STATEMENT OF MATTHEW J. MITTEN
SENATE JUDICIARY COMMITTEE
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I am a Professor of Law and the Executive Director of the National Sports Law Institute and the LL.M. in Sports Law program for foreign lawyers at Marquette University Law School in Milwaukee, Wisconsin. I served as the Law School's Associate Dean for Academic Affairs from July 2002 to June 2004. I currently teach Amateur Sports Law, Professional Sports Law, Sports Sponsorship Legal and Business Issues Workshop, Antitrust Law, and Torts. I am the author of *Sports Law in the United States* (Wolters Kluwer 2011, 2d. ed. 2014, 3d. ed. 2017) and co-author of a law school textbook, *Sports Law and Regulation: Cases, Materials, and Problems* (Aspen/Wolters Kluwer 2005, 2d. ed. 2009, 3d. ed. 2013, 4th ed. 2017, 5th ed. 2020), and *Sports Law: Governance and Regulation* (Wolters Kluwer 2013, 2d. ed. 2016, 3d. ed. 2020), an undergraduate and graduate text. I served as the president of the Sports Lawyers Association from May 2015-May 2017 and am a member of its Board of Directors who co-presents the Year in Review summary of current legal developments at its annual conference. My CV, which has been submitted to the Committee, includes additional information about my background and experience.

I have been studying and writing about college athletics for over 30 years. I have written several articles about college sports legal issues that focus on NCAA internal governance and external legal regulation, particularly antitrust issues, which have implications for Congressional consideration of the appropriate permissible scope of and limitations on intercollegiate student-athletes' licensing of their names, images, and likenesses (NIL) or publicity rights and related matters. *See, e.g.*, *Regulate, Don't Litigate, Change in College Sports*, Inside Higher Ed, June 10, 2014 (with Stephen F. Ross); *Why and How the Supreme Court Should Have Decided O'Bannon v. NCAA*, 62 Antitrust Bulletin 62 (2017).

As Professor Ross and I observed in our 2014 Inside Higher Ed article, as compared to regulation through Congressional legislation, "antitrust litigation [is] a less attractive means of reforming college sports." More specifically, "[c]ase-by-case litigation to resolve the antitrust validity of particular NCAA student-athlete eligibility rules is not an optimal method of externally regulating intercollegiate sports competition among nonprofit institutions of higher education." It has resulted in conflicting judicial decisions creating legal uncertainty rather than principled and predictable application of antitrust law as well as being very expensive and time-consuming." 62 Antitrust Bulletin at 89.

Since 2014, legal developments and multiple private antitrust lawsuits have reconfirmed and reinforced this viewpoint. My prior academic writings suggest potential alternative means for effectively reforming intercollegiate athletics at a macro level, specifically by federal legislation. As explained in my scholarship, the important point to recognize is that, compared to antitrust litigation, the Congressional legislative process enables consideration of multiple societal goals in connection with intercollegiate athletics (e.g., maximizing college sports participation opportunities and scholarships, advancing Title IX gender equity) as well as affected constituencies (e.g., student-athletes who play other intercollegiate sports, college sports fans,

etc.) and not just the particular litigants. *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 Ore. L. Rev. 837 (2014) (with Stephen F. Ross); *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 San Diego L. Rev. 779 (2010) (with James L. Musselman & Bruce W. Burton).

The U.S. college sports system, which is the product of a unique cooperative endeavor among hundreds of institutions of higher education that does not exist anywhere else in the world, provides access to college education opportunities for athletically-gifted persons of all socioeconomic backgrounds, offers a very popular distinctive brand of sports entertainment, and both cross-subsidizes athletic participation opportunities for women and men, and trains the next generation of U.S. Olympic athletes. This intercollegiate athletics model originated from and finds its justification in the common educational mission of American universities and creates important co-curricular activities that provide opportunities for development of leadership, teamwork, and other interpersonal skills outside the classroom. At most universities, the only sports that produce net revenues are football and men's basketball, which typically are used to subsidize other intercollegiate sports and, in some instances, academic programs. The cross-subsidization of sports within the athletic department is similar to, and consistent with, the historical cross-subsidization of academic programs within a university; for example, net revenues generated by law and business schools may subsidize the humanities and other academic programs. Regardless of whether each of them individually generates net revenues, all of a university's academic programs and intercollegiate sports are an important part of its overall educational mission.

By its nature, antitrust litigation, particularly application of the very fact-specific Rule of Reason under §1 of the Sherman Act, has a limited focus (i.e., determination and balancing of the anticompetitive and pro-competitive economic effects of the challenged restraint in the relevant market, which is complicated by a less restrictive alternative analysis) that eschews several legitimate noneconomic justifications for challenging NCAA bylaws and student-athlete eligibility rules. Therefore, judicial consideration of only economic considerations while analyzing the merits of a particular antitrust claim may result in unintended adverse consequences. By failing to take into account non-economic (but nevertheless socially important) considerations, the strict application of antitrust law may have the adverse effect of reducing colleges' financial ability to sponsor both revenue producing and non-revenue sports with corresponding reduced athletic participation and scholarship opportunities for student-athletes in these sports.

Because it is only prohibitory in nature, federal antitrust law can function only as a blunt instrument that enjoins specific anticompetitive conduct in intercollegiate athletics without considering any broader collateral effects. A court cannot mandate particular procompetitive conduct to remedy anticompetitive effects or act as a market regulator (e.g., by establishing a "fair" price for inputs necessary to produce college sports such as student-athlete playing services). Antitrust law is thus an ineffective tool for valid systemic reform of a unique joint venture among institutions of higher education in which their cooperation and collective rule-

making is necessary to produce athletic competition in a form attractive to consumers (e.g., student-athlete eligibility rules to maintain the distinctive features of college sports vis-à-vis professional sports). This shortcoming exacerbates the danger of unintended future adverse consequences. For example, in *O'Bannon v. NCAA*, 803 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016), and *Alston v. NCAA*, 2020 WL 2519475 (9th Cir.), federal courts declined the NCAA's request to introduce evidence concerning the impact of the proposed relief requested by plaintiffs (i.e., primarily greater economic benefits for football and men's basketball players) on Title IX gender equity in intercollegiate athletics in devising its remedy for the antitrust violations. Accordingly, the limited ability of courts to craft appropriate "all things considered" systemic relief or to take into account the future effects of their rulings, particularly unintended consequences, also makes federal legislation generally much more preferable than antitrust litigation for macro-level reforms.

Because the NCAA is a national association of colleges and universities with a federated governance structure, intercollegiate sports teams compete nationally in Divisions I, II, and III,and athletic conferences have member schools in multiple states, nationally uniform laws are essential for the external regulation of college sports. Conflicting and differing legislation by multiple states cannot provide the uniformity necessary for a system of national intercollegiate athletic competition. Therefore, a nationally uniform law regulating intercollegiate student-athletes' licensing of their NIL rights is required to provide consistency; to prevent the development of conflicting state laws; and to avoid the dangers of professionalizing college sports and creating competitive balance inequities if different states enact different NIL laws for their respective colleges and universities.

Like national professional sports leagues, a national intercollegiate sports association needs uniform legal regulation to produce its unique brand of athletic competition. There are, however, important differences between intercollegiate sports and professional sports that should not be blurred or eliminated by student-athletes' exercise of NIL rights. The U.S. Supreme Court's majority opinion in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), recognized that an "academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable, such as for example, minor league baseball" as well as the importance of the "preservation of the student-athlete in higher education." It also recognizes the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports;" its need for "ample latitude to play that role;" and that "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." The dissenting opinion written by Justice Byron White, who played college football at the University of Colorado and finished second in the 1937 Heisman Trophy balloting, strongly cautioned against "treating intercollegiate athletics . . . as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits."

The NCAA as well as its member schools and athletic conferences must fully comply with all of the standards and requirements of a federal NIL law established by Congress, which I

respectfully submit should include appropriate provisions to prevent the dangers of inconsistent state regulation and the professionalization of college sports by prohibiting "pay for play" (i.e., not permitting direct or indirect payments to individual student-athletes by universities or representatives of their athletics interests). To achieve these objectives as well as to provide the NCAA with "ample latitude" to establish rules to preserve "the student-athlete in higher education" and to penalize its member universities and their student-athletes for violations of a federal NIL law, a necessary component of this law is an express, narrow antitrust exemption for the NCAA and its member educational institutions and athletic conferences. Without limited antitrust immunity, Congress's determinations regarding the appropriate scope of student-athletes' NIL rights could be subject to antitrust challenges and continuing judicial resolution. The defense of antitrust litigation by the NCAA, its member schools, and athletic conferences has been and would continue to be time-consuming and economically wasteful, thereby diverting resources that would be better devoted to the intercollegiate athletic programs and other socially beneficial components of the broad educational missions of American universities.

To prevent the achievement of socially legitimate objectives from being thwarted by private antitrust litigation, Congress previously granted limited immunity from federal antitrust law to sports leagues (e.g., Sports Broadcasting Act of 1961, 15 U.S.C. §1291 et seq.), educational institutions (e.g., Improving America's Schools Act of 1994), and other unique industries (e.g., 2004 Medical Resident Matching Program Exemption, 15 U.S.C. § 37b). A narrow antitrust exemption as part of a federal NIL law is appropriate as well. Antitrust immunity is necessary to prevent case-by-case antitrust challenges to NCAA regulation, *inter alia*, "to prevent NIL opportunities from infecting recruiting, distracting [student-athletes] from their educational obligations, providing external economic pressure for playing time, press availability." "Separate Statement of Commissioner Harvey Perlman" at pages 1-2 in connection with June 15, 2020 Final Report and Recommendation for a Uniform State Law Drafting Committee by the Study Committee on College Athlete Name, Image, and Likeness Issues.

Alternatively, courts could provide the NCAA and its member schools and athletic conferences with implied antitrust immunity for their NIL rules compliance and enforcement actions similar to the immunity that the United States Olympic and Paralympic Committee and National Governing Bodies have from antitrust challenges to Olympic sports commercial advertising rules and athlete eligibility requirements pursuant to their regulatory authority under the Ted Stevens Olympic and Amateur Sports Act. *Gold Medal LLC v. USA Track & Field,* 899 F.3d 712 (9th Cir. 2018); *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989). But this is clearly a second-best option that is fraught with uncertainty and unpredictability, which would require litigation to determine the scope of such implied antitrust immunity. Congress could avoid these problems by providing express antitrust immunity in a federal NIL law.

To be absolutely clear, I am not advocating or suggesting a broad antitrust exemption from the Sherman Act similar to Major League Baseball's common law antitrust immunity (see *Flood v. Kuhn*,) that would immunize the NCAA, athletic conferences, and universities from antitrust

liability for any and all anticompetitive conduct in connection with their governance of intercollegiate athletics. Rather, I propose very narrow antitrust immunity to protect them from liability only for adopting and enforcing rules consistent with the provisions of a federal NIL law. Absent such Congressionally conferred protection, it is virtually certain that they will continue to face antitrust suits challenging a wide variety of NCAA student-athlete eligibility rules, including on the theory that their compelled adherence to federal and state laws permitting intercollegiate student-athletes to license their NIL rights would preclude their defense based on the traditional NCAA amateur/academic model of intercollegiate athletics as well as the *O'Bannon* and *Alston* precedent that "cash sums untethered to educational expenses" may be prohibited nationwide by NCAA rules.

This is not a speculative concern. For example, in June 2020, Arizona State men's swimmer Grant House and Oregon women's basketball player Sedona Prince sued the NCAA and the so-called Power Five conferences in the Northern District of California alleging that the NCAA's current rules prohibiting student-athletes from earning any NIL income violate federal antitrust law and should be certified as a class action suit. Tymir Oliver, a former University of Illinois football player, filed a materially identical complaint a few weeks later. These complaints request that (1) the NCAA be enjoined from having any association-wide rules restricting the amount of NIL compensation student-athletes may earn; (2) the Power Five conference football, men's basketball, and women's basketball players be entitled to damages for the use of their alleged NILs during telecasts of games; and (3) that athletes in any sport at a Power Five school be entitled to damages related to social media earnings.

In summary, Congress is uniquely positioned to evaluate and appropriately balance all constituents' legitimate interests and national public policy in determining the proper nature and scope of systematic reform of intercollegiate athletics that should result from providing student-athletes with NIL licensing rights. Unlike courts applying federal antitrust law on a case-by-case basis, Congress has the ability to preserve the many benefits of intercollegiate sports (including noneconomic and social ones) as well as to consider and prevent future unintended adverse consequences, including the professionalization of college sports, loss of intercollegiate athletic participation opportunities and scholarships in nonrevenue sports, and barriers to the achievement of Title IX gender equity in college sports.