June 7, 2021

Honorable Senator Maria Cantwell
Chair
U.S. Senate Committee on Commerce,
Science, And Transportation
Washington, DC 20510-6125

Re: WRITTEN TESTIMONY OF ROD GILMORE SENATE COMMITTEE ON COMMERCE, SCIENCE & TECHNOLOGY HEARING NCAA ATHLETE NIL RIGHTS 6/9/21

Dear Hon. Sen. Cantwell,

Thank you for the opportunity to testify before the Senate Committee on Commerce, Science & Technology Hearing on NCAA Athlete NIL Rights. It is an honor and privilege to do so. This is my written testimony prepared in connection with the hearing.

I. Introduction.

My name is Rod Gilmore and I'm pleased and honored that the Committee asked me to testify today. I played college football and baseball at Stanford University and graduated in 1982. I graduated from the University of California at Berkeley Law School in 1986 and have been a practicing business lawyer for 35 years. I have also worked in the media since 1990 as a college football analyst, covering college football games across the country (for all major conferences and others) and appearing on studio shows, national and local radio broadcasts, podcasts, and social media. I have worked at ESPN for the last 25 years as a college football analyst and am deeply familiar with the on-field and off-field the field issues the sport faces.

Over the last 30 years I have watched the NCAA and its member institutions, universities that are non-profit entities with academic missions, avail themselves of our country's free market economic system and compete for entertainment dollars and television revenues in the sport and entertainment business, competing against professional leagues like the NFL and NBA. Since universities and conferences gained control of television rights through a 1984 Supreme Court decision, university athletic departments have relied less on money from their universities by turning what was once local campus activity into a mammoth $14 Billion a year industry. And many universities have rushed in to share in the money. For example, in 1984 there were 105 football teams in the top division of college football.[1] That number has now grown to 129. Few of those teams in 1984 appeared on live television because the NCAA limited televised games to a few games each week and limited appearance to just the most popular universities. Now, thanks to that 1984 decision, scores of live college football and

[1] "Division 1" now consists of two subdivisions, the "Football Bowl Subdivision" or "FBS," which is the most popular and lucrative and includes the most well-known college football teams, and the "Football Championship Subdivision" or "FCS."

basketball games (men's and women's) are shown almost every day of the week at various hours. Thus, universities have added football teams in this TV era despite the public claim that almost all athletic departments lose money.

While the NCAA, its members, coaches, and administrators have benefited handsomely from this very lucrative marketplace[2], the NCAA stripped players of their right to participate in this market--particularly restrictive of football and basketball players.[3] The NCAA rules that stripped players of their right to monetizing their Name, Image and Likeness ("NIL") have been (i) arbitrary, (ii) have had no impact on competitive balance, and (iii) are an affront to our free market system. Players are frustrated and upset by the NCAA's hypocrisy and failure to remove the NIL restrictions. Remember, monetizing NIL rights does not require any payment from the NCAA or its member institutions to players. Rather, money is paid by an unrelated third party to a player for being permitted to use that Player's NIL rights in promotions, advertisements, etc. However, the NCAA believes, and I have had coaches and administrators tell me this, that third parties will pay less to the NCAA and universities if they are allowed to also pay players directly. In other words, the NCAA wants to protect its revenue stream and wants NIL legislation that will protect them from the marketplace or having to partner with players. The NCAA wants protections that are inconsistent with a free market.

Today, I want to remind the Committee that, while college football and basketball players have principally created this $14 Billion industry, players[4] have had ***NO*** ability to negotiate or change oppressive NCAA rules and have no ***NO*** legally authorized entity that can negotiate with the NCAA on behalf of players.[5] This has allowed the NCAA to determine for itself what is best for players and have *prioritized* its own self-interest and economic well-being at the expense of players. Players have not been allowed to enjoy the freedoms and rights that the NCAA, every other student and every other American enjoys: the right to fully participate in a free market.

Non-athlete students can and have monetized their NIL rights to promote themselves and earn money on social media, start businesses while in college, and do any other myriad of things to earn money—whether they are on scholarship (academic or other non-athletic scholarship). Those students are treated like every other citizen in this country. However, the NCAA has made college football and basketball players ***second class citizens*** by stripping them

---

[2] The University of Texas Athletic Department was the leader in revenue for 2018-19, the most recent available year, with $223,879,781. Two other universities had over $200 Million in revenue (Texas A&M and Ohio State). Forty university athletic departments had more than $100 Million in revenue. Alabama Head Football Coach Nick Saban is the highest paid Head Football Coach ($9.3 Million). Ten other Head Football Coaches earn more than $6 Million per year. At least 56 of the 130 FBS (defined later in this Written Testimony) Head Coaches earn more than $3 Million per year. Former Big Ten Commissioner Jim Delaney retired after the 2019 season and received a $20 Million bonus. (Source: USA Today.)

[3] While the NCAA has prohibited football and basketball players from receiving any third-party payments for their NIL rights or their athletic performance, the NCAA has allowed athletes in certain "Olympic Sports" to cash in from their performances in recent Olympics: Swimmer Katy Ledecky, Stanford ($355,000); Wrestler Kyle Snyder, Ohio State ($250,000); and Wrestler Joseph Schooling, University of Texas ($740,000). Also, the NCAA has for years allowed tennis players to retain up to $10,000 in prize money from events without losing any eligibility. *See Alston v NCAA 958 F. 3rd 1239 (9th Cir. 2020).*

[4] According to the NCAA, in 2020 there were 34,783 Division 1 college football and basketball players (29,234 football and 5,549 basketball).

[5] This has forced players to rely on the judicial system and State legislatures to have their issues addressed.

of their NIL rights.[6] The NCAA's approach is so Draconian that even players who earned local scholarships for their high school performance (whether academic or athletic) have been forced to forfeit those scholarships when they accept a college athletic scholarship. Those local scholarship can range from hundreds of dollars to a few thousand dollars, money most recipients desperately needed.

I also see the NCAA prohibiting players from monetizing their NIL rights as a Civil Rights issue. It is disturbing that the $14 Billion in revenues is generated in large part on the backs of Black players. About half of FBS College Football Players are Black, in the Top 5 Conferences (Power 5) about half are Black; in the Southeastern Conference, which is recognized as the most lucrative and most successful conference, that number is about 61%.[7] And, when the playing careers of Black players end, there are few opportunities available to them in this lucrative industry. It is an overwhelmingly White industry from coaches to administrators, which, as noted above, is where most of the money from this enterprise ends up being distributed.

The NCAA, its member institutions and their coaches do not need the help of this Committee or Congress to address NIL rights. They are sophisticated parties with sophisticated professional advisors who have helped them become very successful in this lucrative college sports industry. They are asking for protections from the free market. But it is the players who need your help—not the NCAA. If this Committee chooses to act on NIL and other issues, it should do so with an eye towards representing and protecting college players.

Do not allow the NCAA to continue to treat college players as second-class citizens. Require the NCAA to lift its prohibition so that players may fully use their NIL rights and fully participate in our free market as intended for every American citizen.

II. <u>If This Committee Addresses Only NIL, Then The NCAA Will Be the Major Beneficiary of That Legislation—Not The Players.</u>

A. Do we need a national NIL law?

The threshold question to be asked is whether federal legislation of NIL rights is necessary. For more than fifteen years there has been a push to have the NCAA remove its restriction of players having the right to monetize their NIL rights. Since the NCAA failed to act on this issue, the States have been acting to solve this problem. The State of California created the first legislation to address NIL in September 2019, and since then over 40 States have contemplated NIL legislation and 18 States have fully enacted such legislation with half of those laws going into effect by July 1, 2021. (Only 9 states appear to have not contemplated any NIL action at all.)

[6] For example, in 2017 the NCAA stripped University of Central Florida kicker Donald De La Haye, Jr., of his eligibility for monetizing his popular YouTube channel that tracked his daily life, including his athletic life.

[7] Sources: ncaa.org and vox.com.

In other words, States have made it clear that they want players to be able to monetize their NIL rights. States like California have heard from players and experts and understood that they needed to help players. The State of California did its due diligence and found the same facts that I found during my private discussions with players and coaches over the years and while working for ESPN, that: (a) many players are struggling financially and some use their scholarship (including Cost of Attendance money) to help their families[8]; (b) for almost all college football players, their college years will be their best opportunity to monetize their NIL rights[9]; and (c) all athletes, including women[10], will benefit from the State legislation.

Some States have included protections for the NCAA from the free market and have adopted laws that are overly paternalistic of players. Some prohibit players from entering into contracts with third parties with whom the university also has a contract, such as a sports apparel company like Nike, Under Armour, Adidas, etc. Others require players to take financial classes as a condition to being able to monetize their NIL rights. No other students are subject to these restrictions. Such restrictions may be well intended, but they are anti-free market and treat players as less—less than other students and less than other citizens. If this Committee enacts NIL rights for players, it should override such provisions.

In a short period of time, we have seen States react and create a market in which players will have choices. Players will now be able to factor in how a university will handle his/her NIL rights in determining which university and in which State he/she chooses to play. However, the NCAA believes that if universities can offer different NIL rights to players, it will destroy competitive balance and there will no longer be "level the playing field." Competitive balance is a red herring because competitive balance does not currently exist and has not for a long time.

---

[8] Many players have privately told me about their tough financial situations over the years, in confidence, and I do not have permission to publicly discuss their private situations. However, there are several published reports that illustrate this problem. For example, see https://www.kansascity.com/sports/article86062912.html (Missouri's men's player and women's player estimate that 10 teammates send money home); http://www2.kusports.com/news/2016/jul/24/what-if-kansas-paid-its-basketball-players-it-alre/?templates=desktop (Kansas men's basketball player pays some of his mother's bill with his Cost of Attendance money); see also https://www.providencejournal.com/article/20150124/SPORTS/301249983 (Men's basketball player in Rhode Island sends money home to family in East Lansing, MI)

[9] For example, former Stanford Running Back had a tremendous junior season in 2017 in which he ran for 2,178 yards and was considered a potential 1st or 2nd round NFL draft pick. He was at the height of his popularity and NIL rights earning potential in 2017. He returned to Stanford for his senior season in 2018 and suffered a knee injury. He slipped to the 4th round of the 2019 draft by the Washington Football Club. Unfortunately, Bryce never fully recovered from his knee injury and was released in 2020, which ended his football career. He never had the opportunity to monetize his NIL rights.

[10] Despite the public perception that only a handful of star football and basketball stars will benefit from NIL legislation, studies have shown that female athletes will benefit greatly—and perhaps greater than their male counterparts. For example, see Temple University School or Sport, Tourism and Hospitality Management study 2/21; and Villanova Sports Law/NIL Symposium 3/25/21.

Competitive balance is already so lacking that FBS Playoff officials and conference commissioners recently publicly admitted that they are considering expanding the Playoff to drive more interest and access. How uncompetitive is it now? The same teams win their conference each year and play for the national championship. For example, in the 7 years of the current 4 team College Football Playoff, there have been a total of 28 spots in the Playoff. Only 11 of the 130 FBS football playing colleges have made the Playoff. **And 22 of the 28 spots have been held by only 5 teams: Alabama (6), Clemson (6), Ohio State (4), Oklahoma (4) and Notre Dame (2).**

Those same 5 schools are annually ranked in the top 10 recruiting rankings. In other words, a handful of teams compete for the championship each year and they replenish their rosters with the best young talent each year. Each year the ESPN highest ranked top 50 players overwhelmingly select the same elite teams.[11] For example, the 2021 recruiting class is generally like previous classes: Alabama signed 7 of the ESPN top 50 players; Ohio State landed 5; Clemson signed (5); USC (4); and Oklahoma signed (3). About half of the top 50 are concentrated on 4 teams. How much does recruiting matter and create a competitive advantage? Alabama turned its 6th ranked 2018 recruiting class into six players drafted in the first round of the NFL draft, tying the previous record set in 2004 by the University of Miami. Any college football expert will tell you that there is no competitive balance in college football and NIL rights are unlikely to significantly change that.

The NCAA also raises the fear factor that some teams will violate recruiting rules and offer exorbitant NIL rights to high school players and transfers to induce them to join their team. First, the NCAA already has existing recruiting rules to cover this situation and the ability to enforce these rules if it so chooses. Second, even if there is an abuse with offers that exceed market value, in our country we allow the free market to work its magic over time and solve these issues. For a recent example, consider the wide swings in value for purchases of bitcoin. Again, the NCAA is fearful of the free market.

While the NCAA might find it inconvenient to address various State NIL laws, that is not a compelling reason to enact federal legislation to assist the NCAA. It is normal and customary in this country for businesses that operate nationally to comply with various State laws. That is the norm—whether it is laws addressing the manufacture, production, distribution, and sale of products, or raising capital for a new or existing business. Businesses regularly must comply with various laws enacted by States where they want to conduct business. There is no compelling reason to exempt the NCAA from the ordinary course of business and various State laws.

[11] In recruiting today, the "NFL Dream" is the dominant theme sold to the top high school recruits. The message is that the player should be focused on achieving that dream, and the university has the elite facilities, coaches, and development plan to help that player achieve that dream. The elite programs have those things, and the competitive balance is unlikely to be altered by the inclusion of NIL rights because those programs have shown that they are committed to competing for elite talent. The "NFL Dream" pitch is a marked departure from the days when the academic benefits were a bigger component of the recruiting narrative.

B. Group Licensing.

If the Committee intends to provide a benefit in a federal NIL law that is not covered by the recently enacted State laws, it should consider granting players the right to have group licensing. Group licensing would allow all players to monetize their NIL rights in a single product. Senator Chris Murphy (D-Conn) previously introduced a bill that would allow group licensing. Group licensing would likely, for example, allow the return of a popular college football video game that was eliminated because of the anti-trust case between former UCLA men's basketball player Ed O'Bannon. *O'Bannon vs NCAA (802 F.3rd 1049 (9th Cir. 2015).*

C. Revenue Sharing.

The Committee should also consider the merits of revenue sharing for players. In talking to players over the years, they have made it overwhelmingly clear that they want to receive a fair share of the $14 Billion generated in college sports. Indeed, last summer a group of a dozen football players in the Pac12 Conference, representing their colleagues, demanded that the Pac12 "Distribute 50% of each sport's total conference revenue evenly among athletes in their respective sports."

Giving players the right to share in revenues generated is not a new concept and is a common practice in professional sports. However, it is not generally common in the business world. Owners of businesses do not normally agree to share a percentage of revenues with its workers. It is not a common practice in a free market.

While I understand the argument for revenue sharing, I do not believe that the Committee should ***mandate*** revenue sharing in any NIL legislation. However, I also do not believe that the Committee should ***prohibit*** universities and conferences from having the right to adopt revenue sharing if they deem that it is in their best interest. This approach is consistent with our free market system.

III. If This Committee Addresses NIL Rights, It Should Also Address Additional Important Matters Affecting Players Like Improving Healthcare and Improving their Academic Experience.

A. Athletic Health Care.

First, it seems that each year we have players die because of accidents during offseason workouts overseen by training staffs of college football teams. The most recent example is the 2018 death of Jordan McNair, a football player at Maryland University. Mr. McNair collapsed during an offseason workout and died of heatstroke. It is shocking that since 2000, approximately 30 college football players have died from non-traumatic causes (heatstroke)

suffered during workouts.[12] That's almost two deaths a year! Only one NFL player (Korey Stringer) has died since 2000 during an offseason workout from heatstroke—zero since 2001. How is it that offseason workouts are hazardous for college players, but not NFL players?

What is considered safe and appropriate for offseason workouts vary from training staff to staff. Now, the NCAA deserves credit for addressing this issue and trying to determine "best practices" and have universities adopt those best practices. However, to my knowledge, it is unclear if those "best practices" will be universally mandated by the NCAA and it is unclear how the NCAA will monitor universities and how or if it will penalize those who do not comply.

Also, medical coverage for players after their careers end are woefully inadequate. I am aware of players suffering injuries that occurred while playing college football, but not covered by their schools after their eligibility ends. Many issues arise after a player's career has ended, including chronic injury problems related to joints and shoulders. This issue has been documented in the media over the last several years. In response to this problem, in 2018 the Power 5 conferences adopted a measure to provide healthcare and treatment for at least two years after the player has left his or her institution. The Pac12 Conference went further and extended the period to four years.

This two-to-four-year period seems woefully inadequate in light of how long injuries suffered while playing college football may remain dormant before becoming active when a player gets older. And, as noted above, chronic pain and injuries related to having played football may not arise by the time a player is 24 or 25. I have had my own experiences. I suffered shoulder and ankle injuries during college football games that were treated at that time. However, both injuries bothered me a short time after my playing career ended and continue to do so. Fortunately, those issues have not been debilitating.

This Committee should delve into this issue with medical and sports performance professionals to determine the reasonable and appropriate time frame to extend medical coverage for former players. It should certainly be longer than 2 or 4 years.

B. <u>Academic Outcomes.</u>

As a former player, I certainly struggled balance my academic life with my athletic obligations—practices, meetings, workouts, treatment, games, recruiting events, community events, etc. It impacted classes I chose, the major I chose and experiences I could not have (e.g., a semester at my universities' European campus was out of the question because it conflicted with baseball, and when I had to end my baseball career, it conflicted with Spring football practice). I had teammates who also had similar experiences. This was not unique decades ago. Michigan Head Football Coach Jim Harbaugh publicly stated in 2007 that, as a Quarterback at

[12]www.sportingnews.com/us/ncaa-football/news/ncaa-best-practices-guidelines-offseason-workout-deaths-jordan-mcnair/ssmpvzvhm5e318btjw5eoagnf

Michigan in the 1980's, he and teammates were steered towards softer majors than the general student population.[13]

Based on my observations and discussions in the college football community, not much has changed in the last few decades. Many players have privately told me that football is an 11-month job (e.g., Winter Conditioning, Spring Practice, Summer Conditioning, and the fall Regular Season) and it limits their choice of major and classes—particularly those that conflict with their football obligations. The dirty little secret is that the focus at most places is to keep players eligible rather than provide them with the most robust academic experience that they can handle. This concept of "clustering" players in easier majors became a public topic in hearings with this Senate Commerce Committee back in 2014. See https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education. Northwestern QB Kain Kolter addressed this in 2014 when he publicly stated that his football commitment forced him to give up his desire to be a pre-med major and forced him to select the easier psychology major. https://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120. Those are not isolated incidents. Several players have made similar statements under oath in the *O'Bannon* anti-trust trial and in the pending *Alston* anti-trust trial. See *O'Bannon* and *Alston v NCAA,* noted above. This leaves players stuck in majors that have nothing to do with their career interests. Id.

Then NCAA has emphasized a narrative focusing on graduation rates rather than the experiences players are having. It cites improved graduation rates as proof that its players are having success. Ignoring the "clustering" issue for the moment, it must be noted that the NCAA reports graduation rates by using a more lenient formula for calculating graduation rates than the formula used by the federal government. If the NCAA were required to use the federal formula, the public would see the true graduation rates of players. This would likely force the NCAA to take action to improve the academic journey of players.

This Committee should not be satisfied with the "appearance" of academic success when players consistently report that their academic experience is subservient to their athletic obligations—and not always by their choice. This Committee should do at least two things in this area; (1) reduce the allowable hours for practice and team activities (including how those hours are calculated (e.g., the time doesn't count until the airplane takes off); and (2) require better oversight and monitoring of the academic journey of players. It's not hard to recognize the problem when the team issued media guide is filled with players clustered in similar majors—such as "general studies" or something similar. This is not to say that players must take the most challenging majors available. Rather, more of an effort needs to be made to match each player's major with each player's career interest.

[13] See https://www.espn.com/espn/columns/story?columnist=forde_pat&sportCat=ncf&id=2966536 and related articles.

IV. Conclusion.

Again, in considering NIL legislation, this Committee should be a guardian for the players, their NIL rights and the free market. Currently, the recently enacted State NIL laws are serving the interests of the players, and this Committee should not enact legislation to override those benefits for the convenience of the NCAA and compromising the free market. If the Committee decides to enact NIL legislation, it should do so to (a) override anti-free market protection provisions for the NCAA (.e.g., limits on contracts with parties with whom the university has a contract), that treat players differently from other students and are overly paternalistic (e.g., required financial classes, delayed receipt of money until after they graduate, etc.), and (b) include measures that improve health care and the academic experience of players.

Thank you for the opportunity to appear before you.

Respectfully submitted,

Rod Gilmore