

THE INHERENT BAD FAITH OF THE NCAA’S USE OF TITLE IX TO SHIELD ITS ILLEGAL BUSINESS PRACTICES

SAM C. EHRLICH*

ABSTRACT

This Essay examines the moral and policy implications of the NCAA’s use of Title IX to argue for legislative immunity from antitrust and employment law. Regardless of if there is merit to the NCAA’s in-court assertions that Title IX prevents employment status, revenue sharing, and other reforms, the NCAA’s requests to Congress for legislative protection and immunity requires a monumental degree of faith that an all-powerful NCAA would sincerely carry out its supposed commitment to gender equity. Yet this Essay finds that the NCAA has hardly earned the level of trust necessary to grant it that power. To the contrary, the NCAA has shown repeatedly that they cannot be trusted to follow through on this implicit promise in light of the NCAA and its’ member schools’ historical battles against Title IX and incessant use of loopholes, each of which highlight their bad faith in these discussions. While the NCAA’s arguments regarding Title IX are compelling to many, history simply does not support trusting an above-the-law NCAA to actually work to ensure gender equality in college sports. As such, this Essay argues that it is at the utmost levels of bad faith for the NCAA to attempt to use Title IX as a shield when the NCAA and its stakeholders have been fighting Title IX’s on-paper and in-spirit application to college sports at every turn.

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* Sam C. Ehrlich, J.D./Ph.D., Assistant Professor of Legal Studies, Boise State University College of Business and Economics. Profuse thanks are owed to Neal Ternes and Susan Park, whose advice, edits, and validation did wonders to help convert this piece from a disorganized rant into an actual piece of scholarship. © 2023, Sam C. Ehrlich.

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INTRODUCTION

Consider, for a moment, a hypothetical criminal defendant accused of breaking and entering his neighbor’s home to steal an item of great value. That defendant—representing himself *pro se* (at least one would hope)—tells that court that he just had to steal the item, otherwise he would be compelled to murder his neighbor instead for the offense of flaunting the valuable item in his face.

It is unlikely that a court would accept that argument. Yet we are currently seeing a fundamentally similar defense play out in the world of college sports.

Over the past few years, the National College Athletics Association (“NCAA”), has been faced with the death of its long-held “amateurism” defense—a defense that, thanks to a throwaway paragraph in a Supreme Court case it *lost*,¹ granted the NCAA the ability to grow precipitously and unfettered as a sanctioned monopsony.² But with that defense no longer available, the NCAA has now turned to the gender equity requirements of Title IX³ as a sort of affirmative defense in both the courtroom and in federal and state legislative lobbying.

In other words, the NCAA has positioned its argument in the same vein as our hypothetical criminal defendant: the NCAA *simply must* be exempt from employment and antitrust law, because otherwise it will be forced to do the *truly* unthinkable: give up on its commitment to the gender equity principles for which Title IX stands. Compliance with all three laws is apparently an impossible task; the NCAA offers no third solution where it can comply with all three laws as currently written and applied.

The NCAA’s use of Title IX and women’s sports in this regard is, in a word, shameless.

The jury is still out on whether there is merit to the NCAA’s assertions that Title IX prevents employment status, revenue sharing, and other potential

1. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (noting that the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports” and stating that there is “no question but that it needs ample latitude to play that role.”).

2. See Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA’s Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 673 (2018) (summarizing and discussing how the *Regents* “ample latitude” language was turned by courts into “a quasi-exemption from antitrust law that activated anytime amateurism was implicated in an antitrust challenge.”); Sam C. Ehrlich, *Probing for Holes in the 100-Year-Old Baseball Exemption: A New Post-Alston Challenge*, 90 U. CIN. L. REV. 1172, 1192–93 (2022) (collecting notable citations to cases that relied on the *Regents* language to grant the NCAA “ample latitude” in a variety of areas outside of antitrust law, including against age discrimination claims, efforts by states to enforce due process protections for punished coaches, calculations of tort damages for college athlete plaintiffs, attacks on the NCAA’s alleged status as an educational institution for the purposes of state tax exemptions, and claims to athlete employment status).

3. 20 U.S.C. §§ 1681–82.

reforms.⁴ The NCAA points in court to inconsistent standards between Title IX and its employment counterpart, Title VII,⁵ that it claims would yield “a minefield of unforeseen consequences” that has “the potential of falling disproportionately on female [athletes’] shoulders because it might ultimately undo advances that Title IX has wrought for female athletics.”⁶ Yet there is currently a possible circuit split where courts are seemingly conflicted as to whether sex-based discrimination relief for all employees at educational institutions (including, perhaps, student employees) is restricted only to the less expansive Title VII or whether relief can be found through either Title VII or Title IX.⁷ This split could eventually be resolved in favor of allowing the more robust Title IX to apply in that context.

Similarly, the NCAA argues that sharing media rights revenues with athletes would violate Title IX as male athletes—thanks to football and men’s basketball—

4. At least one scholar has argued that neither compensation models based solely around payment for athletes’ names, images, and likeness (NIL) nor employment-based compensation models have to be out of compliance with Title IX, even if—in that scholar’s opinion—the NIL model is more likely to comply with Title IX than an employment model. See generally Arianna Banks, *The Supreme Court Gets the Ball Rolling: NCAA v. Alston and Title IX*, 117 N.W. U.L. REV. 549 (2022).

5. 42 U.S.C. §§ 2000e–2000e17.

6. Oral Argument at 00:37, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023), <https://perma.cc/S6AW-8ZL4>.

7. Compare *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995) (finding that 1991 amendments to Title VII preempt Title IX as the exclusive means of relief for employees at educational institutions), with *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988), *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017), and *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994) (each finding that Title VII and Title IX are independent rights and can both apply). See also *Kashdan v. George Mason Univ.*, 70 F.4th 694 (4th Cir. 2023) (“The implied right of action by which private plaintiffs may sue to enforce Title IX ‘extends to employment discrimination.’”). For scholarly analysis of this circuit split, see Kendyl L. Green, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1 (2017); Nicole Dlugosz, *The Revival of a Twenty-Year Circuit Split Featuring a Medical Residency Program Twist: An Analysis of Doe v. Mercy Catholic Medical Center & the Applicability of Title IX Remedies*, 71 RUTGERS U. L. REV. 457 (2018); Brigid Burroughs, *Title VII Meets Title IX for Student Employees: Remedies for Discrimination Against Graduate Students*, 89 UMKC L. REV. 441 (2020) (each discussing the circuit split in whether Title VII, Title IX, or both have jurisdictional authority over discrimination claims by employees at educational institutions). At the same time, one possibly could make a key distinction between two sets of cases based on the nature of the plaintiffs in these individual cases. In other words, there may actually be no circuit split when it applies specifically to *student* workers, as college athletes would be considered. Of the five cases listed above, only the plaintiffs in *Lipsett* and *Doe* were student workers. (Specifically medical residents, which is a status where—not unlike college athletes—there is some debate over whether they are students or employees. See Mary Vest Mason, *Are Residents Considered Students or Employees?*, 279 J. AM. MED. ASSOC. 1669 (1998)). By contrast, the plaintiffs in the two cases where the Fifth and Seventh Circuits found in favor of Title VII preemption (along with the 2023 Fourth Circuit case finding in favor of either) were faculty or staff members. So in the cases of student-employees which college athletes would be, a court could find room to distinguish the two cases deciding in favor of preemption from the two cases involving medical residents and find that there is no dispute that either Title IX or Title VII would then apply—especially since both *Lipsett* and *Doe* specifically highlighted the plaintiff’s dual status in their holdings. *Lipsett*, 864 F.2d at 897 (“Plaintiff here was both an employee and a student in the program”); *Doe*, 850 F.3d at 556–57 (quoting the cited *Lipsett* language while also distinguishing the medical residency situation from cases where students were not extended Title IX relief at internships where the employer had no direct affiliation with an educational program).

would clearly receive a much bigger share of the pie.⁸ Yet it is still unclear what form revenue sharing would take if and when a revenue sharing compensation model happens. Perhaps instead of being team-based, revenue sharing may take the form envisioned in California's pending revenue sharing bill, where universities are required to distribute their athletic revenues equally between men and women, thus allowing universities to comply with Title IX while doing so.⁹

But this Essay does not discuss the legal merits of the NCAA's use of Title IX as an affirmative defense. Instead, the Essay looks to the moral and policy implications of the NCAA's current pleas to Congress for untold power to shape college sports how it wishes through legislative immunities to antitrust and employment law. Only through this exempted status, the NCAA argues, can college sports as an industry comply with Title IX.¹⁰ But this preferred solution requires a monumental degree of faith that an all-powerful and above-the-law NCAA will actually work towards achieving gender equity in college sports.

The NCAA has hardly earned that level of trust. To the contrary, the NCAA and its stakeholders have shown repeatedly throughout history that they *cannot* be trusted to follow through on this implicit promise. While the NCAA loves to put out statements, advertisements, and vague platitudinal policies about its deep commitment to gender equity in college sports and its devotion to Title IX,¹¹ the reality is that the NCAA and its stakeholders have fought Title IX's application

8. See Defs. Joint Opp. to Pls. Mot. for Class Certification at 15–16, *In re* College Athlete NIL Litigation (House v. NCAA), 545 F. Supp. 3d 804 (N.D. Cal. 2023); Expert Report of Barbara Osborne, *In re* College Athlete NIL Litigation (House v. NCAA), 20-cv-03919, 545 F. Supp. 3d 804 (N.D. Cal. 2023) (ECF No. 251, Exhibit 3).

9. See The College Athlete Protection Act, A.B. 252, Art. 3, § 67463(i)(1)(D) (Cal. 2023) (“The institution shall make, in aggregate, for an academic year, one-half of the total amount of degree completion fund payment designations for its female college athletes, and one-half of the total amount of degree completion fund payment designations for its male college athletes.”). The quoted language reflects amendments made to AB 252 after the bill was passed by the California Assembly. The bill is currently delayed until the 2024 California legislative session. Steve Berkowitz, *California Bill that Would Allow College Athletes to be Paid by Schools Delayed Until 2024*, USA TODAY (July 3, 2023, 11:49 PM), <https://perma.cc/Z3Y7-N8TK>. There are certainly other issues with splitting revenues equally between male and female athletes. For example, the fact that the two highest revenue sports, football and men's basketball, primarily feature lower socioeconomic Black athletes while “non-revenue” Olympic sports primarily featuring more affluent White athletes must be considered when discussing further exacerbating existing injustices of distributing revenues earned by football and men's basketball to Olympic sports. See, e.g., Victoria Jackson, ‘We’re All Complicit to an Extent’: How Team USA Uses College Football and Basketball as Funding Sources, THE ATHLETIC (July 22, 2021), <https://perma.cc/W9UV-SEJ6>. However, such a discussion—as vital as it is—is beyond the scope of this Essay.

10. See, e.g., Eric Prisbell, *Why Can't the NCAA Get Its Public Messaging Right?*, ON3 NIL (May 4, 2023), <https://perma.cc/PQW5-3LGM>.

11. See, e.g., NCAA DIVISION I MANUAL, Art. 1 § G (2022) (“The Association is committed to gender equity. Activities of the Association, its divisions, conferences and member institutions shall be conducted in a manner free of gender Divisions [sic].”); NCAA, *Journey Through Title IX*, YOUTUBE (June 16, 2022), <https://perma.cc/EML7-88ND>; NCAA, *Because of Title IX: Reflecting on Title IX's 50th Anniversary*, YOUTUBE (June 16, 2022), <https://perma.cc/V6D5-UFAB>; NCAA, *NCAA Social Series: Celebrating Title IX*, YOUTUBE (June 22, 2022), <https://perma.cc/HD3E-RVXM>; NCAA *Title IX 50th Anniversary Celebration*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://perma.cc/F74Y-TXBU>.

to college sports at every turn.¹² Indeed, the NCAA themselves enjoys hard-fought immunity from any sort of individual accountability under Title IX,¹³ and the association refuses to take ensuring its members' compliance with Title IX into their own hands, as, in its view (and by its members' design), "Title IX is a law, not a voted-upon NCAA rule."¹⁴

And let it not be said that the NCAA's opposition to Title IX is in the past or is ancient history. It was just two years ago that the NCAA had to be shamed through social media,¹⁵ Congressional letters,¹⁶ and external reviews¹⁷ into even attempting to make gender equity anything close to a priority in the operation of its men's and women's basketball championships¹⁸ and elsewhere in its operations.¹⁹ Even looking beyond the NCAA corporate apparatus—as, after all, the NCAA is not the organization but the schools are—the NCAA member schools themselves continue to exploit loophole after loophole to give the perception of Title IX compliance while painstakingly working to avoid true gender equity.²⁰

12. See generally Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95 (2003) (highlighting decades of college sports stakeholder opposition to the application of Title IX to intercollegiate athletic programs). See also *infra* Part II(A).

13. NCAA v. Smith, 525 U.S. 459 (1999). See *infra* notes 115–128 and accompanying text.

14. Henry Bushnell, *After 50 Years, Title IX Compliance in College Sports Still Lags. The Reason? "It Has No Teeth,"* YAHOO SPORTS (June 23, 2022), <https://perma.cc/2666-RSZZ>. In 1993, the NCAA did start a Certification Program that required Division I members to self-report on gender and racial equity goals, timetables, and deliverables, but the program was discontinued in 2011. Brian L. Porto, *Unfinished Business: The Continuing Struggle for Equal Opportunity in College Sports on the Eve of Title IX's Fiftieth Anniversary*, 32 MARQ. SPORTS L. REV. 259, 299 (2022). This program reportedly certified compliance plans that would not have brought schools back into compliance and took no action to follow up on plans after they were certified. Steve Berkowitz, *U.S. Senator Wants Answers from NCAA's Mark Emmert on Efforts to Promote Title IX Compliance*, USA TODAY (June 17, 2022), <https://perma.cc/3JK6-4KCS>.

15. Sedona Prince (@sedonaprince_), X (Mar. 18, 2021, 8:26 PM), <https://perma.cc/35B9-5QYG>. See also J. Brady McCollough, *Oregon's Sedona Prince highlights the gender inequality on display in NCAA weight rooms*, LOS ANGELES TIMES (Mar. 18, 2021), <https://perma.cc/C4SL-Q8AT>.

16. Jabari Young, *Congress wants answers from NCAA after weight room disparity at women's basketball tournament*, CNBC (Mar. 25, 2021), <https://perma.cc/KV9D-QDPD>.

17. KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE I: BASKETBALL CHAMPIONSHIPS, (2021), <https://perma.cc/HUY4-SZHN> (highlighting continued gender-based inequities within the NCAA which "stem from the structure and systems of the NCAA itself, which are designed to maximize the value of and support to the Division I Men's Basketball Championship as the primary source of funding for the NCAA and its membership.").

18. *Id.* See *infra* notes 129–140 and accompanying text.

19. KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE II 2 (2021), <https://perma.cc/RBZ8-77FR> (finding that pressure to increase revenue leads the NCAA "to invest more—and in some instances considerably more—in those championships that it views as already or potentially revenue-producing" and that those preferred championships "are exclusively men's championships.").

20. Jim Sergeant, *Tactics Used to Thwart Title IX: Inside Look at How Colleges Rig Numbers, Shortchange Women*, USA TODAY (May 26, 2022), <https://perma.cc/Z4WM-MGNE>; Alicia Jessop & Joe Sabin, *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*, 31 J. LEGAL ASPECTS OF SPORT 253 (2021). See *infra* Part II(B).

For these reasons and more, this Essay argues that it is at the utmost levels of bad faith for the NCAA to attempt to use Title IX as a shield when the NCAA and its stakeholders have been fighting Title IX's on-paper and in-spirit application to college sports at every turn.

I proceed in two broad parts. First, Part I looks at why and how the NCAA has turned to Title IX as a defense by examining how the NCAA's previous protections propped it up for thirty-seven years but have failed it since *Alston*, and how the association has turned towards Title IX ever since to protect its preferred business model. Part II then outlines the NCAA's historical opposition to Title IX application both to college sports generally and to the NCAA as the foremost governing body of college sports. This is done both by looking at the NCAA's own disgraceful history of fighting Title IX and by pointing out recent events that showed that the NCAA—despite its statements and platitudes—still prioritizes reactivity and profits over propping up women's sports. Further, Part II highlights the fact that NCAA member institutions themselves have shown that they must be dragged kicking and screaming into true Title IX compliance. As such, this Essay argues that the NCAA has both legal and ethical responsibilities to reform itself in a way that both complies with all laws—both as written and as intended—even if the only reformative model that allows it to do so disrupts its preferred way of doing business.

I. THE NCAA'S INVOCATION OF TITLE IX TO SHIELD ITSELF FROM MEANINGFUL REFORM

A. THE RISE OF THE NCAA'S LUCRATIVE "AMATEUR" SPORTS BUSINESS MODEL

It is well known at this point that the NCAA is in a precarious legal position.²¹ While the Supreme Court's mandate in the seminal 2021 antitrust decision *NCAA v. Alston*²² was facially narrow—focusing exclusively on finding NCAA restraints on education-based compensation to be unlawful restraints of trade—the manner by which the Supreme Court unanimously rejected the NCAA's arguments places the association in something of a difficult situation.

To understand why, we must briefly return to a prior NCAA-related decision at the Supreme Court: the Court's decision in *NCAA v. Board of Regents*.²³ *Regents* stemmed from a disagreement between the broader association and a few member schools (Georgia and Oklahoma) that sought to act in their own interests, rather than in the apparent collective interests of the association at large.²⁴ In short, the NCAA had for decades leading up to the events of *Regents* had a television plan

21. See, e.g., Ross Dellenger, *As Coaches Squabble About NIL, Enforcement May Still Be Leagues Away*, SPORTS ILLUSTRATED (May 23, 2022), <https://perma.cc/2BAL-6ZJY>; Sam Bragg & Stuart Plunkett, *NCAA in Foul Trouble After Supreme Court Favors Student-Athletes*, JD SUPRA (June 30, 2021), <https://perma.cc/344T-V4NV>; Dustin Dopirak, *IU Professor: Opinions in Alston v. NCAA spell long-term trouble for amateurism model*, THE DAILY HOOSIER (June 22, 2021), <https://perma.cc/NZ9B-LWVS>.

22. 141 S.Ct. 2141 (2021).

23. 468 U.S. 85 (1984).

24. *Id.* at 88–89.

intended to “reduce, insofar as possible, the adverse effects of live television upon football game attendance.”²⁵ The plan limited college football’s live television exposure to just one game per week, and spread out the exposure among the several dozen member schools so that no member institution could appear on television more than a total of six times and more than four times nationally between the two network partners of the NCAA.²⁶

Georgia and Oklahoma—as two of the more popular programs that could thus profit significantly from more liberal television exposure rights—had issues with this plan, and along with fellow members of the five major NCAA conferences, received a contract offer from NBC separate from the NCAA’s overarching television contract.²⁷ Disliking this break from the collective, the NCAA threatened to harshly sanction any member institution that complied with this new contract, and Georgia and Oklahoma filed suit to enjoin the NCAA from taking this sort of action on the basis that such disciplinary actions would constitute illegal price fixing that in effect destroyed the market for college football broadcasting rights.²⁸ The Supreme Court agreed in large part with this conclusion, finding that the television plan was not “intended to equalize competition within any one league” as it did not “regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs.”²⁹

Justice John Paul Stevens wrote in the majority decision that the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports” and “needs ample latitude to play that role,” as “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”³⁰ At the same time—and somewhat ironically—the Court found that the challenged restraints on individual school television broadcast rights at issue in *Regents* were not among the rules that fit within the contours of that “critical role,” finding the NCAA to have violated antitrust law for their implementation.³¹

Despite the on-paper loss, the NCAA made lemonade out of lemons. The NCAA and its stakeholders took the off-hand “critical role” language from this loss and turned it into a profound legal weapon, somehow using this dicta to convince courts to grant it a sort of “quasi-exemption” both from antitrust law and from several other forms of legal attacks on their amateur business model.³²

25. *Id.* at 90–91.

26. *Id.* at 90–94.

27. *Id.* at 94–95.

28. *Id.* at 95.

29. 468 U.S. 85, 117–19 (1984).

30. *Id.* at 120.

31. *Id.*

32. Baker, Edelman, & Watanabe, *supra* note 2, at 673. See also Ehrlich, *supra* note 2, at 1192–93 (collecting notable *Board of Regents* citations that granted the NCAA legal protection in areas other than antitrust).

Thanks to this exemptive relief—combined with schools’ newfound freedom to partake in ever-growing broadcast revenues—*Regents* set the NCAA and member institutions up to thrive for nearly four decades. As the Supreme Court noted in *Alston*, in 1985 (one year after *Regents*) Division I football and basketball raised approximately \$922 million and \$41 million respectively.³³ By 2016, the revenue number for Division I schools jumped to more than \$13.5 billion.³⁴ Looking solely at the NCAA and its closest stakeholders, in 2022 the NCAA itself boasted overall revenues of \$1.22 billion while the Power Five conferences took in a combined sum of over \$3.3 billion.³⁵

Indeed, the individuals most directly involved in the NCAA’s “maintenance of a revered tradition of amateurism in college sports” have themselves profited handsomely off of college sports. A *Sportico* report of the NCAA’s 2022 fiscal year tax return found that the association’s former chief operating officer and president combined made over \$6.8 million in 2022, even while the “NCAA’s overall workforce shrank to its lowest number in eight years.”³⁶ A similar report from *USA TODAY* found that the “Power Five” conference commissioners each earned over \$1.8 million during the 2021 fiscal year, with the highest earner, Southeastern Conference (“SEC”) commissioner Greg Sankey, earning just over \$3.7 million.³⁷ These salaries pale in comparison to the compensation given to the various all-powerful coaches among the NCAA’s top “revenue sport” programs, where, for example, each of the top football coaches made at least \$7.5 million per year in 2022.³⁸

These numbers grate against other NCAA actions during the same time period. During the same thirty-seven-year period where NCAA revenues and salaries rose exponentially and seemingly without limit, athletes remained “amateurs”—meaning their compensation remained capped at a scholarship plus some incidental benefits. To keep up its illusion of amateurism, the NCAA has spent immense time, resources, and political capital going after athletes for the pettiest of “amateurism” violations.³⁹ To this end, the *Regents* “critical role” language in truth

33. *Alston*, 141 S.Ct. at 2158.

34. *Id.*

35. Daniel Libit & Eben Novy-Williams, *NCAA MINTS MILLIONAIRES AS REVENUE RISES AND WORKFORCE SHRINKS*, SPORTICO (May 24, 2023), <https://perma.cc/QVD7-RAYX>; Steve Berkowitz, *NCAA’s Power Five Conferences are Cash Cows. Here’s how Much Schools Made in Fiscal 2022*, USA TODAY (May 19, 2023), <https://perma.cc/PG3L-YUUH>.

36. Libit & Novy-Williams, *supra* note 35.

37. Berkowitz, *supra* note 35.

38. Matt Wadleigh, *The 10 Highest-Paid College Football Head Coaches for 2022*, USA TODAY (Oct. 17, 2022), <https://perma.cc/62YX-MFZP>. Illustrating this absurdity, public universities spent over \$530 million from 2010 to 2021 on coaching *buyouts*, a figure that reflects only compensation made to coaches that schools had already fired. Len Simon, *How College Athletes Finally Got Paid*, WASH. MONTHLY (June 19, 2023), <https://perma.cc/G5WL-6MNV>; Paula Lavigne & Mark Schlabach, *FBS Schools Spent Over \$533.6 Million in Dead Money Over 10+ Years*, ESPN (Nov. 5, 2021), <https://perma.cc/5XKV-SZYF>.

39. See, e.g., Patrick Hruby, “So Dumb”: *How the NCAA Fines Athletes into Submission*, HREAL SPORTS (Dec. 3, 2019), <https://perma.cc/HWU4-DBXM>. To give three illustrative examples: In 2013, a

merely gave the NCAA, conferences, and member institutions the green light for unfettered growth as a sanctioned monopsony, affording it the legal positioning and moral high ground to cling to its fantasy of college sports as still functionally an amateur exercise unsullied by the destructive influences of money and professionalism while looking past the billions of dollars in revenue the NCAA and its member institutions receive each year to run these “amateur” contests.⁴⁰

B. THE FALL OF THE NCAA'S AMATEURISM AFFIRMATIVE DEFENSE

But in some ways, many of the NCAA's current day problems—both perceived and actual—can be traced back to *Regents*.⁴¹ After all, while *Regents* opened the spigot to untold levels of revenue in college sports free from legal exposure, the “ample latitude” language gave the NCAA and member institutions a false picture of themselves as above the law.⁴²

The NCAA and its member institutions would be quickly shaken back to reality when the Supreme Court issued its Summer 2021 decision in *NCAA v. Alston*.⁴³ *Alston* involved a challenge to NCAA caps on grant-in-aid compensation, where the plaintiffs argued that association-wide restrictions on the types and amount of benefits college athletes could receive as part of their athletic

Division III golfer was ruled ineligible for writing a book about golf while on a gap year. Simon, *supra* note 38; Dylan Dethier, *The Strange Saga of a Division III Golfer Who Got Kicked Out of the NCAA*, GOLF (Oct. 4, 2019), <https://perma.cc/986G-JBPT>. In 2020, the NCAA gave the UMass women's tennis team a penalty of two years' probation, a \$5,000 fine, and expungement of records and matches from two seasons for the crime of mistakenly providing two players with a phone jack in an off-campus apartment valued at \$252. Tara Sullivan, *In Punishing UMass for a \$252 Violation, the NCAA's Hypocrisy is on Full Display*, BOSTON GLOBE (Oct. 24, 2020), <https://perma.cc/6F6J-4TFH>. And a present example: even after being forced to allow athletes to make money off of their names, images, and likeness (NIL) thanks to a barrage of state law, the NCAA has still continued to fight allowing athletes to make money off of their athletic talents at every turn. Illustrating its need for complete control over the price of college athlete labor, the NCAA in late June 2023 reached the point of telling member institutions that they must resort to treating NIL restrictions plainly designed to prevent pay-for-play as *above conflicting state law*. Amanda Christovich, *NCAA Tells Schools to Ignore State Laws When It Comes to NIL*, FRONT OFFICE SPORTS (June 27, 2023), <https://perma.cc/39VZ-J6JA>.

40. *Board of Regents*, 468 U.S. at 120. *See., e.g.*, Nick Greene, *The Big Ten's Big Business: The Insane Bankability of Nonprofit “Amateur” Sports*, SLATE (May 10, 2018), <https://perma.cc/H9MH-N74G>. The set of media rights contracts that paid \$2.46 billion over six years to the Big Ten highlighted in this piece has since been supplanted by a 7-year, \$7 billion agreement signed by the Big Ten with Fox, CBS, and NBC. Adam Rittenberg, *Big Ten Completes 7-Year, \$7 Billion Media Rights Agreement with Fox, CBS, NBC, ESPN* (Aug. 18, 2022), <https://perma.cc/NV7N-DDRR>.

41. Indeed, former Big Ten commissioner Jim Delany in a recent interview with *The Athletic* traced conference realignment—a hated element of the new era in college sports for many fans and pundits—back to the *Regents* decision. Scott Dochterman, *How Conference Realignment Shaped College Sports, in ex-Big Ten Boss Jim Delany's Words*, THE ATHLETIC (July 12, 2023), <https://perma.cc/8F5J-2KRT>. For critiques of realignment as “spell[ing] doom” for college sports, *see, e.g.*, Schuyler Callihan, *Conference Realignment Spells Doom for Future of College Athletics*, FANNATION (SPORTS ILLUSTRATED) (July 5, 2022), <https://perma.cc/XB3U-V3BC>; Kahlil Thomas, *Conference Realignment Continues to be Bad for College Athletics*, JERSEY SPORTS NEWS (July 18, 2022), <https://perma.cc/883V-6B5X>.

42. 468 U.S. at 120A.

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

scholarships are in effect labor price-fixing schemes that work to fix the cost of college athlete labor.⁴⁴ This point was not contested by the NCAA; it instead argued that limitations on scholarships were necessary to ensure the amateur character of college sports, within the association's sacred "critical role" assigned to it by the Supreme Court in *Regents*.⁴⁵

However, the district court disagreed that caps on the educational benefits contained within an athletic scholarship package did much of anything to preserve amateurism in college sports.⁴⁶ Indeed, the court noted that the NCAA's definition of amateurism had shifted considerably over the years and was in fact left completely undefined within its bylaws and rulebooks.⁴⁷ As such, while the district court gave some credence to the NCAA's procompetitive purpose of preserving amateurism, it did issue a narrow injunction forbidding NCAA restrictions on education-based benefits, as no one could confuse post-graduate internships and laptop computers "with a professional athlete's salary."⁴⁸

Unsatisfied with even this narrowly tailored, education-based injunction, the NCAA appealed this decision all of the way up the ladder: first to the Ninth Circuit Court of Appeals, which supported the district court's holdings in full;⁴⁹ and next to the Supreme Court.⁵⁰ The NCAA clearly expected the Supreme Court to fall back to its previous "ample latitude" language and reassert that the NCAA had the power to shape college sports however it deems necessary to ensure the continuance of its amateur character.⁵¹ What it received, however, was close to the complete opposite.

Citing the "dramatically increased [] amounts and kinds of benefits" afforded by schools to college athletes and the substantially increased revenues of the sport, the Supreme Court questioned the continued applicability of the *Regents* "ample latitude" language, writing that "stray comments" from *Regents* "do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions."⁵² As to the NCAA's arguments that the educational-focused amateur character of college sports entitled the association to special treatment against the commercial-focused antitrust laws, the Court rejected the idea that the NCAA was seeking relief in the wrong arena, as the Court "has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important

44. *Id.* at 2151–52.

45. *Id.* at 2152.

46. *Id.* at 2153. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 1071-83 (N.D. Cal. 2019).

47. *NCAA v. Alston*, 141 S.Ct. at 2152; *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F.Supp.3d at 1070–71.

48. *Id.* (quoting *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 1083 (N.D. Cal. 2019)).

49. *See generally In re Nat'l Collegiate Athletic Ass'n*, 958 F.3d 1239 (9th Cir. 2020).

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

51. *Board of Regents*, 468 U.S. at 120A.

52. *Alston*, 141 S.Ct. at 2158.

social objectives beyond enhancing competition.”⁵³ As to the district court’s injunction itself, the Court joined the Ninth Circuit in affirming the district court’s holdings in full, finding that counter to the NCAA’s complaints of micromanagement, “the district court extended the NCAA considerable leeway” and that the lower court’s holding in general “stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.”⁵⁴

The NCAA and its defenders are quick to argue that *Alston*’s actual mandate should be read as exceedingly narrow and without much broader effect.⁵⁵ From a certain perspective these defenders are correct: yes, the mandate of the decision focuses specifically on the district court’s injunction, which was narrowly-focused on educational-related benefits like internships to serve as a least restrictive means of curing the anticompetitive effects of capping these benefits while still considering the *Regents* “ample latitude” instruction in the decision.⁵⁶ Indeed, the Court was quick to ensure that its decision be read as such, writing to close the unanimous opinion that the Court’s task was limited “simply to review the district court judgment through the appropriate lens of antitrust law.”⁵⁷

What these naysayers ignore, however, is the significantly broader effect *Alston* had in rejecting the *Regents* “ample latitude” language that the NCAA had so heavily relied on to support claims to the industry’s legal immunity. When the Supreme Court in *Alston* found that “ample latitude” language from *Regents* was merely “stray comments” that no longer reflect the “market realities” of college sports,⁵⁸ the effect was to remove the very foundation from the NCAA’s labor price-fixing scheme. This crippled the organization’s ability to defend its

53. *Id.* at 2159.

54. *Id.* at 2163, 2166.

55. See, e.g., Press Release, NCAA, NCAA Statement on U.S. Supreme Court Decision (June 21, 2021), <https://perma.cc/E6CJ-KR4Z> (“While today’s decision preserves the lower court ruling, it also reaffirms the NCAA’s authority to adopt reasonable rules and repeatedly notes that the NCAA remains free to articulate what are and are not truly educational benefits, consistent with the NCAA’s mission to support student-athletes.”); Appellants’ Opening Brief at 15, *Johnson v. NCAA*, No. 22-1223 (3d Cir. 2022), ECF No. 17 (framing *Alston* as “praising [the district court’s] care in in crafting a remedy that ‘would not blur the distinction between college and professional sports’” and arguing that its employment law victory in *Berger* “remains good law, undisturbed by *Alston*”)(emphasis in original). One may feel that the NCAA’s framing of *Alston* as narrow and exclusive to the specifics of educational benefits is incredibly ironic (and perhaps a touch hypocritical) given how it treated a throwaway aside in *Regents* for nearly four decades, but that is just one author’s opinion.

56. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.* (*Alston v. NCAA*), 375 F.Supp.3d 1058, 1105-06 (N.D. Cal. 2019) (justifying injunctive relief that “expands education-related compensation and benefits . . . in a way that would not result in unlimited cash payments, untethered to education, similar to those observed in professional sports” as *Regents* and the Ninth Circuit’s prior decision in *O’Bannon* instructs that courts must consider that “consumer demand for Division I basketball and FBS football as distinct from professional sports is driven by consumers’ perception that student-athletes are students” but that “[a]dditional education-related benefits, if anything, would serve to enhance student-athletes’ connection to academics.”).

57. *Alston*, 141 S.Ct. at 2166.

58. *Id.* at 2158.

lucrative business model while leaving NCAA administrators completely without answers as to how to proceed—aside from desperately pleading to Congress to give it back the immunity they had lost in *Alston*.⁵⁹

The NCAA's weakened legal position has already been shown in three key areas. First, ten days after *Alston*'s release the NCAA completely abandoned previous efforts to allow athletes to earn personal profit from name, image, and likeness ("NIL") activities (e.g., sponsorship and endorsement deals) only with particular "guardrails" crafted to ensure that NIL use was done "in a manner consistent with the collegiate model."⁶⁰ NIL had been a long-time priority for athlete advocates.

Still, the NCAA's proposed guardrails included not only restrictions on pure "pay-for-play" compensation where athletes are directly paid for their on-field performance or enrollment at a particular school but also included prohibitions on the use of school intellectual property and restrictions on athlete NIL use to help promote certain vice industry products like alcohol, tobacco, and gambling.⁶¹ In this regard, many of the NCAA's proposed guardrails were proposed not to ensure competitive balance but instead were made in the name of economic protectionism: the rules would protect against ambush marketing and brand tarnishment should consumers associate athletes' endorsement with their school.⁶²

However, *Alston*'s dismissal of the NCAA's amateurism defense would remove the legal foundation that the NCAA felt it needed to successfully implement and enforce policy that would restrict athletes' ability to compete in commercial markets using their NIL. And with just ten days in between the *Alston* decision's release and the impending arrival of various state laws that would force schools to allow NIL, the NCAA would be forced to settle for only a few guidelines in a nationwide "interim" policy that (at least facially) bars only the most explicit forms of "pay-for-play" while otherwise abdicating regulatory authority over NIL to applicable state law and school policy.⁶³

While the NCAA and its stakeholders have endlessly complained about these perceived competitive balance issues in the new state of college sports without their preferred guardrails, this lax "interim" NIL policy remains in effect two

59. Ivan Maisel, *NCAA Must Come Up with Plan B if Federal NIL Legislation Continues to Fizzle*, ON3 NIL (May 16, 2023), <https://perma.cc/E292-KYET>.

60. Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 52–54 (2021).

61. *Id.* at 53.

62. *Id.* See also generally Sam C. Ehrlich & Neal C. Ternes, *Ambushing NIL Restrictions: How NIL "Conflict Language" Policies Conflict With the First Amendment*, 41 CARD. ARTS & ENT. L.J. 859, 861–66 (2023) (defining ambush marketing and discussing how athletes' NIL can be used for ambush marketing, why schools wish to protect against ambush marketing through NIL, and noting that prohibitions against athlete use of NIL for ambush marketing made its way into state NIL laws and individual school NIL policy).

63. Ehrlich & Ternes, *supra* note 60, at 53; *NCAA Approves Interim NIL Policy for College Athletes*, THE ATHLETIC (June 29, 2021), <https://perma.cc/YH98-K535>.

years later.⁶⁴ In sharp contrast to the NCAA's pre-*Alston* plans, its only remaining plan for meaningful NIL reform—aside from impotently trying to take the position that schools must follow NCAA rules over conflicting state law⁶⁵—has taken the form of begging Congress to either give it the antitrust immunity it needs to implement its preferred NIL guardrails or to take NIL off its hands completely by creating a new federal agency to regulate NIL for it instead.⁶⁶

A second instance showing the NCAA's newfound legal weakness comes in *Johnson v. NCAA*⁶⁷—ongoing litigation where the plaintiffs claim that college athletes are employees under the Fair Labor Standards Act (“FLSA”) and are thus entitled to minimum wage and overtime benefits. Undoubtedly, a declaration that college athletes are employees of their institutions would significantly affect how universities govern athletic programs, placing on the table not only direct compensation by schools, but also opening the door to worker's compensation, unemployment insurance, and—thanks to the interlocking nature of FLSA and National Labor Relations Act (“NLRA”) definitions of employment—athlete unionization, and collective bargaining.⁶⁸

Demonstrating *Alston*'s importance even beyond antitrust, Judge John Padova of the Eastern District of Pennsylvania would rely heavily on *Alston*'s unanimous disapproval of a broad read of the “ample latitude” language from *Regents* to reject a motion to dismiss by the various schools attended by the plaintiffs.⁶⁹ In

64. See, e.g., Griffin McVeigh, *Charlie Baker Lays Out Problems with NIL, Reveals Potential Solutions*, ON3 NIL (June 19, 2023), <https://perma.cc/5FAV-9G8Q>; David Ubben, *Nick Saban on NIL, Pay for Play Disparities: 'I Don't Think It's Going to Be a Level Playing Field'*, THE ATHLETIC (May 30, 2023), <https://perma.cc/9578-43QF>; Pete Nakos, *With Season Days Away, Dabo Swinney Talks NIL Concerns*, ON3 NIL (Sep. 1, 2022), <https://perma.cc/KA5J-3M3X>; see also Bryan K. Clontz, *Name, Image, And Likeness: An Uneven Playing Field*, FORBES (Feb. 28, 2023), <https://perma.cc/C8E2-MEWF>.

65. Madison Williams, *NCAA Releases NIL Memo, Warns Schools that Rules Supercede State Laws*, SPORTS ILLUSTRATED (June 27, 2023), <https://perma.cc/3MU2-VXHP>. As I commented to *Front Office Sports* in response to this NCAA directive, “Lol.” Amanda Christovich (@achristovichh), X (June 27, 2023, 11:41 AM), <https://perma.cc/AZ2P-8Y5U>.

66. See, e.g., Nicole Auerbach, *The NCAA's Hopes to Control NIL Laws Hinge on Congress. Will It Get What It Wants?*, THE ATHLETIC (June 2, 2023), <https://perma.cc/UA23-B2Q7>; Eric Prisbell, *What Happens if NCAA Doesn't Get Desired Federal NIL Reform?*, ON3 NIL (June 23, 2023), <https://perma.cc/G3YF-4DAH>.

67. *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021). While the NCAA is listed as the chief defendant here, this particular district court opinion dealt only with the particular schools that the plaintiffs attended. *Id.* at 496 (listing the five “Attended School Defendants” to which the cited opinion applies). Judge Padova issued a second opinion one month later that denied a motion to dismiss by the NCAA but granted a motion to dismiss by a class of twenty additional “Non Attended School Defendants”—a group composed of the other NCAA Division I schools within the Third Circuit's jurisdiction. *Johnson v. NCAA*, 561 F.Supp.3d 490, 493 (E.D. Pa. 2021).

68. See Andrew Zimbalist, *Who is Winning in the High-Revenue World of College Sports?*, PBS (Mar. 18, 2023), <https://perma.cc/JJ77-5N2D>. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947) (noting that the FLSA “is a part of the social legislation of the 1930's of the same general character as the [NLRA]” and as such “[d]ecisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the [FLSA].”)

69. *Johnson*, 556 F. Supp. 3d at 501.

light of this shift in tone, Padova rejected the defendant schools' argument that the plaintiff athletes "are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between Plaintiffs and the ASD."⁷⁰ The NCAA and the affected member schools appealed this decision to the Third Circuit, but oral arguments heard in March 2023 did not, according to most commentators, portend a reversal or any sort of meaningfully positive outcome for the NCAA.⁷¹

A third instance showing the NCAA's legal weakness has come in a familiar battleground for college sports: the National Labor Relations Board ("NLRB"). Seeing an opportunity to revisit the NLRB's previous refusal to extend jurisdiction over college sports in *Northwestern University*,⁷² NLRB general counsel Jennifer Abruzzo issued a memorandum in September 2021 stating her "prosecutorial position that certain Players at Academic Institutions are employees" under the National Labor Relations Act.⁷³ Abruzzo relied heavily on *Alston* in her argument, writing that while "the Court did not disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, it recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are 'forevermore' lawful."⁷⁴ That decision, coupled with the NCAA's suspension of NIL rules, per Abruzzo "makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport" than simple non-employee students.⁷⁵

70. *Id.*

71. See, e.g., Alexandra Jones, *NCAA Stumbles in 3rd Circuit Arguments on Pay for College Athletes*, COURTHOUSE NEWS (Feb. 15, 2023), <https://perma.cc/63MK-G92V>; Michael McCann, *NCAA Amateurism Roasted by 'Hot Bench' in Federal Appeals Hearing*, SPORTICO (Feb. 15, 2023), <https://perma.cc/7U23-JQ6U>; Billy Witz, *Federal Judges Express Skepticism College Athletes Are Not Employees of Institutions*, N.Y. TIMES (Feb. 17, 2023), <https://perma.cc/Q9YW-62VV>. "Most commentators" in this case does include the author of this Essay. See Sam C. Ehrlich, *The NCAA Took a Beating in Oral Arguments in Johnson. Here's Why*, EXTRA POINTS (Mar. 15, 2023), <https://perma.cc/7S65-YGSW>.

72. *Nw. Univ.*, 362 N.L.R.B. 1350 (2015) (rejecting a petition for a unionization election by a group of Northwestern University football players on the grounds that it would not promote stability in labor relations to allow athletes at one school to unionize and not others, especially since the NLRB would not be able to assert jurisdiction over athletes at public universities as they are not covered under the National Labor Relations Act). This decision came as a result of an appeal from an NLRB regional board decision that found that the petitioner football players were in fact employees of their universities as defined under labor law. See *Nw. Univ.*, No. 13-RC-121359, 2014 N.L.R.B. WL 1246914 (Mar. 26, 2014). See generally Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 *CARD. L. REV.* 1627 (2017) (summarizing the *Northwestern University* decisions and explaining their impact).

73. N.L.R.B. Guidance Mem. 21-08 at 1 (Sept. 29, 2021), available at <https://perma.cc/VEN3-NJ2X>.

74. *Id.* at 5.

75. *Id.* at 6.

However, the majority opinion was not the only part of *Alston* that the NCAA had to worry about. For while the unanimous opinion of the Court more subtly decimated the legal foundation of the NCAA's preferred business model, a concurrence by Justice Kavanaugh wrought even further doom for the NCAA. Whereas the unanimous Court was content to largely limit their ruling to the merits of the lower courts' injunctive relief barring restrictions to education-based compensation as part of college athletes' grant-in-aid compensation, Justice Kavanaugh went several steps further. Kavanaugh opined on the NCAA's business model as a whole, writing "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."⁷⁶ Commenting specifically on the NCAA's archetypal amateurism defense, Kavanaugh wrote that the NCAA's reasoning "is circular and unpersuasive" as the "innocuous labels" of amateurism "cannot disguise the reality" that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."⁷⁷

While Justice Kavanaugh's concurrence was not joined by any other justice, both federal courts and the NLRB have cited language from this concurrence alongside the *Alston* majority opinion to illustrate a simple truth: attitudes about the NCAA and its amateurism model have changed. In *Johnson*, Judge Padova cited Justice Kavanaugh's "circular and unpersuasive" framing of the NCAA's amateurism tradition to reject the idea that the "economic reality" between athletes and their schools is defined by "a long-standing tradition of amateurism in NCAA interscholastic athletics."⁷⁸ Similarly, NLRB general counsel Jennifer Abruzzo wrote in her prosecutorial memo that Kavanaugh's concurrence had "suggested that the NCAA's remaining compensation rules also violate antitrust laws" and "questioned 'whether the NCAA and its member colleges can continue to justify not paying student athletes a fair share' of the billions of dollars in revenue that they generate."⁷⁹ Moreover—and understandably—Abruzzo was quick to note Kavanaugh's suggestion that colleges and athletes "could resolve the difficult questions regarding compensation . . . by 'engag[ing] in collective bargaining."⁸⁰

At the same time, while commenting on those "difficult questions" Justice Kavanaugh did extend the NCAA something of a lifeline. Even while dismantling the NCAA's view of the role of amateurism in college sports, Kavanaugh noted that if courts do find that the rest of the NCAA's compensation rules violate antitrust law, "some difficult policy and practical questions would undoubtedly

76. *NCAA v. Alston*, 141 S.Ct. 2141, 2166-67 (2021) (Kavanaugh, J., concurring).

77. *Id.* at 2167 (Kavanaugh, J., concurring).

78. *Johnson*, 556 F. Supp. 3d at 501.

79. N.L.R.B. Guidance Mem. 21-08 at 5 (Sept. 29, 2021), available at <https://perma.cc/FJ4P-TRTR> (alterations in original; emphasis removed) (quoting *Alston*, 141 S.Ct. at 2167 (Kavanaugh, J., concurring)).

80. *Id.*

ensue.”⁸¹ These difficult questions, according to Justice Kavanaugh, include how “paying greater compensation to student athletes [would] affect non-revenue-raising sports” and how “any compensation regime [would] comply with Title IX.”⁸² These questions, per Kavanaugh, “could be resolved in ways other than litigation” including through legislation or, as NLRB General Counsel Abruzzo noted, through collective bargaining.⁸³

With Justice Kavanaugh’s concurrence clearly in mind, the NCAA has recently started to shift its legal and public relations strategies. While the NCAA and its advocates have still stuck to their ideal amateurism structure as a chief talking point, the NCAA has also latched on to Justice Kavanaugh’s statement about the “difficult policy and practice questions” that would arise from dismantling the NCAA’s remaining compensation rules, including through college athlete employment status and sharing media rights revenues. Rather than simply relying on the critical role it was deemed to have over the maintenance of amateurism, the NCAA has instead sought to establish itself as playing a new critical role: as the guardian angel of gender equity in college sports through the protection of Title IX. And according to its new positioning, the NCAA cannot do that job without leniency from the courts and—more critically—without help from Congress.

C. THE NCAA’S NEW GAMEPLAN: TITLE IX AS THE NEW FAVORED AFFIRMATIVE DEFENSE

One of the first and more notable indications of this shift in positioning came in the *Johnson v. NCAA* employment law appeal at the Third Circuit.⁸⁴ About two weeks before oral arguments, the circuit panel issued a strange order to the arguing parties that they should “be prepared to discuss at oral argument how Plaintiffs’ FLSA arguments might impact colleges’ and universities’ obligations under Title VII and Title IX.”⁸⁵ The forecasted line of questioning was particularly interesting in the context of the case, as the NCAA had not itself raised Title VII or Title IX in its brief.⁸⁶ Yet the Third Circuit panel somehow got the idea *sua sponte* to probe this line of reasoning.

81. *Alston*, 141 S.Ct. at 2167 (Kavanaugh, J., concurring).

82. *Id.* at 2168. See also generally Banks, *supra* note 4.

83. *Alston*, 141 S.Ct. at 2168 (Kavanaugh, J., concurring).

84. See *supra* notes 63–66 and accompanying text.

85. Clerk’s Letter at 1, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023) (ECF No. 69).

86. *Id.* A generous reading might find that the Title IX issue was raised in two pro-NCAA amicus briefs, as each cited Title IX in some form. But neither of these briefs actually argued the specific way that the Third Circuit panel invoked Title IX: that there is a possibility college athlete employment status would make Title IX compliance impossible. Instead, each amicus brief based their arguments on congressional intent, claiming that the language of Title IX, Title VII, the FLSA, and other statutes made it clear that Congress did not intend for college athletes to be considered employees under the FLSA. See Brief for Amici Curiae American Council on Education and Twelve Other Educational Organizations in Support of Appellants at 19, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023) (ECF No. 31) (arguing that Congress has acted consistently with the notion that student-athletes are

Despite the apparent hesitancy of the NCAA and its defenders to bring up Title IX themselves, NCAA attorney Steven Katz clearly saw the court's order as an opportunity. Katz pounced on the Title IX issue right from the start of his oral argument, arguing that the panel's directive conjured a vision of "a minefield of unforeseen consequences," as "the potential for the adoption of plaintiffs' rationale and therefore leading to a conclusion ultimately that student-athletes are employees under the FLSA would create a terrible double bind for universities caught between inconsistent Title VII and Title IX standards."⁸⁷ This bind, Katz argued, "has the potential of falling disproportionately on female shoulders because it might ultimately undo advances that Title IX has wrought for female athletics."⁸⁸

Ironically, Katz's focus on this point did not go particularly well for him or his client, as Judge McKee immediately responded by bringing up the recent NCAA "fiasco" involving University of Oregon women's basketball player Sedona Prince's viral social media posts calling out vast discrepancies between the men's and women's weight rooms at the 2021 Women's Division I National Basketball Championship to highlight that the NCAA already has a gender inequity problem.⁸⁹ Faced with this resistance, Katz dropped the point for the remainder of his argument time.⁹⁰ But the waters had already been tainted. Various popular press write-ups of the *Johnson* oral arguments pointed to Katz's point about the potential "unforeseen consequences" in the Title IX space as being a critical issue in the litigation, despite the relative lack of argument time devoted to the question.⁹¹

students rather than employees by, for example, "enact[ing] Title IX protections for intercollegiate athletics instead of relying on Title VII, which already protected against discrimination in employment"); Brief for Southeastern Conference at 11–12, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023) (ECF No. 33) (arguing that "Congress has never questioned, clarified, or otherwise altered the uniform understanding that student-athletes are not employees under Title VII or the FLSA," and that while "Title IX provides protections both to student-athletes and to employees of colleges and universities, Title IX and its implementing regulations do not treat student-athletes *as* employees") (emphasis in original).

87. Oral Arguments at 00:18, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023). For a more thorough discussion of the looming conflict between Title IX and Title VII in the college sports space, see, e.g., Claudine McCarthy, *Consider How Title IX Could Apply to Employment of Student-Athletes*, 19 COLLEGE ATH. & L. 1 (Jan. 2023), available at <https://perma.cc/EAK8-J3B5>. See also Kristi L. Schoepfer, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 107 (2000) (arguing that, counter to the NCAA's arguments, Title VII's jurisprudence may make it a better path towards gender equity than Title IX).

88. Oral Arguments at 00:18, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023).

89. *Id.* See McCollough *supra* note 15; See also *infra* notes 152–154 and accompanying text.

90. Title IX and Title VII did come up in the respondents'/plaintiffs' case-in-chief, but only to make the point that the question was outside of the court's purview for the appellate question in front of them. Oral Arguments at 48:07, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Jan. 30, 2023). Katz did not bring up Title IX at all during his rebuttal.

91. See, e.g., Sydney Baxter, *Johnson v. NCAA Leaves More Questions than Answers Surrounding Student Athlete Employment Status*, NOVA SPORTS LAW (Mar. 13, 2023), <https://perma.cc/TSW7-EH5S>; Eric Prisbell, *Johnson v. NCAA: Why College Sports Fans Need to Pay Attention to This Court Case*, ON3 (Feb. 21, 2023), <https://perma.cc/BP8Y-DWE6>; Josh Goldberg & Carter Gaines, *What You Need to Know About Johnson v. NCAA*, GREENSPOONMARDER (May 1, 2023), <https://perma.cc/BQD8-8BCN>.

Shortly thereafter, the NCAA and their advocates began to lean heavily into the “unforeseen consequences” narrative themselves while advocating to Congress for broad antitrust and employment law immunity, tying it explicitly to sought-after reform in the NIL space.

As an illustrative example of this new lobbying focus, Title IX and the potential loss of non-revenue sports were major foci of a March 2023 House of Representatives hearing where advocates for the NCAA pled their case for federal legislation to give the NCAA more control over NIL.⁹² The hearing featured a witness, Florida State softball player Kaley Mudge, whose written testimony focused almost entirely on Title IX and the “many threats through legislation and litigation that would undermine” the current model of equal participation in college athletics.⁹³ According to Mudge, reforming college sports with “an employee-employer model would significantly threaten this current dynamic and alter everything we know about how sports outside of football and men’s basketball are supported.”⁹⁴ Another witness, Washington State athletic director Patrick Chun, mentioned his school’s legal obligations under Title IX in his written testimony, his oral opening statement, and repeatedly during questioning.⁹⁵

This shift in focus was not limited to the witnesses. Committee chairperson Cathy McMorris Rodgers (R-WA), the Congressperson who took a leadership role in putting together the hearing, noted that unless “a clear and consistent set of rules” for NIL are put in place, “[a]dvances[] thanks to Title IX . . . will be reversed.”⁹⁶ Similarly, several members of Congress called attention to potential risks of harm to Title IX during questioning. Representative Kathy Castor (D-FL) stated her belief that federal NIL policy “should not undermine the progress we have made or warp” Title IX shortly before asking witnesses whether female athletes are receiving NIL opportunities as lucrative as those received by male athletes.⁹⁷ Representative McMorris Rodgers, following up on her opening statement, asked Mudge directly to “speak to Title IX” and how she may “believe—or just how it can potentially be reversed in coming years” if Congress were to not get NIL legislation “right.”⁹⁸ Representative Lori Trahan (D-MA) also focused the brunt of her questioning on the Title IX ramifications of uneven

92. See generally *Taking the Buzzer Beater to the Bank: Protecting College Athletes’ NIL Dealmaking Rights: Hearing Before the H. Subcomm. on Innovation, Data, and Comm.*, 118th Cong. (2023).

93. *Id.* at 43 (statement of Kaley Mudge).

94. *Id.* at 44.

95. *Id.* at 49, 71, 107, 112–113, 162 (statement of Patrick Chun, Dir. Of Athletics, Wash. St. Univ.). Chun would have another conversation during questioning about his school’s commitment to Title IX, though Chun would be far less happy to engage in the particulars of this conversation. *Id.* at 116–118. See *infra* notes 95, 175–77 and accompanying text (discussing Rep. Lori Trahan (D-MA)’s questioning of Chun regarding Washington State’s use of roster spot loopholes to show on-paper compliance with Title IX).

96. *Id.* at 13 (statement of Rep. Cathy McMorris Rodgers).

97. *Id.* at 67.

98. *Id.* at 74.

distribution of NIL monies by school-endorsed collectives, even if she seemed far less favorable to the NCAA in doing so.⁹⁹

Even beyond this March 2023 hearing, recent public NCAA communications to Congress have pointed to Title IX implications as a key area that would be affected by college athlete employment or revenue-sharing should a NCAA-friendly federal bill not be passed. A June 2023 letter sent to Congressional leaders by Division I Student-Athlete Advisory Committee chair Cody Shimp claimed that “[p]reserving non-employee status also helps institutions maintain compliance with Title IX.”¹⁰⁰ NCAA president Charlie Baker has also spoken about Title IX ramifications in the new NIL world of college sports. At the April 2023 LEAD1 conference, Baker tied the NCAA’s push for federal legislation to concerns about Title IX issues with male athletes receiving more NIL money than female athletes.¹⁰¹ He has also argued that one of his big goals in federal legislation, a registry of NIL deals, would push donors and collectives into ensuring equal NIL opportunities by ensuring public accountability.¹⁰²

Returning to the courts, the NCAA has begun to use Title IX as a defensive strategy in the antitrust arena as well. As it turns out, *Alston* has something of an ongoing sequel: *House v. NCAA*.¹⁰³ *House* focuses on athletes’ NIL rights, but does so in a way that goes quite a bit beyond both prior NIL litigation¹⁰⁴ and the NCAA’s new NIL rules.¹⁰⁵ The *House* plaintiffs claim that the NCAA’s NIL rules violate antitrust law on two fronts: first, broadly, by prohibiting athletes “from receiving compensation for their NIL from outside employment,” and second, more specifically and more crucially, by prohibiting “NCAA member conferences and schools from sharing the revenue they make from their broadcasting contracts with networks, marketing contracts with companies that make sports apparel, social medial sponsorships, and other commercial activities that involve the use of student-athletes’ NIL.”¹⁰⁶ Judge Claudia Wilken—the same trial court

99. *Id.* at 118–121. As noted *supra* note 95, Representative Trahan also spent some questioning time to call out Washington State athletic director Patrick Chun for his school’s use of loopholes to distort their Title IX participation numbers and pushing her co-sponsored legislation that would close these loopholes. *Id.* at 116–118. See Sergent, *supra* note 20. These loopholes are discussed *infra* notes 147–174 and accompanying text.

100. Letter from Cody Shimp, Chair, Division I Student-Athlete Advisory Committee, to Sen. Maria Cantwell et al. at 3 (June 12, 2023), available at <https://perma.cc/46VQ-XXHT>.

101. Eric Prisbell, *NCAA president warns NIL could lead to Title IX implications for school-affiliated collectives*, ON3 NIL (Apr. 26, 2023), <https://perma.cc/94MG-XLNR>.

102. Ralph D. Russo, *Charlie Baker says NCAA made a ‘big mistake’ by not setting up framework for NIL compensation*, BOSTON.COM (June 9, 2023), <https://perma.cc/WV8F-J96A>.

103. See *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021) (denying motion to dismiss).

104. See, e.g., *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (finding NCAA rules prohibiting athletes from being compensated for their NIL violates antitrust law).

105. See Chase Goodbread, *Pay for college athletes could be on the horizon: Will the NCAA crumble?*, TUSCALOOSA NEWS (May 12, 2022), <https://perma.cc/Y3L8-8A7A> (summarizing the issues presented in *House*, 545 F. Supp. 3d at 804).

106. *House*, 545 F. Supp. 3d at 808–09.

judge who decided previous NCAA antitrust defeats *O'Bannon v. NCAA*¹⁰⁷ and *Alston*¹⁰⁸—rejected an NCAA motion to dismiss this complaint in June 2021.¹⁰⁹ The case is currently in the midst of discovery, ticketed for a January 2025 trial date.¹¹⁰

Through this discovery process, the NCAA submitted three expert witness reports—one of which, a report written by University of North Carolina sport management professor Barbara Osborne, stands out.¹¹¹ While the other two NCAA experts were tasked specifically and directly to refute a plaintiff's expert,¹¹² Professor Osborne was instead tasked by the NCAA and its broadcast partners “to assess whether there are Title IX implications and/or gender equity concerns raised by Plaintiffs’ proposed broadcast revenue share payment model.”¹¹³ As part of showing damages in their antitrust claim, the plaintiffs submitted a “but-for world” based on three damages models where broadcast revenues would be shared with full scholarship players on the football and men’s and women’s basketball teams.¹¹⁴ Osborne, a Title IX scholar and independent Title IX consultant, focused her testimony on her opinion that the plaintiff’s “but-for world” model—where conferences “would voluntarily decide to distribute portions of their broadcast revenue directly to certain student-athletes”—would not happen because conferences would not want to risk violating Title IX.¹¹⁵ While the plaintiffs claim that conferences would distribute this revenue, not the member institutions, Osborne countered by pointing to the fact that the conferences act through their member institutions and that the member institutions own and control the broadcast rights to games and merely distribute them to conferences through grant of rights agreements.¹¹⁶

Later in her report, Professor Osborne also argued that the plaintiffs’ proposed model would “run[] afoul of the gender equity principles underlying Title IX, which the NCAA has incorporated into its own governing documents.”¹¹⁷ While

107. 7 F.Supp.3d 955 (N.D. Cal. 2014), *aff’d in part*, 802 F. 3d 1049 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 277 (2016).

108. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F.Supp.3d 1058 (N.D. Cal. 2019), *aff’d*, *In re NCAA*, 958 F. 3d 1239 (9th Cir. 2020), *aff’d*, *NCAA v. Alston*, 141 S.Ct. 2141, 2163 (2021).

109. *House*, 545 F. Supp. 3d at 820.

110. Goodbread, *supra* note 105; Cole Forsman, *How House v. NCAA Could Change the Landscape of College Sports*, SPORTS ILLUSTRATED (September 21, 2023), <https://perma.cc/hzg8-8897>.

111. Expert Report of Barbara Osborne, *In re College Athlete NIL Litigation* (House v. NCAA), 20-cv-03919, 545 F. Supp. 3d 804 (N.D. Cal. 2023) (ECF No. 251, Ex. 3).

112. See Expert Report of Catherine Tucker, *In re College Athlete NIL Litigation* (House v. NCAA), 20-cv-03919, 545 F. Supp. 3d 804 (N.D. Cal. 2023) (ECF No. 251, Exhibit 1); Expert Report of Bob Thompson, *In re College Athlete Nil Litigation* (House v. NCAA), 20-cv-03919, 545 F. Supp. 3d 804 (N.D. Cal. 2023) (ECF No. 251, Ex. 2).

113. Expert Report of Barbara Osborne, *supra* note 111, at 7.

114. *Id.* at 8–9.

115. *Id.* at 29–30.

116. *Id.* at 31–39.

117. *Id.* at 55.

Osborne admitted that “the Supreme Court has held that the NCAA is not subject to Title IX,” she contended that “the NCAA is committed to gender equity” as demonstrated by the association’s addition of a Principle of Gender Equity to its governing constitution in January of 1994 (amended in December 2021).¹¹⁸ Moreover, Osborne argued, the broadcast revenue received by NCAA member institutions is essential to the NCAA’s commitment to Title IX, as after Title IX’s enactment “many institutions used their football and men’s basketball revenue (along with many other sources) to ensure equal opportunities and treatment for women’s sports.”¹¹⁹ According to Osborne, the plaintiffs’ broadcasting model would undermine and violate Title IX “by creating a level of participation opportunity for many more male student-athletes than female student-athletes.”¹²⁰

Professor Osborne’s Title IX-focused testimony is notable given that Title IX did not come up in any of the expert reports in *Alston*.¹²¹ In fact, prior to this expert report, Title IX had been mentioned in the antitrust briefs of the NCAA and its stakeholders just once in 2014 in an answer to an amended complaint in the earliest stages of the *Alston* litigation.¹²² In this 2014 pleading, the SEC employed Title IX similarly to how the NCAA is using it now: as an affirmative defense purporting that the plaintiffs’ requested relief “fails to account for the impact of, is inconsistent with, would violate, and/or is barred by Title IX of the Education Amendments Act of 1972” and that the plaintiffs’ liability theories “all ignore the impact of Title IX and improperly depend upon purported antitrust analysis of legally and economically interrelated markets as if they were independent.”¹²³ However, the SEC in *Alston* quickly dropped this argument as a potential affirmative defense, and Title IX did not meaningfully arise again for the rest of the litigation. One could perhaps conclude that Title IX was not as relevant given the differences in proposed relief—*Alston* focused on education-related benefits while *House* is focused on broadcast revenues—but one would still think that the NCAA and its stakeholders could craft a similar ‘more money equals more Title IX problems’ argument against advancing grant-in-aid compensation as well.

Yet Professor Osborne’s expert report brings back this line of reasoning. In the same way that the SEC tested the waters back in *Alston*—and in the same way the NCAA argued in Third Circuit oral arguments in the *Johnson* employment case¹²⁴—the NCAA, through Professor Osborne’s report, effectively treats Title IX as an affirmative defense as the schools, conferences, and NCAA writ large

118. Expert Report of Barbara Osborne, *supra* note 111, at 55–56.

119. *Id.* at 56–57.

120. *Id.* at 57.

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

122. Answer and Additional Defenses at 2, 72–73, *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation* (*Alston v. NCAA*), No. 14-md-02541, 375 F.Supp.3d 1058 (N.D. Cal. Nov. 6, 2014) (ECF No. 149).

123. *Id.*

124. See *supra* notes 61–65 and accompanying text.

not only *could* not but also *would* not share broadcast revenues to college athletes simply because such a distribution would overwhelmingly favor male athletes and thus violate Title IX. The direction of this line of reasoning is clear from an antitrust perspective: antitrust law requires collective anticompetitive action, yet if the various institutions and conferences would have each reached the conclusion that they could not distribute broadcast revenues independently without risking Title IX peril, any purported anticompetitive agreement would not be anticompetitive since it is just restating the inevitable.¹²⁵

This line of reasoning does have its share of holes, as it is impossible to predict what schools and conferences might have done if compensation through media rights revenue was open to them without risking the NCAA's wrath. The driving forces of competition are powerful; indeed, the power of these forces has been shown in college sports over the past few years. For example, the NCAA may have argued that there was no way schools would have competed with each other in the battleground of the various state legislatures for laxer and laxer NIL legislation that even serves to circumvent NCAA rules. Yet just two years into that post-NIL world, new laws in Oklahoma, Texas, Arkansas, Colorado, Missouri, and New York are clearly designed to give schools cover to break NCAA rules regarding collaboration between schools and NIL collectives.¹²⁶ Competitive forces are tempered only by anticompetitive restraints of trade—including, for example, a rumored coalition between SEC schools to lobby state legislatures in their areas for model legislation that would “even the playing field.”¹²⁷ So a defense that the defendants would have come to the same conclusion independently is not a particularly strong antitrust defense—especially in a situation where, in actuality, the NCAA has clear, nationwide, and anticompetitive

125. The NCAA would use Osborne's report in just this way in an April 2023 motion opposing class certification, likely showcasing a line of reasoning that will also be used later at summary judgment, trial, and eventual (and perhaps inevitable) appeals to the Ninth Circuit and Supreme Court. Defs. Joint Opp. To Pls. Mot. for Class Certification at 15–16, *In re* College Athlete NIL Litigation (House v. NCAA), No. 20-cv-03919, 545 F. Supp. 3d 804 (N.D. Cal. Apr. 28, 2023) (citing Osborne's expert report to argue that arguing that the plaintiffs' proposed “but-for” world where conferences and schools were permitted to share broadcast revenue with college athletes would be impossible because schools and conferences would have never enacted it on their own because Title IX “prohibits disproportionate distribution of benefits, opportunities, resources, and treatment to student-athletes based on sex.”).

126. See Jeremy Crabtree, *Texas Gov. Greg Abbott signs transformative NIL bill*, ON3 (June 10, 2023), <https://perma.cc/GFC3-78MY>; Jeremy Crabtree, *New York introduces revised NIL legislation that would ‘greatly benefit’ state schools*, ON3 (May 15, 2023), <https://perma.cc/DC4Y-PW2U>. The NCAA responded to this legislation in June 2023 by releasing a memo to schools restating its rules regarding collaboration between schools and NIL collectives (namely, that there should not be any) and warning schools they will be required to comply with NCAA rules regardless of relevant state law, as such rules are “part of a voluntary membership.” Ross Dellenger (@RossDellenger), X (June 27, 2023, 10:30 AM), <https://perma.cc/LL3U-74U6>; See *supra* note 41 and accompanying text.

127. Ross Dellenger, *In College Athletics, ‘Employment’ Is a Dirty Word. SEC Leaders Are Looking for an Alternative*, SPORTS ILLUSTRATED (May 31, 2023), <https://perma.cc/2TKA-9US9>; Andy Wittry, *Will the SEC Continue with its Fractured State-by-State NIL Approach?*, ON3 NIL (June 29, 2023), <https://perma.cc/4TJ2-6JN8>.

agreements among the separate institutional actors barring these payments in the form of the NCAA “amateurism” rules.¹²⁸

Of course, such legal conclusions are ultimately for the courts to decide. What matters more at present is the ethics of the situation, particularly in light of the NCAA’s advocacy for Congress to legislatively ease its burdens under antitrust and employment law so that the NCAA and member institutions can ensure continued support for gender equity in college sports.

In this regard, the reality of this supposed commitment to gender equity in college sports must be assessed and critiqued. And that reality is clear: when one looks past the platitudes and empty statements, it is obvious that neither the NCAA nor its member institutions are not now—and certainly have never been—actually committed to gender equity in college sports.

II. THE NCAA’S HISTORICAL (AND PRESENT-DAY) BAD FAITH TOWARDS TITLE IX

A. THE NCAA’S HISTORY WITH TITLE IX: FERVENT OPPOSITION, COURT BATTLES, AND EMBARRASSMENT INTO ACTION

Given how prevalent sports are in any conversation about Title IX, many may be surprised to hear that Title IX was not targeted towards addressing inequality in school sports specifically. In fact, many others may be surprised to discover that Title IX did not originally even apply to sports at all. Rather, Title IX was passed in response to vast discrepancies among faculty members at various institutions and the gaps within the Equal Pay Act of 1963, Title VI and Title VII of the Civil Rights Act of 1964, and two executive orders that served as stopgap measures against discrimination in hiring government contractors.¹²⁹ Nowhere within the text did the word “sports” appear in the bill, and as such the college athletic establishment of the time had no idea for a long while that the new law would have any effect on athletics.¹³⁰ Yet the text of the bill that would become Title IX was written to be exceptionally broad, covering all “benefits” of any “educational program[s] receiving Federal financial assistance”—unless the

128. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), the Supreme Court noted that plaintiffs must show “evidence that tends to exclude the possibility that [defendants] were acting independently” in the form of “direct or circumstantial evidence that reasonably tends to prove that the [defendants] ‘had a conscious commitment to a common scheme designed to achieve an unlawful objective.’” Similarly, the Supreme Court has also stated that Sherman Act § 1 plaintiffs “must tend to rule out the possibility that the defendants were acting independently.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007). An agreement among all of the NCAA member institutions not to allow athletes to be compensated in the form of a broadcast revenue share for being a college athlete—say, for example, the amateurism guidelines in the NCAA bylaws, which forbids athlete participation in college sports “if the individual . . . [u]ses athletics skill (directly or indirectly) for pay in any form in that sport”—would presumably be direct evidence that rules out the possibility that NCAA member institutions are acting independently to enforce no-pay-for-play restrictions. NCAA DIVISION I MANUAL, Art. 12.1.2(a) (2022).

129. Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference it Made*, 55 CLEV. ST. L. REV. 473, 475–76 (2007).

130. *Id.* at 478.

program was covered by the specifically included exemptions for private undergraduate admissions, social activities for fraternities and sororities, single sex dormitories, and specifically-defined youth organizations like the Boy Scouts and Girl Scouts.¹³¹

With Title IX's education-focused mission in mind, it makes sense that the first successful attempt to tighten up Title IX's broad language was focused around its effects on athletics. Once it realized that Title IX could indeed affect athletics, the then all-male NCAA lobbied extensively against this broader application.¹³² The association sought to include amendments in the legislative process that would remove intercollegiate athletics entirely from the statute¹³³ and to exempt so-called "revenue producing" sports.¹³⁴ While the NCAA was unsuccessful in these targeted efforts, it did succeed in amending the bill to instruct the Secretary of Health, Education and Welfare ("HEW") to prepare regulations that "shall include with respect to intercollegiate athletics . . . reasonable provisions considering the nature of particular sports."¹³⁵

However, this was not enough for the NCAA. Even with those favorable regulations, the NCAA filed a lawsuit against the HEW seeking reversal, clearly still preferring that Title IX not apply to intercollegiate athletics at all.¹³⁶ When those efforts stalled due to questions over whether the NCAA had standing to challenge these regulations, the NCAA turned instead to supporting other litigation targeting Title IX.¹³⁷ When the Supreme Court decided in *Grove City College v. Bell*¹³⁸ that Title IX's mandate affected only the specific educational programs that directly receive federal funding, rather than requiring all schools receiving any federal funding to be gender-equitable in all programs (as it applies today), the NCAA stood in firm support of the challenging plaintiffs, providing support through the services of its legal counsel.¹³⁹ *Grove City* would be a major win for the NCAA, as the vast majority of intercollegiate sports do not (or at least do not need to) receive any sort of direct federal funding.

Yet this victory was short lived. Congress acted a few years later to reverse *Grove City* through the passage of the Civil Rights Restoration Act of 1988, which allowed regulators to confidently apply Title IX to require that educational

131. *Id.* at 479; see 20 U.S.C. §§ 1681-1688 (2006) (describing the text of Title IX and its exemptions); see also generally *New Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (noting the broad nature of Title IX's statutory text several times).

132. See Staurowsky, *supra* note 12, at 100-01.

133. *Id.*

134. *Id.*

135. *Id.* at 101; S. Conf. Rec. No. 1026, 93d Cong., 2d Sess. 421 (1974).

136. *NCAA v. Califano*, 444 F. Supp. 425, 433 (D. Kan. 1978). The district court dismissed for lack of standing, but the Tenth Circuit overturned, reviving the litigation. See generally *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980). No recorded decision exists after that point, suggesting that the lawsuit was dropped (potentially due to movement in the *Grove City* litigation). Sue Ann Mota, *Title IX, the NCAA, and Intercollegiate Athletics*, 33 J. COLLEGE & UNIV. L. 121, 128 (2006).

137. Staurowsky, *supra* note 12, at 104.

138. 465 U.S. 555, 575 (1984).

139. *Id.* at 574-76.

institutions be equitable in their offering of athletic programs.¹⁴⁰ The passage of the Civil Rights Restoration Act largely ended the fight for the NCAA against Title IX's application to sports, and soon after, the NCAA itself took over sponsorship of intercollegiate women's athletics.¹⁴¹

Over the course of the following decade, the landscape of Title IX's specific application to intercollegiate sports began to take shape, primarily through litigation.¹⁴² The resulting case law and related regulations resulted in the development of a three-part test that has come to rule Title IX application in college sports.¹⁴³ Yet one question was still unresolved: whether Title IX applied to the NCAA directly. Even if it had been well-established that institutional athletic programs themselves had to comply with Title IX, the NCAA still held significant sway over the operations of these programs through its regulatory authority.

Such was the scene when St. Bonaventure volleyball athlete Renee Smith sued the NCAA in 1996. Smith had graduated from St. Bonaventure early and sought to pursue a graduate education at a different university, as St. Bonaventure did not offer graduate programs of the sort that she sought to pursue.¹⁴⁴ As one might expect, Smith preferred to keep playing volleyball at her new universities so that she could have these graduate programs paid through athletic scholarships.¹⁴⁵ Unfortunately, at the time, the NCAA had a rule stating that athletes could not participate in intercollegiate athletics while pursuing a postgraduate degree at a university different from the one at which the athlete received their undergraduate degree.¹⁴⁶ Smith's new institutions, Hofstra University and later the University of Pittsburgh, applied for waivers of this rule on Smith's behalf for each of the two

140. See Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 28. See Staurowsky, *supra* note 12, at 104.

141. *Historically, Title IX Survives Challenges*, THE MORNING CALL (Feb. 3, 1992), <https://perma.cc/YR98-AQ2E>. In doing so, the NCAA ironically caused the demise of the women's equivalent of the NCAA, the Association of Intercollegiate Athletics for Women (IAIW). *Id.*

142. Mota, *supra* note 136, at 130-31. See *infra* Part III.

143. See, e.g., *Cohen v. Brown University*, 991 F.2d 888, 897-98 (1st Cir. 1993) (demonstrating and discussing this three-prong test). The mentioned three-part test requires intercollegiate athletics programs to show Title IX compliance in one of three ways:

1. Substantial Proportionality, where the institution shows that participation opportunities "are provided in numbers substantially proportionate to their respective enrollments";
2. History of Expansion, where the institution shows "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex"; or,
3. Full & Effective Accommodation of Athletic Interests, where the institution demonstrates "that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

Id. See also Mota, *supra* note 136, at 130-33 (collecting litigation demonstrating the test while providing regulatory context for the establishment of the test).

144. *Smith v. NCAA*, 139 F.3d 180, 183 (3d Cir. 1998).

145. *Id.*

146. *Id.* A rule that has since been revoked, with some apparent regret and bellyaching. See Gregg Clifton & John Long, *NCAA Considers Restrictions to Curtail Use of Graduate Student Transfers*, JD

seasons Smith sought to compete for them.¹⁴⁷ The NCAA denied both requests.¹⁴⁸

Smith filed suit against the NCAA claiming that its graduate transfer rules both violated the Sherman Antitrust Act as an illegal restraint of trade and excluded her from participation based upon her sex in violation of Title IX.¹⁴⁹ On the Title IX claim, the question of whether the NCAA's imposition of the rule violated Title IX quickly took a backseat to a more pressing issue: whether the NCAA, as an indirect recipient of federal funding through the dues it receives from public colleges and universities, must comply with Title IX.¹⁵⁰

The NCAA ardently fought back against Smith's lawsuit, fearing that direct accountability to Title IX would require it to shift its strategic plans to ensure Title IX compliance.¹⁵¹ When the Third Circuit ruled in favor of Smith on the Title IX question and held that the NCAA was within the "quite broad" statutory scope of Title IX,¹⁵² the NCAA appealed to the U.S. Supreme Court. This paid off when the Supreme Court reversed, holding unanimously that the NCAA's receipt of dues from public institutions was not sufficient and that "Title IX coverage is not triggered when an entity merely benefits from federal funding."¹⁵³ The result was support for NCAA corporate's current position where it is allowed to act as a mere cheerleader for institutional compliance without having any of its own skin in the game.

Of course, the *Smith* decision has effects beyond simply allowing the NCAA to stay untouched while its member institutions violate Title IX. Although the NCAA has a vast ocean of rules and regulations extending from broad governance issues all the way down to the lowest matters of triviality,¹⁵⁴ the NCAA

SUPRA (Apr. 11, 2019), <https://perma.cc/DUH4-55SL>; Dean Golembeski, *Graduate Transfers Become a Disruptive Force in College Sports*, BEST COLLEGES (Apr. 15, 2022), <https://perma.cc/S6W2-GVY2>.

147. Smith, 139 F. 3d at 183.

148. *Id.*

149. *Id.* at 184.

150. *Id.* at 187–89.

151. Lauren McCoy Coffey, *Improving Gender Equity Through the Controlling Authority of the NCAA*, 33 MARQ.

SPORTS L. REV. 357, 362 (2023) (noting that post-*Smith*, NCAA governance "does not have to consider Title IX compliance even though it impacts all of their member institutions" and that the NCAA's actions "can be solely motivated by the commercialization of intercollegiate sports and how to grow economically even if that growth is to the detriment of gender equality.").

152. The circuit did not rule that Smith's specific Title IX claim was a winner, merely that the statute did apply to the NCAA's operations. *See Smith*, 139 F. 3d at 187–89. The Title IX claim had been dismissed by the district court for lack of an allegation that the NCAA receives federal funding—a decision the appellate court agreed with—but the district court had denied Smith's motion to amend her complaint. *See id.* at 189. The appellate court disagreed with and overturned that decision, in part due to procedural issues but also in part because of the court's finding that the NCAA could be subject to Title IX scrutiny with a showing that it was even an indirect recipient of federal funds. *Id.* at 187–90. Off-topic from the subject of this article, but of note since the parallel antitrust claim was mentioned earlier, the district court's dismissal of that parallel antitrust claim was affirmed by the appellate court as an eligibility rule not subject to antitrust scrutiny. *Id.* at 184–87.

153. *NCAA v. Smith*, 525 U.S. 459, 468 (1999).

154. *See supra* note 33.

itself takes absolutely no role in ensuring that its members comply with Title IX.¹⁵⁵ Rather, an NCAA spokeswoman when pressed on the matter in 2022 said that the NCAA cannot impose penalties for Title IX noncompliance because “Title IX is a law, not a voted-upon NCAA rule.”¹⁵⁶

If the NCAA was held directly to the requirements of Title IX, it as a governing body may very well have to take a more active role in ensuring that its member institutions comply with the statute or face penalties for noncompliance itself.¹⁵⁷ But for now, thanks to *Smith*, the NCAA is free to act with legal indifference towards Title IX both in its oversight of member institutions and in its own corporate operations as the promoter for most championship events.

The NCAA's lack of institutional accountability was made crystal clear in 2021, when several athletes—led by University of Oregon women's basketball player Sedona Prince—took to social media to demonstrate the inequality between the weight rooms, food, and other amenities provided by the NCAA to athletes during the 2021 Division I basketball tournaments.¹⁵⁸ These vast discrepancies would not have happened if the NCAA were legally held directly to Title IX compliance—or even if the NCAA operated on its own with an actual goal of gender equality that purportedly drives its litigation strategy and legislative efforts.¹⁵⁹

But the rot in the NCAA's internal gender equality efforts extends far beyond weight rooms and swag bags. In the wake of the NCAA's public embarrassment at the hands of Prince and her (and others') social media posts, the NCAA announced that it had hired New York-based law firm Kaplan Hecker & Fink (hereafter “Kaplan”) to conduct an independent gender-equity review of the NCAA championship offerings across all three divisions and for all sports.¹⁶⁰ Coincidentally (or perhaps not so), this announcement also came one day after a group of thirty-six House Democrats, responding to the Prince incident, wrote to the then-NCAA president Mark Emmert asking for “a review into ‘all other

155. Henry Bushnell, *After 50 Years, Title IX Compliance in College Sports Still Lags. The Reason? 'It Has No Teeth.'*, YAHOO SPORTS (June 23, 2022), <https://perma.cc/5CJR-4ZY6>.

156. *Id.*

157. See B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L. REV. 273, 281–83 (1999); see also McCoy Coffey, *supra* note 151, at 362–63; See generally Darryl C. Wilson, *Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303 (1998) (discussing whether the NCAA should take a more active role in ensuring Title IX compliance among its membership).

158. See Prince, *supra* note 15; McCollough, *supra* note 15; See also Cecelia Townes, *Where is Title IX in the NCAA Weight Rooms?*, FORBES (Mar. 19, 2021), <https://perma.cc/PEQ5-78FM> (linking the NCAA's lack of equality shown in the Prince incident and in other similar unequal benefits to the *Smith* case).

159. Maggie Mertens, *The Title IX Loophole That Hurts NCAA Women's Teams*, THE ATLANTIC (Apr. 1, 2021), <https://perma.cc/24N3-ATG5> (drawing a direct connection between the Prince weight room incident (and other similar incidents) to the *Smith* holding).

160. Heather Dinich, *NCAA Hires Law Firm for Gender-Equity Review After Men's Women's Tournament Disparities*, ESPN (Mar. 25, 2021), <https://perma.cc/8UQK-A3YH>.

championship competitions to ensure that they adhere to the gender equity principles of Title IX.”¹⁶¹

The resulting two reports were—to put it mildly—damning for the NCAA. As an overall conclusion, Phase I of the report (which focused specifically on basketball as a comparative example) found that the NCAA’s structure and systems “are designed to maximize the value of and support to the Division I Men’s Basketball Championship as the primary source of funding for the NCAA and its membership.”¹⁶² Moreover, Kaplan found that the organization’s “broadcast agreements, corporate sponsorship contracts, distribution of revenue, organizational structure, and culture all prioritize Division I men’s basketball over everything else in ways that create, normalize, and perpetuate gender inequities.”¹⁶³ Kaplan found that the NCAA’s structures and systems served not to advance women’s basketball but instead “limit[] the growth of women’s basketball and perpetuat[e] a mistaken narrative that women’s basketball is destined to be a ‘money loser’ year after year.”¹⁶⁴

In this regard, the Report also highlighted vast comparative differences between how the NCAA ran the 2021 men’s and women’s Division I basketball championships. These differences include everything from the amount of staff allocated by the NCAA to handle each tournament (21.86 full-time employees for men’s basketball compared to 13.92 for women’s basketball¹⁶⁵), to the NCAA’s singular corporate relations team waiting until March 5, 2021, to tell the women’s tournament organizers that they could have a food truck at the event,¹⁶⁶ to the NCAA’s inexplicable refusal to allow the women’s tournament to use the famous “March Madness” moniker.¹⁶⁷ Perhaps most glaringly, the Report found that the NCAA focused exclusively on planning a COVID-19 “bubble” for the men’s tournament before even starting similar planning for the women’s tournament, delaying planning for the March 2021 women’s tournament until December 2020.¹⁶⁸ Putting numbers to the discrepancy, the Kaplan Report found that NCAA disbursements for the men’s tournament totaled \$53,186,729 compared to just \$17,907,931 for the women’s tournament—a difference of over \$35

161. *Id.*

162. KAPLAN HECKER & FINK LLP, *supra* note 17, at 5.

163. *Id.*

164. *Id.*

165. *Id.* at 53.

166. *Id.* at 30.

167. *Id.* at 37–39. Kaplan found that, counter to a prevailing narrative, there were no trademark issues with using the “March Madness” branding. On the contrary, Kaplan found—after reviewing applicable sponsorship agreements—that the contractual language of the agreements stated that the “March Madness” term could be used by sponsors for “Division I men’s *or women’s* basketball only.” *Id.* at 39 (emphasis added). NCAA internal legal staff members interviewed by Kaplan did not disagree with that conclusion. *Id.*

168. *Id.* at 14–15. By contrast, plans for the men’s tournament were approved a full month earlier in November 2020. *Id.* at 15. Kaplan (understandably) considered this delay to be a root cause of the other inequities faced in the tournament as the women’s tournament organizers simply did not have enough time to put together their event while the men’s tournament organizers did. *Id.* at 14–48.

million that would certainly put the NCAA outside of Title IX compliance but for *Smith*.¹⁶⁹

Yet recent developments have shown that despite the NCAA's efforts and attitudes, the idea that women's basketball—or women's sports generally—is a guaranteed “money loser” is far from the truth. Indeed, women's sports have exploded since the birth of the NIL age in college sports. An early 2023 report found that NIL sponsorship of female athletes grew twenty percent from September 2021 to September 2022 (compared to just two percent for male athletes) and that female athletes made up six of the top ten earners in the first year-and-a-half of the NIL era.¹⁷⁰ Moreover, in a year when ratings for the men's Division I basketball championship sharply declined, ratings for the women's Division I basketball championship game soared to record heights, undeniably spurred in large part due to the NIL-fueled marketability of stars like LSU's Angel Reese and Flau'jae Johnson and Iowa's Caitlin Clark.¹⁷¹ Similarly, television ratings for women's softball jumped in 2023, with viewership for Oklahoma's third straight championship in the 2023 Women's College World Series jumping seven percent from 2022 to a peak of nearly 2.3 million viewers.¹⁷² The 2023 women's gymnastics championship averaged over a million viewers (peaking at 1.32 million)—a number undoubtedly fueled by the popularity of NIL stars like LSU's Livvy Dunne, UCLA's Jordan Chiles, and Auburn's Sunisa Lee rather than by the NCAA's own efforts.¹⁷³

And, of course, in the same way that the NCAA accepted Title IX and women's sports generally only after losing a protracted fight against it, hardly any of the immeasurable gains for women's sports since NIL can be attributed to the NCAA's own gender equity efforts given how the NCAA fought NIL with everything it had up until the *Alston* decision. Just as they have over the past fifty years, advances in women's sports have been achieved *in spite* of the NCAA's efforts, not because of them.

169. *Id.* at 58.

170. Charles Hallman, *NIL's Impact on Women Athletes Not as Predicted*, MINN. SPOKESMAN-RECORDER (Feb. 9, 2023), <https://perma.cc/5JSW-C5LB>.

171. Brad Adgate, *March Madness Finals Ratings Set a Record High for Women, Record Low for Men*, FORBES (Apr. 5, 2023, 2:54 PM), <https://perma.cc/W7PV-CDVC>; Remy Tumin, *N.C.A.A. Women's Tournament Shatters Ratings Record in Final*, N.Y. TIMES (Apr. 3, 2023), <https://perma.cc/W6YY-TPYH>.

172. Emily Caron, *Oklahoma's College World Series Three-Peat Scores TV Ratings Win*, SPORTICO (June 12, 2023, 12:01 AM), <https://perma.cc/X8KS-H75R>.

173. Amanda Christovich, *2023 NCAA Gymnastics Championship Sets Viewership Record*, FRONT OFFICE SPORTS (Apr. 18, 2023, 2:15 PM), <https://perma.cc/5EFW-LRBU>; Jon Lewis, *How Did the NCAA National Championships Stack Up in 2022-23?*, SPORTS MEDIA WATCH, <https://perma.cc/7K6S-R4A3>.

B. LOOPHOLES AND LITIGATION: THE CURRENT STATE OF TITLE IX “COMPLIANCE”
AMONG THE NCAA MEMBERSHIP

Of course, the operational cynicism towards women’s sports and Title IX in the college sports industry is not limited to the NCAA’s corporate operations. In the same way that the NCAA’s corporate apparatus can make use of its *Smith* loophole to avoid true equity in championship events, individual colleges and universities can and do use their own loopholes to perpetuate gender inequalities in college sports. In fact, in many ways the member institutions are *even worse* than the NCAA in this regard as they have positioned themselves in a way that enables them to comply with Title IX on paper (at least from the perspective of the Department of Education) while completely adulterating the gender equity ideals at the heart of Title IX.

In May 2022, *USA Today* released a report analyzing 2018-19 roster numbers compared to Equity in Athletics Disclosure Act (EADA)¹⁷⁴ reports, finding that public universities regularly employed three tactics that allow them to cheat the system by making the number of women’s roster spots on university-sponsored varsity teams seem equal on paper to the number of men’s roster spots at the same institution.¹⁷⁵ The first tactic counts women who compete on multiple teams (most commonly indoor track, outdoor track, and cross-country) as one person *per sport* rather than as one singular person, thus double, or even triple, counting the same athlete.¹⁷⁶ The second tactic involves overfilling rowing team rosters with more women participants (sometimes far more) than are needed for events comparable to the roster spots recommended by applicable conference and NCAA regulations.¹⁷⁷ Finally, the third tactic involves counting men who practice with women’s basketball teams as members of the women’s basketball roster for the purposes of the reported numbers.¹⁷⁸

174. 20 U.S.C. § 1092(e) (2023).

175. Sergeant, *supra* note 20. See also Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES (Apr. 25, 2011), <https://perma.cc/BCQ7-5NJH>; Margaret Hartmann, *How Colleges Lie About Female Athletes*, JEZEBEL (Apr. 27, 2011), <https://perma.cc/RD22-XU3J> (reporting on these loopholes as far back as 2011).

176. Sergeant, *supra* note 20. See also David Moltz, *Not as Easy as 1, 2, 3*, INSIDE HIGHER ED (May 2, 2011), <https://perma.cc/CRJ8-XU8Q>. This practice is allowed by the U.S. Department of Education despite—as the Inside Higher Ed article notes—the practice specifically being ruled as unlawful by the Second Circuit in *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 99-102 (2d Cir. 2012). Granted, the Second Circuit (relying on the affirmed district court decision) only discounted a few of the double- and triple-counted roster spots by Quinnipiac in *Biediger* that were clearly illusory, dropping Quinnipiac’s claimed 78 women’s cross-country, indoor track, and outdoor track roster spots to 67. *Id.* at 101.

177. Sergeant, *supra* note 20. See also Brian L. Porto, *Checking the Scorecard: Title IX, College Sports, and the Limits of Litigation*, 33 MARQ. SPORTS L. REV. 273, 274–75 (2022) (finding that “roster stuffing” using this second tactic is “just not getting looked into unless there is a lawsuit”).

178. Sergeant, *supra* note 20. It is important to note that this tactic does *not* imply that the out-of-place “men” refer to transgender women. Instead, these men are club players invited to practice with the women’s team, and for that reason counted as members of the women’s basketball team for reporting purposes. See Jeff Eisenberg, *Counting Men as Women? Inside the Fuzzy Math of Title IX Compliance*, YAHOO! SPORTS (June 22, 2022), <https://perma.cc/2U87-XBN3> (providing additional context regarding as well as illustrative examples of this tactic). While counting male practice players as women for the

These loopholes—and the hypocrisy shown by NCAA member institutions in relying on them—were highlighted during the NCAA's March 2023 attempt to beg for favorable legislation on Capitol Hill.¹⁷⁹ As noted earlier, this hearing—framed as one in which the NCAA could tell Congress how they can help the association better control NIL—focused heavily on the potential harm that not enacting NCAA-friendly legislation could inflict on advancements in gender equity created by Title IX.¹⁸⁰ But Representative Lori Trahan (D-MA) would turn this focus around on NCAA member schools somewhat during her questioning, asking Washington State University athletic director Patrick Chun about the *USA Today* report and the loopholes it called out—and its specific finding that Chun's Washington State athletic department had “overcounted [their] women's rowing roster by twenty-one athletes and counted eight male practice players as women's roster spots to show compliance with Title IX on paper.”¹⁸¹ Chun neither denied the existence of the report nor its findings and instead merely agreed with Trahan that such overcounting “depriv[es] . . . twenty-nine women of the chance to continue their athletic career,” “[a]ssuming those numbers are correct.”¹⁸²

As noted earlier, Chun focused a great deal of his testimony on potential Title IX impacts of uncontrolled reform, claiming in his opening remarks that college athlete employment status would lead to a financial impact on universities that “could lead to the reduction of opportunities for broad-based participation on campuses around the country, resulting in significant Title IX implications threatening generations of hard-fought progress in women's sports.”¹⁸³ Given the NCAA's history, it was rather appropriate that the NCAA's chosen representative to assert those claims had overseen a department that had at that time exploited loopholes to get around true Title IX compliance under the spirit (if not the letter) of that law.

Though in fairness to Chun, his Washington State athletic department is hardly the only school to exploit these loopholes—far from it. According to the *USA Today* report, eighty-six of the 107 reviewed public universities employed one or more of these tactics to boost their female participation numbers in 2018-19 Department of Education reports.¹⁸⁴ The top offender, the University of Alabama, added 106 female roster spots through various loopholes, including double-counting fourteen women, counting twelve male practice players towards the number of female scholarships, and adding *eighty* extra women's rowing

purposes of counting overall roster spots is expressly permitted by the Department of Education, the male practice players must be excluded from similar reports made to the NCAA. *Is Your School Skirting Title IX's Intent?*, USA TODAY (last updated Nov. 18, 2022, 3:31 PM), <https://perma.cc/9E4C-4EDD>.

179. *Taking the Buzzer Beater to the Bank: Protecting College Athletes' NIL Deal-Making Rights: Hearing Before the Subcomm. on Innovation, Data, and Com. of the H. Comm. on Energy and Com.*, 118th Cong. 116–17 (2023), <https://perma.cc/3K9H-PVL8>.

180. See *supra* notes 66–73 and accompanying text.

181. *Taking the Buzzer Beater to the Bank*, *supra* note 179, at 116. See Sergent, *supra* note 20.

182. *Taking the Buzzer Beater to the Bank*, *supra* note 179, at 117.

183. *Id.* at 49. See *supra* note 68 and accompanying text.

184. Sergent, *supra* note 20.

roster spots beyond the twenty-eight spots required to compete in its conference championship and fourteen substitute rowers (adding up to a total of 122 rowing team members).¹⁸⁵ Two schools—Arizona State University and the University of Michigan—markedly used the third tactic to count more than double the amount of actual female roster spots on their women’s basketball teams; in a sport with a firm fourteen-member roster limit, Arizona State reported thirty-eight women’s basketball players (including twenty-four male practice players) and the University of Michigan reported forty-three women’s basketball players (which included twenty-nine male practice players).¹⁸⁶ Ably demonstrating the absurdity of these loopholes, the University of Hawai’i on paper showed a surplus of female participation in their athletic programs—302 women to 241 men—yet in actuality those programs had only 224 female participants because seventy-eight of them were double- or triple-counted in the roster count submitted to the Department of Education.¹⁸⁷ Overall, *USA Today* found that use of the third tactic was so prevalent that *at least one-quarter* of all women’s basketball roster spots reported to the federal government were actually male practice players—a startling statistic.¹⁸⁸

It must be noted that all three of these tactics are allowed—if not encouraged—by the Department of Education.¹⁸⁹ That is a moral failing by the Department of Education. In late 2022, Representative Trahan cosponsored a bill with Senator Chris Murphy (D-Conn.), Representative Alma Adams (D-N.C.), and Representative Suzanne Bonamici (D-Ore.) that would close these

185. *Id.* In the interest of openness and candidness, the author of this Essay will include the numbers for his affiliated (alma mater and employer) institutions. The author’s employer, Boise State University, was listed as adding twenty-five total roster spots through twenty-three duplicated women and including two male practice players in the women’s basketball team numbers. *Id.* The author’s Ph.D. alma mater, Florida State University, added fifty-five roster spots, all by duplicating female participants. *Id.* Notably, Florida State not only duplicated 106 female participants, but also duplicated fifty-one male participants, coming out to a net of fifty-five roster spots added through this tactic. *Id.* The author’s law school alma mater, Thomas Jefferson School of Law, does not sponsor intercollegiate athletics. Finally, the author is embarrassed to note that his undergraduate alma mater, the University of Massachusetts, finished second only to Alabama with *ninety-two* total roster spots added by duplicating forty-two female participants, including twenty male practice players in their women’s baseball team roster numbers, and including an extra thirty rowers beyond what is needed for their conference championships. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See U.S. DEP’T OF EDUC. OFF. OF POSTSECONDARY EDUC., USER’S GUIDE FOR THE EQUITY IN ATHLETICS DISCLOSURE ACT WEB-BASED DATA COLLECTION at 29–30 (2022) (providing guidelines for university reports stating that male practice players listed on women’s team rosters “should be counted as participants of the women’s team” and requiring a separate “[u]nduplicated count” that removes the duplicated count of athletes who participate in more than one sport). Both men’s and women’s roster spots can and often are duplicated for these counts, but per the *USA Today* report the difference is predictably vast: 2,525 male participants are duplicated versus 4,760 duplicated female participants. Several schools—namely University of Hawai’i, University of Utah, San Diego State, Ohio State, The University of Maryland, and New Mexico State—conspicuously reported several dozen duplicated women and zero duplicated men, starkly highlighting the tactical use of this loophole to avoid actual gender balance. *Id.*

loopholes, but the bill never made it out of the House Committee on Education and Labor before a new Congress was seated in 2023.¹⁹⁰ One would think (or perhaps just hope) that lawmakers will insist that similar language be included in any other offered NCAA-related bill before they would support its passage, but one never knows until that happens.

Yet these three loopholes are hardly the only loopholes that schools exploit to facially comply with Title IX as needed for their annual Department of Education reports while flouting the spirit and intent of Title IX. For instance, Alicia Jessop and Joe Sabin, authors of *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*, noted that the gap between how men's and women's sports are publicized does not end at the NCAA offices: athletic departments themselves have "spent drastically larger sums promoting men's sport teams than women's sports teams, especially on those that generate a positive net income, like men's basketball and football."¹⁹¹ For example, Jessop and Sabin found that among the top ten revenue earners in college sports, twenty-five sport-specific marketing employees existed for men's sports compared to only four for women's sports.¹⁹² And these problems are not limited to Division I programs: Jessop and Sabin cited research showing about a ten percent gap between funding for men's programs versus women's programs at the Division II and III levels as well.¹⁹³

Jessop and Sabin's work called out the argument that NIL will further exacerbate this disparity, claiming that argument "misses the forest for the trees" because it "presumes that women's sport athletes will attain equal publicity if the athletics department retains exclusive control of promotion."¹⁹⁴ They highlighted research showing that, on the contrary, athletic departments and the NCAA "typically do not spend equal amounts publicizing men's sport athletes versus women's sport athletes or their respective teams."¹⁹⁵ To this end, Jessop and Sabin underscored the opening of athlete NIL rights as a way to "narrow the publicity gap between NCAA men's and women's sports in furtherance of the plain language and intent of Title IX."¹⁹⁶

As with the roster counting loopholes, the publicity gap also complies with Department of Education regulations. Jessop and Sabin noted that required EADA disclosures do not require "the reporting of the amount spent to publicize

190. H.R. 9615, 117th Cong. (2022). See Amanda Christovich, *Federal Lawmakers Introduce Bill to Strengthen Title IX*, FRONT OFFICE SPORTS (Dec. 20, 2022, 12:57 PM), <https://perma.cc/Q3T2-MTK5>.

191. Jessop & Sabin, *supra* note 20, at 276.

192. *Id.* at 279–80.

193. *Id.* at 276 n.105 (citing 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 (Jan. 2020), <https://perma.cc/2L83-234H>).

194. *Id.* at 275.

195. *Id.*

196. *Id.* at 254.

sports within an intercollegiate athletics program, let alone how much money was spent publicizing men's sport teams versus women's sport teams" but rather allow these numbers to be aggregated in total expenses figures.¹⁹⁷ Similar "hide-the-ball" disclosure policies exist within the NCAA's own structure. While NCAA member institutions must also submit annual reports to the NCAA containing relevant financial data, "amounts spent on marketing are not listed as line items, but aggregated into the total expense amount" and "marketing expenditures are not delineated by gender."¹⁹⁸ These reporting practices "allow[] athletics departments to hide biased and discriminatory practices in how women's sport teams are marketed."¹⁹⁹

Even if the Department of Education sanctions all of these loopholes, the loopholes are still *loopholes*, and they still violate the *spirit* of Title IX. These institutions have certainly surrendered any moral high ground from which they can spout platitudes about their commitment to Title IX equity and how impossible that would continue to be should courts hold them to their employment and antitrust responsibilities. It does not matter whether their statements about the economics of college sports or of the interlocking nature of these laws with Title IX and Title VII are true or not. Between the exploitation of these loopholes and their sustained history of fighting Title IX's applicability to athletic programs altogether, the NCAA and its member institutions have not shown any resolve to comply with the spirit of Title IX (and often not even the letter). How can anyone trust them to continue to do so if they are given unfettered power to regulate themselves without fear of antitrust or employment law exposure?

And the truth of the matter is that many *do not* trust the NCAA or member institutions to comply with Title IX on their own. Indeed, at the end of the day most of the gains for gender equity in college sports and basically all of the clarity in how Title IX should be enforced has come not from the Department of Education, not from member schools, and certainly not from the NCAA. Instead, these gains and clarity have come from *litigation forcing the issue*.²⁰⁰

From the passage of Title IX all the way through the 1990s, the road to even the present marginal state of gender equity in college sports has been paved not by NCAA or school administrators but by litigants and courts dragging colleges kicking and screaming into something resembling Title IX compliance.²⁰¹ With

197. Jessop & Sabin, *supra* note 20, at 275.

198. *Id.* at 287.

199. *Id.*

200. See generally Porto, *supra* note 177.

201. Jessop & Sabin, *supra* note 20, at 286–93. See, e.g., Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (rejecting Temple University's argument that its athletic department is not governed by Title IX); Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993) (affirming injunctive relief to members of the Indiana University of Pennsylvania gymnastics team on the chopping block, finding that the university's proposed substitution of a new soccer team for the cut gymnastics team would decrease the overall percentage of investment into women's sports overall even while adding new opportunities given the differences in expenses between gymnastics and a much cheaper soccer team and that the school would still be out of compliance anyway); Roberts v. Co. St. Univ., 998 F.2d 824 (10th Cir. 1993)

the Department of Education taking little meaningful action on its own—quite possibly by design²⁰²—this string of litigation would not only serve as the only meaningful check on schools' supposed commitments to gender equity in athletics but also swat down various attempts by universities to employ even more loopholes to avoid true compliance. This case law included, most notably, the First Circuit Court of Appeals making it more difficult for institutions to rely on purposefully misleading surveys to show compliance under the Accommodation of Interest prong—especially when the school is using those surveys to justify cutting an otherwise viable women's sport.²⁰³

Such litigation has continued into the 21st century, predicated by events like the University of California-Davis in 2001 responding to a Title IX complaint by women wrestlers losing their roster spots on a co-ed wrestling team by forcing these women to compete against their male teammates for continued placement on the team (and their athletic scholarships),²⁰⁴ Quinnipiac University in 2009 trying to count thirty newly-added cheerleading roster spots as justification for cutting a viable volleyball team,²⁰⁵ and various women's sports cuts made even before athletic departments' favored COVID-19 revenue shortfall excuse became relevant.²⁰⁶ Even at this present moment, several more Title IX lawsuits are

(affirming in part a district court injunction forcing Colorado State University to reinstate a cut varsity softball team, agreeing with the lower court that the university had not effectively accommodated the interests of the women on that cut team); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (affirming a district court injunction ordering Brown University to reinstate cut women's gymnastics and volleyball programs).

202. Rachel Axon, *What happens if a school doesn't comply with Title IX? Not a whole lot.*, USA TODAY (Dec. 15, 2022), <https://perma.cc/8XUV-D6ZH> (discussing the “toothlessness” Department of Education's Office of Civil Rights in enforcing athletics-based Title IX violations based on interviews with 40 advocates, complainants, students, attorneys, academics and current and former OCR staff).

203. *Cohen*, 991 F.2d at 898–900. See generally Erin E. Buzuvis, *Survey Says... A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006) (discussing generally the use of surveys to prove compliance under the Accommodation of Interest prong and the problems created by a Bush-era policy that encouraged their use). The *Cohen* “viable sport” rule has since been codified into Office of Civil Rights regulatory rule. Department of Education, Office for Civil Rights, *Intercollegiate Athletics Policy Clarification: the Three-Part Test—Part Three*, at 5 (Apr. 20, 2010), <https://perma.cc/7GNF-MT8Z> (holding that eliminating a viable women's sport creates a “presumption that the institution is not in compliance” with the Accommodation of Interest prong); See also *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp.3d 1085, 1101 n.13 (S.D. Iowa 2020) (discussing this clarification memo and its effects).

204. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 962 (9th Cir. 2010). See Porto, *supra* note 177, at 294–95.

205. *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012). Quinnipiac also counted several female cross-country athletes as also being part of the indoor and outdoor track teams even though they did not compete in these events nor receive any benefits from their membership in these second or third teams. *Id.* at 100–01. See Porto, *supra* note 177, at 296–302.

206. Porto, *supra* note 177, at 302–08. See, e.g., *Robb v. Lock Haven Univ.*, No. 4:17-CV-00964, 2019 WL 2005636 (M.D. Pa. May 7, 2019) (sending to trial a case where athletes from a to-be-cut women's swim team and a to-be-demoted women's field hockey team claimed Title IX violations); *Portz v. St. Cloud State Univ.*, 16 F.4th 577 (8th Cir. 2021) (mostly affirming a district court injunction forcing St. Cloud University to reverse planned cuts to women's tennis and Nordic skiing teams); *Balov v. Mich. St. Univ.*, 24 F.4th 1051 (6th Cir. 2022) (reversing a denial of injunctive relief to members of a

currently in front of appellate courts, in discovery, or have recently been decided or settled.²⁰⁷ For as long as Title IX has existed, too many schools have shown an abject refusal to comply with Title IX's athletic participation requirements unless they are forced to do so by litigants and judges in court—despite endless statements and platitudes to the contrary.

The Department of Education-sanctioned loopholes seem all the more deceitful given the fact that courts have largely rejected their use in Title IX suits. In 2020, members of the Iowa women's swimming team sued the University of Iowa after the school announced that the team would be cut, purportedly due to budget shortfalls related to the COVID-19 pandemic.²⁰⁸

To show the disparities between the male-female ratio for athletic participation and the ratio for the entire student body, the plaintiffs (led by their expert witness, former Women's Sports Foundation CEO Donna Lopiano) cried foul on Iowa's EADA reports, claiming that statistical comparison of the EADA reports to website rosters showed that the participation gaps were "considerably understated" due to the university's reliance on Department of Education loopholes.²⁰⁹ The university responded by labeling the plaintiffs' arguments to this effect as "speculative" and as "conspiracy theories."²¹⁰ Yet the court agreed with the expert witness findings that "by their nature, EADA reports always overstate women's participation in intercollegiate athletics" due to the reliance on the three loopholes, as well as the fact that "EADA reports count all nominal members at the time of a team's first competition, regardless of whether they continue to participate meaningfully after that date."²¹¹ As such, the court found that the actual female participation gaps were substantially higher than had been reported.²¹²

In sum, the court utterly dismissed Iowa's loophole-fueled defenses, distilling Iowa's claims that EADA data could not be relied upon to an argument "that the Court ought to 'pay no attention to that [wo]man behind the curtain.'"²¹³ Further, the court was quick to note that Iowa's position was "especially disingenuous considering [the school's] refusal to disclose the official Title IX data they claim exonerates the University—data they admit is discoverable but have nonetheless declined to produce in response to Plaintiffs' request."²¹⁴ Based on this

women's swimming-and-diving team slated for cuts) *See also* *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983 (E.D. Mich. 2018) (granting injunctive relief to members of women's tennis and softball teams adversely affected by university cuts to their sports). Additionally, as Porto, *supra* note 177, at 305, notes, two cases are ongoing against the California State University System in 2022—one against Fresno State and another against San Diego State. *See infra* notes 220–221 and accompanying text (expanding briefly on the ongoing San Diego State litigation).

207. *See generally* Kristen Thorsness, *Hot Topics in Title IX Athletics: Recent Cases about Title IX Compliance in Athletics*, JD SUPRA (Apr. 24, 2023), <https://perma.cc/Y9Q5-RV3Z>.

208. *Ohlenschlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1092–93 (S.D. Iowa 2020).

209. *Id.* at 1090–95.

210. *Id.* at 1095.

211. *Id.* at 1095–96.

212. *Id.* at 1096.

213. *Id.* at 1101 (alteration in original).

214. *Ohlenschlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1101 (S.D. Iowa 2020).

conclusion, the court enjoined Iowa from taking any action to eliminate *any* women's intercollegiate athletic team while the trial was pending.²¹⁵

While it is laudable that courts have been useful tools for those seeking relief in Title IX claims, it remains unconscionable that the only source for justice under Title IX seems to be the bravery of college students who have the willingness and support to file lawsuits. And even then, the settlement reached between Iowa and the plaintiffs after this judgment²¹⁶ does little to stop the institution from continuing to exploit Title IX loopholes, nor does it necessarily fully resolve the substantial proportionality issue by adding enough roster sports in women's swimming and wrestling.

And, of course, again, the problem is hardly limited solely to one school. Indeed, Michigan State replicated Iowa's strategy of denying the accuracy of official EADA reports in *Balow v. Michigan State*²¹⁷—a lawsuit that ended with the Sixth Circuit overturning the district court's denial of a preliminary injunction and a settlement where the school (as with Iowa) agreed to pay the plaintiffs' legal fees and appoint an independent gender equity review director.²¹⁸ As of now, *over eighty percent* of the public schools that could be identified in *USA Today's* report²¹⁹ employed Title IX loopholes to some effect to skirt true Title IX compliance.

It is thus cynically fitting that many of the schools that have employed these loopholes are on the forefront of invoking Title IX to fight against athlete-focused reform. For example, since 2021 the California state legislature has considered bills that would force universities in the state to share broadcast revenues with college athletes. The May 2023 iteration, Assembly Bill 252 ("AB 252"), would do so by establishing a "degree completion fund" that would pay scholarship athletes an equal share of half of their team's annual revenue, minus the cost of the athlete's grant-in-aid.²²⁰ The bill—offered by San Diego State men's basketball player turned California Assemblymember Chris Holden—was passed by the full California Assembly on June 1, 2023, setting it up for consideration by the California Senate.²²¹

215. *Id.* at 1106.

216. Iowa settled the case by agreeing to reinstate women's swimming, add women's wrestling, pay the plaintiffs nearly \$400,000 in attorney's fees and court costs, and hire an independent Title IX compliance monitor. Chloe Peterson, *University of Iowa, Women's Swimmers Reach Settlement in Title IX Lawsuit*, THE DAILY IOWAN (Oct. 7, 2021), <https://perma.cc/9994-JKYB>.

217. 24 F.4th 1051, 1059–60 (6th Cir. 2022).

218. *Id.*; Matt Wenzel, *Michigan State Settles Title IX Lawsuit with Former Women's Swim and Dive Team Members*, MLIVE (Jan. 14, 2023, 7:02 PM), <https://perma.cc/BJ29-KE9N>. Unlike with Iowa, the Michigan State women were unsuccessful at getting their team reinstated. *Id.*

219. Kenny Jacoby, *Methodology Behind USA TODAY's Analysis of College Athletic Rosters*, USA TODAY (May 26, 2022), <https://perma.cc/Y2W9-DB37>.

220. The College Athlete Protection Act, A.B. 252 (Cal. 2023). *See also* Daniel Libit & Michael McCann, *California D-I Athlete Pay Bill Seeks to Avoid Title IX Pitfalls*, SPORTICO (Jan. 19, 2023, 5:00 PM), <https://perma.cc/4PJY-6A33>. *See also infra* notes 201–204 and accompanying text.

221. Steve Berkowitz (@ByBerkowitz), X (June 1, 2023, 4:47 PM), <https://perma.cc/AYE3-CWDX>.

As one might expect, AB 252 is opposed by both the University of California, which includes UCLA and UC Berkeley, and the California State University, which includes San Jose State, Fresno State, and San Diego State.²²² Each of those schools reportedly “believe AB 252 would result in the elimination of non-revenue sports, in addition to any Title IX ramifications.”²²³ Yet, of course, each of these schools excessively employ loopholes to avoid actual Title IX compliance.²²⁴ Indeed, the worst offender of the group, Assemblymember Holden’s alma mater San Diego State,²²⁵ is involved in active Title IX litigation after the school decided to cut their bloated rowing team—citing fears of Title IX exposure not because of loophole use but because they apparently felt women were *over*represented in the school’s athletic programs compared to the overall student population.²²⁶

Interestingly, amendments made to AB 252 specifically to address Title IX complaints allow institutions to, if necessary, “adjust the amounts of degree

222. Jon Wilner, *Pac-12 Economic Threat: New California Legislation Attempts to Redirect Operating Revenue to Athletes*, THE MERCURY NEWS (May 16, 2023), <https://perma.cc/A4N5-7ZVJ>.

223. *Id.*

224. According to USA Today, UCLA added eighty-three total women’s roster spots through loopholes: thirty-two by double- or triple-counting women (seventy-three duplicated women compared to forty-one duplicated men), sixteen by counting male practice players as part of the women’s basketball team, and thirty-five by adding extra roster spots to the rowing team. Sergeant, *supra* note 20. UC Berkeley added thirty-two total women’s roster spots through loopholes: eight by double- or triple-counting women (thirty-seven duplicated women compared to twenty-nine duplicated men), fifteen by counting male practice players as part of the women’s basketball team, and nine by adding extra roster spots to the rowing team. *Id.* San Jose State—the best of the bunch—added twelve total women’s roster spots through loopholes: all by double- or triple-counting women (fifty-three duplicated women compared to forty-one duplicated men). *Id.* Fresno State added fifty total women’s roster spots through loopholes: forty-eight by double- or triple-counting women (sixty duplicated women compared to twelve duplicated men) and two by counting male practice players as part of the women’s basketball team. *Id.*

225. Saving the worst for last, San Diego State added *eighty-two* total women’s roster spots through loopholes: sixty-seven by double- or triple-counting women (compared to *zero* double- or triple counted men) and fifteen by adding extra roster spots to the rowing team. *Id.*

226. See *Fisk v. Bd. of Trustees of Cal. St. Univ.*, No. 22-CV-173, 2023 WL 2919317, at 1–3 (S.D. Cal. 2023) (denying in part San Diego State’s motion to dismiss). For background on the events leading to the cut teams and the litigation in question, see Mark Zeigler, *San Diego State to Cut Women’s Rowing After 2020–21 Season*, SAN DIEGO UNION-TRIBUTE (Nov. 20, 2020), <https://perma.cc/NG7K-YNVY> (noting San Diego State athletic director John David Wicker’s comments that “they have too many female athletes compared to the university’s overall undergraduate enrollment” and that they “needed to do something more aggressive’ to balance them in the other direction.”). Of particular note, this suit was amended shortly after filing to add allegations some of the plaintiffs who are current members of the track-and-field team were ridiculed and threatened by their coach in front of the rest of the team for their participation in the lawsuit. *Fisk*, 2023 WL 2919317 at 3–4. This retaliation claim was specifically upheld by the court on its motion to dismiss ruling as plausibly alleged by the members of the track team who were present for the meeting. *Id.* at 24–25. And, of course, as with *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1101 (S.D. Iowa 2020), and *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1059–60 (6th Cir. 2022), the court on the motion to dismiss rejected San Diego State’s assertion that the school’s EADA data could not be relied upon as accurate Title IX numbers, given that the school similarly refused to provide the plaintiffs with the underlying real Title IX data. *Fisk*, 2023 WL 2919317 at 3 n. 8. See *supra* notes 181–190 and accompanying text.

completion fund payment designations only to comply with Title IX financial aid proportionality comparisons in athletics.”²²⁷ This shift in calculation takes effect so long as the institution does not reduce the aggregate total amount of payments, “the institution is in compliance with Title IX financial aid proportionality comparisons in athletics independent of degree completion fund payment designations,” and the institution submits and publicly publishes a written notice explaining why the adjustment was necessary for Title IX purposes.²²⁸ Moreover, the bill was later amended to allow institutions the option to split all athletic department revenue in equal shares across all teams rather than based on each individual team.²²⁹

Given this amendment happened in January 2023 and the various California schools issued their opposition in May 2023, it is unknown what Title IX issues they still see with the bill. Perhaps these schools feel that, because they will have to provide a share of their operating revenue directly to athletes, they will have to cut sports to comply with Title IX—and doing so would have triggered a rather interesting provision in the bill that would punish any athletic director who cuts a team; reduces aggregate funds for athlete academic, medical, mental health, or other benefits; or eliminates roster spots from a team by suspending the athletic director for a period of three or more years.²³⁰ Or, perhaps, these schools—each of whom have been blatant abusers of the Department of Education substantial proportionality loopholes—fear that equal revenue sharing per athlete would effectively eliminate the double- and triple-counting and male practice player loopholes, since fewer women to distribute revenue to would mean less revenue distributed to women overall.²³¹ Who is to say?

227. A.B. 252, Art. 3, § 67463(k) (Cal. 2023).

228. *Id.*

229. A.B. 252, Art. 3, § 67463(i)(1)(D) (“Each college athlete on the same intercollegiate team, regardless of sport, at the institution who qualifies for a degree completion fund payment designation pursuant to this paragraph shall receive an equal share of moneys calculated pursuant to this paragraph.”). See also Libit & McCann, *supra* note 220 (discussing the intent of the amendment to comply with Title IX). Assembly member Holden also amended the bill before it was passed by the assembly to address concerns by the California Legislative Women’s Caucus, though details on these amendments are not known as of this writing. Steve Berkowitz (@ByBerkowitz), X (June 1, 2023, 4:56 PM), <https://perma.cc/877X-3BN7>. Such amendments were apparently not enough to fully sway those members, however, as many women assembly members from Holden’s party (the Democrats) abstained from voting for or against the bill. Steve Berkowitz (@ByBerkowitz), X (June 1, 2023, 4:51 PM), <https://perma.cc/EBJ3-FN4E>. The bill has since been amended even further to explicitly state that “one-half of the total amount of degree completion fund payment designations” shall be made available for the institution’s female athletes with portions distributed based on each athlete’s “fair market value.” A.B. 252, Art. 3, § 67463(i)(1)(C–D).

230. A.B. 252, Art. 3, § 67469(c)(1) (Cal. 2023). The bill used to limit such a punishment to programs that paid any athletics administrator or coach more than \$500,000, but the bill was amended in May 2023 to remove the \$500,000 salary qualifier, thus applying to all programs. *Id.* The provision was removed altogether in June 2023. *Id.*

231. Of course, this second potential fear is likely compounded by the fact that the new state panel created to govern this athlete revenue sharing would also conduct Title IX audits of California schools each year and post them publicly online. A.B. 252, Art. 3, § 67468(a) (Cal. 2023).

III. CONCLUSION AND THOUGHTS ON THE FUTURE

To be clear, none of the opinions in this Essay are intended to minimize or downplay the importance of Title IX, nor the positive effects the Act has had on college sports. According to the Women's Sports Foundation, Title IX has over the past fifty years increased female participation in college programs from fifteen percent in 1972 to forty-four percent in the 2020-21 academic year—a profound impact.²³² Scholarship has also found that Title IX has positively impacted women's perceptions of their career opportunities in college sports.²³³ Title IX is, without a doubt, an overall good worth preserving.

As such, it is commendable to some degree that the NCAA has seemingly made Title IX compliance a priority when in court and when lobbying Congress for reform. And there are clearly significant questions about the ability for Title IX to continue to make a positive impact when college athletes—in sum or in part—are considered employees. Many athletic departments may legitimately struggle to balance expenses with the added costs that come with employment status.²³⁴ While some (reasonably) call Title IX invocations by NCAA stakeholders within the context of athlete rights debates a “red herring,” the increased costs that would come with athlete employment are a very real concern for many smaller scale schools.²³⁵ Of course, this concern for smaller schools is not helped by the NCAA's constant conflation of the problems of top-level Division I programs (who could almost certainly find the money) with other programs with significantly less revenue to play with; advocates justifiably point to the billions received by top-level programs in these debates, and these vast revenues serve to minimize the problems faced by schools without such privileges.²³⁶

232. *50 Years of Title IX: We're Not Done Yet* at 7, WOMEN'S SPORTS FOUNDATION (May 2022), <https://perma.cc/S6QB-KLXL>.

233. Glenna G. Bower & Mary A. Hums, *The Impact of Title IX on Career Opportunities in Intercollegiate Athletic Administration*, 6 J. INTERCOLLEGIATE SPORT 213 (2013).

234. Though this author has argued in the past that most athletic departments may overestimate how much would change, given how the FLSA allows in-kind compensation to be creditable towards minimum wage. See generally Sam C. Ehrlich, “*But They're Already Paid*”: *Payments in-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1 (2020) (examining the college sports application § 3(m) of the FLSA, which “allows an employer to count the value of food, housing, or other facilities provided to employees under certain circumstances.”). Of course, it must be said that this earlier piece questioned whether athletic scholarships can be creditable, as the fact that NCAA rules requiring athletes to be in degree programs makes an athletic scholarship seem more analogous to a “license” to play college sports than a benefit. *Id.* at 52–57. The author's incredulity to that effect still remains.

235. Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, FORBES (Feb. 4, 2014), <https://perma.cc/C3Q5-9KB7>; see also Kevin Trahan, *Why the NCAA's Title IX Excuse No Longer Works*, SB NATION (Apr. 14, 2014), <https://perma.cc/3RW3-NAVT>; Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for “Employee” Status*, 56 COLUM. J. L. SOCIAL PROBLEMS 451, 500–01 (2023).

236. In that light, perhaps it is appropriate, as some have suggested, for significant restructuring of college sports in a way that would allow the NCAA to focus more on Division II and III, which are products that are much closer to its “amateur” vision not only for athletes but for everyone else involved in their operations. See, e.g., Dan Wolken & George Schroeder, *Is Next College Sports Realignment a Split from NCAA?*, USA TODAY (Apr. 21, 2013), <https://perma.cc/83G5-6STU>; Dan Murphy, *Knight*

Furthermore, the NCAA is correct in stating that there is potential conflict between whether Title IX or Title VII applies to college athletes who are employees of their institutions, given the existent circuit split as to whether Title IX, Title VII, or both applies to other employees at educational institutions.²³⁷ If the courts were to find that Title VII—and not Title IX—applies, the potential for gains in women's sports would be hurt substantially. Employment law's weaknesses in this area were shown rather recently in World Cup and Olympic soccer, where in 2020 the U.S. District Court for the Central District of California found that the vast differences in salaries and working conditions between the men's and women's national soccer teams were justified under both statutes, in part because the women's national team—lacking bargaining leverage due to a long history of inequality—had recently agreed to a less-than-favorable collective bargaining agreement that set forth a different pay structure from the men that ended up paying the women less on average than their male counterparts.²³⁸ Relatedly, female professional athletes in league play are paid far less than their male counterparts with little hope of success on a Title VII or Equal Pay Act claim.²³⁹ Similar barriers to equality may likely also exist in women's college sports under a complete employment structure.²⁴⁰

But any commendation for the NCAA's lobbying for gender equity assumes that its claims to prioritizing Title IX are made in anything resembling good faith.

Commission Endorses FBS Split from NCAA, ESPN (Dec. 3, 2020, 2:14 PM), <https://perma.cc/95US-C2KS>; Joe Moglia, *The NCAA Needs the Power Five. Do the Power Five Need the NCAA?*, SPORTICO (Feb. 28, 2023, 5:55 AM), <https://perma.cc/VJ9N-JGCL>.

237. See Kendyl L. Green, *Title VII, Title IX, or Both?*, 14 SETON HALL CIR. REV. 1 (2017); Nicole Dlugosz, *The Revival of a Twenty-Year Circuit Split Featuring a Medical Residency Program Twist: An Analysis of Doe v. Mercy Catholic Medical Center & the Applicability of Title IX Remedies*, 71 RUTGERS U. L. REV. 457 (2018); Brigid Burroughs, *Title VII Meets Title IX for Student Employees: Remedies for Discrimination Against Graduate Students*, 89 UMKC L. REV. 441 (2020). Yet, as noted *supra* note 7, this circuit split may not be as problematic in the specific case of student employees (as college athletes would be) given that the only cases within that circuit split that involved student plaintiffs turned out on the side of allowing either Title VII or Title IX to apply. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017) and *Preston v. Va. ex rel. New River Com. Col.*, 31 F.3d 203 (4th Cir. 1994).

238. *Morgan v. U.S. Soccer Fed.*, 445 F.Supp.3d 635 (C.D. Cal. 2020). The court did sustain the claims of the women's team regarding discriminatory working conditions as they related to travel and personnel and support services but granted summary judgment to the U.S. Soccer Federation on all other claims, including the teams' allegations of unequal salary under both Title VII and the Equal Pay Act. *Id.* at 665. *But see* Mallory E. Hopkins, *Taking the Game Back: A Response to the District Court Ruling Against the United States Women's National Soccer Team Under the Equal Pay Act*, 14 ELON L. REV. 259 (2022) (arguing that the court's Equal Pay Act decision was incorrectly decided).

239. See Nicole Zerunyan, *Time's Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 LOY. L.A. ENT. L. REV. 229 (2018) (providing evidence for a wide gender-based wage gap in professional sports while decrying the Equal Pay Act's narrow language restricting claims to pay discrimination in the same establishment, which would foreclose any claims by professional athletes).

240. *But see* Schoepfer, *supra* note 87 (arguing that Title VII claims could actually be just as successful—if not more successful—than Title IX claims when fighting gender-based inequity in college sports).

This is, quite frankly, clearly not the case. The NCAA is not calling for reforms to Title IX. The NCAA and its advocates are instead calling for Congress to give the NCAA untold power and legal immunity that—at least according to them—would allow them to maintain gender equity in sports. But such immunity only serves to revert college sports back to the pre-*Alston* status quo. And in this status quo the NCAA and member institutions have demonstrated commitment to gender equity only on paper and through platitudes while doing everything they can to dodge true equity in college sports.

If one were to focus solely on the Title IX problems that may result from athlete employment or revenue sharing, there is a solution for Congress and the NCAA—and it is *not* the solution the NCAA is proposing. The problems the NCAA has identified can be solved simply by resolving the circuit split to make clear that students employed by universities are covered under Title IX, rather than just Title VII.²⁴¹ As an added bonus, such an act would also greatly benefit graduate assistants, work-study workers, professors, and other on-campus workers—all of whom could also very much benefit from clarity and increased protection. Alternatively (or additionally), Congress could just act to strengthen Title VII and the Equal Pay Act—an action that, again, would help far more people than just college athletes.²⁴²

Unlike a grant of antitrust and employment law immunity (which only fix the NCAA's Title IX issues, to the extent it wants these problems fixed), legislation targeting the Title IX/VII circuit split and/or reforming Title VII and the EPA would meaningfully solve the gender equity problems that the NCAA sees with making college athletes employees. And it would do so without giving the NCAA broader power, which is certainly preferable given the NCAA's historic unwillingness to actually commit to gender equity in college sports. Federal legislation can and should be targeted towards fixing the actual problems with Title IX, rather than broadly placing the NCAA above the law.

Congress must call the NCAA's bluff. To this regard, not only should Congress make broader reforms to Title IX, but they should also act to remove the Title IX loopholes addressed in this Essay. Any proposed solution that seeks to resolve potential problems by giving the NCAA and its stakeholders the immunity they already have from Title IX would reward the NCAA for its bad faith arguments while serving only to perpetuate and codify the corruption of the industry. While this author cannot say he has much faith that Congress will act on this suggestion—either because the (actual) infusion of Title IX into the

241. This can be done either by the Supreme Court—potentially soon should writ of certiorari be filed in the recently-decided *Kashdan v. George Mason Univ.*, No. 20-1509, 2023 WL 3959404 (4th Cir. 2023)—or by Congress through amendment to Title IX.

242. See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

discussion would lead to additional bad faith arguments (e.g., what to do about transgender athletes) or because the NCAA and its member institutions would almost certainly vigorously oppose actually being held accountable in this way, or both—such additions to federal legislation are important, if not necessary.

The post-*Alston* and post-NIL world presents important and existential debates regarding the future of college sports. The NCAA has, for its part, decided to use Title IX as a hostage in these negotiations. The NCAA's arguments regarding Title IX are compelling to many. But do we know that a federally exempted and above-the-law NCAA will actually work to ensure gender equality in college sports? History simply does not support that blind trust.