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The Seal Has Been Lifted: NCAA and Predominantly White Colleges Must Soon Stop Exploiting Their Black Athletes

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THE SEAL HAS BEEN LIFTED: NCAA AND PREDOMINANTLY WHITE COLLEGES MUST SOON STOP EXPLOITING THEIR BLACK ATHLETES

DANIEL BARTLETT*

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I. INTRODUCTION

Collegiate athletics is a dominant form of entertainment in the United States, with upwards of ten million average viewers for select tournaments.¹ Sports fans and universities come together on a nightly basis to watch their team perform at student-athletes' expense. Introduced in the 117th Congress's second session, the Amateur Athletes Protection and Compensation Rights Act of 2021 ("AAPCA"), and similar legislation, aim to solve the issue of the lack of compensation for college athletes competing on behalf of their university.²

From a business perspective, college athletics is a lucrative industry with high-profit margins for the NCAA and individual universities.³ While the NCAA and its partner universities offer athletic scholarships to cover the cost of attending a four-year school, athletes are otherwise limited in their ability to capitalize and receive compensation for their athletic success.⁴ Nevertheless, popular college athletes' names, images, and likenesses ("NIL") are used to sell video games, merchandise, and other items, while the athletes receive none of the profit.⁵ The NCAA continues to perform

1. See Christina Gough, *NCAA March Madness Basketball Tournament Average TV Viewership from 2013 to 2019*, STATISTA (Oct. 21, 2021), <https://www.statista.com/statistics/251560/ncaa-basketball-march-madness-average-tv-viewership-per-game/> (showing average television viewership of the NCAA March Madness Tournament).

2. See Amateur Athletes Protection and Compensation Act, S. 414, 117th Cong. (2021); see also CAL. EDUC. CODE § 67456 (West 2021); College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021); College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

3. Eben Novy-Williams, *NCAA Says It Lost \$800 Million in Revenue from Cancelled March Madness*, SPORTICO (Jan. 25, 2021), <https://www.sportico.com/leagues/college-sports/2021/ncaa-lost-800-million-1234621088/> (noting that the NCAA's 2019 revenue totaled \$1.18 billion).

4. Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That's Laughable.*, WASH. POST (Sept. 20, 2018), https://www.washingtonpost.com/outlook/the-ncaa-says-paying-athletes-hurts-their-education-thats-laughable/2018/09/20/147f26c0-bb80-11e8-a8aa-860695e7f3fc_story.html.

5. See Jasmine Harris, *In the Name of 'Amateurism,' College Athletes Make Money for Everyone Except Themselves*, THE CONVERSATION (Apr. 5, 2019, 7:58 PM), <https://theconversation.com/in-the-name-of-amateurism-college-athletes-make-money-for-everyone-except-themselves-114904> (noting that "college sports programs took in US \$14 billion in 2018 through ticket sales, television contracts, apparel deals and merchandise sales," while the athletes receive no portion of this revenue).

legal gymnastics through loopholes and narrow rulings regarding college compensation, harming its athletes, particularly Black athletes.⁶

Black men only make up 2.8% of undergraduate students at the University of North Carolina-Chapel Hill (“UNC”), but sixty-two percent of the school’s basketball and football players.⁷ Basketball and football athletes financially support entire non-profit producing programs such as track, tennis, golf, and swimming.⁸ For example, at Louisiana State University (“LSU”) alone, the 2018–2019 football team earned a profit of \$56.6 million.⁹ Excluding Men’s football, basketball, and baseball, twelve other LSU sports lost over \$1 million.¹⁰ That same Men’s Football roster was comprised of roughly 68% Black athletes.¹¹

It is no secret that Black athletes dominate the high revenue-producing sports of Men’s Basketball and Football.¹² To maintain amateur status and thus NCAA eligibility, these athletes cannot ever be directly paid for their efforts.¹³ Coaches, universities, and athletic departments consistently receive lucrative, multi-year contracts.¹⁴ Three notable Power Five¹⁵ coaches, Nick Saban of Alabama football, Dabo Swinney of Clemson football, and John Calipari of Kentucky basketball, each make roughly \$9 million annually.¹⁶ These contracts can last for up to ten years, and these

6. See *id.* (citing the NCAA’s insistence that college athletes must remain amateurs to preserve their college and educational experience).

7. Victoria L. Jackson, *A Jim Crow Divide in College Sports*, CHI. TRIB. (Jan. 16, 2018), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-college-sports-ncaa-black-athletes-exploited-0117-20180116-story.html>.

8. *Id.*

9. Brooks Kubena, *LSU athletics brought in \$157 million in 2018-19; See Details of Annual Budget*, THE ADVOCATE (Jan. 24, 2020), https://www.theadvocate.com/baton_rouge/sports/lsu/article_6cf42366-3edb-11ea-970e-5bd6522b3e13.html.

10. *Id.*

11. *2019 Football Roster*, LSU SPORTS, <https://lsusports.net/sports/fb/roster/season/2019/> (last visited Jun. 13, 2021).

12. See Mark J. Burns, *Racial Divides Persist on Compensation for Student-Athletes*, MORNING CONSULT (Mar. 20, 2019), <https://morningconsult.com/2019/03/20/racial-divides-persist-on-compensation-for-student-athletes/> (noting that “in 2018, 56 percent of Division I men’s college basketball players and 48 percent of football student-athletes were black.”).

13. See Brandi Collins-Dexter, *NCAA’s Amateurism Rule Exploits Black Athletes as Slave Labor*, THE UNDEFEATED (Mar. 27, 2018), <https://theundefeated.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/>.

14. *Id.*

15. The Power Five conferences are considered the highest level of Division I competition and is comprised of the Atlantic Coast Conference (“ACC”), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (“SEC”).

16. Ricky L. Jones, *Opinion: Power 5 Schools, Built on Black Athletes, Should*

coaches are some of the highest-paid employees in their respective states.¹⁷ Notably, in an industry dominated by Black male athletes, the head coaches and administrators are overwhelmingly white, with about eighty-two percent of college basketball coaches, ninety-two percent of Football Bowl Subdivision (“FBS”) head coaches, and eighty-six percent of conference commissioners are white.¹⁸ Moreover, For March Madness alone, the NCAA Men’s Basketball Championship tournament, Turner Sports and the NCAA entered into a television deal valued at \$8.8 billion.¹⁹

In 1992, Jalen Rose, Chris Webber, Juwan Howard, Jimmy King, and Ray Jackson decided to team up and play for the University of Michigan’s basketball program.²⁰ Referred to as the Fab Five, this is one of the most significant recruiting accomplishments in sports to date.²¹ Before the Fab Five’s recruitment, Michigan’s 1990 – 1991 season record was 14-15.²² After assembling the Fab Five, Michigan’s record jumped to 25-9 in 1992 and then to 31-5 in 1993 with back-to-back NCAA Finals appearances.²³

The Fab Five could have gone to any institution and achieved athletic dominance.²⁴ However, if another Fab Five appeared and attended a Historically Black College or University (“HBCU”) rather than a Predominately White Institution (“PWI”), they could find success on the court as well as through marketing compensation.²⁵ Under the AAPCA

Share Sports Wealth with HBCUs, COURIER J. (Apr. 15, 2020, 6:42 PM), <https://www.courier-journal.com/story/opinion/2020/04/15/ncaa-power-5-schools-should-share-sports-wealth-black-colleges/2994350001/>.

17. See John Duffley, *In 40 States, Sports Coaches are the Highest-Paid Public Employees*, FANBUZZ (Dec. 31, 2019, 12:04 PM), <https://fanbuzz.com/national/highest-paid-state-employees/> (noting that in 40 of 50 states, college head coaches were the highest-paid state employees during the 2018–2019 season).

18. See Jones, *supra* note 16. Exact percentages calculated by the author during research for this Comment.

19. *Id.*

20. Chris Tomasson, *Michigan’s Fab Five were Rock Stars at Minnesota’s Final Four in 1992*, TWIN CITIES, <https://www.twincities.com/2019/04/03/michigans-fab-five-captivated-the-country-at-twin-cities-final-four-in-1992/> (last updated June 9, 2020).

21. See Scott Davis, *Where are They Now? Michigan’s Legendary Fab 5 Team*, BUS. INSIDER, <https://www.businessinsider.com/where-are-they-now-michigan-fab-5-2017-3> (last updated Mar. 21, 2018) (describing the 1991–92 team’s “lasting impact . . . on basketball on all levels” and its status as having “some of the top recruits in the U.S.”).

22. *Michigan Wolverines School History*, SPORTS REFERENCE, <https://www.sports-reference.com/cbb/schools/michigan/> (last visited June 13, 2021).

23. *Id.*

24. See Kendrick Marshall, *The Fab Five Got It Wrong: They Needed to Look in the Mirror*, BLEACHER REP. (Mar. 14, 2011), <https://bleacherreport.com/articles/635835-the-fab-five-got-it-wrong-maybe-they-needed-to-look-in-the-mirror> (noting the potential “revolutionary” impact of the Fab Five playing for an HBCU).

25. See *id.* (highlighting that “the Fab Five became a commercial hit to the tune of

future Black stars can team up at an HBCU and completely change the college sports landscape again.²⁶

This Comment argues that passing the AAPCA, Fair Pay to Play Act, and similar legislation will allow college athletes to rightfully profit from their NIL and open the door for star athletes to choose HBCUs over traditional Power Five sports programs.²⁷ Part II of this Comment will explain the legislative and procedural battles student-athletes have faced when arguing against the NCAA for the right to earn compensation. Traditionally the NCAA has avoided compensating its athletes, and courts have avoided tackling the issue. Part III will analyze previous litigation under the lens of current and pending legislation surrounding these athletes' rights and allowances. Finally, Part IV will recommend a new route for Black student-athletes to take when advocating for the improvement of their rights and the prosperity of the Black community.

II. THE TROUBLED HISTORY OF STUDENT-ATHLETES AND THE NCAA

Since its inception, the NCAA has profited from the entertainment of student athletic competitions.²⁸ Utilizing the shield of amateurism, the NCAA succeeds in litigation suppressing player compensation and avoids allowing its athletes to profit from their NIL.²⁹ The NCAA defines an amateur as “someone who does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport.”³⁰

\$10 million in merchandise sales for Michigan while on campus those two years.”).

26. *See id.* (“The Fab Five at an HBCU could have paved the way for more young black amateur athletes to consider those schools.”).

27. *See* Dennis Dodd, *Majority of Power Five Schools Favor Breaking Away to Form Own Division Within NCAA, Survey Shows*, CBS SPORTS (Oct. 13, 2020, 3:47 PM), <https://www.cbssports.com/college-football/news/majority-of-power-five-schools-fav-or-breaking-away-to-form-own-division-within-ncaa-survey-shows/> (defining the Power Five as athletic programs in the Big Ten, SEC, Big 12, Pac-12, and ACC athletic conferences).

28. *See Finances of Intercollegiate Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited June 13, 2021) (stating that the NCAA’s “total athletic revenue” across all its athletics departments was \$18.9 billion in 2019).

29. *See* O’ Bannon v. NCAA, 802 F.3d 1049, 1061 (9th Cir. 2015) (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)) (holding that “the compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity . . .”).

30. *What is Amateurism?*, NCAA, <https://ncaa.egain.cloud/kb/EligibilityHelp/content/KB-2219/What-is-amateurism> (last visited Dec. 27, 2021); *see* NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA DIVISION I MANUAL § 12.1.2 (2021).

Power Five athletic programs are most often the primary source of revenue for a university.³¹ Moreover, select sports such as Men's basketball and football, usually generate enough revenue to support entire athletic departments.³² This lucrative business model consists of brand sponsorships, endorsements, and television broadcasting deals; however, the actual performers see little to no profit.³³

A. What is the NCAA and What is the Issue?

The NCAA is a non-profit organization that regulates collegiate athletics and provides a bridge between high school and professional sports.³⁴ NCAA rules restrict athletes' rights, preventing the athlete from profiting from their NIL.³⁵ Athletic programs have lost financial aid, recruiting resources, and post-season eligibility as a punishment for violating the NCAA's rules by attempting to compensate their players.³⁶ For example, Southern Methodist University's football program received the "death penalty" in 1987 for paying its future and present players, resulting in a canceled season, over fifty lost scholarships, recruiting restrictions, and post-season bans.³⁷ Today, several states have pending legislation to give college athletes their long-deserved right to receive compensation.³⁸

31. See David Broughton, *Power Five: An \$8.3 Billion Revenue Powerhouse*, SPORTS BUS. J. (Aug. 17, 2020), <https://www.sportsbusinessdaily.com/Journal/Issues/2020/08/17/Colleges/Revenue.aspx>.

32. Denise-Marie Ordway, *Power Five Colleges Spend Football, Basketball Revenue on Money-losing Sports: Research*, JOURNALIST'S RES. (Sept. 10, 2020), <https://journalistsresource.org/studies/society/education/college-sports-power-five-revenue/>.

33. See Broughton, *supra* note 31; see also Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (stating that the SEC was the first to reach more than \$1 billion in "athletic receipts" with "[t]he Big Ten pursu[ing] closely at \$905 million [T]he great bulk of [the money] comes from television contracts.").

34. See NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I MANUAL § 1 (2019).

35. See *id.* § 12.5.3 (allowing athletes to participate in "media activities" but prohibiting athletes from receiving any "remuneration" as a result of their participation in such an activity).

36. See, e.g., *Southern Methodist University Football Scandal*, AM. FOOTBALL DATABASE, https://americanfootballdatabase.fandom.com/wiki/Southern_Methodist_University_football_scandal (last visited Jun. 13, 2021).

37. *Id.* (using "death penalty" to describe the NCAA's cancellation of SMU's 1987 season).

38. See Zachary Zagger, *4 Key Issues As States Tackle College Athlete Pay*, LAW360 (Oct. 9, 2020, 4:47 PM), <https://www.law360.com/articles/1318247/4-key-issues-as-states-tackle-college-athlete-pay> (explaining that states including California, Florida, Colorado, Nebraska, and New Jersey have passed laws to permit student-athlete

B. Cases Where Student-Athletes Fell Short

Despite raising legitimate arguments for compensation, student-athletes have long been unsuccessful in gaining the right to profit from their success. In *Marshall v. ESPN Inc.*,³⁹ former Division I Men's basketball and football players failed to gain publicity rights under Tennessee state law after suing several athletic conferences and broadcasting networks.⁴⁰ The players alleged that defendants used their publicity rights without their consent.⁴¹ The NCAA's defense was rooted in its definition of amateurism: "amateurs in intercollegiate sport[s], and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived . . . and student-athletes should be protected from commercial exploitation by professional and commercial enterprises."⁴² Notably, the court failed to address compensation and fairness.⁴³

Similarly, in *Northwestern University and College Athletes Players Association ("CAPA")*,⁴⁴ athletes unsuccessfully petitioned the National Labor Relations Board ("the NLRB") for compensation rights. Here, football players from Northwestern University asked the NLRB to extend labor rights to college athletes because the players generated substantial amounts of money for their institution.⁴⁵ The players argued that their receipt of grant-in-aid scholarship funds for their athletic performance classified them as school employees.⁴⁶ The NLRB declined to extend jurisdiction, instead, electing to not weigh in on the substantive issue.⁴⁷ The NLRB explained that it would not be appropriate to decide on this matter given that Northwestern was the only private institution in the Big Ten Conference, and this decision would create precedent over public FBS teams.⁴⁸

compensation).

39. 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

40. *Id.* at 820–21.

41. *See id.* at 823 (noting the statutory right of publicity violation under Tennessee law).

42. *Id.* at 822–23.

43. *Id.* at 822.

44. 362 N.L.R.B. 1350 (2015).

45. *Id.* at 1351 ("Northwestern's football program generated some \$30 million in revenue.").

46. *See id.* at 1350–51.

47. *See id.* at 1355 (refusing to decide "whether the scholarship players are employees under Section 2(3)").

48. *See id.* at 1354; *see also How Do the Rules Differ on a Public vs. Private College Campus*, ACAD. SUCCESS (May 10, 2019), <https://academysuccess.com/how-do-the-rules-differ-on-a-public-vs-private-college-campus/> (explaining that private universities do not receive funding through taxes, and therefore, they may impose their own rules and regulations).

In addition to fighting for compensation, college athletes have also attempted to protect their NIL from being utilized for profit by other entities.⁴⁹ In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*,⁵⁰ the Ninth Circuit analyzed college athletes' name and likeness rights concerning video games. Electronic Arts ("EA") created a college football video game series in which college football players' data was used to develop user-controlled avatars for in-game use.⁵¹ Here, the issue was whether college athletes had name and likeness rights to the video game avatars based on their real-life attributes.⁵² The Ninth Circuit established that college athletes have a legitimate right to protect their NIL, but courts have failed to extend this to athletic compensation.⁵³ Despite the court finding that the First Amendment did not protect EA's use of the athletes' NIL under the transformative use test, no direct protections were awarded to the harmed college athletes.⁵⁴

EA has partnered with the Collegiate Licensing Company to bring back the coveted NCAA Football video game franchise amid the AAPCA likeness conversation.⁵⁵ This franchise was halted by *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* and *O'Bannon v. National Collegiate Athletic Association*.⁵⁶ While both cases resulted in settlements for their respective players, neither case established a broader system to compensate athletes for their NIL rights and participation in the video game franchise.⁵⁷ EA and the Collegiate Licensing Company are attempting to toe the legal line of likeness by opting to "include the rights from more than 100

49. *E.g.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

50. 724 F.3d 1268 (9th Cir. 2013).

51. *Id.* at 1271.

52. *Id.*

53. *See id.* at 1284 (noting that "EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment," due to the transformative use test not standing as a valid defense).

54. *See Keller v. Elec. Arts, Inc.*, No. 4:09-cv-1967, 2015 U.S. Dist. LEXIS 114387 (N.D. Cal Aug. 18, 2015) (marking the official settlement of the dispute with cash payouts, instead of legal protections).

55. Zachary Zagger, *EA To Bring Back College Football Game Amid NIL Debate*, LAW360 (Feb. 2, 2021, 8:55 PM), <https://www.law360.com/articles/1351290/ea-to-bring-back-college-football-game-amid-nil-debate>.

56. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d at 1271; *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

57. Zagger, *EA To Bring Back College Football Game Amid NIL Debate*, *supra* note 55 (stating that EA and Collegiate settled with the plaintiffs for \$40 million, and the NCAA settled with the players for \$20 million).

institutions to use the logos, stadiums, uniforms and game day traditions.”⁵⁸ However, the game and its avatars will not contain any characteristics of real-life college athletes.⁵⁹

C. New Legislation to Level the Playing Field

Previously, the NCAA barred student-athlete compensation to maintain the line between amateur and professional athletics, that decision is now being challenged by state legislatures across the country.⁶⁰ First introduced in California, the revolutionary Fair Pay to Play Act (“FPPA”) allows college athletes to receive marketing compensation without forgoing their NCAA eligibility.⁶¹ The FPPA will come into effect in January 2023 and permits student-athletes to receive compensation outside of a traditional athletic scholarship.⁶² Similar legislation around the country has placed pressure on the NCAA to reform its bylaws and address the issue of student-athlete compensation.⁶³ Several other states, including, New Jersey, Colorado, Florida, and Nebraska, have also passed legislation to combat the NCAA’s excessive regulation over student-athlete compensation.⁶⁴ In each state, the respective compensation laws will prohibit colleges and universities from denying their athletes’ right to earn compensation as the result of marketing their NIL, placing immense pressure on the NCAA.⁶⁵

The FPPA, for example, sets clear compensation guidelines for post-secondary education institutions and athletic conferences within certain states.⁶⁶ For instance, these schools cannot restrict athletes from marketing themselves to local brands, organizations, and third-party sponsors.⁶⁷

58. *Id.*

59. *Id.*

60. *Maintaining Amateur Statuses to Play Sports in College*, PETERSON’S (Dec. 13, 2017), <https://www.petersons.com/blog/maintaining-amateur-status-to-play-sports-in-college/>.

61. CAL. EDUC. CODE § 67456 (West 2021).

62. *Id.*

63. Dan Murphy, *College Basketball Players Push for NIL Reform Using #NotNCAAProperty Message*, ESPN (Mar. 17, 2021), https://www.espn.com/mens-college-basketball/story/_/id/31082285/college-basketball-players-push-nil-reform-using-notncaaproperty-message (“Six states have already passed laws that will make current NCAA amateurism rules illegal in the future, and more than a dozen other states have similar bills actively moving through the legislative process.”).

64. See Zagger, *EA To Bring Back College Football Game Amid NIL Debate*, *supra* note 55.

65. See, e.g., S. 414, 117th Cong. § 4 (2021) (conveying a list of conference and school prohibitions to protect student athletes).

66. EDUC. § 67456.

67. *Id.*

Additionally, the NCAA is barred from punishing athletes from capitalizing on their marketability by revoking their eligibility.⁶⁸ After the FPPA takes effect in 2023, athletes will no longer fear losing their eligibility or scholarship if they choose to market themselves at the state and local level.⁶⁹

Notably, this Act, only affords state-level protection as there is no active federal legislation supporting student-athlete compensation.⁷⁰ The AAPCA, and others like it, are designed to allow athletes to market themselves and receive compensation on the federal level.⁷¹

Thus, it also protects the athletes and schools from being barred from athletic competitions if such compensation is received, and fills the gaps left by the NCAA and previous court's refusal to reform.⁷² This bill will allow athletes to receive third-party sponsorships and similarly bar any collegiate athletic association from punishing the school or its athletes for engaging in such activity.⁷³ Under the bill, athletes may enter endorsement contracts with companies, except for those promoting alcohol, tobacco, gambling, or drugs.⁷⁴ As seen in other facets of the entertainment industry, student-athletes can enjoy proper protection of their likeness.⁷⁵ Essentially, this legislation gives college athletes their right to publicity.

68. *Id.* § 67456(a)(3) (prohibiting the NCAA, other athletic conferences, and universities from “prevent[ing] a student of a post-secondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness”).

69. *See id.*

70. *See* Michael McCann, *California’s New Law Worries the NCAA, But a Federal Law Is What They Should Fear*, SI (Oct. 4, 2019), <https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws> (explaining the unavoidable risks surrounding competing state and federal legislation with respect to student-athlete compensation and NIL rights).

71. Amateur Athletes Protection and Compensation Act, S. 414, 117th Cong. (2021); *see also* H.R. 3379, 117th Cong. § 6 (2021) (establishing a government corporation to allow student-athlete agency agreements, NIL agreements, and compensation allowances).

72. *See generally* S. 414, 117th Cong. (2021) (balancing prohibitions against allowances throughout the bill to elucidate the areas of student-athlete compensation and NIL concerns that Congress has decided to address with legislation).

73. *Id.*

74. *See* Zagger, *4 Key Issues As States Tackle College Athlete Pay*, *supra* note 38 (noting that “the NCAA now faces increased pressure to reform, spurring Congress to consider a federal law to ensure consistency across the country”).

75. *See* *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (explaining that professional singers with distinct voices have a legitimate right to protect when and where their likenesses are used).

D. Attempting to Protect College Athletes

The right to publicity awards protection for celebrities and should be extended to a modern celebrity, the student-athlete. The Ninth Circuit grappled with the right to publicity in *White v. Samsung Electronics America, Inc.*⁷⁶ There, “Wheel of Fortune” host, Vanna White, sued Samsung Electronics for using a robotic look-a-like in commercials.⁷⁷ Ultimately, the court recognized that celebrities have the right to protect themselves from exploitation for profit,⁷⁸ explaining that the “law protects the celebrity’s sole right to exploit this value,” a value also attributable to the modern college athlete.⁷⁹

In *O’Bannon*, former Men’s basketball and football players brought a class action against the NCAA for violating their NIL rights.⁸⁰ The Ninth Circuit acknowledged that the NCAA must operate under the Sherman Act’s rules, but the court emphasized the ruling’s limited scope rooted in the NCAA’s amateurism rules.⁸¹ More specifically, the court found that the NCAA’s rules surrounding NIL violated the Sherman Act and federal antitrust laws because they restricted the athletes’ freedom to receive any compensation for their efforts.⁸² Accordingly, the court held that the NCAA had no right to profit off an individual athlete’s image while withholding the athlete’s compensation but did not require the NCAA to affirmatively allow the student to profit off their image.⁸³

The court in *O’Bannon* applied the Rule of Reason and found it necessary for the NCAA to allow its schools to offer up to the cost of attendance to their student-athletes with a deferred payment of \$5,000 upon graduation because it was a pro-competitive policy and attracted athletes.⁸⁴ The Rule of Reason is “a standard used in restraint of trade actions that requires the

76. See 971 F.2d 1395 (9th Cir. 1992) (diving into the legal issues surrounding right to publicity and celebrities).

77. *Id.* at 1396.

78. See *id.* at 1398–99 (noting that the law protects celebrities’ right to exploit or market their own identity if they so choose).

79. See *id.* (explaining that “[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit”).

80. *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

81. *Id.* at 1062–63; see also Bobby Chen, *Antitrust Law and the Future of the NCAA’s Amateurism Rules*, REGUL. REV. (Feb. 21, 2019), <https://www.theregreview.org/2019/02/21/chen-antitrust-future-ncaa-amateurism-rules/> (“If the [NCAA’s] amateurism rules were no longer necessary or procompetitive, the court wrote, they would then be illegal under federal antitrust law.”).

82. *O’Bannon*, 802 F.3d at 1067–68.

83. *Id.*

84. *Id.* at 1078.

plaintiff to show and the factfinder to find that under all the circumstances the practice in question unreasonably restricts competition in the relevant market.”⁸⁵ By holding that the NCAA’s compensation rules were subject to antitrust scrutiny, the court placed pressure on the NCAA to reform its bylaws concerning athlete compensation.⁸⁶ In the wake of *O’Bannon*, it was made clear that the NCAA regulated “labor for in-kind compensation . . . [and student-athlete labor] is a quintessentially commercial transaction.”⁸⁷

E. The Exploitation of Black Athletes

An HBCU is defined by the Higher Education Act of 1965 as “any historically [B]lack college or university that was established prior to 1964, whose principal mission was, and is, the education of [B]lack Americans.”⁸⁸ These institutions provide Black students non-discriminatory access to higher education and play a significant role in professional development.⁸⁹ HBCU graduates account for 25% of African-American college graduates, and 50% of all future African-American lawyers graduate from an HBCU.⁹⁰

As opposed to Power Five institutions, HBCUs have proven to be a more difficult path to play professional sports.⁹¹ For example, there is only one active player from an HBCU in the NBA, Robert Covington from Tennessee State University.⁹² When it comes to college compensation, HBCUs are still under the NCAA’s bylaws and cannot directly pay their Black athletes.⁹³ Despite fewer opportunities to play professional sports and resource inequality, HBCUs provide Black students with a fair chance for a college

85. *Rule of Reason*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/rule%20of%20reason> (last visited June 13, 2021).

86. *O’Bannon*, 802 F.3d at 1079.

87. *Id.* at 1066.

88. *White House Initiative on Historically Black Colleges and Universities*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/whhbcu/one-hundred-and-five-historically-black-colleges-and-universities/> (last visited Jun. 13, 2021).

89. *What is an HBCU?*, HBCU LIFESTYLE, <https://hbculifestyle.com/what-is-an-hbcu/> (last visited June 13, 2021).

90. *Id.*

91. Jerry Bembry, *Texas Southern Stars Want to Reverse Trend of HBCU Players Not Making It to the NBA*, THE UNDEFEATED (Mar. 16, 2018), <https://theundefeated.com/features/texas-southern-stars-demontrae-jefferson-trayvon-reed-want-to-reverse-trend-of-hbcu-players-not-making-it-to-the-nba/>.

92. Gilbert McGregor, *HBCU NBA Players: Historically Black Colleges and Universities Have Produced Some of the Game’s Most Iconic Figures*, NBA (Mar. 7, 2021), <https://ca.nba.com/news/hbcu-historically-black-colleges-and-universities-nba-legends-list-active-players-hall-of-famers/1owv1b4kla7mt1k12hrv11d7dz>.

93. David Steele, *Can HBCU Athletes Get Paid for Use of Their Images and Names?*, THE UNDEFEATED (Dec. 18, 2019), <https://theundefeated.com/features/can-hbcu-athletes-get-paid-for-use-of-their-images-and-names/>.

education.⁹⁴ With the help of the AAPCA and FPPA, they will become a collegiate destination for Black athletes to promote the NCAA's mission for competitive equality.⁹⁵

The opportunity for a professional sports career heavily incentivizes attending a predominately white Power Five institution⁹⁶ as these programs produce the majority of professional athletes.⁹⁷ From a competitive standpoint, choosing a Power Five program carries the potential to earn millions at the professional level.⁹⁸

To meet the media and endorsement demands for elite performance, Black athletes in revenue-producing sports must spend over fifty hours a week practicing and competing.⁹⁹ However, they are only compensated up to \$5,000 to meet the cost of attendance for an institution.¹⁰⁰ Black athletes are promised an elite education at top universities, but in reality, their athletic performance is prioritized to benefit coaches, athletic departments, and universities.¹⁰¹ The athletes are pressured to preference practice over classes, and the classes they do attend are often effortless or fraudulent, evidenced by *McAdoo v. UNC*,¹⁰² where former student-athletes sued the University of North Carolina for failing to provide them an adequate education.¹⁰³ With the promise of receiving a purposeful education from UNC and the support

94. *See id.*

95. *Id.*

96. *Where the NBA Players Come From*, RPI RATINGS, <http://rpi-ratings.com/NBA.php> (last visited June 13, 2021) (stating that of the 496 players active in the NBA during the 2019–20 season, 307 come from Power Five schools); Spencer Parlier, *NFL Players by College on 2020 Rosters*, NCAA (Sept. 8, 2020), <https://www.ncaa.com/news/football/article/2020-09-07/nfl-players-college-2020-rosters> (stating that of the 1696 players active in the NFL during its 2020 season, 1512 come from Power Five Conferences).

97. *Where the NBA Players Come From*, *supra* note 96; Parlier, *supra* note 96.

98. *See* Parlier, *supra* note 96 (noting in particular, the SEC and Big Ten conferences, have the most NFL players of all college conferences).

99. *See* Victoria L. Jackson, *A Jim Crow Divide in College Sports*, CHI. TRIB. (Jan. 16, 2018), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-college-sports-ncaa-black-athletes-exploited-0117-20180116-story.html> (noting further that these athletes often enroll in easier classes than athletes in sports who receive less media attention, such as track and field, and may not graduate because of their intense practice schedules, media schedules, and studying playbooks).

100. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1078 (9th Cir. 2015) (noting television sports consultant Neal Pilson's skepticism that "paying students \$5,000 per year will be as effective in preserving amateurism as the NCAA's current policy").

101. *See* Jackson, *supra* note 99.

102. *Id.*; e.g., *McAdoo v. Univ. of N.C. at Chapel Hill*, 248 F. Supp. 3d 705 (M.D.N.C. 2017).

103. *McAdoo*, 248 F. Supp. 3d at 709 (alleging that student athletes were instructed to take essentially meaningless classes).

of the athletic department, star student-athletes were “funneled into a shadow curriculum of bogus courses.”¹⁰⁴

The current student-athlete argument is not advocating for direct pay but allowing athletes to profit from their rights through individual efforts.¹⁰⁵ Most athletes do not make it to the professional level and only have a small four-year window to capitalize on athletic success.¹⁰⁶ Black athletes bring in a substantial amount of revenue that supports entire athletic programs.¹⁰⁷ This newfound freedom will allow Black athletes to choose athletic programs without the fear of losing their marketability because they can capitalize nationally on their NIL rights from any university.¹⁰⁸ With the FPPA, AAPCA, and other new college compensation acts, the door is now open for Black athletes to play for HBCUs and still be in the national spotlight.¹⁰⁹

III. HOW THE PASSING OF COLLEGE ATHLETE COMPENSATION LEGISLATION WILL HAVE AN UNFORESEEN EFFECT ON THE COLLEGE LANDSCAPE

The AAPCA’s impact on NIL and the right to publicity will help rectify the financial injustice created by the NCAA’s exploitation of Black athletes by providing the opportunity for equitable compensation.¹¹⁰ Without the NCAA controlling players under its amateurism rules, the athletes will have more freedom to choose where they wish to participate in collegiate sports.¹¹¹

104. *Id.*

105. See Daniel Locke, *Should NCAA Athletes Be Allowed to Profit from Their Own Fame?*, BLEACHER REP. (Oct. 31, 2011), <https://bleacherreport.com/articles/918372-free-market-ncaa-athletes-should-be-allowed-to-profit-off-their-own-fame>.

106. See *Estimated Probability of Competing in Professional Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last updated Apr. 8, 2020) (explaining that only roughly twenty-one percent of draft eligible NCAA athletes are drafted to professional leagues).

107. See Jackson, *supra* note 99.

108. Dan Murphy, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate (explaining how NCAA rule changes and a Supreme Court decision have created a way for athletes to capitalize on their name, image and likeness).

109. See Marshall, *supra* note 24.

110. See Earl Smith, *On The Issues Associated With Exploitation of Student Athletes*, SMITH & HATTERY (Sep. 7, 2020), <https://smithandhattery.com/2020/09/07/on-the-issues-associated-with-exploitation-of-student-athletes/> (noting that during a global pandemic in which Black athletes are being compelled to play sports unpaid while white coaches are receiving bonuses).

111. See Richard Obert, *Recruiting Landscape Will Change with California’s ‘Fair Pay to Play’ Law*, AZ CENT. (Oct. 13, 2019), <https://www.azcentral.com/story/sports/>

This presents the opportunity for Black athletes to play for HBCUs, as without federal legislation and due to their limited location, many HBCU's would be left without the opportunity to attract athletes.¹¹²

A. How the NCAA Has Failed Its Athletes

The NCAA acts as its own court of law and operates under its own system of regulations.¹¹³ The court in *Board of Regents v. NCAA*¹¹⁴ notes that “the NCAA is essentially an integration of the rulemaking and rule-enforcing activities of its member institutions.”¹¹⁵ Courts have heavily deferred to decisions made by NCAA administrators on the topic of sports, as judges do not wish to impede on the nature of college athletics.¹¹⁶ Under these protections, the NCAA has failed to establish a monetary system of compensation for its primary performers, despite requests from its current and former student-athletes.¹¹⁷ In essence, the NCAA has ignored its athletes and shown a preference for making money over the best interest of its players.¹¹⁸

B. Case Law's Shortcomings and How Future Collegiate Compensation Litigation Can Provide Relief

Courts' historical reluctance to afford student-athletes compensation may finally be subject to legislative scrutiny. In *Marshall*, the plaintiffs sought compensation for the lucrative broadcasting deals with ESPN.¹¹⁹ Here, the

high-school/2019/10/13/recruiting-landscape-change-fair-pay-play-act/3946513002/ (alleging that this new legislation will greatly impact college athletics in as early as the program's recruiting stage).

112. See *List of HBCUs by State*, HBCUFIRST, <https://hbcufirst.com/resources/hbcu-list-map> (last visited Feb. 14, 2022) (highlighting that HBCUs are located in only 19 states).

113. *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1153 (10th Cir. 1983).

114. 707 F.2d 1147 (10th Cir. 1983).

115. *Id.*

116. *Id.* (“[The NCAA] is the guardian of amateurism in the athletic programs of its members in essentially all intercollegiate sports.”).

117. See *id.*

118. See Kevin B. Blackistone, *The NCAA was Created to Protect College Athletes. Now It's Trotting Them Out During a Pandemic*, WASH. POST (Dec. 13, 2020, 11:48 AM), <https://www.washingtonpost.com/sports/2020/12/13/ncaa-college-basketball-pandemic/> (highlighting the NCAA's insistence on continuing a college sports season during the Coronavirus pandemic).

119. See *Marshall v. ESPN, Inc.*, 111 F. Supp. 3d 815, 821 (M.D. Tenn. 2015) (including other networks such as “CBS Broadcasting Inc., NBCUniversal Media, LLC, ABC, Inc., Fox Broadcasting Company, Big Ten Network, LLC, SEC Network, and Longhorn Network.”).

student-athletes challenged the NCAA's revenue streams, such as Power Five sports programs including FBS football and Division I basketball.¹²⁰ The court deferred to the NCAA's rules barring amateurs from receiving compensation¹²¹ and failed to extend such rights to the players through the right of publicity or the Lanham Act.¹²² However, if *Marshall* were decided under the FPPA or the AAPCA, the court might resolve the case differently.

With little to no legislative backing, the plaintiffs could not rely on the Tennessee Personal Rights Protection Act.¹²³ Here, the plaintiffs saw issues with the NCAA and broadcasting companies entering into multi-billion dollar deals and the athletes receiving none of the profits for their efforts.¹²⁴ While acknowledging this issue, the court failed to establish a pay-for-play standard and found for the NCAA and broadcasting networks once again.¹²⁵ The court further noted that the right to publicity does not establish a fundamental right to profit off that publicity.¹²⁶

Beginning in 2023, California and several other states will make this a non-issue.¹²⁷ Student-athletes' NIL rights will be protected concerning compensation, and the NCAA is barred from "prevent[ing] a student of [a] post-secondary educational institution participating in intercollegiate athletics from earning compensation"¹²⁸ Student-athletes have tried multiple avenues to receive compensation for their time and dedication to

120. See *id.* at 821 (alleging in the complaint that the athletes were excluded from their own licensing marketplace with no compensation).

121. See *id.* at 821, 838 (concluding that it is not the court's role to determine whether student-athletes should receive compensation while noting that an "amateur" is an artificial label in college sports); see also *James Wiseman, the NCAA, and State Action*, HARV. CIV. RTS. – CIV. LIBERTIES L. REV. (Dec. 3, 2019), <https://harvardcrcl.org/james-wiseman-the-ncaa-and-state-action/> (noting that "[s]chools escape accountability by deferring to the NCAA, while the NCAA claims its conduct is private and exempt from the requirements of constitutional rights").

122. See *Marshall*, 111 F. Supp. 3d at 824 (citing *Wells v. Chattanooga Bakery, Inc.*, 448 S.W.3d 381, 390 (Tenn. Ct. App. 2014) and *Apple Corps Ltd. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 348 (M.D. Tenn. 1993)) (The TPRPA "was intended to create an inheritable property right for those people who use their names or likenesses in a commercial manner, such as an entertainer or sports figure — someone who uses his or her name for endorsement purposes[.]"); see also *id.* at 836–37 (examining the Lanham Act claim).

123. *Id.* at 824–26 (reasoning that although the plaintiffs had a common law claim to their right to publicity in Tennessee, they had no federal claim to publicity rights as federal statutes prevail over common law claims).

124. *Id.* at 823–24.

125. *Id.* at 838.

126. See *id.* at 830 (highlighting that there is no "fundamental right" to profit).

127. *E.g.*, CAL. EDUC. CODE § 67456 (West 2021).

128. See *id.* § 67456(a)(2).

college sports but have not succeeded in the courtroom.¹²⁹ Currently, these statutes are the only means of protection for these college athletes.¹³⁰

The plaintiffs in *Northwestern University and CAPA* afforded the NLRB an opportunity to assert jurisdiction and deem the players' participation as inequitable working conditions¹³¹ however, the board found that the athletes could not gain labor rights as employees because of their amateur status.¹³² The NCAA has scarcely protected amateurism as it is essential to the make-up of collegiate sports.¹³³ This status allows for collegiate athletic competition and creates a clear line of distinction between college and professional sports.¹³⁴ Thus, while the *Northwestern University and CAPA* athletes sought to challenge this approach and force the NCAA to acknowledge its players as employees,¹³⁵ this argument mainly failed due to the lack of legislation, such as the upcoming student-athlete compensation laws.¹³⁶

The NLRB, in 2023, must analyze the student-athlete compensation laws and how they now recognize a student-athletes' amateur status in light of these changes.¹³⁷ The College Athlete Bill of Rights would give student-athletes the explicit right to "market the use of their NIL or athletic reputations."¹³⁸ With this legislation in play, student-athletes may be able to

129. See, e.g., *Nw. Univ. & Coll. Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350 (2015) (finding that it would not promote stability in labor relations to assert jurisdiction in this case given that Northwestern is a private institution).

130. See Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2020, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/?sh=6e266d1b57d0> (explaining that college athletes can now receive compensation from endorsing products).

131. See *Nw. Univ. & CAPA*, 362 N.L.R.B. at 1352 (citing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 89 (1995)) (pointing to a goal of the case being to obtain rights "belong[ing] only to those workers who qualify as 'employees'").

132. *Id.* at 1352.

133. See Robert Litan, *The NCAA's "Amateurism" Rules*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules> (citing the "preservation of amateurism" as the main factor the NCAA exists).

134. See *id.* (pointing to two reasons for the NCAA's stout reasons for protection: lowered fan interest and scholarship caps).

135. See *Nw. Univ. & CAPA*, 362 N.L.R.B. at 1351–52 (noting that "if the players are not statutory employees, then the Board lacks authority").

136. See *id.* (explaining that the NLRB has never before dealt with athletes, and in this context, it were not inclined to do so).

137. See *id.* (declining to decide on the issue because of the lack of congressional or legislative direction).

138. College Athletes Bill of Rights, S. 5062, 116th Cong. § 3(a)(1) (2020).

argue that they deserve university employment status.¹³⁹ Thus, while the NLRB previously declined to extend authority, the student-athletes in 2023 will have legislative protections to warrant a proper analysis.¹⁴⁰ The goal in seeking employment status was to provide accurate compensation, and athletes will now get a fair chance to receive payment under the new legislation.¹⁴¹

C. The Impact of Modern College Athlete Compensation Legislation

The AAPCA will render previous litigation surrounding players' and entertainers' rights moot.¹⁴² If the AAPCA is enacted, cases similar to *O'Bannon* would likely have different outcomes.¹⁴³ There, the court used amateurism as a shield to antitrust scrutiny under the Sherman Act.¹⁴⁴ The issue of antitrust scrutiny is now under the Supreme Court's review, but in applying the new student-athlete compensation laws, the NCAA is left with little to no defense.¹⁴⁵ In several states, the NCAA is now barred from restricting scholarships or revoking eligibility from players seeking compensation.¹⁴⁶

The California Fair Pay to Play Act, for example, does not explicitly require a school to pay its student-athletes; however, it allows athletes to promote and endorse their personal brands like an ordinary non-athlete college student.¹⁴⁷ Further, this Act enables student-athletes to protect themselves by hiring management without fear of the NCAA revoking their

139. *See id.*

140. *See Nw. Univ. & CAPA*, 362 N.L.R.B. at 1352; S. 414, 117th Cong. (2021).

141. *See Nw. Univ. & CAPA*, 362 N.L.R.B. at 1352; S. 414, 117th Cong. (2021).

142. Amateur Athletes Protection and Compensation Act, S. 414, 117th Cong. (2021) (allowing student athletes to receive compensation).

143. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (suing over the use of a student athlete's NIL in a video game without compensation or consent).

144. *Id.* at 1052–53.

145. *Supreme Court Agrees to Hear NCAA Athlete Compensation Case*, ESPN, https://www.espn.com/college-sports/story/_/id/30530625/supreme-court-agrees-hear-ncaa-athlete-compensation-case (last visited June 13, 2021).

146. *See Zagger, EA To Bring Back College Football Game Amid NIL Debate*, *supra* note 55.

147. Lee Green, *Impact of California's 'Fair Pay to Play Act' On High School Athletes*, NFHS (Nov. 13, 2019), <https://www.nfhs.org/articles/impact-of-california-s-fair-pay-to-play-act-on-high-school-athletes/> (arguing the promotion of economic fairness since student-athletes can now fully be a part of the college experience and enjoy the freedom to market themselves on any platform).

eligibility status.¹⁴⁸ This legislation has spurred interstate involvement to reevaluate the compensation rights system for student-athletes.¹⁴⁹

The specific endorsement deal provisions also allow for flexibility regarding an athlete's right to receive compensation.¹⁵⁰ This language restricts schools from denying a student-athlete the right to a brand deal without a valid reason.¹⁵¹ The Act explains the need for explicit contractual language showing a conflict between the school's brand and the athlete's potential sponsor.¹⁵²

Athletic brands such as Nike, Adidas, and Under Armour have long battled for control of the college sports landscape regarding sponsorship.¹⁵³ In FBS college football, Nike is the sponsor for 79 of the 128 FBS teams.¹⁵⁴ Nike's association conveys not only its brand dominance but also a correlation of on-field success.¹⁵⁵ Student-athlete compensation laws are drafted mainly to prevent contractual disputes between large brands like Nike, Adidas, and Under Armour, as that would cause complicated litigation and jade the primary purpose of providing student-athletes an avenue to receive compensation.¹⁵⁶ In reality, these laws will enable lesser-known amateur

148. See *id.* (affirming that “the statute allows college student-athletes to hire professional representation for NIL matters, but requires that those individuals be licensed attorneys or athlete-agents”).

149. See Gregg E. Clifton, *UPDATE: Michigan Joins Growing Number of States Granting Name, Image, Likeness Rights to Collegiate Student-Athletes*, JACKSONLEWIS (Jan. 1, 2021), <https://www.collegeandprosportslaw.com/> (noting that with the passing of House Bills 5217 and 5218, Michigan has become the sixth state to “pass a law protecting the rights of student-athletes to be paid for the commercial use of their name, image, and likeness rights”).

150. See CAL. EDUC. CODE § 67456(e)(1) (West 2021) (“A student athlete shall not enter into a contract providing compensation to the athlete for use of the athlete’s name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete’s team contract.”).

151. See *id.* § 67456(f) (“A team contract of a postsecondary educational institution’s athletic program shall not prevent a student athlete from using the athlete’s name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities.”).

152. *Id.* § 67456(e)(3).

153. See *Which Brand Has the Most Influence in College Sports Nike, Adidas, Or Under Armour?*, BYOG, <https://www.byoglogo.com/brand-influence-college-sports-nike-adidas-armour/> (last visited June 13, 2021) (explaining that since the 1980s, athletic brands have found major influence and success with brand association and sports).

154. See Sara Griffith, *Statistically Speaking Nike Dominates College Football*, SAMFORD UNIV. (July 18, 2017), <https://www.samford.edu/sports-analytics/fans/2015/nike-and-its-domination-of-college-football> (explaining that Nike is the lead sponsor across the college sports landscape).

155. See *id.* (“Nike sponsors 88.2 percent of the last 19 FBS National Champions and 64.7 percent of the last FCS National Champions.”).

156. See Steve Radick, *Brand Marketing and the Fair Pay to Play Act*, PUB.

athletes to accept deals from local vendors.¹⁵⁷ Thus, allowing athletes at every collegiate level to market themselves as influencers.¹⁵⁸

D. Setting a New Legal Standard for Compensation

The AAPCA and FPPA set forth a new standard for college athletes with respect to compensation. Now, athletes faced with similar complications as seen in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* will achieve a just outcome.¹⁵⁹ There, the court found that college athletes had publicity and likeness rights¹⁶⁰ and that EA improperly applied California's transformative use defense in favor of the plaintiff.¹⁶¹ However, this decision was a hollow win for the athletes. In reasoning that the right to publicity is not a right to compensation, the court failed to extend any compensation towards athletes, and EA merely discontinued the gaming series.¹⁶² However, under the new AAPCA and California's FPPA, the game may make its return with its featured college athletes having the ability to receive a percentage of the profits.¹⁶³ Accordingly, plaintiffs today would have the proper tools to achieve a more favorable and applicable outcome.

These tools will soon be put to the test as EA announced the return of the NCAA Football franchise in February 2021.¹⁶⁴ However, instead of agreeing

RELATIONS STRATEGY, <https://www.steveradick.com/2019/11/22/brand-marketing-and-the-fair-pay-to-play-act/> (last visited June 13, 2021) (touching on the overarching impact the California Fair Pay to Play Act will have on the sports branding industry).

157. *See id.* (considering the idea that a third-string recruit who is not being coveted by the likes of Nike, now has options to accept deals and receive compensation from local car dealerships, restaurants, etc.).

158. *See id.* (noting that the student-athlete compensation laws will not only favor star Power Five athletes, such as Zion Williamson, but provide equal opportunity for any athlete to profit from their own merit).

159. *See id.*; *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1289 (9th Cir. 2013) (Thomas, C.J., dissenting) (articulating the standard at the time of this case that "even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status;" however, under state laws, like the California law this would now be possible).

160. *See id.* at 1271; *see also id.* at 1289 (Thomas, C.J., dissenting) (further explaining that "NCAA Bylaw 12.5 specifically prohibits commercial licensing of an NCAA athlete's name or picture").

161. *Id.* at 1273–79.

162. *See id.* at 1271, 1281, 1284; *see also id.* at 1284 (Thomas, C.J., dissenting) ("[T]he right to compensation for the misappropriation for commercial use of one's image or celebrity is far from absolute.").

163. Bryan Wiedey, *The Door is Finally Open for "NCAA Football" Franchise to Return*, SPORTING NEWS (Oct. 30, 2019), <https://www.sportingnews.com/us/ncaa-football/news/door-finally-open-for-ncaa-football-franchise-to-return/1akmgbijqk2d1opir5wzu2o0>.

164. Zachary Zagger, *EA To Bring Back College Football Game Amid NIL Debate*,

to support and pay college athletes, EA has attempted to circumvent burgeoning NIL rights, opting to cut the athletes out of the equation entirely by using non-specific video game avatars to represent select NCAA football teams.¹⁶⁵ With the proposed legislation to allow players the right to profit from their NIL, EA and other game developers must make a conscious effort to distinguish their avatars from college athletes.¹⁶⁶ This return to action will be severely impacted by legislation such as the AAPCA and FPPA as soon college athletes will have legislative support in their financial claims to likeness.¹⁶⁷

Power Five sports programs, such as Notre Dame football, have already supported compensating their players for their participation in the NCAA football video game reboot.¹⁶⁸ The school explained that it would not give EA permission to use their school in the game absent clear and concrete rules around player compensation were finalized. This withholding of participation empowers other Power Five football programs to show their support for student-athlete compensation.¹⁶⁹ In 2023, college athletes will be able to sue the NCAA if it attempts to restrict an athlete's marketing and endorsement efforts.¹⁷⁰ Under the AAPCA and the FPPA, schools and their respective student-athletes will soon have legal weapons to utilize against the NCAA and third parties, such as EA, seeking to exploit college athletics for financial benefit to the detriment of its student-athletes.¹⁷¹

E. New Legislation and Outcomes for Black College Athletes

On its face, the AAPCA will directly impact the business of college sports but not through the expected avenue.¹⁷² The FPPA in California is only the first step and multiple states are soon to follow.¹⁷³ In due time, Congress

supra note 55.

165. *Id.*

166. *Id.*

167. *Id.*

168. Zachary Zagger, *Notre Dame Signals Supports For Athlete Name, Image Rights*, LAW360 (Feb. 22, 2021, 9:34 PM), <https://www.law360.com/articles/1357617/notre-dame-signals-support-for-athlete-name-image-rights>.

169. *See id.* (illustrating Notre Dame's decision to withhold its image from EA as a way of support for NCAA rule changes involving athlete compensation).

170. Michael McCann, *What Will Happen If the California 'Fair Pay to Play Act' Gets Signed Into Law?*, SI (Sept. 10, 2019), <https://www.si.com/college/2019/09/10/california-fair-pay-play-act-law-ncaa-pac-12>.

171. *Id.*

172. *See* McCann, *supra* note 170 (the anticipated area of impact would be the shift of endorsement revenues from the schools to the players; however, I am proposing this further shifts the recruiting landscape for PWIs to HBCUs).

173. *See id.* (detailing how some states have already proposed legislation like

will enact federal law, given the unavoidable Commerce Clause implications.¹⁷⁴ Black athletes can now justify playing for HBCUs as they can profit from third-party sponsorship.¹⁷⁵ For example, HBCU football star Steve ‘Air’ McNair, who was on the cover of *Sports Illustrated* and third in the Heisman voting, would have been able to profit from his fame in college.¹⁷⁶

This Act will allow for Black star athletes to play for HBCUs without the threat of losing financial and career possibilities.¹⁷⁷ The stark reality is that HBCUs do not provide the direct route to professional sports that high-level athletes seek, and many end up transferring to predominantly white Power Five schools.¹⁷⁸ With multiple states enacting NIL legislation to allow for publicity right compensation, the NCAA has changed its rules to favor college athletes.¹⁷⁹ In the coming years, we will see student-athletes in complete control of their right to publicity and NIL.¹⁸⁰ NIL will affect the core business of collegiate sports and alter its landscape.¹⁸¹

The NCAA outlines in its Bylaws that its purpose is to “promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.”¹⁸² The capitalizing structure of the Power Five conference’s dominance has crippled

California’s and how some states plan to draft similar legislation).

174. *See id.* (noting that the Commerce Clause gives Congress the power to regulate interstate commerce, and college athletics being an interstate entity will undoubtedly be subject to the passing of NIL state legislation).

175. *See Steele, supra* note 93.

176. *Id.* (quoting Pep Hamilton’s explanation as to how players like McNair would have benefitted from these NIL rules).

177. *See* Donovan Dooley, *Transferring to Power 5 Schools is a Path to the Pros for HBCU Basketball Players*, THE UNDEFEATED (Jun. 19, 2018), <https://theundefeated.com/features/transferring-to-power-5-schools-is-a-path-to-the-pros-for-hbcu-basketball-players/>.

178. *See id.*

179. *See* McCann, *supra* note 170; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> (pointing to the NCAA’s interim policy update on NIL and further noting their intent to adhere to state laws concerning the issue).

180. *See* Greta Anderson, *Eyeing Future Profits*, INSIDE HIGHER ED (Jan. 14, 2020), <https://www.insidehighered.com/news/2020/01/14/market-rights-college-athletes-name-image-likeness-emerging> (discussing how companies are already looking to capitalize on the prospect of college athletes receiving NIL compensation).

181. *See id.*

182. NCAA DIVISION I MANUAL, *supra* note 30, § 2.10 (“The Principle of Competitive Equity”).

the competitive landscape and made it impossible for smaller programs, chiefly HBCUs, to compete.¹⁸³

The student-athlete compensation laws will provide a means for HBCUs to improve their star athletic representation.¹⁸⁴ The need for representation not only combats Black athletic exploitation by PWIs but also analyzes the issue of a lack of resources for HBCUs.¹⁸⁵ HBCUs are not afforded the same luxuries as Power Five athletic programs with respect to resources and recruiting.¹⁸⁶ Adequate resources and proper recruiting are fundamental to any athletic program's success, and the current system does not provide a fair or competitive ground for HBCUs to compete against Power Five programs.¹⁸⁷ The AAPCA and FPPA can provide support for the NCAA's mission for competitive equality by increasing the incentive for Black athletes to compete at HBCUs.¹⁸⁸

Current and former Black athletes are coming together to close the funding, education, and athletics gap in the Black community.¹⁸⁹ Even white players from other sports are ready to help change the narrative.¹⁹⁰ With this

183. See Chris Johnson, *HBCUs vs PWIs: Why Division I Historically Black Athletic Programs Struggle Against Predominantly White Institutions*, JOURNEY MAG. (Jan. 22, 2019), <https://jmagonline.com/articles/hbcus-vs-pwis-why-division-i-historically-black-athletic-programs-struggle-against-predominantly-white-institutions/>.

184. See Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players> (acknowledging the lack of compensation for student-athletes as "primarily an issue of civil rights and exploitation of black student-athletes").

185. See Cassandra Negley, *Deion Sanders Calls Out Inequities at HBCU Jackson State: 'It Causes a Kid Not to Dream'*, YAHOO SPORTS (Jan. 14, 2021), <https://sports.yahoo.com/deion-sanders-sounds-off-on-football-inequities-at-hbcu-jackson-state-it-causes-a-kid-not-to-dream-173928273.html>.

186. *Id.*

187. Johnson, *supra* note 183.

188. *NCAA Allows Right of Publicity Endorsement*, INTELLECTUAL PROP. CTR. (Apr. 29, 2020), <https://theipcenter.com/2020/04/student-athletes-earning-money-from-rights-of-publicity/> (noting that such acts will allow student-athletes from all schools to earn "income off endorsements and licensee fees for the use of the student's likeness in video games and online").

189. See Negley, *supra* note 185 (emphasizing the impact that the hiring of professional football legend Deion Sanders as a coach for Jackson State will have on the HBCU).

190. E.g., Charlotte Wilder, *Patriots' Chris Long Says He Supports His Peers' 'Right to Protest'*, USA TODAY (Sep. 14, 2016, 11:02 AM), <https://www.usatoday.com/story/sports/ftw/2016/09/14/patriots-chris-long-says-he-supports-his-peers-right-to-protest-in-an-indepth-interview/90351490/> (quoting Chris Long: "I play in a league that's 70 percent black and my peers . . . are very socially aware . . . if they identify something that they think is worth putting their reputations on the line [for] . . . I'm going to listen to those guys").

new legislation comes the freedom and financial flexibility for Black athletes to redirect money back into their community.¹⁹¹ Now, the NCAA cannot defeat California's FPPA, and other states are creating their own regulations in an effort to finally support the college athletes they watch for entertainment every weekend.

IV. ARE THERE ALTERNATIVE AVENUES FOR BLACK ATHLETES TO TAKE WHEN COMBATTING COMMERCIAL EXPLOITATION?

With the AAPCA proposal, the collegiate landscape is bound to see significant changes in the coming years.¹⁹² Soon, student-athletes may receive compensation and protect their right to publicity¹⁹³ as the proposed bill will enable these athletes to benefit from their NIL.¹⁹⁴ Variations of the bill have been offered in five states, including California, New Jersey, Colorado, Florida, and Nebraska.¹⁹⁵ Now, the issue turns on whether schools and athletes will act under NCAA or state regulations.

A. Looking Forward

In revisiting the significance of *O'Bannon*, *Marshall*, and the *NCAA Likeness Litigation*, courts will have a new set of compensation rules to apply to college athlete's NIL.¹⁹⁶ In the past, athletes have been denied the opportunity to gain compensation for their athletic efforts and achievements.¹⁹⁷ The "cost of attendance" and a "scholarship" have been accepted as an appropriate justification for billions of dollars in the pockets of the NCAA and its schools for far too long.¹⁹⁸ With the budding state laws

191. See Negley, *supra* note 185 (quoting Coach Deion Sanders: "It's not a level playing field. It's unacceptable").

192. Amateur Athletes Protection and Compensation Act, S. 414, 117th Cong. (2021).

193. See *id.* (defining covered compensation as "any remuneration, in cash or in kind and regardless of the date on which the remuneration is provided, to an amateur intercollegiate athlete").

194. See Modernizing the Collegiate Student Athlete Experience Act, H.R. 3379, 117th Cong. (2021) (noting the term publicity right "permits an individual to control and profit from the commercial use of the name, image, or likeness of the individual").

195. Zagger, *4 Key Issues As States Tackle College Athlete Pay*, *supra* note 38.

196. See *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); see also *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013).

197. See Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (explaining that "a basic purpose of the NCAA was to make the student-athlete an integral part of the student body").

198. See *O'Bannon*, 802 F.3d at 1079 (noting that, under the Rule of Reason, NCAA schools are not exempt from the Sherman Act and must provide up to the cost of

concerning NIL, the NCAA and Supreme Court must address sharing the profits with those who rightfully earn them.¹⁹⁹ Thus, college athletes will no longer be punished for their social media presence or entrepreneurial efforts associated with their athletic ability.²⁰⁰

B. The Push for Publicity Rights Legislation

The Collegiate Athlete Compensation Rights Act failed to move forward in the 116th Congress; however, its language surrounding publicity rights should be adopted by the current college athlete compensation legislation as it provides a relevant perspective on college athletes and social media.²⁰¹

Athletes have long struggled to obtain their rights of publicity.²⁰² The right to publicity is “an individual’s right to control and profit from the commercial use of his/her name, likeness and persona, . . . [p]rotecting the individual from the loss of commercial value resulting from the unauthorized appropriation of an individual’s identity for commercial purposes.”²⁰³ While copyrights are protected under federal law, the right of publicity is only available at the state level.²⁰⁴ This right is appropriately invoked when protecting a celebrity as there is an incentive to protect against the improper use of an individual’s identity that has commercial value.²⁰⁵ This right exists to protect individuals from unwanted brand associations or, as college athletes argue, to provide a legal right to marketing compensation.²⁰⁶ Athletes may now receive compensation through avenues such as third-party endorsements, social media influencing, personal business, and promotional ventures.²⁰⁷ Accordingly, athletes, particularly Black athletes, will now have more flexibility when choosing which university to attend for athletics.

In *White*, the Ninth Circuit expanded on the theory that celebrities have a

attendance for its student-athletes).

199. Zagger, *Notre Dame Signals Supports For Athlete Name, Image Rights*, *supra* note 168 (noting that current NCAA rules are “in direct conflict” with new state laws concerning NIL rights).

200. *See id.*

201. *See* S. 5003, 116th Cong. § 2 (2020).

202. McCann, *supra* note 170.

203. *Right of Publicity*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/right-of-publicity.html#> (last updated May 26, 2016).

204. *See id.* (explaining that “uniform federal law does not currently protect the individual’s right of publicity”).

205. *See id.*

206. *See NCAA Allows Right of Publicity Endorsement*, *supra* note 188.

207. *See id.* (noting however that “the NCAA has not indicated if they will be imposing a monetary cap on student-athletes endorsement deals”).

precious right to publicity.²⁰⁸ With the passing of student-athlete compensation laws, this standard will extend to the college athlete as they will now have similar claims to their likeness.²⁰⁹ College athlete compensation legislation should allow for student-athletes to capitalize on their right to publicity.²¹⁰ Student-athletes will no longer be bound by the holdings of cases like *White*, as the athletes will be protected under the legislation.²¹¹

The modern college athlete enjoys the same level of celebrity as some movie stars, which the rise of social media has amplified.²¹² In *O'Bannon*, the court failed to extend a right to publicity for video games to college athletes because the NCAA prevented such action under its current regulations and the court did not feel it had the authority to change such rules.²¹³ Under the new protections afforded through student-athlete compensation laws, such as the AAPCA and California's FPPA college athletes are now, in a legal sense, entertainers and should be afforded the same right to publicity protections that entertainers have been awarded.²¹⁴

208. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (citing *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983)) (highlighting that celebrities have a right to protect their identity from commercial exploitation).

209. See L. Kent Wolgamott, *Players in Sports and Music Have Much in Common*, J. STAR (Oct. 4, 2008), https://journalstar.com/entertainment/music/players-in-sports-and-music-have-much-in-common/article_c7986f88-99d7-5430-bc61-a2a6973a9504.html (linking athletes to musicians as they “share everything from performance anxiety to injuries, rigorous training to celebrity”).

210. See S. 5003, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/5003/text/is?overview=closed&format=xml> (including under the term covered compensation: “social media compensation and payments for licensing or use of publicity rights”).

211. See *id.* (defining a publicity right to “include any right that is licensed under a name, image, and likeness agreement”).

212. See Samuel In, *UCLA Quarterback Walks the Line Between YouTube Monetization and NCAA Regulations*, DAILY BRUIN (Nov. 3, 2020, 6:15 PM), <https://dailybruin.com/2020/11/03/ucla-quarterback-walks-the-line-between-youtube-monetization-and-ncaa-regulations> (noting that in UCF kicker Donald De La Haye was monetizing his videos before the NCAA intervened).

213. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1067–69 (9th Cir. 2015).

214. See CAL. EDUC. CODE § 67456 (West 2021); *SB-206 Collegiate Athletics: Student Athlete Compensation and Representation*, CAL. LEGIS. INFO. (Oct. 1, 2019, 2:00 PM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

C. A New Perspective

In 2023, under the enacted bills such as California's FPPA, athletes will have the legislative tools to ensure they are protected.²¹⁵ This act establishes a framework for student-athletes to apply and prevent unjust judicial outcomes.²¹⁶ Courts have proven to be unable to properly award rights to such athletes, but now there is a new standard.²¹⁷ Judges can consider whether compensation was given for pure recruiting purposes, still a clear violation of NCAA rules, or whether the payment was rooted in marketing.²¹⁸

Once barred from interracial competition, Black athletes are now the focal point of many prominent sports programs; a new avenue for opportunity is now available.²¹⁹ With no procedural bars to compensation, athletes such as Michigan's Fab Five, Duke's Zion Williamson, High School sensation Mikey Williams, and Howard's Makur Maker have the freedom to earn money outside of a college scholarship.²²⁰

HBCUs are more attractive than ever for Black athletes.²²¹ Athletes seeking elite training and national exposure have shied away from HBCUs, taking the traditional Power Five route.²²² Zion Williamson, for example, chose Duke for its basketball pedigree and NBA-producing promise.²²³

215. EDUC. § 67456.

216. *Id.*

217. *Id.*; O'Bannon, 802 F.3d at 1049.

218. EDUC. § 67456 (defining clearly the types of agreements student athletes can permissibly enter).

219. See Richard Johnson, *College Football Wasn't Made for its Black Players, and They're Pushing Back*, FORTHEWIN (June 19, 2020, 2:19 PM), <https://ftw.usatoday.com/2020/06/college-football-black-players> (declaring that “[c]ollege football was not made for its Black players, so they’re trying to remake it”).

220. See Shaheem Sutherland, *Five and Four-Star Black Athletes are Choosing HBCUs Over PWIs*, SSUTHERLAND MEDIA (July 31, 2020), <http://shaheem-sutherland.com/five-and-four-star-black-athletes-are-choosing-hbcus-over-pwis/> (quoting Mikey Williams: “If there’s anybody that is getting paid from me being at their school, I’d want it to be my own people”).

221. See Mary Louise Kelly & Jess Kung, *Should Black Athletes Go To Black Schools?*, NPR CODE SWITCH (Sept. 11, 2019, 4:18 PM), <https://www.npr.org/sections/codeswitch/2019/09/11/410268200/should-black-athletes-go-to-black-schools> (agreeing with Jemele Hill’s argument that “top-tier black college athletes should take their talents to historically black institutions”).

222. See Jemele Hill, *It’s Time for Black Athletes to Leave White Colleges*, THE ATLANTIC (Oct. 2019), <https://www.theatlantic.com/magazine/archive/2019/10/black-athletes-should-leave-white-colleges/596629/> (“About 30 Division I schools each bring in at least \$100 million in athletic revenue every year . . . [B]lack men make up 55 percent of the football players in those conferences, and 56 percent of basketball players.”).

223. See Scott Fowler, *Why did Zion Williamson Really Choose Duke over UNC, Clemson and Kentucky?*, CHARLOTTE OBSERVER (Jan. 21, 2018),

However, Williamson's basketball abilities would have ensured his top prospect position regardless of his choice of college, a possibility not available to many.²²⁴

D. HBCUs as the Future of College Sports

College athletes have faced major injustices, and historically, Black athletes are exploited the most.²²⁵ The AAPCA and the FPPA will ultimately lessen the exploitation of Black athletes and redirect the economic benefit from the Power Five programs to the Black community.²²⁶

For instance, Makur Maker was a top-twenty college recruit, making him the highest-ranked player to commit to an HBCU by attending Howard University.²²⁷ His commitment shocked the basketball world, as playing for a Power Five School is an almost guaranteed path to competing for a college championship and, ultimately, a spot in the NBA.²²⁸ Maker turned down offers from numerous Power Five Schools and will be sure to draw attention, thus warranting national broadcasting time, for the Howard Bison.²²⁹ Shaqir O'Neal, son of NBA legend Shaquille O'Neal, has committed to play for the

<https://www.charlotteobserver.com/sports/spt-columns-blogs/scott-fowler/article195806969.html>.

224. See Trevor Hooth, *NBA Draft Prospect Zion Williamson Claims He Would've Still Gone to College Even if He was Eligible to Go to NBA Straight Out of High School*, CLUTCHPOINTS (Feb. 20, 2019), <https://clutchpoints.com/nba-draft-news-zion-williamson-claims-he-wouldve-still-gone-college-even-if-he-was-eligible-to-go-to-nba-straight-out-of-high-school/>.

225. See Shaun R. Harper, *Good Bet for the Office NCAA Pool: Black Men Will Play and White Men Will Profit*, CHI. TRIB. (Mar. 11, 2018, 2:45 PM), <https://www.chicago.tribune.com/sports/college/ct-spt-ncaa-tournament-race-pool-20180311-story.html> (highlighting that in the annual March Madness tournament, which brings in over \$821 million, the majority of unpaid players will be black, and the majority of excessively compensated head coaches will be white); see also Paul Steinbach, *Academics Confront the Exploitation of African-American Male Athletes*, ATHLETIC BUS. (May 27, 2010), <https://www.athleticbusiness.com/People/academics-confront-the-exploitation-of-african-american-male-athletes.html> (noting the NCAA generates 90% of its revenue during March Madness, a tournament where 60% of the athletes are black).

226. See Sutherland, *supra* note 220 (emphasizing the need to “re-write the narrative and strengthen the black community . . . to help generate the millions of dollars their talent is worth for a black institute instead of a predominately white school”).

227. See Jeff Borzello, *Five-star College Basketball Recruit Makur Maker Commits to Howard Over UCLA*, ESPN (Jul. 3, 2020, 8:39 AM), https://www.espn.com/mens-college-basketball/story/_/id/29403929/five-star-recruit-makur-maker-commits-howard-ucla.

228. See *id.* (quoting Makur saying, “I need to make the HBCU movement real so that others will follow”).

229. See *id.* (highlighting that “[Makur] would be the first such HBCU product since Kyle O’Quinn (Norfolk State) in 2012”).

HBCU Texas Southern University.²³⁰ In the college football realm, the 2022 top ranked recruit Travis Hunter committed to play for HBCU Jackson State and Deion Sanders.²³¹ These recruits have shifted the NCAA's economic benefit and should lead to more players playing for HBCUs.²³²

This college athlete compensation legislation has provided Black athletes an opportunity to choose an HBCU and have a successful career.²³³ Judges will no longer have to ignore the request for just compensation when a Black athlete brings a case alleging the third party will capitalize on their NIL.²³⁴ Black athletes will not be punished and threatened for receiving compensation for their athletic gifts in an effort to support themselves or their families.²³⁵

V. CONCLUSION

In utilizing the AAPCA, and similar legislation, there is a legitimate chance for athletes to receive their long-overdue compensation. The courts and NCAA have failed to protect athletes on a federal level, and we are now only seeing change due to state legislative pressure. The NCAA cannot surrender the Power Five's monetary significance, but sports advocates can encourage a redistribution of Black talent through other economic outlets. The emphasis is on Black star athletes to launch their careers through an HBCU. HBCUs are historic universities that produce a wealth of Black entrepreneurs and scholars. The revenue these star athletes can generate for these institutions will significantly benefit the Black community. It will provide more access to tools, scholarships, and resources to further education for Black people. HBCUs provide a great environment and platform for Black students, who may otherwise not attend or complete college. There lies tremendous potential in bringing money back to the Black community if the up-and-coming athletes are ready and empowered to take the next step.

230. Tolly Carr, *Shaquille O'Neal's Son Commits to Texas Southern*, HBCU GAMEDAY (Apr. 30, 2021), <https://hbcugameday.com/2021/04/30/shaquille-oneals-son-commits-to-texas-southern/>.

231. See Chase Goodbread, *Top Recruit Travis Hunter Spurns Florida State to Commit to Deion Sanders, Jackson State*, NFL (Dec. 12, 2021), <https://www.nfl.com/news/deion-sanders-travis-hunter-jackson-state-florida-state-commit>.

232. See Sutherland, *supra* note 220 (discussing that top black recruits like Maker are aware of the impact their college decision can have on the black community).

233. See *id.* (noting that Black athletes are making the move to HBCUs over traditional Power Five athletic programs).

234. See Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. 1350 (2015).

235. *Id.* at 1363.