PUNT AND PASS: WHY CONGRESS SHOULD PUNT ON AN ANTITRUST EXEMPTION AND PASS ON EXPRESS PREEMPTION WHEN REGULATING STUDENT-ATHLETE NAME, IMAGE, AND LIKENESS

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I. INTRODUCTION

Imagine putting your body on the line day in and day out, waking up early to go to five a.m. practices, and devoting practically your whole life to mastering a sport. Further, because of your hard work, you could utilize your name, image, and likeness (NIL) to receive compensation, but unfortunately, you are restricted from exercising that right.[1] Simply put, that is unfair and inequitable. California noticed this problem and enacted the Fair Pay to Play Act in the fall of 2019, which prohibited California colleges from restricting student-athletes' ability to profit from their NIL.[2] Subsequently, other states mirrored California and began working on and enacting similar bills.[3]

States' movement towards allowing NIL benefits for student-athletes spurred the NCAA to act and begin working on new NCAA bylaws that allow and regulate student-athlete NIL payments.[4] However, to ensure that their bylaws are successful, the NCAA has engaged Congress to enact a federal NIL bill that contains an express preemption clause removing states' power to interfere with the NCAA's NIL bylaws and additionally requested an antitrust exemption.[5]

This Comment furthers the idea that Congress must provide an express preemption clause for NCAA NIL bylaws to be successful. Further, it argues Congress should do so by utilizing the model presented in Representative Gonzalez's proposed act because it has the required scope to allow NCAA

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1. *See 2020–21 NCAA Division I Manual*, NCAA PUBL'NS 1, 77 (Aug. 1, 2020), http://www.ncaapublications.com/productdownloads/D121.pdf.

2. Reid Wilson, *California Inspires Other States to Push to Pay College Athletes*, HILL (Oct. 4, 2019, 6:00 AM), https://thehill.com/homenews/state-watch/464268-california-inspires-other-states-to-push-to-pay-college-athletes; Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student-Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/?sh=427a837c57d0.

3. *See* Nicole Berkowitz et al., *More States Step Up to the Plate with New Legislation to Address Student Athlete Compensation and the NCAA Passes the Ball to Congress*, BAKER DONELSON (Jan. 23, 2020), https://www.bakerdonelson.com/more-states-step-up-to-the-plate-with-new-legislation-to-address-student-athlete-compensation-and-the-ncaa-passes-the-ball-to-congress.

4. *See NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations*, NCAA 1, 24–25 (Apr. 17, 2020) [hereinafter *Working Group Report*], https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf.

5. *Id.* at 27.

bylaws to trump state laws while remaining constitutional.[6] Additionally, this Comment explains that the federal NIL bill should not extend an antitrust exemption because: (1) it will remove student-athletes' main avenue for change; (2) the NCAA is not conducive for such exemption; and (3) if needed, Congress can enact NIL restrictions that may violate U.S. antitrust laws.[7]

Part II of this Comment provides background on California's NIL bill implementation and how it spurred many other states to provide similar benefits to their student-athletes.[8] Additionally, this Part discusses both the NCAA's and Congress's reactions to states implementing NIL bills and their plans to address these issues moving forward.[9] Lastly, this Part analyzes recent NCAA litigation involving the Tenth Amendment and antitrust violations, which helps the reader understand why the express preemption clause will be successful and why an antitrust exemption is not required.[10]

Next, Part III of this Comment discusses how Representative Gonzalez's proposed express preemption clause contains the required scope to allow NCAA NIL bylaws to trump state laws.[11] Additionally, this Part discusses why the clause is constitutional and does not violate the Tenth Amendment.[12]

Lastly, Part IV discusses why an antitrust exemption should not be extended to the NCAA and how, even without such exemption, the integrity of college sports will remain.[13] Additionally, this Part examines how antitrust litigation involving NCAA bylaws will be argued after the recent May 2020 decision in *Alston v. NCAA*.[14]

If Congress takes the steps presented within this Comment, the NCAA's bylaws will have the force needed to institute a uniform system, and student-athletes will retain their ability to further their rights through antitrust litigation.

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6. *See* discussion *infra* Part III.B (discussing how Representative Gonzalez's proposed express preemption clause satisfies the required scope to allow the NCAA to essentially preempt state law).

7. *See* discussion *infra* Part IV (discussing the relevant issues that will occur if an express preemption clause is extended).

8. *See* discussion *infra* Part II (providing background information on the implementation of California's bill).

9. *See* discussion *infra* Part II (discussing the reactions of the NCAA and Congress to state implementation of NIL bills).

10. *See* discussion *infra* Part II (analyzing recent litigation involving the NCAA, the Tenth Amendment, and antitrust violations).

11. *See* discussion *infra* Part III (discussing Representative Gonzalez's proposed express preemption clause).

12. *See* discussion *infra* Part III (emphasizing why Representative Gonzalez's proposed express preemption clause does not violate the Tenth Amendment).

13. *See* discussion *infra* Part IV (discussing why the exemption should not be extended).

14. *See* discussion *infra* Part IV (examining how *Alston v. NCAA* affects future antitrust litigation involving NCAA bylaws).

II. NIL DEVELOPMENT AND RESPONSE

Soon after California enacted S.B. 206, many other states began to fall in line and implement similar NIL bills of their own.[15] This wave of states implementing similar NIL bills was likely due to states wanting to remain competitive in the market of college sports.[16] College sports are a main economic driver for states and universities, and generally, highly competitive athletic programs result in larger economic value for the university and the community.[17] For example, applications to Texas Tech University nearly tripled during the Men's Basketball team's national championship run in the spring of 2019,[18] and Lubbock itself received about $44 million in advertising due to the exposure of the city during March Madness.[19]

Further, it is widely accepted that to increase the competitiveness of a college sports program, the athletic department must create a strong recruiting program that draws the best athletes to that university.[20] The ability for a college coach to tell a prospective student-athlete that "if they come to their school [they] will have the opportunity to profit off their NIL" is a huge selling point and may lead to a more competitive sports program with a higher economic value.[21]

A. States' Implementation of Student-Athlete NIL Benefits

Soon after California enacted S.B. 206, states including Florida, Georgia, Michigan, Missouri, and many others either implemented or began working on statewide NIL bills similar to S.B. 206.[22] As of May 2020, three states—California, Colorado, and Florida—have enacted statewide NIL bills,

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15. *See* Berkowitz et al., *supra* note 3 (noting the subsequent impacts of California's legislation).

16. *See id.*

17. *See, e.g.*, Nicolette Perdomo, *Applications at Texas Tech Increase During March Madness*, EVERYTHING LUBBOCK (Apr. 4, 2019, 10:23 PM), https://www.everythinglubbock.com/news/kamc-news/applications-at-texas-tech-increase-during-march-madness/1901418876/.

18. *Id.*

19. Dave Montgomery, *For Texas Tech Fans, N.C.A.A. Men's Final Is Emotional Ride*, N.Y. TIMES (Apr. 9, 2020), https://www.nytimes.com/2019/04/09/sports/ncaabasketball/texas-tech-lubbock-fans.html.

20. *See* Brad Crawford, *College Football's 10 Biggest Spenders in Recruiting*, 247SPORTS (Feb. 12, 2020), https://247sports.com/LongFormArticle/College-football-recruiting-biggest-spenders-Alabama-Michigan-Ohio-State-LSU-Florida-State-Tennessee-Texas-143656317/#143656317_1 (showing that universities are willing to spend upwards of $2 million on their college football recruitment programs).

21. *See* Pardon My Take, *Coach Lane Kiffin, Morten Anderson, and Blake Bortles is Back*, BARSTOOL SPORTS, at 38:45–74:07 (Sept. 22, 2020), https://www.stitcher.com/show/pardon-my-take/episode/coach-lane-kiffin-morten-andersen-and-blake-bortles-is-back-77939797. There, Lane Kiffin used the opportunity for student-athletes to profit from their NIL in his "mock recruitment" speech as a selling point. *Id.*

22. Berkowitz et al., *supra* note 3 (highlighting the domino effect the California's legislation had across the nation).

and thirty-four other states have introduced NIL bills in their state legislatures.[23]

Florida's NIL bill, the "Intercollegiate Athlete Compensation and Rights" statute was enacted on June 12, 2020.[24] Florida's bill has several characteristics that make it different from S.B. 206.[25] First, Florida's bill allows student-athletes within the state to be compensated for their NIL "in amounts '*commensurate with the market value*' of the authorized use of such athlete's NIL."[26] Second, Florida's bill explicitly requires NIL payments to student-athletes to be from third parties and not a postsecondary educational institution.[27] Third, and most notably, the Florida NIL bill is set to go into effect on July 1, 2021, two years before California and Colorado's bills.[28] It is suggested that this earlier enactment date was put in place by Florida to spur Congress and the NCAA to act and implement uniform NIL bylaws before the 2021 academic school year.[29]

B. The NCAA's Action to Allow and Regulate Student-Athlete NIL Benefits

The NCAA was not blindsided by California and other states enacting NIL bills. In fact, the NCAA created the Federal and State Legislation Working Group (Working Group) during the summer of 2019 to investigate responses to proposed legislation relating to the commercial use of student-athletes' NIL.[30] The group was charged to "consider whether modifications to NCAA rules, policies and practices should be made to allow for NIL payments" and "whether any modifications to allow for NIL payments, beyond what the U.S. Circuit Court of Appeals for the Ninth Circuit required in *O'Bannon* and other court rulings, would be achievable and enforceable without undermining the distinction between professional sports and collegiate sports," along with several other directions.[31]

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23. Curt Weller, *NIL Rules Could Give Florida Schools Recruiting Edge*, PANAMA CITY NEWS HERALD (May 5, 2020, 6:53 PM), https://www.newsherald.com/story/sports/2020/05/05/nil-rules-could-give-florida-schools-recruiting-edge/112599884/.

24. *Florida Says "Show Me the Money"—Intercollegiate Athlete Name, Image and Likeness (NIL) Bill is Now Law*, FOLEY & LARDNER, LLP (June 29, 2020), https://www.foley.com/en/insights/publications/2020/06/florida-intercollegiate-athlete-nil-law (last visited Apr. 11, 2021).

25. *Id.*

26. *Id.* This restriction will prevent student-athletes from receiving payments for the use of their NIL in amounts over the fair market value for their services. *Id.* It is believed that this rule would prevent schools from paying a student-athlete for recruitment purposes only. *Id.*

27. *Id.*

28. *Id.*

29. *See* Weller, *supra* note 23 (describing how Florida's bill has forced the NCAA's hand).

30. *Working Group Report*, *supra* note 4, at 1.

31. *Id.* at 4.

1. The NCAA's NIL Implementation Strategy

After the NCAA's initial charge, the Working Group reconvened in October 2019 to discuss the future of NCAA bylaws regarding student-athlete NIL payments.[32] There, the Working Group suggested to the NCAA Board of Governors that the NCAA should: (1) authorize changes to their policies and bylaws to allow student-athletes to receive compensation through the utilization of their NIL; (2) reject any approach that makes student-athletes an employee of the school or allows NIL payments to be used as compensation for student-athletes' participation or performance in college sports; and (3) "[r]eaffirm the integrity of the student-athlete recruitment process, so that the prospect of receiving NIL compensation does not exert undue influence on a student's choice of college."[33]

After reviewing the Working Group's progress, the NCAA Board of Governors agreed and decided to allow student-athlete NIL benefits.[34] The NCAA Board of Governors then recommended a timeline for each of the three NCAA divisions to: first, draft legislative proposals implementing their new NIL rules "not later than October 31, 2020; [then, vote on them no] later than January 31, 2021; and [lastly, have the new rules] effective not later than the start of the 2021–22 academic year."[35]

Further, the April 20, 2020 report by the NCAA Board of Governors and Working Group suggested for the three NCAA divisions to consider several areas and topics when drafting new bylaws relating to student-athlete NIL benefits.[36] These areas included: (1) restricting promotional activities related to alcohol, gambling, and tobacco products; (2) restricting promotional activities with shoe or apparel companies due to their history of recruitment and rule infractions; (3) implementing "adjustments . . . to NCAA rules regarding promotional and other commercial activity by athletes prior to enrollment at an NCAA institution"; (4) creating safeguards to ensure NIL activities do not unduly burden student-athletes' time; (5) preventing boosters from circumventing the NCAA's amateurism rules, potentially through monitoring student-athletes' new NIL activities; and (6) permitting student-athletes to seek "professional services providers in connection with their NIL and business activities."[37] These robust guideposts presented by the report shows that the three NCAA divisions will allow student-athletes to utilize their NIL to profit but will provide extensive restrictions on how that process will occur.[38]

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32. *See id.* at 7–8.
33. *Id.*
34. *Id.* at 1.
35. *Id.* at 2.
36. *Id.* at 24.
37. *Id.* at 24–25.
38. *See id.*

As an overview, the Board of Governors wants to ensure that the three NCAA divisions' bylaws do not undermine the college sports amateurism model and maintain the distinction between collegiate and professional sports. Additionally, the Board of Governors wants bylaws that restrict NIL payments from being used to encourage student-athletes to attend certain universities.[39]

However, for the implementation of the NCAA's new NIL regulations to be successful, the NCAA Board of Governors has suggested that it needs the help of Congress through a federal NIL bill that addresses the issues of state interference and antitrust litigation.[40] Thus, to tackle these issues, the NCAA Board of Governors has engaged Congress to enact a federal NIL bill that: (1) allows for "federal preemption over state name, image and likeness laws"; and (2) provides an antitrust exemption to the NCAA.[41]

2. The NCAA's Request for Preemption

According to the NCAA, federal preemption is crucial for two reasons.[42] First, the NCAA believes that state NIL bills "are fundamentally incompatible with the NCAA's model of intercollegiate athletics, since they purport to completely remove the NCAA's ability to adopt or enforce rules related to third-party commercialization of student-athlete NIL."[43] For example, California and Colorado's bills expressly prohibit the NCAA from regulating student-athlete NIL payments from third-parties.[44] The NCAA suggests that because of this, the NCAA would be stripped of its power to maintain the intercollegiate athletics model in its current national form, promote student-athlete welfare, and prevent "the creation of a back-door scheme of pay for play" and inequitable recruiting.[45] Second, the NCAA believes that leaving NIL implementation to the states will allow NCAA members around the country to be governed by different state laws, creating an unbalanced system.[46] Because of these reasons, the NCAA believes that it is appropriate for Congress to enact a federal law that preempts state laws on the topic of student-athlete NIL.[47]

It is fairly accepted that for the NCAA to have success in implementing bylaws regulating student-athlete NIL benefits, Congress will need to provide an express preemption clause removing the power of states to regulate NIL

39. *Id.* at 20–21.
40. *Id.* at 2.
41. *Id.* at 27.
42. *Id.* at 28.
43. *Id.*
44. *Id.* at 27–28.
45. *Id.* at 28.
46. *Id.*
47. *Id.* at 29.

benefits of student-athletes.[48] Another commentator suggests that express preemption is required to make all states play by the same rules and to avoid states attempting to gain a competitive edge over sister states. [49] Further, it is suggested that because the NCAA today cannot anticipate "the scope of state experimentation tomorrow," an express preemption clause is required to provide certainty within the world of college sports.[50]

Further, another commentator suggested that Congress could use an express preemption clause that mirrors the language utilized within the Employee Retirement Income Security Act of 1974 (ERISA).[51] ERISA states that this subchapter "shall supersede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan."[52] Courts have continuously upheld the validity of this clause, and it has done its job by restricting states from interfering with the federal power to legislate employment benefit plans.[53]

3. The NCAA's Request for an Antitrust Exemption

The NCAA's additional request, being an antitrust exemption, is not as universally accepted as the NCAA's request for express preemption.[54] For example, Professor Dionne Koller from the University of Baltimore School of Law spoke out against an antitrust exemption for the NCAA in her opening statement before the Senate Committee on Commerce hearing *Exploring a Compensation Framework for Intercollegiate Athletics.*[55] She suggested that an exemption would remove power from the student-athletes by restricting their antitrust challenges against the NCAA and additionally stated that the NCAA was not conducive for an exemption like other sports leagues because student-athletes are unable to unionize.[56]

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48. Justin W. Aimonetti & Christian Talley, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. ONLINE 28, 35 (2019).

49. *Id.* at 31, 35.

50. *See id.* at 31.

51. *Id.* at 40.

52. 29 U.S.C. § 1144(a); Aimonetti & Talley, *supra* note 48, at 40 (explaining that ERISA has a very expansive preemption provision).

53. Aimonetti & Talley, *supra* note 48, at 40 (discussing that ERISA's preemption provision can serve as a blueprint for Congress regarding preemption of state student-athlete compensation).

54. *See Exploring a Compensation Framework for Intercollegiate Athletes: Hearing Before the S. Comm. on Com., Sci., and Transp.* 10–11 (2020) (statement of Dionne Koller, Professor of Law, Director, Center for Sport and the Law, University of Baltimore School of Law) [hereinafter *Koller Statement*] (discussing Dionne Koller's opposition to the NCAA being granted an antitrust exemption); *see also* Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes' Rights*, HARVARD JSEL (Aug. 31, 2020), https://harvardjsel.com/2020/08/ncaa-and-an-antitrust-exemption-the-death-of-college-athletes-rights/ (discussing why Congress should not present an antitrust exemption to the NCAA and how an exemption will negatively affect the power of student-athletes to enforce their rights).

55. *See Koller Statement*, *supra* note 54.

56. *Id.*

The NCAA suggests that this antitrust exemption provided by Congress is necessary to prevent the NCAA from having "to devote scarce and valuable resources to defending" against antitrust lawsuits that they believe are brought "to force the Association to change its rules for the benefit of [non-student-athlete plaintiffs'] business interests."[57] Additionally, the NCAA requests an antitrust exemption because recent litigation has proven that plaintiffs can provide less restrictive alternatives to preserve amateurism in the NCAA, and plaintiffs are now using antitrust litigation to "second guess" NCAA financial aid rules.[58] It is suggested that the exemption will block this wave of litigation and reduce interference with the NCAA's ability to properly regulate college sports.[59] Because of these reasons, the NCAA has engaged Congress to include in their federal NIL bill an antitrust exemption from both federal and state antitrust laws.[60]

Additionally, it has been argued by other commentators that the abundance of antitrust exemptions utilized in other sports arenas—like the National Football League (NFL) and Major League Baseball (MLB)—shows that the exemption can also have success within the NCAA.[61] However, players within the NFL and MLB have the protection of unions and the ability to collectively bargain with their league to negotiate and discuss the anticompetitive restrictions that may be placed upon them.[62] Student-athletes, on the other hand, cannot unionize or meaningfully express their opposition to anticompetitive restrictions.[63] A sports class similarly situated to student-athletes if an exemption is extended is minor league baseball players, who, because they do not have a fair seat at the collective bargaining table, are now having to fight in court to extend their rights as players.[64]

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57. *Working Group Report*, *supra* note 4, at 29 (discussing the impediments posed by antitrust litigation).

58. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–76 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020); *Working Group Report*, *supra* note 4, at 29–30.

59. *See* Jayma Meyer & Andrew Zimbalist, *A Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 299–301 (2020).

60. *Working Group Report*, *supra* note 4, at 29–30.

61. Meyer & Zimbalist, *supra* note 59, at 300–01.

62. Koller Statement, *supra* note 54, at 10–11.

63. *Id.*

64. Katherine Acquavella, *Supreme Court Clears Way for Class-Action Lawsuit from Minor League Players Being Paid Below Minimum Wage*, CBS SPORTS (Oct. 5, 2020), https://www.cbssports.com/mlb/news/supreme-court-clears-way-for-class-action-lawsuit-from-minor-league-players-being-paid-below-minimum-wage/; The Sports Law Podcast, *SCOTUS and Baseball, Garrett Broshuis Breaks Down the MiLB Lawsuit*, CONDUCT DETRIMENTAL (Sept. 6, 2020), https://podcasts.apple.com/tn/podcast/scotus-baseball-garrett-broshuis-breaks-down-milb-lawsuit/id1490287845?i=1000494078019.

C. Congress's Involvement: Representative Gonzalez's Proposed Act

Similar to the NCAA, Congress was not blindsided by the states' implementation of NIL bills and the movement towards allowing student-athletes to profit from their NIL.[65] Several different federal NIL bills have been introduced by sponsors over the years, including Congressman Mark Walter's "Student-Athlete Equity Act"[66] and Senator Marco Rubio's "Fairness in Collegiate Athletics Act."[67] Further, this past year, four congressional hearings were conducted discussing the possibility of implementing a federal NIL bill and discussing compensation of student-athletes.[68]

Most recently, Congressman Anthony Gonzalez (R-Ohio) and Congressman Emanuel Cleaver (D-Missouri) proposed Resolution 8382, the "Student Athlete Level Playing Field Act" (proposed act), which allows and regulates student-athlete NIL payments.[69] The proposed act was introduced and referred to the Committee on Education and Labor on September 24, 2020.[70]

The proposed act aligns with the NCAA's request—and generally, the national consensus—by providing an express preemption clause.[71] In § 6 of the proposed act, there is an express preemption clause which states: "No State may enforce a State law or regulation with respect to permitting or abridging the ability of a student[-]athlete attending an institution of higher education to enter into an endorsement contract or agency contract pursuant to this Act or by an amendment made by this Act."[72]

However, Congressman Gonzalez and Congressman Cleaver's proposed act does not contain an antitrust exemption clause as requested by

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65. *See* Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 2(a) (2019); *Rubio Introduces Legislation to Address Name, Image, Likeness in College Sports*, MARCO RUBIO US SENATOR FOR FLA. (June 18, 2020), https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-introduces-legislation-to-address-name-image-likeness-in-college-sports.

66. Student-Athlete Equity Act, H.R. 1804, 116th Cong. § 2(a) (2019).

67. *Rubio Introduces Legislation*, *supra* note 65.

68. Ralph D. Russo, *Senator: Allowing College Athletes NIL Pay is 'Huge Mistake'*, WASHINGTON POST (Sept. 15, 2020), https://www.washingtonpost.com/sports/colleges/senator-allowing-college-athletes-nil-pay-is-huge-mistake/2020/09/15/a1031598-f79c-11ea-85f7-5941188a98cd_story.html.

69. Michael McCann, *Latest NIL Bill Overrides States but Leaves Tax and Labor Questions Behind*, SPORTICO (Sept. 29, 2020), https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/.

70. Student Athlete Level Playing Field Act, H.R.8382, 116th Cong. (2020).

71. *See supra* Part II.B.2 (discussing the NCAA and national consensus for an express preemption clause in the federal NIL bill); Anthony Gonzalez, *Student Athlete Level Playing Field Act*, ANTHONY GONZALEZ HOUSE (Sept. 14, 2020), at § 6, [hereinafter *Gonzalez Proposed NIL Bill*] https://anthonygonzalez.house.gov/uploadedfiles/the_student_athlete_level_playing_field_act.pdf; *see also* Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020) (for version of Bill introduced in the house).

72. *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 6.

the NCAA.[73] In a report with CBS Sports, Congressman Gonzalez stated: "I would say, through the course of talking through a piece of legislation and trying to balance all the different priorities, we felt the right thing to do was leave as it is on the antitrust front."[74] Of course, Congressman Gonzalez's view regarding the extension of an antitrust exemption is not universal.[75] The NCAA is still pushing to have the exemption placed within the federal NIL bill, as shown by NCAA President Mark Emmert's request during a Senate Judiciary Hearing held in late July 2020.[76]

Further, the proposed act contains several guideposts and restrictions placed on NIL benefits, seemingly to promote and retain the integrity of college sports as a whole.[77] For example, the proposed act allows universities to prohibit NIL contracts with discrediting companies, such as alcohol, marijuana, and gambling companies.[78] Additionally, the proposed act prevents boosters from inducing student-athletes to come to a certain university through NIL payments.[79]

These guideposts and restrictions on NIL payments within Congressman Gonzalez's proposed act show that Congress does not intend to preempt the states and simply allow the NCAA to have the full regulatory power over student-athlete NIL payments. Rather, Congress will flex its power to regulate student-athlete NIL payments alongside the NCAA, seemingly creating a dual-system for regulation between Congress and the NCAA divisions.[80]

D. Murphy v. NCAA *and Federal Preemption*

The recent U.S. Supreme Court decision in *Murphy v. National Collegiate Athletic Association*, reviewing Tenth Amendment violations and

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73. Dennis Dodd, *Bipartisan Name, Image, Likeness Bill Introduced to U.S. House Would Supersede State Laws for College Athletes*, CBS SPORTS (Sept. 25, 2020), https://www.cbssports.com/college-football/news/bipartisan-name-image-likeness-bill-introduced-to-u-s-house-would-supersede-state-laws-for-college-athletes/.

74. *Id.*

75. *See* Ross Dellenger, *Mark Emmert to Ask Senate to Grant NCAA Antitrust Protection in Name, Image, Likeness Hearing*, SPORTS ILLUSTRATED (July 22, 2020), https://www.si.com/college/2020/07/22/mark-emmert-senate-hearing-antitrust-protection-name-image-likeness; Meyer & Zimbalist, *supra* note 59, at 300.

76. *See* Dellenger, *supra* note 75.

77. Dodd, *supra* note 73. This sentiment is shown through the restrictions on NIL payments related to recruiting and additionally through a proposed act's co-sponsor Congressman Jeff Duncan (R–South Carolina) stating "I understand first-hand the need to create a fair system for student-athletes while maintaining the integrity and distinctiveness of college sports." *Id.*

78. *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 2.

79. *Id.* at § 3.

80. *See id.*; Dodd, *supra* note 73.

the scope of preemption clauses, helps evaluate Congressman Gonzalez's express preemption clause in the proposed act.[81]

In *Murphy*, the Supreme Court held that a provision of the Professional and Amateur Sports Protection Act (PASPA) that prohibited "states from authorizing and licensing sports gambling was unconstitutional under the Tenth Amendment."[82] The Tenth Amendment and the anticommandeering doctrine are based on the idea that powers not directly provided to Congress through the Constitution are reserved for the states.[83] The Supreme Court noted that "absent from the list of powers given to Congress is the power to issue direct orders to the governments of the [s]tates," so federal legislation that directs orders to state governments violates the Tenth Amendment and the anticommandeering doctrine.[84]

The Supreme Court discussed that the PASPA provision violated this anticommandeering doctrine because "[the] provision unequivocally dictate[d] what a state legislature may and may not do" by mandating that states must refrain from enacting laws that authorized sports gambling.[85]

Further, Murphy argued that the Supremacy Clause and federal preemption could save the PASPA provision.[86] Federal preemption is based on the Supremacy Clause and provides that federal law is supreme in the case of a conflict with state law.[87] The Supreme Court noted that for the PASPA provision to preempt state law through federal preemption it must: (1) be a power conferred by the Constitution; and (2) the provision must be one that regulates private actors.[88] Using this test, the Supreme Court stated that the PASPA provision was not a federal preemption provision because it did not regulate private actors, but rather was a direct command to state legislatures.[89]

The Supreme Court distinguished the PASPA provision from the express preemption clause reviewed in *Morales v. Trans World Airlines, Inc*. within the Airline Deregulation Act.[90] There, the express preemption clause stated that the Act "provided that 'no [s]tate or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or

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81. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018); *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 2.

82. Erica L. Bishop, Murphy v. NCAA*, 138 S. Ct. 1461 (2018)*, 45 OHIO N.U. L. REV. 239, 240 (2019); *Murphy*, 138 S. Ct. at 1478.

83. *Murphy*, 138 S. Ct. at 1476.

84. *Id.*

85. *Id.* at 1478; *see* Bishop, *supra* note 82, at 245.

86. *Murphy*, 138 S. Ct. at 1479–80.

87. *Id.* at 1479.

88. *Id.* For example, "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* at 1480.

89. *Id.* at 1481.

90. *Id.* at 1480.

services of any [covered] air carrier.'"[91] The Supreme Court ruled that, unlike the PASPA provision, the express preemption clause in the Airline Deregulation Act regulated private entities by conferring "a federal right to engage in certain conduct subject only to certain (federal) constraints."[92] Thus, the Supreme Court distinguished the Airline Deregulation Act's express preemption clause from the unconstitutional PASPA provision because the Airline Deregulation Act's express preemption clause was deemed to regulate private actors rather than command the states.[93]

E. Recent NCAA Antitrust Litigation

Over the past few years, student-athletes, in hopes of extending their rights, have subjected the NCAA to antitrust litigation by arguing that NCAA bylaws violate antitrust laws.[94] The Sherman Act provides the governing law for antitrust violations and prohibits contracts, combinations, or conspiracies that unreasonably restrain trade.[95] More specifically, the Sherman Act restricts acts that restrain interstate commerce and competition.[96]

In antitrust lawsuits revolving around NCAA bylaws, courts have applied the "[R]ule of [R]eason analysis to determine whether the rule is unreasonably anticompetitive."[97] The Rule of Reason test provides a three-step framework: (1) student-athletes have the initial burden of showing that the rule or bylaw has a significant anticompetitive effect within the relevant market; (2) if student-athletes satisfy their initial burden of showing an anticompetitive effect, the NCAA must provide evidence showing the rule or bylaw's procompetitive effects; and (3) then student-athletes must show whether there are any less restrictive alternatives to the anticompetitive bylaw or rule.[98]

In 2015, the Ninth Circuit Court of Appeals in *O'Bannon v. National Collegiate Athletic Association* utilized the Rule of Reason doctrine to determine whether the NCAA's bylaws restricting players' abilities to profit from their NIL violated the Sherman Act due to their restraint on trade.[99] Under the first step of the Rule of Reason analysis, the court found that the NCAA's rules restricting NIL benefits presented an anticompetitive effect

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91. *Id.* at 1480 (alteration in original) (quoting 49 U.S.C. § 1305(a)(1) (1988)).

92. *Id.*

93. *See id.*

94. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–76 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020).

95. 15 U.S.C. §§ 1–38 (2004).

96. *Id.*

97. Meyer & Zimbalist, *supra* note 59, at 268.

98. *Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1256.

99. *O'Bannon*, 802 F.3d at 1052.

through price-fixing and valuing student-athletes' NIL at zero.[100] Because the court found the bylaws to have an anticompetitive effect, the court proceeded to determine whether the NCAA presented any procompetitive justifications.[101] The Ninth Circuit concluded that the NCAA's NIL restrictions and compensation rules provide two procompetitive effects: "integrating academics with athletics, and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.'"[102]

Lastly, the *O'Bannon* court looked to see if there were any less restrictive alternatives to the NCAA's current rules.[103] In reviewing the less restrictive alternatives, the Ninth Circuit ruled that allowing student-athletes to receive scholarships up to the full cost of attendance would be a viable and substantially less restrictive alternative.[104] However, the court found that allowing NIL payments untethered to education would not be an acceptable alternative to achieve the NCAA's procompetitive purpose.[105] Thus, *O'Bannon* did not strike down the NCAA's NIL restrictions but did provide student-athletes with the ability to receive scholarships up to the value of the cost of attendance.[106]

In May 2020, the Ninth Circuit revisited the topic of NCAA antitrust violations in *Alston v. NCAA* by determining whether NCAA rules restricting payments to student-athletes unrelated to education violated the Sherman Act.[107] The Ninth Circuit utilized the Rule of Reason doctrine, like in *O'Bannon*, and found the student-athletes successfully argued that the challenged NCAA rules had an anticompetitive effect.[108]

Next, the court looked to the NCAA's procompetitive justification for the challenged rules that "challenged rules preserve 'amateurism,' which, in turn, 'widen[s] consumer choice' by maintaining a distinction between college and professional sports."[109] The Ninth Circuit held that NCAA rules restricting cash payments unrelated to education served the NCAA's procompetitive justification; however, the restriction of non-cash educational benefits, like scholarships for post-eligibility tuition, did not promote the NCAA's procompetitive justification.[110]

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100. *Id.* at 1057–58.

101. *Id.* at 1058.

102. *Id.* at 1072 (quoting O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014)).

103. *Id.* "[T]o be viable under the Rule of Reason[,] an alternative must be virtually as effective in serving the procompetitive purposes of the NCAA's current rules . . . ." *Id.* (internal quotations omitted) (quoting Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).

104. *Id.* at 1074–75.

105. *Id.* at 1076.

106. *Id.* at 1074–76.

107. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1248 (9th Cir. 2020).

108. *Id.* at 1256–57.

109. *Id.* at 1257.

110. *Id.* at 1257–58.

Additionally, in *Alston*, the student-athletes attempted to argue that the NCAA cannot rely on the argument "that NCAA limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports" when the NCAA voted to allow NIL benefits in October 2019.[111] However, the Ninth Circuit stated that "[t]his argument is premature" because the NCAA did not endorse "cash compensation untethered to education" but rather loosened its bylaws "to permit NIL benefits that are 'tethered to education.'"[112]

III. FEDERAL PREEMPTION

Varying statewide legislation is not conducive for a national system.[113] This is especially true for the NCAA, which has members that are constantly trying to gain an edge on each other through better recruiting, more funding, and stronger up-to-date infrastructure.[114] This economic incentive for a state's college sports program to be successful will likely induce state legislatures to provide liberal rules regarding NIL payments to student-athletes to allow coaches to have the upper hand in recruiting star athletes to their state.[115] Further, without statewide preemption, any attempt by the NCAA to regulate student-athlete NIL payments could be deemed useless if the states provide conflicting state laws.[116] The strongest examples of this are state NIL bills, like Florida and California's, which expressly prevent the NCAA from creating bylaws related to student-athlete NIL benefits.[117] Thus, Congress should follow the NCAA's request and guidance of other commentators and provide within the federal NIL bill an express preemption clause restricting the power of states to regulate student-athlete NIL benefits. However, for this express preemption clause to be implemented successfully, Congress must provide an express preemption clause with an expansive scope.

This Part will first argue that the scope required is one that allows the NCAA, as well as Congress, to preempt the states. Second, this Part will argue that Representative Gonzalez's proposed express preemption clause fits that required scope. Lastly, this Part will show why Congress's implementation of the proposed express preemption clause will be deemed constitutional.

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111. *Id.* at 1265.

112. *Id.*

113. *See supra* Part II.B.2 (discussing the problems that will occur if there are varying state NIL laws).

114. FOLEY & LARDNER, LLP, *supra* note 24, at 1 (showing that Florida utilized their NIL bill to be the first state to be able to offer the opportunity to student-athletes).

115. *See supra* Part II.A (discussing the market of college sports).

116. *See Working Group Report*, *supra* note 4, at 27–28 (showing that NCAA bylaws will be ineffective because state laws prohibit the NCAA from regulating NIL payments).

117. *See supra* Part II.B.2 (discussing state bills that expressly restrict the NCAA from regulating NIL benefits).

A. An Expanded Preemption Scope Is Required

The federal express preemption clause will require an expansive scope because both the NCAA and Congress will regulate student-athlete NIL benefits through a dual system.[118] The dual-regulatory system will occur through the NCAA's three divisions implementing bylaws restricting student-athlete NIL payments and Congress placing restrictions within their federal NIL bill, similar to those presented in Congressman Gonzalez's proposed act.[119] Therefore, states will essentially need to be preempted by both the federal government and an institution not connected to the federal government—like the NCAA.

The NCAA needs this preemptive authority and to be a part of this student-athlete NIL dual-regulating system because while Congress can provide guideposts within the federal legislation,[120] the three NCAA divisions will be better suited to implement and enforce the more nuanced NIL regulations that will be required.[121] For example, Congress can provide in their federal NIL bill the guidepost that the NIL benefits should not be used to encourage or recruit student-athletes to attend a certain university.[122] Then, the NCAA can expand upon Congress's guidepost through their bylaws by more effectively explaining what a recruitment violation would look like and how punishment for such violation would occur.[123] Without the NCAA at the regulating table, rules implementing NIL benefits may not have the full regulatory scope required, and Congress may not be able to react as fast and efficiently as the NCAA.[124]

Through the Supremacy Clause, Congress can preempt state laws regulating student-athlete NIL payments, insofar that they conflict with federal laws, but should additionally expand their preemption scope to ensure that NCAA bylaws are not, additionally, conflicted by state laws. [125] In order to successfully implement a uniform national system regulating student-

118. *See supra* Part II.B.1, C (discussing the NCAA's plan to have the three divisions create bylaws regulating student-athlete NIL payments and guideposts Congress plans to put in its bill to regulate NIL payments).

119. *Working Group Report*, *supra* note 4, at 2; *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 2.

120. *See supra* Parts II.B.1, II.C (discussing the NCAA's plan to have the three divisions create bylaws regulating student-athlete NIL payments and guideposts Congress plans to put in its bill to regulate NIL payments).

121. *See supra* Part II.B.1 (discussing the request for the three divisions to regulate NIL payments).

122. *See Gonzalez Proposed NIL Bill*, *supra* note 71, at § 3 (showing an example of a guidepost on restricting recruiting violations).

123. *See Working Group Report*, *supra* note 4, at 27–28 (showing that the three divisions will likely implement rules showing what a recruitment violation looks like).

124. *See Gonzalez Proposed NIL Bill*, *supra* note 71, at § 3. Within the proposed act there are rules on recruiting; however, they are broad and do not go into detail on how they will combat recruiting violations. *See id.*

125. *See supra* Part II.D (discussing the Supremacy Clause and its relation to preemption).

athlete NIL payments, the NCAA, a private institution, must be free to regulate without state laws impeding their process.[126]

B. Representative Gonzalez's Proposed Act Satisfies the Required Scope

Luckily, Congress has noticed the need for express federal preemption and the scope required to allow the NCAA to essentially preempt conflicting state laws.[127] This has been shown by Representative Gonzalez and Representative Cleaver including an express preemption clause in their federal NIL bill introduced on September 24, 2020.[128]

The goals of providing a level playing field and allowing both the NCAA and Congress to regulate NIL payments without state interference will be achieved if Congress follows the express preemption model presented in the proposed act.[129] The proposed act's preemption clause states that "[n]o [s]tate may enforce a [s]tate law or regulation with respect to permitting or abridging the ability of a student[-]athlete attending an institution of higher education to enter into an endorsement contract or agency contract pursuant to this Act or by an amendment made by this Act."[130] The language utilized in the proposed act tracks one of the most expansive express preemption clauses—the one utilized in ERISA—stating that this subchapter "shall supersede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan."[131]

However, the proposed act's express preemption clause has a slight distinction from the ERISA clause, which will allow it to have the expansive scope required. One of the main differences between the two is that the proposed act's express preemption clause utilizes the phrase "[n]o [s]tate may enforce" rather than "supersede."[132] This is an important concept because the word "supersede" seems to imply that Congress will be creating regulations that will take the place of state laws, and additionally, that Congress will be the only one regulating in that area.[133] This is what occurred with ERISA.[134]

The phrase "supersede" turned out to be successful for ERISA; however, for the NCAA, a private institution, to have a preemptive effect over states, utilizing the phrase "may not enforce" is more fitting. Utilizing

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126. *See supra* Part II.B.2 (explaining state NIL bills that completely prevent the NCAA from regulating NIL benefits).

127. *See supra* Part II.C (discussing the express preemption clause placed within Congressman Gonzalez's proposed act).

128. *See supra* Part II.C (discussing the express preemption clause presented within the proposed act).

129. *See infra* Part IV (explaining how having the proposed express preemption clause and no antitrust provision will provide success).

130. *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 6.

131. 29 U.S.C.A. § 1144(a).

132. *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 6.

133. *See supra* Part II.B.2 (discussing the express preemption clause provided within ERISA).

134. *See supra* Part II.B.2 (same).

the phrase "supersede" could cause confusion within this dual-regulating system because there would be a question as to whether the NCAA bylaws regulating student-athlete NIL benefits will *additionally* supersede state laws, like those within the federal NIL act.[135]

For example, such confusion could arise if Congress in its bill restricts boosters from inducing student-athletes to attend a university without much more direction—which is what Representative Gonzalez's bill essentially does. Additionally, at the same time, the NCAA in its bylaws expands upon Congress's guidepost and further explains what inducement looks like and when a player can be punished for it. Then imagine that Florida creates a state law defining what inducing a student-athlete means and how a university in that state can punish the student-athlete.

If the ERISA model and the phrase "supersede" is used, it would be clear that Congress's rule outlawing booster inducement would trump Florida's state law.[136] However, because the federal bill would not explain precisely what inducement looks like and how the student-athlete should be punished, which is explained in the NCAA's bylaws, there could be a question as to where a Florida university should look for guidance, and if Florida state law would be superseded by the NCAA's bylaws expanding upon Congress's guidepost. This situation could lead to potential litigation and confusion.

However, by utilizing the phrase "[n]o [s]tate may enforce," as the proposed act does, any confusion discussed above is completely removed.[137] This is because, under the proposed act's express preemption clause, the state will be completely removed from the power to even enforce a law relating to NIL payments that conflict with the NCAA's bylaws. [138] This completely removes the state's ability to enforce a state law in conflict with the NCAA and, rather, requires the state to abide by the NCAA NIL regulation.

The verbiage used in the proposed act allows Congress and the NCAA to supersede state laws relating to NIL payments without using the phrase superseded.[139] This preemption clause takes the fight out of the states. This is proper because, without the ability for the NCAA to regulate NIL benefits free of conflicting state laws, the dual-regulatory system between Congress and the NCAA will not function properly.

Thus, Congress should move forward with the model presented by Representative Gonzalez because it will allow Congress and the NCAA to work in tandem to create uniform national rules regulating student-athlete

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135. *See supra* Part II.B.2 (same).

136. *See supra* Part II.D (discussing the Supremacy Clause and its relation to preemption).

137. *Gonzalez Proposed NIL Bill*, *supra* note 71, at § 6.

138. *Id.*

139. *See Gonzalez Proposed NIL Bill*, *supra* note 71, at § 6; *see supra* notes 137–138 and accompanying text (discussing the removal of the power of the states to completely legislate student-athlete NIL payments).

NIL payments without interference from state legislatures that choose to regulate to create an advantage for their state.

C. According to Murphy*, the Proposed Express Preemption Clause Is Constitutional*

As discussed above, the proposed express preemption clause will sufficiently prevent state interference with the NCAA and Congress's ability to establish a uniform student-athlete NIL system.[140] However, the next question is whether the states will simply roll over, or will they attempt to fight back and have the clause deemed unconstitutional.

A potential avenue for states to pursue a challenge to the constitutionality of the express preemption clause would be to attempt to show that the clause violates the Tenth Amendment, similar to the clause deemed unconstitutional in *Murphy*.[141] At first glance, it may seem that the suggested preemption clause discussed above, restricting states' ability to enforce legislation related to student-athlete NIL payments is similar to the unconstitutional PASPA clause that restricted states' ability to authorize sports gambling in their state.[142]

However, states will likely be unsuccessful on this route because the proposed express preemption clause does not direct orders to the states, like the PASPA provision, and additionally, the clause is a proper exercise of the Supremacy Clause according to the model presented within *Murphy*.[143]

1. Congress Would Not Direct Orders to the States Violating the Tenth Amendment

As noted, the PASPA clause that was deemed unconstitutional[144] for its violation of the Tenth Amendment and the proposed express preemption clause seem similar.[145] Due to this perceived similarity, states may attempt to have the proposed express preemption clause deemed unconstitutional for commandeering the states' power in violation of the Tenth Amendment.[146] However, because the proposed express preemption clause does not direct

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140. *See supra* Part III.B (discussing why the express preemption clause will be successful).

141. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2019).

142. *Id*.

143. *Id.* at 1479. For example, "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* at 1480.

144. *Id.* at 1478.

145. *See supra* notes 135–36 and accompanying text (discussing similarities between the PASPA provision and the express preemption clause).

146. *See supra* Part III.C (discussing whether states will just lay down or not regarding losing their ability to regulate NIL payments).

orders to the states, unlike the PASPA clause, courts will not find a Tenth Amendment violation.[147]

According to *Murphy*, federal legislation that directs orders to state governments violates the Tenth Amendment and the anti-commandeering doctrine.[148] This does not occur with the proposed express preemption clause.[149] This is because the proposed express preemption clause would not force state legislatures to either implement or restrain from implementing and passing certain legislation, like the PASPA provision.[150] Rather, the proposed express preemption clause would simply restrict the enforcement of such legislation.[151] This is a slight distinction from the PASPA clause, but it will likely show that the proposed clause is not in violation of the Tenth Amendment and the anti-commandeering doctrine.[152] Thus, because the proposed express preemption clause does not force or restrain states from enacting legislation, but rather restricts states from enforcing such legislation, courts will likely find the clause does not violate the Tenth Amendment.[153]

2. The Proposed Express Preemption Clause Aligns with the Scope of Preemption Clauses Described in Murphy

Additionally, there should be no Tenth Amendment violation because the proposed express preemption clause falls within the scope of the Supremacy Clause and its preemption power, unlike the PASPA clause.[154] *Murphy* notes that for a provision to preempt state law, it must: (1) be a power conferred by the Constitution; and (2) be one that regulates private actors.[155] The proposed express preemption clause meets this two-pronged test for the following reasons.

First, it has been suggested by other commentators and presumed that Congress gains the power to regulate within the area of student-athlete NIL payments through its Commerce Clause.[156] Second, the proposed express preemption clause will be deemed to be a provision that regulates private

147. *See infra* notes 142–47 and accompanying text (discussing the distinction between the PASPA provision and the proposed express preemption clause and why the PASPA provision was unconstitutional).

148. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2019).

149. *See supra* Section III.B (discussing the distinction between the PASPA provision and the proposed express preemption clause).

150. *See Murphy*, 138 S. Ct. at 1478. Because the PASPA clause forces the states to refrain from enacting legislation it violated the Tenth Amendment. *Id.*

151. *See supra* Part III.B (discussing the potential express preemption clause).

152. *Murphy*, 138 S. Ct. at 1476. The PASPA clause removed the power of the states to authorize sports gambling. *Id.*

153. *See supra* Part III.B (discussing the potential express preemption clause).

154. *See supra* Part II.D (discussing the Supremacy Clause and its relation to preemption).

155. *Murphy*, 138 S. Ct. at 1479. For example, "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* at 1480.

156. Aimonetti & Talley, *supra* note 48, at 39.

actors due to its similarities with the express preemption clause used in the Airline Deregulation Act.[157]

At first glance, the proposed express preemption clause seems to only regulate the actions of state actors, similar to the PASPA clause.[158] This is because the proposed clause directly restrains state actors from enforcing state legislation related to student-athlete NIL payments.[159] However, a deeper look into the proposed clause shows that it aligns closer to the express preemption clause utilized in the Airline Deregulation Act and does regulate private actors.[160] The express preemption clause in the Airline Deregulation Act states "that 'no [s]tate or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier.'"[161] The Supreme Court ruled that the clause enacted "a federal right [for private actors] to engage in certain conduct subject only to certain (federal) constraints."[162] The proposed express preemption clause has similar language to the Airline Deregulation Act clause, being that both restrict the states' enforcement power over an area of the law that the federal government wants to be the sole regulator within.[163]

Further, both the proposed express preemption clause and the Airline Deregulation Act clause have the same purpose—which is to allow private citizens to be regulated solely by the federal government in a topic area and not by the states.[164] Because of these similarities, courts will likely find that the proposed express preemption clause does regulate private actors, similar to the Airline Deregulation Clause, and does not solely regulate the actions of state governments, like the PASPA provision.[165]

Thus, because the proposed preemption clause is a proper exercise of congressional power and it regulates private actors, it will likely be deemed a proper exercise of Congress' federal preemption power through the Supremacy Clause.[166] So, states may attempt to have the proposed express preemption clause deemed unconstitutional to win back their ability to regulate and enforce student-athlete NIL payments but will likely not have

157. *Murphy*, 138 S. Ct. at 1480.

158. *Id.*

159. *See supra* Part III.B (discussing why the express preemption clause will be successful).

160. *Murphy*, 138 S. Ct. at 1480.

161. *Id.* (quoting 49 U.S.C. § 1305(a)(1)).

162. *Id.*

163. *Id.*; *see supra* Part III.B (discussing the potential express preemption clause).

164. *See supra* Part III.B (discussing the purpose for the preemption clause is to remove the state's power and provide for one governing body).

165. *Murphy*, 138 S. Ct. at 1480.

166. *See supra* Part III.C (discussing why the proposed express preemption clause will not be deemed unconstitutional).

success due to the distinction the proposed clause will have from the PASPA provision.[167]

IV. ANTITRUST EXEMPTION

As discussed above, the NCAA has requested protections to successfully create bylaws that establish uniform NIL requirements for student-athletes that include preemption over states and an antitrust exemption.[168] Congress should provide the NCAA with its request for state preemption but should not provide their request for an antitrust exemption because: (1) doing so will remove the student-athletes' only avenue to advance their rights; (2) antitrust exemptions within the world of sports are not successful without collective bargaining and unionization; and (3) the spirit and integrity of college sports will remain even if the NCAA is subject to antitrust scrutiny.

If Congress provides both state preemption and the antitrust exemption, the NCAA would be able to legislate student-athlete NIL payments without any system holding them accountable—being states[169] or antitrust laws.[170] It makes sense to allow the NCAA to create a uniform system without interference from the states; however, it does not make sense to take away the ability for the uniform system to hold the NCAA accountable to U.S. antitrust laws.[171] Thus, the NCAA should not be exempt from free-market rules that every other industry in the United States must follow.[172]

This Part will first argue that an antitrust exemption would restrict student-athletes' single avenue for protection. Second, this Part will show that without unionization and collective bargaining, an antitrust exemption will not be successful. Third, this Part will argue that the integrity of college sports will not be lost because Congress can step in to enact necessary rules that, if enacted by the NCAA, would violate antitrust laws. Lastly, this Part will outline what future antitrust battles the NCAA may face will look like and how the NCAA and student-athletes will frame their arguments.

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167. *See supra* Part III.C (discussing the distinctions between the proposed express preemption clause and the PASPA provision).

168. *Working Group Report*, *supra* note 4, at 27 (discussing NCAA's request for an antitrust exemption).

169. *See supra* Part III.A & B (discussing state interference with the NCAA's ability to regulate NIL payments).

170. *See supra* Part II.B.3 (discussing interference the NCAA may face from antitrust lawsuits being filed).

171. *See infra* Part IV.A & B (discussing why the NCAA needs to be held accountable by antitrust laws).

172. *See supra* Part II.E (discussing the Sherman Antitrust Act and its requirements).

A. An Antitrust Exemption Restricts Student-Athletes' Avenue for Protection

The NCAA argues that a wave of antitrust litigation would result from regulating student-athlete NIL payments without an antitrust exemption.[173] It is true that if Congress did provide such exemption, it would remove some headaches for the NCAA and reduce costs associated with litigation.[174] Additionally, it is true that without such exemption, the NCAA will likely be subjected to extensive antitrust litigation in the future.[175]

However, despite the possibility of future litigation, Congress should not provide an antitrust exemption to the NCAA because doing so would seemingly eliminate a student-athletes' only ability to protect their rights against the NCAA in the future.[176] As well, the exemption would allow the NCAA to have a complete blank check to write their bylaws without any threat of an antitrust challenge, which will lead to restrictions put in place by the NCAA that will not favor the student-athletes.[177]

In the recent past, student-athletes have used antitrust litigation as their main driver to advance their ability to be treated fairly by the NCAA and have a voice.[178] Additionally, antitrust battles fought by the student-athletes have been a mechanism to expose inequalities to society and spur positive change for the student-athletes, like NIL benefits.[179] Examples of this include *O'Bannon v. NCAA* and *Alston*—two recent antitrust battles that advanced student-athlete rights and likely encouraged California to move forward with their NIL bill.[180]

Both battles centered around the amount of compensation that student-athletes could receive and whether or not the NCAA's restriction of

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173. *See supra* Part II.B.3 (discussing the NCAA's motives for requesting an antitrust exemption).

174. *See supra* Part II.B.3 (same); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–76 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020) (providing examples of antitrust litigation that the NCAA has had to deal with and will likely have to deal with moving forward into the future).

175. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257 (providing examples of antitrust litigation that the NCAA has had to deal with and will likely have to deal with moving forward into the future).

176. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257.

177. The NCAA has done all it can in the past to ensure that student-athletes are unable to profit from their NIL. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257. As well, the NCAA is already planning on implementing bylaws that will restrict the profitability of student-athletes. *See Working Group Report*, *supra* note 4, at 24–25.

178. *See supra* Part II.E (discussing recent antitrust litigation battles leading to advancements in favor of student-athletes).

179. *See* Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes' Rights*, HARVARD JSEL (Aug. 31, 2020), https://harvardjsel.com/2020/08/ncaa-and-an-antitrust-exemption-the-death-of-college-athletes-rights/ (discussing why Congress should not present an antitrust exemption to the NCAA, and how an exemption will negatively affect the power of student-athletes to enforce their rights). The inequalities shown in the recent antitrust litigation are likely what has caused California to move forward with their NIL bill causing the NCAA to now make this move. *Id.*

180. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257.

this dollar amount violated the spirit of U.S. antitrust laws.[181] Even though these lawsuits were not 100% successful, they did move the ball in the right direction.[182] As a result of the antitrust fight in *O'Bannon v. NCAA*, student-athletes can now receive scholarships up to the full cost of attendance. [183] Further, this right was expanded in *Alston*, which ruled that restraints against non-cash educational benefits did not serve a procompetitive purpose and allowed the student-athletes to now begin receiving additional benefits related to education, like scholarships for post-eligibility graduate school tuition.[184] These two lawsuits show that progress in advancing the rights of student-athletes has its roots in holding the NCAA accountable to antitrust violations, and an exemption extended to the NCAA would hinder this route. [185]

If Congress were to extend an antitrust exemption to the NCAA, the NCAA would have a blank check to regulate student-athletes' NIL, and the student-athletes could not pushback. As well, without these fights, it is likely that issues, like the initial NIL argument, will not be brought to the forefront, debated, and potentially remedied. Congress should promote the progression that is occurring, not block it, and if Congress presents such exemption to the NCAA, the progression of student-athlete rights will be sacked.

B. Without Unionization and Collective Bargaining, an Antitrust Exemption Will Not Have Success

Further, antitrust exemptions utilized in other sports arenas can be successful because of the athlete's ability to collectively bargain and to unionize.[186] Examples of this include the National Football League Players Association (NFLPA) and the Major League Baseball Players Association (MLBPA).[187] These organizations can negotiate with their respective leagues to determine the anticompetitive constraints that will be placed on the athletes.[188] That ability is not present within the NCAA, so if an antitrust exemption is presented, the NCAA would be able to create bylaws that do not align with U.S. antitrust laws without pushback from a collective bargaining agreement or a union. This same concept is occurring with minor league baseball players who are harmed by the MLB's anticompetitive price

181. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257.
182. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257.
183. *O'Bannon*, 802 F.3d at 1074–76.
184. *Grant-in-Aid Cap*, 958 F.3d at 1257.
185. *See O'Bannon*, 802 F.3d at 1074–76; *Grant-in-Aid Cap*, 958 F.3d at 1257.
186. *See supra* Part II.B.3 (discussing other sports leagues that can unionize and collectively bargain).
187. *Koller Statement*, *supra* note 54, at 10–11 (describing the difference in the NCAA and professional sports players' associations).
188. *Id.*

restrictions without a fair seat at the collective bargaining table.[189] The student-athletes will be in a similar scenario to the minor league players if an antitrust exemption is presented because, like the minor league baseball players, the student-athletes will be subjected to anticompetitive laws without an ability to negotiate and discuss those laws. So, the success seen of antitrust exemptions in other sports arenas would not have the same success in college sports because of the inability to unionize and collectively bargain.[190]

C. The Integrity of College Sports Will Remain Without an Antitrust Exemption

It has been argued that the NCAA would not be able to properly legislate NIL payments, and as a result, lose their ability to protect the integrity of college sports if an antitrust exemption is not extended.[191] However, the NCAA's predicted doom and gloom scenario that is supposed to occur if they do not receive an antitrust exemption from Congress is simply not true. In a world without the exemption, the NCAA and college sports will still be able to run smoothly, and student-athletes will be able to exercise their right to profit from their NIL without harming the world of college sports.[192]

That is because Congress can place guideposts regulating student-athlete NIL payments within the federal NIL bill.[193] Federal legislation can avoid the purview of antitrust litigation, so any rules put into place by Congress regulating NIL payments would not be subject to any antitrust challenges that the NCAA or a NIL commission would be subjected to.[194] So, if there is a need for an anticompetitive rule regulating student-athlete NIL payments necessary to protect the integrity of college sports,[195] it can be implemented by Congress rather than the NCAA.[196]

For example, the proposed act of Representative Gonzalez establishes rules restricting deceptive practices of boosters and alums to prevent large payments to recruit student-athletes to certain universities.[197] This guidepost

189. The Sports Law Podcast, *SCOTUS and Baseball, Garrett Broshuis breaks down the MiLB Lawsuit*, CONDUCT DETRIMENTAL (Sept. 6, 2020), https://podcasts.apple.com/tn/podcast/scotus-baseball-garrett-broshuis-breaks-down-milb-lawsuit/id1490287845?i=1000494078019.

190. *See supra* Part II.B.3 (discussing other sports leagues that can unionize and collectively bargain).

191. *See supra* Part II.B.3 (discussing the NCAA's request for an exemption and the commentator's suggestion regarding an antitrust exemption).

192. *See supra* Part II.B.3 (same).

193. *See supra* Part IV.C (discussing how Congress is outside of the purview of antitrust litigation).

194. *See supra* Part IV.C (discussing how Congress is not subjected to antitrust litigation and that the NCAA would be subjected to such scrutiny).

195. *See supra* note 70 and accompanying text (discussing the need for the new system to maintain the integrity of college sports).

196. *See supra* Part IV.C (discussing how Congress is outside of the purview of antitrust litigation).

197. *See Gonzalez Proposed NIL Bill*, *supra* note 71, at § 3 (discussing Representative Gonzalez's proposed act).

of restricting improper recruiting is viewed as a necessary component to assure the success of college sports in a post-NIL payment world.[198]

Thus, if it became apparent that a rule or regulation is needed to be put in place that if enacted by the NCAA may violate antitrust laws, Congress could follow the method shown in the proposed act, and simply enact rules that it sees fit to ensure that NIL payments are equitable to the student-athletes and preserve the success of college sports.[199] This dual-regulatory system between Congress and the NCAA will provide for success. The NCAA's bylaws could be implemented in addition to the guideposts presented by Congress, and those additional bylaws implemented by the NCAA would simply need to align with the spirit of U.S. antitrust laws. Requiring the NCAA to adhere to antitrust laws is not a problem and is rather a proper guardrail to protect the student-athletes.[200]

D. Antitrust Challenges to NCAA Bylaws Moving Forward

If Congress does not provide an antitrust exemption to the NCAA, the NCAA will inevitably be subjected to antitrust battles challenging bylaws that both restrict payments to student-athletes untethered to education and restrict the student-athletes' ability to profit from their NIL.[201] This raises the question as to what those antitrust lawsuits against the NCAA will look like after the Ninth Circuit's recent decision in the *National Collegiate Athletic Association Grant-In-Aid Cap Antitrust Litigation*[202] and the NCAA's endorsement of NIL benefits.[203]

1. Analysis of National Collegiate Athletic Association Grant-In-Aid Cap Antitrust Litigation

In *Alston v. NCAA*, the Ninth Circuit stated that the NCAA restriction on noneducational payments to student-athletes had anticompetitive effects, but is otherwise allowable because it serves the procompetitive justification of the NCAA: "The challenged rules preserve 'amateurism,' which, in turn, 'widen[s] consumer choice' by maintaining a distinction between college and professional sports."[204] It is plausible to believe that to maintain the

198. *See supra* note 70 and accompanying text (discussing the need for the new rules to maintain the integrity of college sports).

199. *See Gonzalez Proposed NIL Bill*, *supra* note 71, at § 3 (explaining how Congress can use the proposed act to avoid violating other laws).

200. *See supra* Part IV.A (discussing why the NCAA adhering to antitrust laws is beneficial to the student-athletes).

201. *See supra* Part IV.A (discussing previous antitrust lawsuits and realizing this issue will probably continue and will not just stop here).

202. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1257 (9th Cir. 2020).

203. *Working Group Report*, *supra* note 4, at 8.

204. *Grant-in-Aid Cap*, 958 F.3d at 1257.

distinction between professional sports and college sports, which is the goal of the NCAA, that a rule restricting noneducational payments to student-athletes would further that goal.[205] However, it is illogical to believe that the NCAA can still argue that restricting payments unrelated to education advances their ability to remain distinct from professional sports when the NCAA now allows NIL payments—which are essentially payments to student-athletes untethered to education.[206]

A hypothetical illustrating this situation would be a modeling agency whose goal is to have its male models in peak physical shape. Thus, to achieve this goal, the modeling agency restricts its models from eating chocolate. Then, the models bring an antitrust lawsuit against the modeling agency, stating that their restriction on chocolate violates U.S. antitrust laws. At trial, the court utilizes the Rule of Reason doctrine and finds that the models successfully argued that the chocolate restriction is anticompetitive.[207] However, the court does not strike down the rule for violating antitrust laws because the rule serves the modeling agency's valid procompetitive justification of intending to keep its models physically fit. Now suppose that after the trial, the modeling agency agrees to allow the models to drink chocolate milk when they are not in California. Can the modeling agency in a subsequent trial still argue that their anticompetitive blanket rule restricting the models from eating chocolate serves its procompetitive goal of keeping the models fit?

The student-athletes presented this argument in *Alston* by stating that because the NCAA is seemingly allowing payments to student-athletes unrelated to educational benefits, being NIL payments, then restricting payments untethered to education can no longer be a purpose to serve the NCAA's procompetitive justification of preserving the distinction between professional and college sports.[208] The Ninth Circuit disagreed, and the court stated that the NCAA did not endorse cash compensation untethered to education but rather simply loosened its restrictions related to NIL benefits.[209]

However, the court's analysis seems inconsistent because the NCAA has stated its approval for NIL payments, which is essentially a cash compensation for student-athletes that is not related to education.[210] Because of this approval by the NCAA for NIL payments,[211] it would then logically follow that the NCAA could no longer argue that restricting cash payments unrelated to education would serve its procompetitive goal of maintaining a

205. *Id.*

206. *Working Group Report*, *supra* note 4, at 8.

207. *See supra* Part II.E (discussing the Rule of Reason doctrine and its application to NCAA antitrust lawsuits).

208. *Grant-in-Aid Cap*, 958 F.3d at 1265.

209. *Id.*

210. *Working Group Report*, *supra* note 4, at 8.

211. *Id.*

distinction between professional and college sports.[212] Whether the NCAA can still argue that restricting payments to student-athletes serves its procompetitive justification will likely be the center of discussion in future antitrust lawsuits or if the Supreme Court hears this case.[213]

2. The Student-Athletes' and NCAA's Strategies Moving Forward

In future antitrust lawsuits revolving around NCAA bylaws regulating how student-athletes will benefit from their NIL, both the student-athletes and the NCAA will likely frame their arguments in these ways. First, the student-athletes will likely argue that the NCAA's loosening of NIL restrictions has changed the scope of what serves the NCAA's procompetitive argument and that the challenged restriction no longer serves that purpose.[214] Further, the student-athletes will state that challenged NIL bylaws do not serve the NCAA's procompetitive goal of remaining distinct from professional sports anymore because the NCAA has agreed to allow NIL payments.[215]

On the other hand, the NCAA will argue that the potentially challenged NIL bylaw does serve the anticompetitive purpose of "amateurism" and maintains a distinction between college and professional sports.[216] For example, if a student-athlete challenges an NCAA bylaw that restricts the amount a student-athlete may receive from a donor in an antitrust lawsuit, the NCAA will have to successfully argue that the implementation of that rule serves its procompetitive goal of keeping college sports distinct from professional sports.[217]

An additional route for the NCAA would be to reframe its procompetitive justification to align stronger with the anticompetitive bylaw.[218] For example, the NCAA could argue that its procompetitive justification is to establish a level playing field for the competing institutions, and their anticompetitive restriction on the amount a student-athlete could receive from a booster or alum for NIL services promotes and serves that procompetitive justification.[219]

Nonetheless, it should be noted that courts in the recent past have been lenient towards the NCAA, and in general, courts have found that the NCAA's restrictions on payments to student-athletes served a procompetitive

212. *Grant-in-Aid Cap*, 958 F.3d at 1257.

213. *See supra* Part IV.D.1 (discussing how the NCAA's acceptance of NIL payments may change the scope of their recent antitrust argument).

214. *See Working Group Report*, *supra* note 4, at 8.

215. *Id.*; *see also Grant-in-Aid Cap*, 958 F.3d at 1257.

216. *See supra* Section II.E (discussing the NCAA's procompetitive justification of keeping the NCAA and professional sports separate).

217. *See supra* Section II.E (same).

218. *See supra* Section II.E (discussing the Rule of Reason doctrine and its application).

219. *See supra* Section II.E (same).

purpose.[220] Thus, it is unlikely that there will be a huge shift from this pattern moving forward.[221]

However, the NCAA and college sports will not be harmed if such NIL bylaws are deemed to violate antitrust laws in litigation down the line.[222] This is because antitrust laws are put into place to protect citizens against anticompetitive restraints in the marketplace, and if student-athletes receive those protections as well, it is not a bad thing.[223] Further, if such restriction is necessary for the furtherance of college sports, it can successfully be put into place by Congress without any pushback from antitrust laws.[224]

Thus, through a dual legislating system, Congress can put into place necessary guideposts and restrictions that may violate antitrust requirements if put in place by the NCAA, and the NCAA can expand upon those rules by implementing bylaws that align with the spirit of antitrust laws. This dual system will allow NIL restrictions to be put in place to preserve the integrity of college sports and additionally will allow the student-athletes to retain their vehicle for expanding their rights, being antitrust litigation.

V. CONCLUSION

The movement towards empowering student-athletes to profit off of their NIL is a historic step.[225] Through California's actions, student-athletes are on the cusp of being able to benefit from their hard work like never before.[226] Legislators, student-athletes, and the NCAA need to continue pushing forward and must not retreat. However, Congress and the NCAA must implement student-athlete NIL benefits in a way that allows for a level-playing field to be created while not shutting the door for future innovation.

Thus, Congress should move forward with a federal NIL bill that preempts the states by restricting their ability to enforce NIL restrictions, similar to Representative Gonzalez's proposed express preemption clause. This will allow both Congress and the NCAA to create a level-playing field without interference from the states.[227] In addition, Congress should refrain

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220. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–76 (9th Cir. 2015); *Grant-in-Aid Cap*, 958 F.3d at 1257.

221. Courts are unlikely to make a drastic shift away from their rulings in the previous antitrust litigations.

222. *See infra* notes 223–224 and accompanying text (discussing why the NCAA having to be under the purview of U.S. antitrust laws is not a bad thing).

223. *See supra* Section II.E (discussing the purview of antitrust laws and what those laws protect).

224. *See supra* Part IV.C (discussing the ability of Congress to implement NIL rules that, if enacted by the NCAA, would violate antitrust laws).

225. *See supra* Part II (discussing the movement to allow student-athletes to begin profiting off of their NIL).

226. *See supra* Part II (same).

227. *See supra* Part III.B (discussing the ability of Representative Gonzalez's express preemption clause to have the required scope to allow the NCAA to essentially preempt state laws).

from placing an antitrust exemption within the federal NIL bill. This is because an antitrust exemption will remove the student-athletes' power to protect their rights, and the NCAA can have success without protection from antitrust lawsuits.[228]

Taking these steps will solve the issue of state interference with the NCAA's ability to create a uniform system[229] and will additionally empower student-athletes to challenge that uniform system, being the NCAA, through antitrust litigation.[230]

228. *See supra* Part IV (discussing why an antitrust exemption for the NCAA is not required).

229. *See supra* Part III.B (discussing the ability of Representative Gonzalez's express preemption clause to have the required scope to allow the NCAA to essentially preempt state laws).

230. *See supra* Part IV (discussing how the NCAA should not be gifted an antitrust exemption because it would remove the power of student-athletes to hold the NCAA accountable).