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**TESTIMONY BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SUBCOMMITTEE ON MANUFACTURING, TRADE, AND CONSUMER PROTECTION**

**HEARING ON NAME, IMAGE, AND LIKENESS:
THE STATE OF INTERCOLLEGIATE ATHLETE COMPENSATION**

FEBRUARY 11, 2020

Mr. Chairman and Members of the Committee,

My name is Kendall Spencer. Thank you for the opportunity to offer testimony on behalf of the hundreds of thousands of current and former student-athletes on this important issue of Name, Image, and Likeness.

For more than a decade, my efforts—as they relate to student-athlete advocacy—focused on highlighting today's student-athlete experience, and making sure that the impact on our welfare is not misplaced in these discussions around emerging issues. Contrary to popular belief, student-athletes live considerably active lives beyond what the public streams on today's media platforms. In order to protect the lives and experiences of these individuals, we must all ensure that these conversations reflect the critical impact to relevant components such as education, time demands, and gender equity. The complexity surrounding the commercial use of Name, Image and Likeness is not exclusive to intercollegiate athletics, but reflects the broader societal issues that modern America faces today.

Today I am currently a third-year law student at Georgetown University Law Center, where I am a Technology Law and Policy Scholar focusing on Privacy and Election Security. Throughout law school, I have continued to train competitively as a Track and Field athlete with the expectation of competing in the 2020 Olympic Games.

Before making my way to Washington D.C., I was a Track and Field student-athlete at the University of New Mexico. During my time on campus I competed in the Olympic Trials, was a National Champion, and a Two-Time Division I NCAA All-American, ultimately leading to me securing a silver medal for my country while competing in Mexico City.

As a student-athlete I was a member of the Student-Athlete Advisory Committee (SAAC) at the institutional, conference, and national levels, charged with representing the voice of student-athletes on all issues from time demands to pay for play. I served as the SAAC chair at the national level for a number of years and became the first student-athlete to serve on the NCAA's Board of Directors.

In this testimony, I will explain the framework that today's modern student-athlete lives in, as well as the value of the student-athlete experience, with emphasis on the practical application of Name, Image, and Likeness within intercollegiate athletics.

NAME, IMAGE, AND LIKENESS

Name, Image, and Likeness (NIL) are smaller but complex elements comprising the Right of Publicity. This right, in all of its complexity and confusion, is the right of any person to control the commercial use of their identity by others without their consent. Despite widespread acknowledgement as a core right granted to every individual, there is no single right to publicity. A consequence of our federalist system in the US is that the recognition of publicity rights is highly decentralized, with each state responsible for its standards for recognizing human identity—or what is left of it.

Contrary to today's discussion around NIL and the concept of this right to publicity, the first cases delving into this complex topic were rooted in privacy issues. Most of the causes of action around NIL involve a variety of infractions leading to the conclusion that a person was unduly harmed due to the commercial use of their identity without their consent. To date, there is no uniform model for the right to publicity to serve as a one-size fits all example suitable to cross state lines. This creates a porous system designed to protect human identity rather than a patch work of state laws.

Discussions surrounding the issues of commercial use of a person's Name, Image, and Likeness is not a new conversation; however, the discussion has continued to evolve into a popular issue with regard to intercollegiate athletics and the professionalization of student-athletes.

I. TODAY'S MODERN STUDENT-ATHLETE LIVES IN A WORLD DOMINATED BY POWERFUL ACTORS THAT DID NOT EXIST UNTIL RECENTLY.

Student-athletes today live in a world that is highly complex, both operationally and logistically. The day to day activities of athletes on campus involve a sequence of tasks, responsibilities, and hurdles shaping the lives of young students in ways that transcend their on-the-field activity. Beyond the typical balancing act student-athletes take up when they commit to an institution looms the societal framework we all subject ourselves to in today's modern culture. In today's social construct—driven by digital communication and emerging technology platforms—student-athletes live lives that often go unnoticed to today's fan and proponents who continue to call for the recognition of Name, Image, and Likeness as a form of compensation.

Laws and regulatory frameworks providing societal boundaries for Americans do not exist in a vacuum, rather they too manifest themselves through the context of the times they exist in. Student-athletes are also subject to these factors. As a result, the lives of student-athletes, and the impact of Name, Image, and Likeness within the constructs of intercollegiate athletics, cannot be discussed as if they exist in a world without technology. While our rights themselves may not change over the years, the way we express these rights is fundamentally different. As long as the US values innovation and technological advancement, this will continue to be an emerging issue within American public policy.

A. *ROLE OF TECHNOLOGY FOR THE MODERN STUDENT-ATHLETE*

The lives of today's student-athletes—like most of the nation—are in fact dominated by the proliferation of emerging technologies. Technology serves a dual purpose in athletics that connects student-athlete to institutional resources (online lectures, and study materials) on and off the field. Emerging tools in the tech space also connect fans with the players they love to support and cheer for. Athletic contests can be streamed, recorded, duplicated, and used for educational purposes presenting enormous value to the student-athlete. While the innovative benefits in the form of efficiency and access are graciously accepted, a regulatory structure

around technology and its constructs has been difficult to create at both the state and federal level given the rapid growth within those spaces.

B. STUDENT-ATHLETES AND THE INNOVATION ECONOMY DRIVEN BY SOCIAL MEDIA

This innovation economy is the idea that entrepreneurs, social media influencers, and other content creators (as it relates to technology) are really the ones who are helping to drive economic growth in today's society. Furthermore, it refers to this idea that most anyone has access to the potential for economic success but is not guaranteed any benefit for the efforts they are putting in. The innovation economy puts into context the world that today's student-athletes live in, how they interact with each other, and, more importantly, their ability to create any narrative that they choose.

Social media is a vehicle today's student-athlete uses to navigate this new innovation economy which allows influencers, entrepreneurs and technology authorities to become key drivers for economic growth. When people talk about how we exercise some of the core rights granted to us in the Constitution, such as free speech, social media is the way that today's student-athletes and youth are expressing themselves. Around the world, companies see this and, in recognition of its utility to reach their target audience and potential consumers of products they sell, have begun to redirect advertising to social media and social media influencers. The market around social media influencers is one of the engines powering the debate around potential financial success via Name, Image, and Likeness. One of the many concerns regarding this idea is the brand development, significant effort, and extraordinary talent or niche needed to capitalize on this opportunity. These necessary characteristics are not retained by all student-athletes however. While some influencers can receive a very lucrative living from social media by leveraging their network, the majority of users do not, and will never have access to that type of brand influence. More importantly, social media exemplifies one of the many question marks around building a regulatory structure involving emerging technologies.

To date, social media platforms still lack significant regulation – the current state of financial success when it comes to social media platforms, such as YouTube, Instagram, Facebook, and Twitter, are tied to the number of subscribers, views, or likes on a picture that any individual might receive on their post. At any given time, however, the individuals who run these platforms can remove any one of these features without permission from the user or the federal government. Unfortunately, this would also remove one of the sources of revenue streams for social media users.

Social media gives us access to the world around us. It allows us (student-athletes) to connect with fans, supporters, individuals we admire and, more importantly, the community. Despite the role social media plays in everyone's lives, most platforms are grossly misunderstood and often allow for the Name, Image, and Likeness of any of its users to be misappropriated without consequence. A diligent review of terms and conditions for many of these platforms would illustrate this fact.

C. REGULATORY FRAMEWORK IMPACTING THE STUDENT-ATHLETE EXPERIENCE

The Right of publicity, personality rights, and Name, Image, and Likeness are all phrases often used interchangeably. As with other rights, however, the way we exercise this right through technology complicates already difficult issues. Because we live in a data driven society, one of the floating issues is how we define Name, Image, and Likeness. In particular, what is likeness and how can we arrive at a definition that is both fair and inclusive?

Generally, everyone has a right to control the commercial use of their Name, Image, and Likeness; however, the value of exercising this right is not necessarily worth the efforts needed to protect it. Not everyone's commercial use of their Name, Image, or Likeness will be a lucrative endeavor. Not all student-athletes attribute the same value to their Name, Image, and Likeness. Unfortunately, this publicity right has become a subject of popular debate in the US but not for the reasons that it should be.

For the student-athlete, Name, Image, and Likeness has been thrown around by the public in an attempt to justify the collegiate model for amateurism. It has also been used as a justification for creating a free market in intercollegiate athletics despite the negative impacts that it would have on the majority of student-athletes. Within the current discussion on this topic, conversations fixate around the NCAA rather than the welfare of the student-athlete. This unfortunate truth reflects the bitter reality that this current debate is placing student-athletes in the crosshairs of a war between sports fans seeking access to content, and the NCAA looking to provide a workable model that prioritizes educational opportunity and academic stability to all student-athletes.

NIL, like the right to publicity, also has important implications regarding privacy rights. The right of publicity and the right to privacy are inextricably connected. Some of the basic privacy rights we enjoy today evolved out of disputes regarding the right to publicity. Many privacy rights, for the most part, are, like publicity rights, states' rights, which means they exist within the framework that states choose to recognize them in. This is why we talk about privacy laws as a patchwork of regulations governing protections within this country. One of the causes for concern with regard to privacy issues and NIL is the close relationship with technology. States are struggling to wrap their heads around privacy, how to protect it, and what to do next. The patchwork of privacy laws at the state level are leading to constant petitions to the federal government for a broad sweeping piece of legislation that will govern privacy protections in the US.

Like many other rights, the right of privacy exists through the constructs that student-athletes interact with – social media, a platform that exists without regulation. What's important is that privacy is intertwined through all of this. Privacy rights were created in an environment that did not foresee the changes in society or the regulatory structures that we see today. It also did not, or could not, predict the growing and emerging role that technology is playing in today's social structure. Furthermore, the US reliance on digital communications are also heavily impacted by right to privacy – this includes streaming (music, television, athletic contests).

Legally, in intercollegiate athletics, administrators at the institutional conference and national level need to understand how these rights and regulations operate in order to avoid liability when it comes to college athletics.

II. UNDERSTANDING THE STUDENT-ATHLETE EXPERIENCE AND ITS VALUE IS A CRITICAL COMPONENT TO ASSESSING THE IMPACT OF COMPENSATION THROUGH NAME, IMAGE, AND LIKENESS ON THE MODERN STUDENT-ATHLETE.

The recognition of Name, Image, and Likeness as a form of compensation for student-athletes substantially impacts the student-athlete's experience: a critical component to intercollegiate athletics and the overall value of participating in college sports. The recognition of value and the substantial role that the student-athlete experience plays within intercollegiate athletics, and society, was one of the many reasons that the Student-Athlete Advisory Committee (SAAC) exists and continues to have a voice throughout the membership process. One of the many functions carried out by SAAC at both institutional and national levels involves highlighting current changes to regulatory, political, academic, and athletic frameworks, and analyzing their impact on the student-athlete experience. In this regard, the work done by SAAC at every level operates as more than a sounding board for institutional reform, but instead stands as a principled voice of the primary stakeholders in all of these discussions.

A. *THE STUDENT-ATHLETE VOICE IS MANIFESTED THROUGH THE STUDENT-ATHLETE ADVISORY COMMITTEES PRESENT ON EVERY COLLEGE CAMPUS*

I served on SAAC at the institutional level, I chaired the Mountain West conference SAAC, and eventually became chair of the National Division I SAAC. This ultimately led to my appointment as the first student-athlete to serve on the NCAA's Board of Directors. National SAAC creates the opportunity for student-athletes to involve themselves in NCAA's governance, policy making, and transparency efforts as they relate to all sports. At the national level, all of the committees within the membership, including the Olympic committees that govern USA Olympic team selection, receive at least one liaison from the SAAC. In this capacity, I have served on the Competitive Safe-Guards and Medical Aspects of Sports Committee tasked with creating and reviewing many of the changes to concussion protocol and mental health resources. I also served as a liaison to the Olympic Sports Committee. This was an incredibly important role as it represents the fact that many of our outstanding performers at the Olympic Games are current, or former, student-athletes. How we deal with issues at the collegiate level impacts decisions made elsewhere.

B. THE VALUE OF THE STUDENT-ATHLETE EXPERIENCE

The student-athlete experience is what gives intercollegiate athletics, and many of our college campuses, life. It's why colleges sponsor athletics. It's the reason student-athletes have higher graduation rates than the regular student body. And it's the motivating factor powering student-athletes to give their time, energy, and attention to four years of discipline, training and success beyond the field. The student-athlete experience encompasses components operating beyond the touchdown passes, goals scored, and perfectly executed technique. The way we engage with our academic advisors, our student body, our coaches, our training staff, and perhaps most importantly, our teammates and surrounding community, are all relevant factors that impact the student-athlete experience.

When we arrive on campus, many of us will have an opportunity to compete in athletic contests at the institutional level. Some of us will have an opportunity to compete at the conference level. But very few student-athletes will have the privilege of competing for a national title or championship at the national level. Regardless of whether you are a third string quarterback, or Division I national champion, most student-athletes will find that upon graduation it's not the trophies or the on-the-field successes that they take with them after graduation. Instead, it's the lessons that come from participation in intercollegiate athletics that transcend every victory, every loss or injury, and any gold medal that a student-athlete may experience at one point in time or another. The few individuals outside of intercollegiate athletics that actually choose to recognize the value of the student-athlete experience and the valuable lessons we take away from our experiences usually hear about time management skills, discipline, and teamwork. But what you don't hear about are things like selflessness, patience, perseverance, and comradery. These are themes of our experience that connect us to our universities, our communities, and the people that support us beyond the talents that we display on the field. These are the interactions that student-athletes hold onto.

Unfortunately, when it comes to the current debates around Name, Image, and Likeness, the intercollegiate model for amateurism, and the overall value that student-athletes tap into by being a student-athlete, the majority of individuals leave the student-athlete experience out of the equation. This does a great disservice to the student-athlete, the institution, and society as a whole because it is an experience that makes the intercollegiate athletic model in the United States as important as it is. It's also the reason why comparing athletes at the professional level with student-athletes at the collegiate level is so incredibly dangerous. On balance, the public bases this comparison off of what they see. They base it off of the performances viewed on ESPN, and the incredible value that entertainment brings to their screens. But most viewers don't see the experiences we share with each other before or after the game. They don't see the flash cards we take into the ice bath. They don't see the textbooks that we bring on the bus ride to away games. And for athletes like myself, they'll never understand the value of surrounding ourselves with likeminded individuals connected by an ambition for success on and off the field.

Because the public typically only pays attention to the 2% of student-athletes at the elite level, they often fail to consider the hundreds of thousands of student-athletes who will go pro in something other than their sport. Soccer players who win conference championships still go to med school; football players who choose not to participate in the draft become professors; and track and field athletes, like myself, continue to train for the Olympics while balancing law school. But more importantly, student-athletes that participate in intercollegiate athletics have an opportunity of exposure that no other organization or institution has been able to provide. Student-athletes come to these great academic institutions and leave as scholars. The same individuals that come to these universities thinking their value in society is one dimensional, receive mentorship and guidance that enable them to leave with master's degrees and other fantastic credentials. Some of these very same student-athletes are probably in this room today.

C. KEY FACTORS SHAPING THE STUDENT-ATHLETE EXPERIENCE

Time Demands

The student-athlete experience is tied to a variety of different factors. This includes, but is not limited to, time demands, team dynamics, and community engagement. The majority of fans think that our college experience revolves around the games they see on weekends, when in reality we are spending copious amounts of time in, and outside of, the training room. In 2014, myself, and the rest of my colleagues on Division I SAAC, launched the largest time demands survey in the country, which ultimately lead to many of the playing time policies and other athletic procedures that you see today. Unsurprisingly, we found that student-athletes were spending upwards of 50-60 hours per week on athletically related activities.

On top of these activities, student-athletes are also expected to be full time students and to rise to the highest levels of academic excellence. The presence of these standards and expectations are what lead to the successes off the field that student-athletes are known for, many of whom say they would not change it for the world. Name, Image, and Likeness complicates this fragile dynamic of time demands. NIL is only valuable if it can be controlled and protected. In order for a student-athlete to capitalize on this dynamic, her NIL will need to be monitored at every level: academic, institutional, conference, national and state.

Any social media influencer will tell you that monitoring an individual's Name, Image, and Likeness on some of these platforms can be a hefty task. When coupled with the efforts needed to develop your brand on social media in order to gain a profit from it, this would place a substantial burden on the already limited time and attention student-athletes give to the tasks in front of them. Bad actors, acting with the malicious intent of taking advantage of this opportunity, threaten the welfare of student-athletes.

Given the current regulatory state of NIL, student-athletes choosing to embark on that journey would likely have to hire an individual to monitor the use of their brand and perhaps an attorney to regulate compliance with the porous framework of state laws governing its use. A considerable amount of effort would have to go into the management, development, and compliance with the state of Name, Image, and Likeness and the regulatory framework around it.

Student-athletes do not live in world where these external pressures are non-existent. As a result, the impact on the already burdensome time demands of student-athletes would be exacerbated.

Team Dynamics

Another important aspect of the student-athlete experience is the impact of the team dynamic. On the surface, student-athletes develop teamwork and the ability to manage expectations. But teamwork and team dynamics go a lot deeper than that. It's the value of altruism – really being selfless and understanding that some things are more important than you. This is understanding that regardless of what your role is, everyone has a role to play. One of the reasons I think this lesson is so incredibly important, and why its tie to the student-athlete experience is so valuable, is because teamwork transcends college athletics; teamwork is the way our country should work.

Society initially was designed to function through teamwork. Teamwork is one of the reasons we are all here today, because we recognize the value, and more importantly, the need to work these problems out as a unit. On balance, I think the issues we find plaguing intercollegiate athletics and the complexities around college sports are the same complexities and problems that we deal with on a societal level.

Teamwork and the relationships that I built as a track and field student-athlete with my relay, with the other student-athletes at my school, within my conference, and throughout the NCAA, are the lessons that all of us actually take with us and the connections that make this experience what it is. To this day, I still talk to my college roommate, and I still talk to teammates that left my team after the first year, many of whom are no longer competing. I couldn't imagine the impact on the student-athlete experience if issues like Name, Image, and Likeness began to put pressures on those dynamics. The unfortunate result of this strain would fall on coaches who have to manage, not only the success of the team, but the dynamics of this team and the overall cohesion within the program.

Community relationships

Stepping the student-athlete experience outside of the institutions, community engagement is often the lifeline for a student-athlete participating in intercollegiate athletics. Many student-athletes attend institutions far away from home – away from parents, family, and loved ones. The communities that surround our athletic or academic institutions serve, not only as a great resource for fan support, but are often homes away from home. There is a kinship built between student-athletes and the communities that they're connected to. Many children within the community look up to student-athletes as role models and parents look to student-athletes with a trust that they will set the tone and example for success in every field of the human endeavor for their children. More importantly, student-athletes are looked to as leaders in the community, often because of the lessons they learn while participating in intercollegiate athletics.

The bond between student-athletes and their communities is multi-faceted, however. Outside of family dynamics, student-athletes also form relationships with many places of business that have been cornerstones within these communities. This is the sandwich shop owned by the married couple that has been in the community for thirty years. It's the diner that's been family owned and operated since before the school even had an athletic department. And it's the bakery that always buy seasons tickets to our games and continues to hang up posters of their favorite athletes in their shops. For student-athletes, this has never been about value in the commercial sense, but about creating value in other places that transcends financial compensation.

Up until this point, most of these establishments, some of which struggle to stay afloat, have not needed to concern themselves with potential legal violations to the right of publicity when it comes to their student-athletes. Name, Image, and Likeness could greatly impact the communities that support college athletics. This is a speed bump that comes with now potentially holding the community responsible for supporting their student-athletes. It follows that NIL impacts the way student-athletes experience each factor tied to the student-athlete experience, greatly impacting the welfare of the student-athlete.

D. EDUCATION IS THE EPICENTER OF THE STUDENT-ATHLETE EXPERIENCE

The debate around a potential pay for play model and the use of NIL as a source of compensation for student-athletes has continued to persist with little to no discussion of the most important aspect of the student-athlete experience: education. The emphasis on academic scholarship and excellence is one of the many factors separating collegiate athletics from the professional leagues. Notwithstanding any of the tremendous benefits serving to illustrate the value of the student-athlete experience, education continues to play a substantial role in our interaction with these academic institutions. Acknowledging this reality is paramount to understanding the value of the current collegiate model for student-athletes and the impact NIL might have on this framework. The primary function for any of our academic institutions is—and should continue to be—the education of students.

The potential for NIL as a means to provide compensation for student-athletes has grown, in part, due to criticisms that the collegiate model does not compensate student-athletes fairly. In order to truly evaluate the merits of such a claim, institutions and other key stakeholders have to assess, and put a price tag on, all of the services that student-athletes currently receive. Naturally, this would include putting a price tag on a college education for both scholarship and non-scholarship athletes. Even if we could place an accurate price tag on the value of education in America, we then face the situation of what to do about the number we see. In the event that the student-athlete experience, education, and the like are not comparable to the value student-athletes bring to the table, NIL might not be the best vehicle to address the disparity. Rather, if we truly value this idea of education and the role that it plays in producing a productive and useful member of society, it may substantially benefit the entire nation to increase the value of the education and experiences student-athletes take part in. I shudder to think, however, that

notions around educational opportunity and value will instead be shut down because, at the end of the day, the viewing public has never looked at the student-athlete as a student, but rather as a form of entertainment. Most fans could probably never tell you what any of their student-athletes do off the field. The respect and admiration fans have for many student-athletes seems to only go as far as they can throw a football or, in my case, jump into a pit full of sand. This is likely the reason why compensation for student-athletes has centered around Name, Image, and Likeness, and something so closely tethered to entertainment for the 2% of student-athletes that the fans actually see, rather than the 98% of outstanding student-athletes who are doing amazing things beyond the fields of play.

Conclusion

Today's student-athlete faces problems similar to the rest of the American people when it comes to the issue of modernization. Regulatory uncertainty and the rapid growth of technology places a strain on many of the factors impacting the welfare of Americans. It is no secret that most institutions, organizations, and legal frameworks are in desperate need of a new approach that takes into account important components of the world we live in today. Digital communications, social media platforms, and other advances in technology are nestled within an innovation economy that student-athletes must live in. NIL can only be understood through the lens of how it is exercised by student-athletes.

Fairness is another common theme floating in the periphery of these NIL discussions. Intercollegiate athletics looks at fairness from the vantage point of equality between all student-athletes. By contrast, the public evaluates these levels of fairness by comparing scholar athletes to regular students. This comparison is misguided but not because fairness is not important to student-athletes. Most student-athletes do not expect to receive an experience equal to the average student, we expect an experience that is better and our institutions provide that experience for all of us. The current model for intercollegiate athletics places us in the best possible position to achieve this standard because the individuals that run college athletics—senior women administrators, university presidents, athletic directors, coaches, athletic trainers, and other student-athletes—understand our needs and the value of our experiences better than anyone. Our institutions see to the proper administration and equality of women's athletics beyond the requirements of Title IX. Our institutions see to it that all student-athletes have access to health and wellness resources on their campuses. The current efforts managed by the membership institutions of the NCAA see to it that roughly 300,000 student-athletes have access to an outstanding education.

The porous framework of NIL legislation across the country poses a substantial threat to the welfare of today's student-athlete. These upstream approaches to state legislation that neglect to consider the world of technology and experiences of today's student-athlete, will surely have downstream consequences. Student-athletes are more than the entertainment that fans subscribe

11 February 2020

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to in between professional football games. The value of our education and welfare is no less important than those of other students on campus. Rapid growth of state legislation pertaining to NIL without the structural guidelines from the governing bodies of intercollegiate athletics creates a serious problem for student-athletes seeking to navigate this patchwork of state laws that govern their likeness. Protecting the welfare of student-athletes is not about getting it done, it's about getting it done right. When regulatory frameworks that affect the education and welfare of students get it wrong, the entire nation suffers. Are we—the student-athlete—not worth protecting?