trainers admit to returning concussed players back to same game.

https://www.cbssports.com/college-football/news/why-the-ncaa-wont-adopt-concussion-penalties----at-least-not-yet/
https://www.cnn.com/interactive/2014/10/us/ncaa-concussions/index.html

- National Athletic Trainers Assoc: 19% of coaches played athletes who were not medically cleared, 2/3 report being pressured by nonmedical staff to make medical decisions for athletes, despite NCAA guidelines discouraging this practice.

https://www.nata.org/press-release/062619/only-half-collegiate-level-sports-programs-follow-medical-model-care-student
http://www.chronicle.com/article/Trainers-Butt-Heads-With/141333/?cid=longform-related
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4639885/

- California Athletic Trainers Association Survey: 82% of trainers do not follow colleges' own concussion policies.

(Attached)

- Multiple claims of serious athlete mistreatment at UCLA, USC, Loyola Marymount.

https://www.latimes.com/sports/ucla/la-sp-ucla-football-lawsuit-jim-mora-20190530-story.html
https://sports.vice.com/en_us/article/usc-football-team-doctor-admits-to-ignoring-fda-and-ncaa-painkiller-regulations
http://www.espn.com/college-football/story/_/id/14682233/university-california-admits-negligence-2014-death-lineman-ted-agu
http://www.latimes.com/sports/usc/la-sp-usc-brian-baucham-lane-kiffin-lawsuit-20160425-story.html
http://deadspin.com/5949336/uscs-robert-woods-couldnt-keep-his-balance-after-a-helmet-to-helmet-hit-missed-one-play
http://sanfrancisco.cbslocal.com/2016/07/08/stanford-university-ncaa-facing-concussion-lawsuit-from-former-football-players/
http://www.dailycal.org/2016/09/01/former-cal-football-players-files-concussion-lawsuit-pac-12-ncaa/
Loyola Marymount faculty member & NCPA spoke w multiple players claiming misconduct – here's a glimpse https://www.youtube.com/watch?v=S_aW6skSHOs

- African American college athletes and football players may have an increased risk of COVID-19 complications (high blood pressure, sickle cell, obesity)

https://prospect.org/health/playing-games-with-college-athletes-lives/
http://www.ncaa.org/sport-science-institute/core-principles-resocialization-collegiate-sport
http://www.ncaa.org/sport-science-institute/resocialization-collegiate-sport-action-plan-considerations

Due Process

How a Little Known Rule Shuts NCAA Athletes Out of the Legal System https://www.vice.com/en_us/article/8qy533/how-a-little-known-ncaa-rule-shuts-athletes-out-of-the-legal-system

Transparency

Why Top NCAA Recruits Shouldn't Sign National Letters of Intent https://www.vice.com/en_us/article/pgn38z/why-top-ncaa-recruits-shouldnt-sign-national-letters-of-intent

Example of Alternative to National Letter of Intent: https://www.ncpanow.org/cap-guarantee