SJU Saint Joseph's University

November 7, 2023

Sent Via Email
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Honorable Members of the Senate Judiciary Committee,

I would like to offer my sincere gratitude for your ongoing engagement in the issues facing college athletics, and for inviting me to testify at the recent hearing. I am extremely appreciative of the opportunity to offer the perspective shared by many non-football institutions like Saint Joseph's University. In light of the existing legal environment, I truly believe that we need assistance from Congress so that we can continue to make improvements to college athletics while preserving many aspects that make college athletics so special. I am encouraged by the engagement of and thoughtful questions posed by the Senate Judiciary Committee members – during the hearing and in the following Questions for the Record.

Before responding to the Questions for the Record, I would like to offer a general comment regarding the future of college athletics. The NCAA and its member institutions have made many positive changes for student-athletes in the past few years, and we must continue to evaluate additional changes. However, many colleagues and I have a growing concern that we are drifting farther than ever from our educational mission in contemplating these changes. As long as we continue to seek Congressional assistance, I hope that you will continue to ask important questions about the role of education in college athletics.

Thank you again for your engagement, and I look forward to continued participation in this important conversation.

Sincerely,

Jill Bodensteiner

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Vice President and Director of Athletics

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Bodensteiner Response to Questions for the Record

The Honorable Senator Durbin

1. **You have experience working at both Notre Dame—where football dominates the athletic scene—and Saint Joseph's, a smaller Division I, non-football school. You also previously specialized in employment litigation as an associate at a law firm in Chicago. The case *Johnson v. NCAA* in the U.S. Court of Appeals for the Third Circuit is examining whether college athletes should be classified as employees. Relatedly, there is a proposal in the California state legislature that would require revenue sharing with some college athletes.**

   a. **How would classifying college athletes as employees impact universities like St. Joseph's? How, if at all, would the impact differ at a university like Notre Dame?**

   If college student-athletes are classified as employees, institutions like Saint Joseph's would have to make difficult decisions regarding whether to continue to support varsity athletics and at what level. If we elected to continue to sponsor some or all of our 20 sports, we would have to make significant changes. For starters, we would likely reduce or eliminate all athletics financial aid (approximately $9 million) and instead use that money toward student-athlete wages. To stay competitive at the national level in basketball, we might have to spend a significant portion of that money on basketball student-athletes. As we have seen with the widespread payment of NIL unrelated to legitimate active or passive use of student-athlete NIL (i.e., impermissible recruiting and retention inducements from collectives), the open market would surge immediately. Notably, some Division I men's basketball programs – through collectives – are currently spending $3 million or more annually on men's basketball alone. Presumably, there would be no national collective bargaining agreement or antitrust exemption to serve as a governor on basketball compensation. Furthermore, unlike money from collectives, Title IX would apply to employment compensation and would (appropriately) lead to similar wages for men's and women's basketball student-athletes. Spending $9 million on basketball student-athlete wages is untethered to the amount of revenue produced and entirely inconsistent with the educational mission of institutions like Saint Joseph's.

   If we elected to continue to offer Division I sports, and we could support funding for reasonable wages, the administrative considerations would be overwhelming. For example, neither our existing Human Resources nor Student Employment personnel could manage the applications, onboarding, compensation analysis, employee relations, payroll, and other functions associated with 500 student-athletes; as such, we would likely have to reduce the number of student-athletes.

   I hesitate to speculate on how the classification of student-athletes as employees would impact the University of Notre Dame but will note the obvious fact that Title IX would add a significant challenge to the equation for schools that sponsor football.

b. How would forcing universities to share a portion of their revenues with college athletes impact universities like St. Joseph's? How, if at all, would the impact differ at a university like Notre Dame?

At Saint Joseph's, we want to remain competitive nationally in several of our sponsored sports; currently, we routinely (and oftentimes successfully) compete against institutions with much larger total budgets. Under the few proposals for revenue share that we have seen to date, Saint Joseph's would be exempt by virtue of its annual revenue. Although this would seem to be a positive on its face, it would be difficult to maintain an equitable competitive environment with some institutions offering revenue share and others not.

Notre Dame likely would not be exempt from any revenue share requirements and therefore would be in a much different position. In my opinion, the most challenging aspect of revenue share at this level would be deciding how to distribute the revenue to student-athletes in compliance with Title IX in light of the source of most current media revenue.

2. College sports are not a monolith. Within the NCAA, member universities are divided into Divisions I, II, and III. Further, Division I football is broken into the Football Bowl and Football Championship Subdivisions. In many respects, college sports operations at institutions like the Universities of Texas, Alabama, and Michigan look very different than college sports operations at St. Joseph's, or universities in Divisions II and III.

a. Given the differences that exist between NCAA divisions and even within NCAA divisions, does a "one-size-fits-all" approach to addressing issues like NIL make sense?

I believe that a one-size-fits-all approach to NIL is appropriate. The legitimate use of NIL is such that the market should determine who earns the most opportunities regardless of the sport played or institution attended. Likewise, all student-athletes should be entitled to the same level of protection in the NIL market.

b. What are some possible solutions that could account for differences across schools and sports?

I do not believe there should be any difference in NIL solutions across schools or sports. In addition to the opportunities for legitimate NIL activity referenced above, no student-athletes – regardless of sport played or institution attended – should be paid through alleged NIL simply to attend or remain at an institution.

c. Given your background in employment litigation, can you explain how schools or conferences might operationalize a revenue-sharing model for select sports?

I believe that key elements of any proposal for revenue share would have to include an evaluation of the sources of revenue; Title IX considerations; the importance of

maintaining a competitive environment in college athletics; clarity on whether revenue share renders student-athletes "employees"; the possibility of unlimited amounts of revenue being shared; and recognition that the primary mission of institutions of higher education is to educate students.

3. **Currently, there is no national, uniform law addressing NIL in college athletics, leaving NIL policy to be governed by a patchwork of state laws.**

   How difficult is it for current and prospective college athletes to understand and stay on top of the different state laws addressing NIL?

   It is difficult for me to keep up with and understand the various state laws, so I am confident that current and prospective student-athletes are confused. I also have reason to believe that – due to such confusion and extremely limited enforcement of state laws – many individuals involved in NIL activity feel no responsibility to understand or abide by state laws.

4. **As Congress considers potential legislation to regulate college sports, please answer the following questions.**

   a. **In 2022, the Power 5 conferences reported a combined $3.3 billion in revenue. Should athletes in Power 5 conferences be subject to the same rules with respect to NIL, revenue sharing, and employment status as athletes in non-Power 5 conferences? Why or why not?** *See below for a combined answer to (a) - (d).*

   b. **In the past few years, the Big Ten (seven years, $7 billion), SEC (ten years, $3 billion), and Big 12 (six years, $2.28 billion) signed massive media-rights deals driven largely by the rights to air the conferences' football games. Should football players in Power 5 conferences be subject to the same rules with respect to NIL, revenue sharing, and employment status as athletes in other sports and conferences? Why or why not?** *See below for a combined answer to (a) - (d).*

   c. **In 2016, the NCAA extended its contract with Turner Sports and CBS to broadcast the men's college basketball tournament. The extension was for $8.8 billion over eight years. Should men's basketball players be subject to the same rules with respect to NIL, revenue sharing, and employment status as other athletes? Why or why not?** *See below for a combined answer to (a) - (d).*

   d. **What other distinctions, if any, should Congress make when crafting rules for NIL, revenue sharing, and employment status for college athletes?**

      I recognize that additional student-athlete benefits must be considered and that there is a case to be made that student-athletes in certain sports deserve additional benefits beyond those in other sports. However, I remain steadfast in my beliefs that (i) NIL rules should be market-driven and consistent regardless of sport or institution and (ii) student-athletes should not be considered employees of their institution.

The Honorable Senator Grassley

1. **Do you believe federal preemption of state laws is the best way to deal with NIL? What issues do you believe should be addressed at the federal level and what issues, if any, should be left to the states?**

   Yes, I believe that federal preemption of state laws is an essential aspect of any NIL solution. In a competitive environment that includes institutions of higher education in all 50 states, I do not see any role for state NIL laws. In addition, states with agent and NIL laws on the books have demonstrated little to no interest in enforcing such laws. Uneven adoption and enforcement of state laws – whether due to resources, the interest of states in seeing their own institutions succeed in athletics, or other factors – has and will continue to create confusion and hinder the competitive environment.

2. **Who do you believe should be in charge of creating NIL guidelines, requirements and restrictions – Congress, the FTC or another third party, or the NCAA? Why?**

   As with other aspects of college athletics, I believe the best NIL solution includes a role for Congress, one or more federal agencies, and the NCAA. An example of the foregoing joint approach to governance is Title IX – a law passed by Congress, with implementing regulations and enforcement by the Department of Education's Office for Civil Rights, and regarding which the NCAA has imposed additional obligations on member institutions. Working alone, the NCAA is incapable of solving the issues that exist in the current NIL environment for legal and practical reasons. Furthermore, the existing NIL climate is already creating issues that have or should (arguably) result in government guidance or enforcement in the following areas: tax, student visa status, FTC advertising regulations, financial aid rules, and gender equity, to name a few.

3. **Who do you believe should be in charge of overseeing and enforcing provisions of a new NIL law – Congress, the FTC or another third party, or the NCAA? Why?**

   I believe that enforcement of any federal NIL law should be a joint effort. The NCAA, conferences, and member institutions should oversee and enforce the day-to-day requirements of the law. The federal government should be involved in at least two ways: (1) enforcement of the federal NIL law as it applies to individuals or entities over whom the NCAA has no jurisdiction and (2) monitoring whether individuals and entities involved in college NIL are in compliance with existing federal laws and regulations, including those promulgated by the IRS, FTC, Department of Education (including the OCR), and DHS, among others.

4. **What transparency requirements should be imposed upon athletes, colleges, conferences and collectives with respect to NIL agreements?**

   Transparency in the NIL environment is important for several reasons, including compliance with existing federal and state laws and NCAA regulations, and the opportunity to contradict the misinformation that is currently flowing to the detriment of both student-athletes and institutions. For privacy reasons, aggregate reporting is warranted rather than individually identifiable reporting. In addition, I am aware that many state laws currently require disclosure; despite those existing laws, many student-athletes are not disclosing their deals to their respective institutions. As such, any proposed transparency requirements should include incentives for reporting and/or consequences for non-reporting. Notably, the NCAA membership is now considering several changes to NCAA NIL regulations, including student-athlete disclosure of NIL activity with a value over $600.

5. **What safeguards do you believe are needed to ensure student athletes are protected from unfavorable contracts?**

   I believe that any federal NIL law should include provisions that protect student-athletes. Notably, the NCAA membership is now considering several changes to NIL regulations related to student-athlete protection, including an NCAA-produced, comprehensive education program; standardized contract terms; voluntary registration for NIL service providers; and disclosure and transparency.

6. **Concerns have been raised regarding possible Title IX violations if there is no federal preemption of state NIL laws. Do you agree? If so, what would you propose Congress do to mitigate Title IX concerns?**

   Although reliable data regarding the current NIL market is limited, there appears to be a stark difference between legitimate NIL activity and NIL payments made by collectives (many of which are not legitimate NIL transactions, but rather payments made by donors and friends of the university intended to recruit or retain one or more student-athletes). Although women are faring extremely well in the legitimate NIL activity market for several reasons, NIL payments made by collectives are predominantly intended to benefit male student-athletes. If collectives continue to exist in their current form, I believe that the OCR should consider treating collectives as a "program or activity" of the institution that they support, thereby subjecting them to the requirements of Title IX.

7. **Several bills dealing with NIL have been introduced in the House and Senate. Which bill or bills do you support? Why? Which bill or bills do you oppose? Why?**

   Many of the leaders on the Senate Judiciary Committee have suggested thoughtful legislation addressing various aspects of college athletics. In my opinion, Senator Cruz has addressed many of the current issues in college athletics effectively. Senators Booker

and Blumenthal also put forward several thoughtful provisions designed to protect student-athletes, including a provision that gives student-athletes the ability to rescind their contracts upon completion of their participation in college sports.

The Honorable Senator Whitehouse

1. **Student-athletes are young and have little experience with contract negotiations, leaving them vulnerable to bad actors who attempt to take advantage of them in one-sided NIL contracts.**

    a. **Who should be responsible for ensuring that student-athletes are protected from exploitation?** *See below for a combined answer to (a) - (b).*

    b. **What processes or regulations are necessary to ensure student-athletes do not fall victim to predatory business practices?**

    Student-athletes are permitted to retain any number of service providers (e.g., legal counsel, tax experts, marketing representatives, agents) to assist them with NIL activity, and many are doing so. I do NOT believe that institutions of higher education should provide tax, legal, marketing, or agent services to student-athletes. In fact, I believe that providing free professional services to a commercial enterprise would jeopardize the tax-exempt status of non-profit institutions of higher education for the same reasons articulated in the IRS Office of the Chief Counsel's general legal advice memorandum dated June 9, 2023 (related to NIL collectives).

    Notably, the NCAA membership is considering several changes to NCAA NIL regulations related to student-athlete protection, including an NCAA-produced, comprehensive education program; standardized contract terms; voluntary registration for NIL service providers; and disclosure and transparency. Any federal NIL law should reinforce these elements of an NIL program designed to protect student-athletes.

    I believe that enforcement of a federal NIL law should be a joint effort. The NCAA, conferences, and member institutions should oversee and enforce the day-to-day requirements of the law. The federal government should consider involvement in two ways: (1) enforce the federal NIL law as it applies to individuals or entities over whom the NCAA has no jurisdiction, including agents, representatives, and service providers, and (2) help ensure that individuals and entities involved in college NIL are in compliance with existing federal laws and regulations, including those promulgated by the IRS, FTC, Department of Education (including the OCR), and DHS, among others. Finally, I do not believe that state laws would be effective in protecting student-athletes. Many states currently have agent and NIL laws on the books and have demonstrated no interest in enforcing such laws. Uneven enforcement of state law – whether due to resources, the interest of states in seeing their

institutions succeed in athletics, or other factors – has and would continue to cause confusion to student-athletes and hinder the competitive environment.

2. **Star athletes playing collegiate men's football and basketball at dominant institutions have secured the majority of NIL deals.**
    a. **To what extent should Congress or the NCAA try to create NIL regulations that promote NIL deals for all student-athletes, not just the star players?** *See below for a combined answer to (a) - (c).*

    b. **To what extent should Congress or the NCAA try to create NIL regulations that promote NIL deals for teams that do not generate revenue for their universities?** *See below for a combined answer to (a) - (c).*

    c. **How can Congress or the NCAA ensure fairness and equity between men's and women's collegiate athletics in securing NIL deals?**

In an ideal world, all NIL activity for college student-athletes should be related to legitimate passive (e.g., jerseys, trading cards, video games) or active (e.g., autographs, endorsement of a product or service) use of a student-athlete's name, image or likeness. As such, the open market should dictate which student-athletes generate more revenue through NIL. Unfortunately, a large part of the current NIL activity market consists of direct payments – especially those from collectives to student-athletes – that have no relation whatsoever to legitimate passive or active use of a student-athlete's name, image or likeness and instead are purely offered as recruiting and retention inducements. Although there is current disagreement as to whether institutions should pay student-athletes directly through revenue share, employment, or in another manner, I do not believe that direct payments from donors (or, for that matter, from institutions) to student-athletes disguised as NIL activity is the answer.

Institutions should comply with existing Title IX regulations. Namely, under current NIL regulations, any resources or other support provided by institutions that are designed to promote student-athletes or assist them in entering into legitimate NIL activity must be provided in an equitable manner consistent with Title IX regulations.

3. **It is important that we protect the health and safety of student-athletes. Injuries are very common in collegiate athletics, and some injuries recur or manifest later in an athlete's life.**

    a. **Should there be a fund to pay for medical care for former student-athletes whose injuries can be traced back to their collegiate careers, even if those injuries manifest later in life?** *See below for a combined answer to (a) - (b).*

    b. **If so, how should the fund be structured and what other important considerations should be kept in mind when creating such a fund?**

The health and safety of our student-athletes is the most important aspect of what we do in college athletics. At Saint Joseph's, like many Division I institutions, we are extremely proud of our integrated well-being model that includes:

- incredible partnerships with local physicians and other medical providers;
- considerable investment in institutional personnel whose primary role is to support our student-athletes' well being;
- comprehensive training on matters of health and safety;
- a culture that reinforces the "unchallengeable authority" of physicians and certified athletic trainers when it comes to decisions that impact the health and safety of student-athletes;
- and a robust insurance plan.

The insurance offered by NCAA member institutions and the NCAA (through its catastrophic insurance plan) is comprehensive and provides significant protection for our student-athletes. That being said, there are limitations to any insurance plan and, for that reason, I support the evaluation of a medical fund. There are many operational issues to evaluate with respect to such a fund, including funding, eligibility criteria and determination (causation would be the most challenging aspect of administering such a fund), and claims administration. I do not believe the NCAA or its member institutions should be responsible for the determination of eligibility or claims administration.