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Title IX Hypocrisy Continues After *NCAA v. Alston*

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TITLE IX HYPOCRISY CONTINUES AFTER *NCAA V. ALSTON*

MACI EDWARDS* & WALTER CHAMPION**

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I. INTRODUCTION

After years of ignoring the demands for gender equity in education, in 1972 the United States Congress passed the Title IX provision of the Education Amendments to the United States Code.[1] This code provision prohibits discrimination on the basis of sex for any institution that receives federal financial assistance.[2] While this provision seemed to be a progressive dream, the stark reality was a flood of male dominated loopholes. For years, universities and other amateur sports programs receiving federal funds ignored Title IX and its requirements with little to no repercussions.[3] However, universities and the National Collegiate Athletic Association have the opportunity to close these loopholes using the bright horizon of *NCAA v. Alston* and the new found ability for collegiate athletes to sell their name, image, and likeness.[4] This Article will first briefly address the history of the National Collegiate Athletic Association policy prohibiting compensation for student-athletes.

Collegiate football superstars for generations have been burned by the National Collegiate Athletic Association compensation restriction which limits athletes from accepting funds more than tuition, room, and board.[5] Second, this Article will describe the violations and consequences for notable players such as Reggie Bush, Cam Newton, and Johnny Manziel, who have been punished by the National Collegiate Athletic Association for violations of this policy, some more harshly than others. The National Collegiate Athletic Association has used the argument of amateurism to stifle these athletes in their prime, arguably a federal anti-trust violation in and of itself.[6]

After being ridiculed for its hypocritical and archaic policies in a unanimous Supreme Court opinion, the National Collegiate Athletic Association lifted this policy, allowing states like California to begin allowing

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1. 20 U.S.C. §§ 1681-1688 (2022).

2. *Id.*

3. Katie Thomas, *Long Fights For Sports Equity, Even With a Law*, N.Y. TIMES (July 28, 2011), https://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html.

4. NCAA v. Alston, 141 S. Ct. 2141, 2152 (2021).

5. *See NCAA Delivers Post Season Football Ban*, ESPN (June 10, 2010), https://www.espn.com/losangeles/ncf/news/story?id=5272615; Joe Schad, *Sources: Newtons Talked of Pay Plan*, ESPN (Nov. 9, 2010), https://www.espn.com/college-football/news/story?id=5786315; Jenna Lemoncelli, *Johnny Manziel Admits He Made at Least $33k For Autographs at Texas A&M*, N.Y. POST (June 3, 2021, 6:15 PM), https://nypost.com/2021/ 06/03/johnny-manziel-i-made-33k-for-autographs-at-texas-am/.

6. Daniel Laws, Comment, *Amateurism and the NCAA: How a Changing Market Has Turned Caps on Athletic Scholarships into an Antitrust Violation*, 15 U. RICH. L. REV. 1213, 1213-15 (2017).

amateur, collegiate athletes to profit from their name, image, and likeness.[7] Third, this Article will discuss the change in the National Collegiate Athletic Association's policy, which now allows athletes to be compensated for the use of their name, image, and likeness as well as the many states that are slowly following the example of California by adopting their own Pay for Play laws, in an effort to compete for up and coming athletes.

The question then becomes, where does this leave women's sports? Traditionally, women's sports have been underfunded and unappreciated by their universities. While many female athletes have won against their universities in Title IX suits, universities across the country continue to provide unequitable opportunities for female athletes.[8] Often times the executive branch fails to adequately enforce Title IX, leaving athletic programs to openly discriminate against female athletes and provide inequitable and unfair opportunities between men's and women's sports.[9] Even small, Division III universities, such as Hardin-Simmons University in Abilene, Texas, leave their multi-year champion women's sports teams in the shadows of their underperforming male counterparts, like the football program.[10] Lastly, this Article will address how the new National Collegiate Athletic Association policy and the ability for athletes to be compensated for the use of their name, image, and likeness will affect Title IX and women's sports. The newly lifted National Collegiate Athletic Association restrictions and the upcoming changes to state law provide a unique opportunity for universities to meet the needs of all student-athletes and close the gap of gender inequality within their sports programs.

II. THE HYPOCRITICAL NCAA CAP FOR ATHLETE COMPENSATION

The National Collegiate Athletic Association (NCAA) had a long-held regulation that student-athletes could only be compensated for their athletic

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7. *Alston*, 141 S. Ct. at 2166; CAL. EDUC. CODE § 67456 (Deering, LEXIS through 2022 Sess.); Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12.

8. *See, e.g.,* Cohen v. Brown Univ., 879 F. Supp. 185, 214 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996); Mansourian v. Bd. of Regents of the Univ. of Cal., 816 F. Supp. 2d 869, 941 (E.D. Cal. 2011).

9. Thomas, *supra* note 3.

10. Jordan Hofeditz, *Hardin-Simmons Women's Soccer Gets Past Mary Hardin-Baylor in PKs For 19th-Straight Title*, ABILENE REP. NEWS (Nov. 8, 2021, 12:53 PM), https://www.reporternews.com/story/sports/college/hardin-simmons/2021/11/07/hardin-simmons-womens-soccer-beats-umhb-penalties-asc-title/6333182001.

performance up to the value of tuition, room, and board.[11] This rule was designed to preserve amateurism within collegiate athletics.[12] This preservation of amateurism proves the NCAA's regulation was nothing but a guise and excuse for the institution to circumvent anti-trust laws and athlete protections. When evaluated under the "rule of reason" standard of review that the Court has used to determine if the NCAA is violating anti-trust laws, the NCAA is provided an "easy out" to limit the compensation of athletes and take that compensation for themselves.[13] The general "per se" or "rule of ordinary reason" standard of review for almost all other anticompetitive limitations rule for general Sherman anti-trust law violations and is much more appropriate for the NCAA and their amateurism guidelines.[14] While the National Collegiate Athletic Association vehemently asserts this is for the protection of its athletes, the $19 billion price tag on the collegiate-athletic industry, suggests ulterior motives.[15]

A. Athletes Punished for Violations

1. Reggie Bush

In the early 2000s, Reggie Bush was the big name on campus at the University of Southern California. By 2005, Bush had won a Heisman Award. However, after leaving the University of Southern California to play for the New Orleans Saints, rumors quickly spread that Bush had received almost $300,000 in illegal payments during his time at the University of Southern California.[16] These rumors sparked a sweeping National Collegiate Athletic Association investigation into the football program at the University of

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11. *See 2009-10 NCAA Division 1 Manual*, NCAA, at Bylaw 12 61-76 (Aug. 1, 2009), https://www.ncaapublications.com/productdownloads/d110.pdf.

12. *Id.*

13. NCAA v. Bd. of Regents, 468 U.S. 85, 86, 103-13 (1984); *see also* NCAA v. Alston, 141 S. Ct. 2141, 2147, 2152-58 (2021).

14. *Bd. of Regents*, 468 U.S. at 100-01.

15. Laws, *supra* note 6; Artur Davis & James Davis, *How Much Are Student Athletes Worth? March Madness Returns, As Does Compensations Debate*, USA TODAY (Mar. 16, 2021, 12:00 PM), https://www.usatoday.com/story/opinion/2021/03/16/how-much-student-athletes-worth-march-madness-returns-does-pay-debate-column/4667334001/.

16. Nicholas Reimann, *Reggie Bush Won't Get Heisman Back After NCAA Ruling*, FORBES (July 28, 2021, 3:44 PM), https://www.forbes.com/sites/nicholasreimann/2021/07/28/reggie-bush-wont-get-heisman-back-after-ncaa-ruling/?sh=57a783dbcbb5.

Southern California.[17] It was found that Bush was taking cash and other lavish gifts from “wanna be” sports agent and convicted felon, Lloyd Lake.[18]

While these payments did not come directly from the University of Southern California, the National Collegiate Athletic Association found that members of the University of Southern California football program had knowledge of these gifts and failed to take remedial measures to correct the improper influence on Bush, which is a violation of NCAA guidelines.[19] The National Collegiate Athletic Association imposed harsh punishments on the University of Southern California for these violations and Bush lost his Heisman Trophy.[20]

The *NCAA v. Alston*[21] ruling has received copious amounts of media attention circling around whether or not these gifts would have been a violation of NCAA guidelines after the *Alston* ruling and California’s new Fair Pay for Play Act.[22] The NCAA has made it clear that they will not be revisiting any prior violations and rulings based on the new guidelines.[23] Reggie Bush, among others, have been quite vocal about their disdain with the NCAA’s decision and there has been a large social media campaign for Bush to have his Heisman reinstated.

2. Cam Newton

During recruitment for his freshman year season, Cam Newton did more than look for the school with the best sports program. Sources from Mississippi State University came forward with allegations that Newton’s father, Cecil Newton, told Mississippi State University athletics representatives that Cam would need more than a scholarship to play for Mississippi State.[24] It was further reported that Cecil Newton worked with Kenny Rogers to get a deal made for Cam to play at Mississippi State.[25] Newton eventually signed to play for Auburn University as the NCAA

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17. McNair v. NCAA, No. B295359, 2021 Cal. App. Unpub. LEXIS 759, at *4 (Feb. 5, 2021).

18. *Id.*

19. *Id.* at *5-6.

20. Reimann, *supra* note 16.

21. 141 S. Ct. 2141 (2021).

22. CAL. EDUC. CODE § 67456 (Deering, LEXIS through 2022 Sess.).

23. Reimann, *supra* note 16.

24. *Rogers: Cecil Newton Put Price On Son*, ESPN (Nov. 11, 2010), https://www.espn.com/college-football/news/story?id=5792707.

25. *Id.*

conducted a thirteen-month investigation into the Newton's pay for play scheme accusations.[26]

This investigation revealed that while Cecil Newton did in fact solicit a pay for play scheme for his son to play for Mississippi State University, they found no evidence to suggest that Auburn had exchanged any money for Cam to play for them in the 2010 season.[27] Cam was suspended for one game before being reinstated to play for Auburn.[28] The NCAA found that Cam had no knowledge of his father's activities and did not hire Rogers to be his agent.[29] While *NCAA v. Alston* might have changed the outcome for some of these notable athletes punished for violations of the NCAA's name, image, and likeness policies, it is unlikely that Cam Newton and his father's situation would have turned out any differently.

The new policy from the NCAA allows athletes to use and sell their name, image, and likeness, it does not allow universities to provide inappropriate inducements for athletes to sign with them.[30] Cecil Newton and Kenny Rogers making a financial agreement with Mississippi State for Cam to play football there would almost certainly still be a violation of NCAA policy. While Cam Newton was able to use the defense of ignorance to be relieved of any substantial consequences placed by the NCAA, other notable athletes have not been so fortunate.

3. Johnny Manziel

While Cam Newton could use the excuse of ignorance for his pay for play violation, Johnny Manziel had quite the opposite situation by his unsurprising and flagrant disregard for NCAA rules. Manziel was specifically quoted bragging about the money he made during his time at Texas A&M University and his lack of concern that the NCAA would take away any of his wins or

26. *Id.*; *see also* Tony Manfred, *The NCAA Finds No Evidence of Auburn Paying a $180,000 Bribe for Cam Newton*, BUS. INSIDER (Oct. 13, 2011, 7:28 AM), https://www.businessinsider.com/ncaa-clears-auburn-newton-2011-10.

27. *Rogers: Cecil Newton*, *supra* note 24; Manfred, *supra* note 26.

28. Chris Eggemeyer, *Cam Newton Scandal: NCAA Ruling and SEC Commissioner Show Lack of Integrity*, BLEACHER REP. (Dec. 4, 2010), https://bleacherreport.com/articles/534733-cam-newton-scandal-ncaa-ruling-and-sec-commissioner-show-lack-of-integrity.

29. *Id.*; *see also Rogers: Cecil Newton Put Price on Son*, *supra* note 24.

30. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

statistics.[31] The NCAA investigated the accusations that Manziel was violating amateurism rules by selling his name, image, and likeness through selling his autograph.[32] While Manziel's punishment was minimal, only a one-half game suspension, he would have been able to openly sell his autograph to the highest bidder under the new NCAA guidelines.

III. *NCAA v. Alston* Changes the Game

Shawne Alston, leading a larger group of Division I athletes, filed suit against the NCAA, claiming the cap on compensation for student-athletes was a violation of the Sherman Antitrust Act.[33] In a shocking 9-0 ruling, the Supreme Court held that there was nothing unique about the NCAA's student-athletes and amateur sports that requires the court to alter the method of analysis for anti-trust violations, as suggested by the Court in *NCAA v. Board of Regents*.[34] The court determined that the "rule of reason" is the standard by which these issues should be governed.[35] The dicta opinion of the Court suggests that under this standard of review, the amateurism policies under the NCAA guidelines would not stand.[36] While the athletes, in this case, did not directly challenge the cap on compensation generally, they only challenged the cap on education-related expenses, within this holding, the Court suggested that the compensation cap would not pass under the ordinary rule of reason analysis.[37]

Following this ruling, the National Collegiate Athletic Association Division One Council took swift and corrective measures, likely to avoid another round in the Supreme Court. The NCAA Division I Council recommended that the association temporarily suspend amateurism rules related to student-athletes name, image, and likeness, as long as improper

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31. Barrett Sallee, *Former Texas A&M QB Johnny Manziel Says He Made a 'Decent Living' Signing Autographs in College*, CBS SPORTS (June 3, 2021, 4:24 PM), https://www.cbssports.com/college-football/news/former-texas-a-m-qb-johnny-manziel-says-he-made-a-decent-living-signing-autographs-in-college/#:~:text=Manziel%20told%20Barstool%20Sports%20that,in%20college%2C%22%20Manziel%20said; *see also* Lemoncelli, *supra* note 5.

32. Sallee, *supra* note 31.

33. NCAA v. Alston, 141 S. Ct. 2147, 2147 (2021).

34. *Id.* at 2158; *see* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117-20 (1984).

35. *Alston*, 141 S. Ct. at 2156.

36. *Id.* at 2163.

37. *Id.* at 2153-56.

inducements were still prohibited, opening the door for states to pass their own pay for play laws.[38]

A. What Does that Mean for Name, Image, and Likeness Contracts

1. California Fair Pay to Play Act and Other Copycat Statutes

Following the holding of *Alston*, California quickly moved to pass new legislation to capitalize on this new ruling. The California Fair Pay to Play Act was passed in September of 2019 and is to become effective in January of 2023.[39] This new law prohibits universities and other athletic organizations in California from prohibiting student-athletes from being compensated for their name, image, and likeness.[40] Fair Pay to Play opens the door wide open for athletes to be compensated during, arguably, the peak of their athletic abilities. It further opens the door for increased competition among the top universities across the country to incite the most favorable athletes to their programs.

Twenty-eight other states have adopted pay to play laws following California's example, including Oklahoma, Texas, and Nebraska.[41] These states quickly followed suit in an effort to compete with California for signing upcoming student-athletes to their athletic programs. These pay to play laws allow student-athletes to receive compensation for the use of their name, image, and likeness, and some take it even a step further and allow athletes to contract with professional agents.

Nebraska introduced Legislative Bill 962 in January 2020 which included sections 48-2610 and 48-2614, Reissue Revised Statutes of Nebraska, which includes the Uniform Athlete Agents Act and the Nebraska Fair Pay to Play Act.[42] This law allows student-athletes the ability to receive compensation for their name, image, and likeness, as well as allows for professional representation for student-athletes and contractual agreements between them.[43] This law further prohibits universities from prohibiting athletes to participate

38. Steve Berkowitz, *NCAA Adopts Temporary Policy on Name, Image, and Likeness in Seismic Shift For College Sports*, USA TODAY (June 30, 2021, 9:00 PM), https://www.usatoday.com/story/sports/college/2021/06/30/ncaa-adopts-name-image-likeness-policy/7813970002/.

39. CAL. EDU. CODE § 67456 (Deering, LEXIS through 2022 Sess.).

40. *Id.*

41. *NIL Legislation Tracker*, SAUL EWING, https://www.saul.com/nil-legislation-tracker (last visited Dec. 30, 2022).

42. Nebraska Fair Pay to Play Act, NEB. REV. STAT. §§ 48-2610-14 (2022).

43. *Id.*

in their respective athletic departments just because they are receiving compensation for the use of their name, image, and likeness.

Oklahoma introduced its pay to play in early 2021 and was the first university belonging to the Big 12 Conference to pass such a bill into law.[44] The Revised Uniform Athlete Agents Act provides the legal framework for athlete agents to become registered and begin working with student-athletes to assist them in finding contracts for compensation for the use of their name, image, and likeness.[45] Oklahoma's pay to play legislation focuses around the use of athlete agents, but still provides the same rights to compensation for student-athletes as the other states that have adopted pay to play laws.

In the urgency to stay relevant to incoming athletes after Oklahoma passing its pay to play laws, Texas quickly followed suit. In June of 2021 the Texas legislature passed Senate Bill 1385 which amended Section 51.9246 of the Texas Education Code which permitted student-athletes to receive compensation for the use of their name, image, and likeness.[46] The Texas law provides a protective framework for universities, requiring that student-athletes disclose these contractual agreements and not conflict with the teams existing contracts.[47] It further provides that prospective students cannot contract for the use of their name, image, and likeness before they begin at the institution they are playing for.[48]

The National Collegiate Athletic Association Division I Council suggested that the association allow schools to determine their own "name, image, and likeness" policies in states that have not passed pay to play legislation.[49] This provides states an incentive to pass their own pay to play laws to keep universities at an equal playing ground for attracting athletes to their sports programs.

IV. THE FUTURE FOR "NAME, IMAGE, AND LIKENESS" IN WOMEN'S SPORTS

While the issue of equity within women's sports has continued long after the passing of the Education Amendments of 1972, which included the Title

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44. Ed Godfrey, *A Whole New Age: Oklahoma NIL Bill Passes, Would Let College Athletes Earn Compensation*, OKLAHOMAN (May 26, 2021, 12:24 PM), https://www.oklahoman.com/story/sports/2021/05/25/ou-osu-and-other-student-athletes-could-earn-money-under-bill/7432317002/; Revised Uniform Athlete Agents Act, OKLA. STAT. tit. 70, § 820.1 (2021).

45. Revised Uniform Athlete Agents Act, OKLA. STAT. tit. 70, § 820.1 (2021).

46. S.B. 1385, 87th Leg., 2021 Reg. Sess. (Tex. 2021).

47. TEX. EDUC. CODE § 51.9246 (2021).

48. *Id.*

49. Hosick, *supra* note 30.

IX prohibition against discrimination based on sex, *NCAA v. Alston*[50] provides hope for female athletes to bridge the inequity divide between them and their male counterparts. With the changes in NCAA policies for athletes to contract for the use of their name, image, and likeness, there are opportunities for universities to assist female athletes and their women's sports teams in receiving equitable opportunities compared to the men's teams.

A. The Interworkings of Title IX

Title IX is a federal regulatory statute which governs school systems and prohibits discrimination based on sex.[51] This provision states: "(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[52]

Title IX is applied most commonly to athletic programs at grade schools and universities. While the provision allows separation based on sex, it requires equity between the two different gender programs in three general areas: (1) the number of opportunities they provide to each sex; (2) the quality or number of benefits provided to each sex; and (3) the comparability of scholarships awarded.[53] The applicability of this statute towards third party contracts for an athlete's name, image, and likeness has become a hot dispute in the amateur sports realm.[54]

Generally, Title IX is not implicated if there is no institutional involvement, but the issue then arises, is knowledge or approval institutional involvement?[55] When contracting with third parties, on its face, these contracts wouldn't implicate Title IX, but legal experts believe a larger analysis is required.[56] We must assume these athletes selling their name, image, and likeness will need, at a minimum the universities approval, if not a full joint venture, to sign a compensation contract involving their jersey or school logo,

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50. 141 S. Ct. 2147 (2021).

51. 20 U.S.C. §§ 1681-1688 (2022); *see also* Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. COLL. & U.L. 297, 298 (2015).

52. 20 U.S.C. § 1681(a) (2022).

53. Buzuvis, *supra* note 51, at 322-23.

54. Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan 21, 2020, 1:22 PM), https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=21d74cf97625.

55. *Id.*

56. *Id.*

will this approval implicate Title IX requirements? Further, if the institution's promotional activities favor men's sports over women's sports, will that implicate Title IX because the promotions may increase opportunity for name, image, and likeness contracts?[57]

B. The Little Impacts of Title IX in Women's Sports

"Participat[ion] in intercollegiate sports is a vital component of educational development[,]" as stated by the court in *Mansourian v. Board of Regents of the University of California*.[58] This case arose from a complaint from three female students at the University of California that the university refused them the ability to participate in intercollegiate wrestling.[59] In the court's finding of facts, it was determined that the university compiled a Title IX compliance committee to determine if the university was in compliance.[60] That committee found that the university was not in compliance with any of the three prongs of Title IX and that the ratio of athletic opportunities between men's and women's sports was drastically disproportionate.[61] The court's fact-finding determined that the university took no steps to increase women's participation in athletic programs, to the point of a backwards slope in non-compliance.[62]

The court in this case found that the University of California violated the Title IX mandate that required the university to effectively accommodate the interests and abilities of both sexes.[63] There was not a continuing practice of program expansion during the related time period that plaintiffs were students at the university, in fact, the athletic director for the university, Pam Gill-Fisher, made several recommendations to the university that they were out of compliance with Title IX and the decisions of the university continued to be out of compliance and put the university at risk.[64] In fact, during the time that the plaintiffs were students at the University of California, the university cut

57. *Id.*
58. 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011).
59. *Id.* at 875.
60. *Id.* at 876-78.
61. *Id.* at 877-88.
62. *Id.*
63. *Id.* at 940.
64. Mansourian v. Bd. of Regents of the Univ. of Cal., 816 F. Supp. 2d 869, 878 (E.D. Cal. 2011).

sixty different women's programs, the exact opposite of proving a good faith effort for real program expansion, as required by Title IX.[65]

In 1995, the District of Rhode Island provided a judicial framework for analysis of Title IX claims in *Cohen v. Brown University*.[66] In this case, female athletes sued Brown University in a class action lawsuit after the university cut funding for the women's gymnastics and volleyball teams.[67] These teams were highly successful in intercollegiate competitions and had large participation percentages.[68] The university attempted to balance the funding cuts by also cutting funding for men's water polo and golf teams.[69] These teams had much lower participation counts and were not as successful in competition, the university continued to provide funding for the other, more popular, men's sports.[70]

The court in this case laid out the legal analysis for assessing compliance with Title IX.[71] If Title IX is implicated, there is a three-part test of assessing compliance with the law, called the effective accommodation test; first, if participation is proportional to enrollment; second, the history of expansion and development; and lastly, whether or not the institution is fully and effectively accommodated.[72] Further, there are ten factors to determine whether equitable opportunities are available.[73] The factors include: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; and (10) publicity.[74] In this case, Brown University attempted to avoid Title IX obligations by arguing that

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65. *Id.* at 923.

66. 879 F. Supp. 185, 199-210 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

67. *Id.* at 187.

68. *Id.* at 188-91.

69. *Id.* at 188.

70. *Id.* at 192, 213.

71. *Id.* at 200-10.

72. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

73. 45 C.F.R. § 86.41 (2022); 34 C.F.R. § 106.41 (2022).

74. 45 C.F.R. § 86.41; 34 C.F.R. § 106.41.

women were less interested in sports than men and therefore the ratio for proportionality is lower.[75] The court rejected this argument, criticizing the University for using baseless gender stereotypes to openly discriminate against female athletes.[76]

In 1998 the Office for Civil Rights began an investigation into the University of Southern California for Title IX violations after a complaint was filed by Linda Joplin, stating that the university provided far inequitable benefits and treatments for the Women's Rowing team.[77] The University of Southern California's rowing team has and is one of the most successful women's rowing teams in the country, but at the time was practicing in a warehouse twenty miles from campus and had locker rooms that did not begin to compare to the male locker rooms at the university.[78] This investigation went on for fourteen years before the Office for Civil Rights released its report.[79] This report found that the university had significant disparities between the male and female athletic programs that put these female programs, like the women's rowing team, at a huge disadvantage.[80] The university settled this complaint by providing a series of new accommodations for the women's rowing team, including a new boathouse and locker room.[81] While this investigation ended in a "win" for the women's rowing team at the University of Southern California, it took fourteen years for the Office of Civil Rights to conclude its investigation and just as long for the university to correct their obvious disparities between the sports. This is just further evidence that while Title IX, in theory, provides equitable opportunities for men and women in sports, the follow-through of this provision is lacking in substance.

C. Historical Gender Inequity in Athletics

In 1996, Congress passed the Equity in Athletics Disclosure Act, which required that any school receiving federal funds must disclose their

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75. Cohen v. Brown Univ., 879 F. Supp. 185, 204-05 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

76. *Id.* at 205-06.

77. Allie Bidwell, *U. of Southern California Settles Title IX Complaint Over Women's Crew*, CHRON. HIGHER EDUC. (Jan. 18, 2013), https://www.chronicle.com/article/u-of-southern-california-settles-title-ix-complaint-over-womens-crew/.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

participation counts and budgets for men's and women's sports.[82] The purpose of this act was to create federal accountability to university athletic programs for the funds spent on those programs. This act was passed because Congress knew that Title IX wasn't providing the equitable opportunities for female athletes as it was designed to do. This disclosure act provides openness and accountability to these athletic programs, as these numbers now are publicly available for incoming students.

A study of these disclosures found that Division III universities have a more equal ratio of women to men athletes, around forty-one percent.[83] Comparatively, at Division III universities, women's sports receive about forty-one percent of the operating budgets for athletics.[84] The numbers are vastly different for Division I athletics programs.[85] There is an argument to be made that smaller Division II and III universities provide more equitable opportunities for male and female athletics because their programs are designed for the benefit of the students rather than for economic gain.[86] However that is not always the case.

1. Hardin-Simmons University, Comparing the Women's Soccer Program to the Football Program

Based on the data reported by the university to the Department of Education, Hardin-Simmons University spends substantially more funds on men's sports operating expenses compared to women's sports. Total expenses for men's teams totaled $1,642,789 in 2020 and total expenses for women's teams totaled $859,514.[87] The university regularly spends a significantly higher portion of their total athletic expenses on men's sports even when their women's soccer team just won their nineteenth consecutive American Southwest Conference tournament title.[88] The Hardin-Simmons men's football, baseball, and basketball teams don't compare in performance to the

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82. 20 U.S.C. § 1092(g) (2022).

83. Welch Suggs, *At Smaller Colleges, Women Get Bigger Share of Sports Funds*, CHRON. HIGHER EDUC. (Apr. 14, 2000), https://www.chronicle.com/article/at-smaller-colleges-women-get-bigger-share-of-sports-funds/?cid2=gen_login_refresh&cid=gen_sign_in.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Get Data for One School*, EQUITY IN ATHLETICS DATA ANALYSIS, https://ope.ed.gov/athletics/#/institution/search (last visited Dec. 30, 2022) (follow hyperlink; then search "Hardin-Simmons University;" then click "Revenues and Expenses;" then scroll to "Total Expenses by Team").

88. *Id.*; Hofeditz, *supra* note 10.

women's soccer team.[89] The women's soccer team continually outperforms the Hardin-Simmons football program but is rarely provided the same opportunities.[90]

D. Circumventing Gender Equity

While there are no statutory exceptions to Title IX there are exceptions for contact sports as well as allowable ratio rules.[91] Athletic programs have used these ratio rules to disguise their lack of opportunity as lack of interest for women's sports. Under the first prong of the "effective accommodation" test, universities could use ratios of athletes and students to justify providing more opportunities to men than women. It is generally understood that if a university and their athletic programs comply with the first prong, the proportionality prong, of the "effective accommodation" test they receive safe harbor from being incompliant with Title IX.[92]

The Court attempted to address this issue in *Cohen v. Brown University*,[93] when female student-athletes sued the university for cutting women's programs.[94] While the Court in *Cohen* chastised Brown University for using the argument that women are less interested in sports than men to justify their lack of substantial proportionality, the Office of Civil Rights reaffirmed the safe harbor in a "clarification memo" issued in 1996.[95] The Office of Civil Rights issued this memo in an attempt to explain the three prongs of the "effective accommodation" test and provide guidance and recommendations for how universities could be in compliance with Title IX, however, the "clarification memo" provided more clarification for how to avoid being compliant with Title IX than how to achieve compliance.[96] The recommendations from the Office of Civil Rights provided lots of leniency to

89. *ASC Chart of Champions*, TEX. INTERCOLLEGIATE ATHLETIC ASS'N (July 21, 2022), https://ascsports.org/sports/2021/3/3/GEN_0303214241.aspx.

90. *Id.*

91. 20 U.S.C. §§ 1681-1688 (2022); Mansourian v. Bd. of Regents of the Univ. of Cal., 816 F. Supp. 2d 869, 907 (E.D. Cal. 2011).

92. Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993); Lisa Yonka Stevens, *The Sport of Numbers: Manipulating Title IX to Rationalize Discrimination Against Women*, 2004 BYU EDUC. & L.J. 155, 164 (2004).

93. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992).

94. *Id.* at 979.

95. Norma V. Cantú, Assistant Sec'y for Civ. Rts., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 16, 1996), http://www.ed.gov/about/offices/list/ocr/docs/ clarific.html.

96. *Id.*

universities, essentially manipulating the athletic ratios to prove proportionality and receive safe harbor protection under the first prong of the "effective accommodation" test.[97] However, even against the Courts and the Office of Civil Rights repeatedly failing these students, female athletes have been fighting fiercely to achieve equitable opportunities for athletics to fulfill their educational experiences and growth.

V. A LOOK TO THE FUTURE . . . USING "NAME, IMAGE, AND LIKENESS" TO CLOSE THE GENDER EQUITY GAP

Allowing student-athletes to capitalize on the sale of their name, image, and likeness opens a wide range of possibilities for these athletes, and where there are possibilities, there are problems. One issue that the Office of the General Counsel addresses in their *GC 21-08 Memorandum* is an athlete's statutory protections under the National Labor Relations Act.[98] In this memo, General Counsel, Jennifer Abruzzo, points out that the National Labor Relations Act broadly defines an employee, with statutory protections, with few enumerated exceptions in Section 2(3) of the Act.[99] These exceptions do not include athletes at universities.[100]

Ms. Abruzzo goes on in the memo to address the Board in Northwestern and the National Collegiate Athletic Association misclassifying a group of football players as "student-athletes" when a union filed to represent them in a prior action.[101] The memo states that the use of the term "student-athletes" implies that these players do not have statutory rights under the National Labor Relations Act ("NLRA") because they are not employees, this is not the case.[102] Not only is the National Labor Relations Act definition of employee broad, but under the common law of agency definition of "employee," these players would also be classified as employees. This entitles them to protections under the National Labor Relations Act.[103]

Student-athletes being protected under the National Labor Relations Act provides athletes a unique opportunity never awarded to them before. The

97. *Id.*

98. Jennifer A. Abruzzo, *Memorandum GC 21-08*, NLRB (Sept. 29, 2021), https://www.akingump.com/a/web/fj79W4f637mkQupWaocC8V/3beRb3/memorandum.pdf.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

National Labor Relations Act guarantees employees the ability to organize and bargain collectively with their employers.[104] In this context, the athletes at individual schools or broader, different sports within a particular conference, would be able to unionize and collectively bargain within their universities or conferences.[105] This gives student-athletes a huge advantage and lots of power, that historically has been held by the National Collegiate Athletic Association, to negotiate for things like better facilities, athlete compensation, additional resources, etc. This would specifically be of benefit to female athletes to negotiate as a whole for more equitable resources and funds from their universities without the need for Title IX action.

VI. CONCLUSION

Historically, women's sports in the collegiate setting have been overshadowed and under-valued by their respective athletic departments. Time and time again we see universities providing inequitable opportunities for intercollegiate activities to men and women students. The courts agree that the opportunity to participate in intercollegiate sports is necessary to educational development, yet universities continue to attempt to skirt around Title IX obligations. The federal government more often than not fails to step in and address these Title IX violations, all but encouraging the behavior of these athletic programs to continue.[106] The Office of Civil Rights continues to provide opportunities for universities to lower their standards for Title IX compliance and justify their obvious discrimination against female student-athletes.[107]

NCAA v. Alston[108] and the new opportunity for athletes to receive fair pay to play would seem to provide a new opportunity for universities to change history for women's sports. Athletic departments can capitalize on the social media movements and trends to grow popularity for women's sports. They could use that popularity to assist female athletes in contracts for the use of their name, image, and likeness. However, the data trends speak for themselves.

Just as when the United States Congress passed the Title IX Education Amendments, there was universal excitement for how women's sports would

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104. National Labor Relations Act, 29 U.S.C. § 157 (2022).

105. *Id.*

106. Thomas, *supra* note 3.

107. Cantú, *supra* note 95; Yonka Stevens, *supra* note 92.

108. 141 S. Ct. 2141 (2021).

be advanced, the same is true for *NCAA v. Alston*[109] and individual states pay to play acts. However, universities will likely continue to place more value on men's sports and ignore their obligations under Title IX to create equitable opportunities for female athletes. Just as the excitement for Title IX fizzled out in the 1990s, the excitement for *NCAA v. Alston*[110] and fair pay to play acts in regard to women's sports will also fizzle.

109. *Id.*
110. *Id.*