

Written Testimony

Michael McCann

Professor of Law

Director of the Sports and Entertainment Law Institute
University of New Hampshire Franklin Pierce School of Law

“NCAA Athlete NIL Rights”

Dirksen Senate Office Building

United States Senate Committee on Commerce, Science, and Transportation

June 9, 2021

Chairwoman Cantwell, Ranking Member Wicker and distinguished members of this committee, it is an honor to speak with you today.

My name is Michael McCann. I am a professor of law and Director of the Sports and Entertainment Law Institute at the University of New Hampshire Franklin Pierce School of Law, where I teach a course titled, “Name, Image and Likeness: The Controversy of Identity Licensing in Sports.” I previously served as the law school’s Associate Dean for Academic Affairs and worked on administrative matters at the university level. I also write about NIL and other sports law topics for *Sportico*, a sports business publication, as well as in law review publications. In addition, I’m the author of a book, Court Justice: The Inside Story of My Battle Against the NCAA, with former NBA player and UCLA basketball star Ed O’Bannon, and I’m the editor of the Oxford University Press Handbook of American Sports Law.

There are five themes I’d like to raise.

First, NIL rights for college athletes are long overdue.

For decades, college athletes have been denied a right enjoyed by the rest of us: The right of publicity. This is the right to control the use of what makes us who we are.

Our name. Our appearance. Our voice. Our signature.

This right is worth more to some than to others. Misappropriation of a celebrity’s identity—whether it be Johnny Carson or Kareem Abdul-Jabbar, both of whom brought famous federal lawsuits over misappropriations—can extract considerable value.

That same principle holds true for college sports. Massive amounts of money are spent on this industry. There is no shortage of statistics to evidence that point. According to figures provided by the NCAA, \$18.9 billion in total athletics revenue was reported among all NCAA athletics departments in 2019. Athlete performances and school allegiances drive that spending.

Not everyone has shared in the rewards. The wealth has been generated *around* the athletes. Schools compete for coaches, staff, trainers, facilities, all with an eye towards recruitment of the best athletes, while sneaker companies and other sponsors compete for those schools. Many have benefited handsomely. The athletes, especially those in revenue-generating sports, have not.

But money isn't what matters most about NIL.

It's dignity.

In Court Justice, Ed O'Bannon and I detail his pathbreaking class action against the NCAA and Electronic Arts (EA). He reached a settlement with EA where the publisher agreed to pay thousands of current and former college players whose likenesses appeared in college sports video games. Those players received up to \$7,200. Most received in the ballpark of \$1,000 to \$1,500.

None got rich. That was the never the point. It was, as Ed has often said, about fairness and recognition of identity.

Ed has also stressed that preventing student athletes from utilizing NIL has a disproportionate impact on students of color. As a result, many of the athletes who stand to gain from the changes we are discussing today are people of color.

While college athletes are college students, their identity rights are inferior to those of classmates. A student who is a talented musician, actor, artist, influencer, cheerleader or esports player can typically earn from their right of publicity without endangering a scholarship or jeopardizing a team or coach. They merely exercise a long-established right. It's no big deal and, like other college students, they can juggle their studies, too.

So why suppress *athletes'* right of publicity? Well, purportedly, it helps to distinguish college athletes from pro athletes, even though, paradoxically, other college students enjoy their right of publicity.

The consequences are real, too. Break amateurism rules and become ineligible to play. Ineligibility can lead to a loss of scholarship, which can make college unaffordable and inaccessible.

The NCAA intends to revise NIL rules. It's a membership organization, and the process for changing rules is multifaceted. Change can take time. The NCAA also seeks assurances that endorsement deals won't disguise pay for play.

Those aren't unreasonable factors.

But we're now in 2021, a dozen years after Ed O'Bannon brought his case and many months after states have tackled NIL.

The wait has gone on too long.

Meanwhile, the consequences of waiting haven't been distributed evenly.

Star football and basketball players are viewed as the most likely to benefit from NIL. Some believe other athletes, including women athletes, won't do as well.

I'm not certain about that. According to *Axios*, eight of the 10 most-followed NCAA Elite 8 basketball players this year were women. With NIL, they would be able to earn money through social media influencing opportunities.

The athletes who lose the most without NIL are more likely those who won't go on and play pro sports. Some play sports where major pro leagues don't exist. Their most marketable moments are while they're in college, a short window of life.

And while NIL is often discussed in the context of lucrative and glamorous endorsements, there are other ways it could benefit college athletes. Think of the chance for a field hockey player or a volleyball player to sponsor a camp back home. It might only pay a modest amount but it could make a significant difference to the athlete in making college more affordable. And it would underscore the dignity of their identity.

Second, states have figured ways to make NIL work.

As of this writing, 18 governors have signed NIL bills into law. NIL statutes in five states—Alabama, Florida, Georgia, Mississippi and New Mexico—take effect on July 1 while statutes in two other states, Oklahoma and Nebraska, are worded to take effect immediately.

These laws are remarkably bipartisan. Lawmakers from across the political spectrum firmly agree on NIL.

These laws are also, to significant degree, similar. They make it illegal for colleges to deny athletes opportunities to hire agents or gain compensation for NIL. They also forbid colleges from attempting to prevent an athlete from using their NIL when the athlete isn't engaged in an official team activity.

At the same time, these laws contain certain restrictions that, while debatable, attempt to construct an orderly system. Most notably, these laws tend to prohibit athletes from entering into NIL contracts if the contract would conflict with a team contract. They also call for state licensing of agents, forbid colleges from paying recruits and contemplate practical education for college athletes on NIL.

There are other variations. In Florida, NIL compensation must be commensurate with market value. In Alabama, college athletes are barred from signing deals for tobacco products, casinos and adult entertainment. In Georgia, a school can require their athletes to set aside as much as 75% of NIL earnings to be shared with other athletes at the school. In Texas, if Governor Abbott signs his state's NIL bill into law, it would restrict the use of agents.

It shouldn't be a surprise, or interpreted as a negative, that states are landing on different NIL language. The ability of college athletes to sign endorsements is a new phenomenon. It's to be expected that states, as laboratories of change, have conducted different experiments.

Perhaps, then, it makes sense to let the state market play out.

If an athlete prefers a state with a less restrictive NIL statute, he or she can pick a school in that state. If a state finds that top recruits are signing with schools in other states due to its NIL statute, it could amend the statute and make it more athlete friendly.

The market could take hold.

Third, a federal model would make the most sense.

I'm not sure continuing with a state-by-state approach would be the wisest choice.

For one, the state-by-state model could wind up in court.

For example, the NCAA could seek restraining orders that stop or delay NIL statutes from going into effect. Nearly 30 years ago the NCAA used that approach, successfully, in *NCAA v. Miller*. In that case, the governor of Nevada, Robert Miller, was sued to stop the implementation of a state statute that would have guaranteed due process protections and neutral disciplinary hearings for players and coaches.

The NCAA convinced both a federal district judge and the U.S. Court of Appeals for the Ninth Circuit that the statute would violate the Contracts and Commerce Clauses of the U.S. Constitution.

The state statute, the judges reasoned, interfered with the contractual relationship between the NCAA and member schools, which assent to membership policies. The NCAA would have to treat member institutions differently from preexisting contractual arrangements. The statute also impacted the economies of other states—it would force the NCAA, as a national governing body that tries to treat schools equally, to apply Nevada's statute elsewhere. Further, it presented a so-called "patchwork problem" in that other states could promulgate their own rules, making it impossible for the NCAA to enforce one rule equally.

NIL is different in a lot of ways. It's mainly about the relationship between the athlete and a third party, i.e., the company with which an endorsement or sponsorship is signed. Still, NIL

statutes clearly impact membership duties—they prevent schools from following NCAA rules. They also create a patchwork problem if every state handles NIL a little bit differently. And the patchwork problem will be apparent whether or not the issue goes to court.

A federal standard could resolve state differences and likely ward off certain types of litigation. It could also ensure that there is equal treatment for athletes regardless of whether he or she lives in a state that adopted a statute. Every athlete would potentially have the right to gain.

I also question the merits of a state-by-state approach when many of you, and your colleagues, support a federal NIL approach.

Several members have proposed NIL bills. There are, as you know, differences among them. Some focus on NIL, while others propose more transformative changes.

Rather than accentuating their differences, I'll stress what brings them together. They all call for a federal NIL standard and commonsense restrictions.

Fourth, NIL reform should be the focus of NIL reform.

There's no shortage of issues confronting college athletes and their relationship with schools.

There are legitimate concerns about health care for athletes both during and after college. There are also legitimate concerns about the ability of athletes, either individually or collectively, to have suasion over matters of paramount importance to their lives. We've seen on social media glaring disparities, such as separate and *not* equal weight rooms for women and men who play basketball and varying degrees of access to health care services.

Lawmakers should ask themselves, "Why do so many college athletes feel voiceless?"

Athletes should provide testimony. It is their lives at stake. Their stories deserve to be heard. We should also hear from subject matter experts, such as medical doctors, labor economists and civil rights leaders. These topics are important, complicated and carry implications that are both foreseeable and unforeseeable.

At the same time, I encourage the committee to center NIL legislation on NIL. This is the topic that needs immediate attention. July 1 is just a few weeks away.

For what it's worth, most states have crafted NIL statutes that center on NIL. Maryland is an exception, as it contains health and safety provisions related to return-to-play measures. But most of the state NIL statutes are about NIL. It is noteworthy that they enjoyed widespread support.

There are lessons to be learned from that.

Fifth, don't let perfect be the enemy of good.

There are a number of ways a federal NIL statute could be crafted. No matter the approach, we won't know how it plays out until it plays out. This is, after all, a new world that empowers old world rights. It's not going to be perfect but that shouldn't be a deterrent from acting.

I have thoughts on ten components of federal NIL bills. I'd be happy to address others as well.

First, it's reasonable for a school to wish to avoid conflicts between its contracts and those of students, including athletes. Conflicts could endanger existing contractual obligations. There are a variety of conditions and concessions that come with enrollment at a school. Language permitting schools to deny conflicting endorsements would be appropriate.

Second, each school should be able to craft rules to govern permissible and impermissible types of endorsements and sponsorships. I teach at a public university but was a student at a Catholic university. I recognize there are different philosophies and mission statements. So long as schools refrain from conspiring on what to restrict, I think it's reasonable for schools to preserve their autonomy. The recruit has the choice to go elsewhere.

Third, fair market value review of endorsements is a meritorious idea in the context of a system where pay-for-play is disallowed. However, such review should be conducted by an independent group—one that includes former student athletes as well as intellectual property and valuation experts—and the review should be relatively permissive. Other college students aren't saddled with fair market review of their dealings, so that concept should be brought in cautiously.

Fourth, a federal bill shouldn't contain an antitrust exemption. Antitrust law is intended to promote robust competition. If there's ever an industry where lack of robust competition is a worry, it's the industry surrounding college athletes. Also, scrutiny under antitrust law is hardly equivalent to liability. It's very difficult to win an antitrust case. There are other ways to address legal concerns, as well. The NIL bill introduced by Senator Wicker last December, for example, contained a compliance defense: compliance with the NIL law assures no liability. That seems like a more reasonable approach.

Fifth, education should be part of the bill. College athletes who sign endorsements should know what signing a contract entails. They should know, for instance, that endorsers are typically independent contractors. That usually means taxes aren't taken out of their pay, so they'll have to calculate how much they'll owe the Internal Revenue Service and state treasuries. It also means they shouldn't spend their entire check. Some college athletes are from other countries. The impact of signing an endorsement on their visas should be part of education.

Sixth, student-centered resources provided by colleges for NIL assistance should be furnished consistent with Title IX—both the letter of the law and the spirit of it. If a school helps their

athletes with NIL opportunities, the assistance should be provided equitably to women and men.

Seventh, the bill should contain enforcement features. One concern of state NIL statutes is their lack of clarity on enforcement. The College Athletes Bill of Rights and the College Athlete Economic Freedom Act wisely contain language including a private right of action for athletes and the ability of states' attorneys general to bring claims.

Eighth, the bill should contain mechanisms for adjustment. Some bills contemplate the Federal Trade Commission as overseeing college sports agents. That's not necessarily a bad idea, though the agency hasn't historically been charged with such a responsibility. Sports agents in the major pro leagues are licensed and regulated by players' associations, as consistent with the National Labor Relations Act. To have the FTC or states take on that function should be done carefully and with benchmarks to ensure it proves to be sensible.

Ninth, disclosure and transparency should be part of the NIL dynamic. Both the school and the athlete should reveal to each other certain types of information about their sponsorships. This sharing would help to ensure conflicts do not, or would not, arise and would also comply with potential requirements of a federal NIL statute, such as one that requires fair market analysis. Sharing doesn't mean divulging full contracts and negotiation details, both of which could contain trade secrets. It does mean supplying top level summaries.

Tenth, the bill should permit college athletes and their representatives to engage group licensing with video game companies and other market actors. The College Athlete Freedom Act, for example, proposed the establishment of a federal right for individual or group negotiation and a prohibition on interference with that right. Group licensing comports with consumer demand, particularly for college sports video games that, as a practical matter, can't contain "real players" unless those players negotiate as a group. Group licensing activity could be undertaken by a trade association or a 501(c)(4) nonprofit that represents NIL interests. This measure wouldn't require employee status or collective bargaining, only a group licensing entity.

Thank you for the opportunity to participate in this important hearing. I am hopeful that my remarks and expertise are helpful and I stand ready to continue to assist the committee as you work on these issues.