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Cases

Defeat of Race Discrimination and Retaliation Claims Affirmed by the Eleventh Circuit

By Jeff Birren, Senior Writer

Travis S. Thomas, Sr. sued Auburn University for race discrimination, hostile work environment and retaliation in 2021. One claim was dismissed in 2022. Both sides later filed summary judgment motions. Thomas's motion was denied, Auburn's motion was granted. Thomas appealed, and in an unpublished opinion, the Eleventh Circuit affirmed (Thomas v. Auburn University, Case No. 23-13935, per curiam (10-9-2024)).

Thomas's Employment

Thomas attended Auburn University as a student, earning a B.A. and two M.A.'s in education. In 2017 he was hired as an academic counselor new role created

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specifically for him: Director of Academic Support Services." He "supervised student-athlete academic support services for the football team."

Thomas was terminated on March 1, 2021. He moved rapidly, suing Auburn on March 4, 2021. The Complaint contained three causes of action for purported violations of Title VII, 42 U.S.C. §2000e-2(a)(1) et seq, race discrimination, hostile work environment, and retaliation. Auburn filed a motion to dismiss on March 31. Thomas filed a First Amended Complaint on April 9. Auburn brought another motion to dismiss. Following a hearing, the District Court ruled that Thomas "shall have leave to file an amended complaint on or before 6/30/2021 to address the issues outlined in the Defendant's 15 Motion to Dismiss, as well as the concerns expressed by the Court at oral argument" (*Thomas v. Auburn University,* No. 3:2121-cv-00192 RAH-SMD WO ("Thomas") (M.D. Ala.) (6-24-21)). The Second Amended Complaint followed, leading to yet another motion to dismiss.

The motion was granted in part and denied in part. The Court dismissed the hostile work environment claim but denied the motion as to the race discrimination and retaliation claims (*Thomas*, (2-11-22)). The opinion was examined by Gary Chester, Senior Writer, *Sports Litigation Alert, Thomas v. Auburn University: Was Racism Behind Academic Advisor's Dismissal?* (4-22-2022). Thomas subsequently filed a Third Amended Complaint.

Summary Judgment

The inevitable battles over discovery and protective orders commenced. Two years later, the parties filed competing motions for summary judgment on May 5, 2023. Nearly six months of dueling motions followed, including one by Thomas to file an amended motion for summary judgment. That was granted. The District Court ruled on the summary judgment motions on November 1, 2023. It applied the test enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to the race discrimination claim. When analyzing the retaliation claim, the Court applied several cases, including Gogel v. Kia Motors Mfg. of Georgia, Inc (967 F.3d 1121 (11th Cir 2020) (en banc)). So, too, did the Eleventh Circuit. The analysis of the claims will be postponed until the discussion of the Court of Appeals opinion.

Several statements made by the District Court are worth noting. Thomas had submitted a 20-page "self-serving declaration in lieu of citing his own deposition testimony." That "evidences a tactic that the Court frowns upon and is greatly disfavored. See Sears v. PHP of Alabama, Inc., Case No. 2:05CV304-ID, 2006 WL 932044, at 11 (M.D. Ala. Apr. 10, 2006) (noting 'the general view of courts that deposition testimony is more reliable than affidavit testimony, given that the testimony of the deponent generally has been scrutinized through cross examination'" (Thomas, 2023 U.S. Dist. LEXIS 195983, (FN 6) (11/01/23)).

Thomas asserted, "without citation to law or the record, that his exclusion from leadership team meetings, removal of certain duties and responsibilities, an allegedly … unjustified performance review, and allegedly disparaging and critical remarks regarding him and his work rise to the level of actionable adverse employment actions …. Based on the evidence presented, and the general lack of development of this argument, Thomas has not sufficiently shown these actions to rise to the level of what are typically considered actionable adverse employment actions, especially since there is no assertion that Thomas's compensation, title, or position were fundamentally altered."

A party opposing summary judgment must set out the arguments, citing both supporting evidence and legal authority. "Thomas, by quickly asserting these arguments in a few sentences without citations to case law, has failed to meet this threshold burden in articulating how these actions qualify as adverse employment actions that may be supported by the record." These are not the Court's only criticisms, but it

will suffice. The District Court denied Thomas's motion and granted Auburn's motion for summary judgment. The Court "taxed" costs "of $4,302.92" against Thomas. Thomas appealed to the Eleventh Circuit on December 1, 2023. The Circuit placed it on the "Non-Argument Calendar."

In The Eleventh Circuit

Thomas "initially impressed his supervisors" and "a new role was created specifically for him." Unfortunately, in 2019 his wife was diagnosed with cancer and passed away. His "work started to decline." His supervisors "took turns taking Thomas meals" and did other things to offer "support", including pausing their regular meetings with him and seeking to lighten his workload. They saw support. "Thomas saw racial discrimination." Thomas took his complaints to a department HR official, then to Karla Gacasan, the Assistant Athletic Director for Human Resources. He filed a complaint with the EEOC on June 9, 2020, "asserting race discrimination, sex discrimination and hostile work environment." His 2020 performance evaluation rating was "Marginal", and he filed a second EEOC complaint on June 30, 2020. Nothing in either opinion indicates if the EEOC acted.

In December 2019, a football player received a failing grade in a class, rendering him ineligible to play in the "team's bowl game." After learning about the impact on the player, the professor changed the grade. Thomas did not know about the grade change. In a January 2020 meeting, Thomas stated that the player had been ineligible. He was then told that the grade had been changed. Thomas was "concerned that the grade change was improper, although he did not share his concern at the meeting." He remained quiet, for a year.

The following January, "Thomas reported his concern" to the University. The official "determined that waiting more than a year to report a potential NCAA violation" violated NCAA bylaws and University policy. He recommended that Thomas be terminated. Gacasan concurred, and on March 1, 2021, Thomas was fired.

The Circuit stated that it reviews a grant of summary judgment "de novo, reviewing the evidence in the light most favorable to Thomas and drawing all inferences in his favor. Pizarro v. Home Depot, Inc., 111 F.4th 1165, 1172 (11th Cir. 2024.)" Summary judgment "is appropriate if 'there is no genuine dispute as to any material fact' such that the University is 'entitled to judgment as a matter of law.' Fed. R. Civ. P. 56 (a)."

Title VII Race Discrimination Claim

Such claims are tested in "a three-step burden shifting framework designed to draw out the necessary evidence in employment discrimination cases" (McDonnell Douglas, 411 U.S. at 802). A plaintiff can establish a "prima facie" case of discrimination by showing that he or she is "(1) a member of a protected class, (2) suffered an adverse employment action, (3) was qualified

for his job, and (4) his employer treated differently one or more similarly situated persons outside his protected class."

This fourth step "is met" if the plaintiff presents "evidence of a comparator—someone who is similarly situated in all material respects.' Jenkins v. Nell, 26 F4th 1243, 1249 (11th Cir. 2022)." Comparators will normally have been subject to the same employment policy, "will ordinarily (although not invariably have been under the jurisdiction of the same supervisor as the plaintiff," and share the same employment history.

Thomas "cannot establish a prima facie case of race discrimination because he fails to present a sufficient comparator." Thomas pointed to three white female colleagues, stating that along with Thomas, they made up the "Leadership Team", met regularly, "had the same supervisor, "shared a similar employment or disciplinary history", and engaged in the same basic conduct in leading" the unit. Thomas actually reported to one of his alleged comparators. That person, and another "comparator", reported to the third. Furthermore, Thomas did not have the same employment history. The others were all assistant athletic directors, thus at a higher level than Thomas. They may have met regularly, but supervisors "regularly meet with subordinates." They "had responsibilities that exceeded Thomas's." Furthermore, they had been employed at Auburn far longer than had Thomas. He worked there for 4 years. His immediate supervisor worked there for 13 years. Her supervisor had been there for 19 years and in turn reported to a third "comparator" who was employed at the school for 29 years.

Finally, Thomas "does not show that" these other alleged comparators "engaged in the same misconduct that he did." Nothing indicates that they believed the grade change was improper; failed to timely report a potential violation; or failed to supervise "student athletes under their supervision" leading to his "loss of supervisory responsibilities and "marginal" performance evaluation. Thomas did "not identify appropriate comparators" and thus "cannot satisfy the first step of the McDonnell Douglas framework."

Alternative Theory

A plaintiff can alternatively defeat summary judgment by presenting "a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by a decisionmaker. Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir (2011)." This is "simply enough evidence for a reasonable fact-finder to infer intentional discrimination in an employment action—the ultimate inquiry in a discrimination lawsuit. Tynes v. Florida Dep't of Juv. Just., 88 F.4th 939, 946 (11th Cir. 2023))." Thomas did not make that showing.

Thomas argued that the purported reasons for his termination were a "pretext." "He seems to claim that by questioning the student-athlete's eligibility at the certification meeting he reported the violation." Thomas said that he was told to not discuss it further. That was not enough. He did not "question the propriety of the grade change at the certification meeting, he merely questioned whether the student athlete was eligible because he was not aware that the grade had in fact been changed." Furthermore, even if he had had been told to not discuss it further, "this would not alleviate his duty to report a potential violation."

Thomas made a number of complaints about his treatment, including being "disparaged", being excluded from meetings, being downgraded and "evaluated improperly" but "he does not connect this alleged mistreatment to his race." His "claims are conclusory, and he fails to tie any of them to evidence of racial animus." The Court saw "no error" in granting summary judgment on the race discrimination claim.

Title VII Retaliation Claim

Retaliation claims require a plaintiffs to "show '(1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was casually related to the protected activity'" (Gogel, 967 F.3d at 1136). Thus, the protected activity was the but-for cause of the adverse action. If "there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint fails as a matter of law. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004)." Therein lay the problem.

He engaged in protected activity when he brought the EEOC charges against the University. The District Court and the Circuit assumed the HR complaints were also protected activity. However, "Thomas does not connect any of those actions to his termination in March 2021, over seven months later." He argued

that there was a whole series of adverse actions. The Court went through the list, but stated that what "Thomas does not do, however, is to show how any of these actions were taken because of his EEOC charges and HR complaints." "[M]any adverse actions" may have "increased" after his protected activity, but as Auburn pointed out, he complained about his treatment "before Thomas brought his EEOC charges." (But why else file EEOC charges?) Finally, "for those that happened after either the HR complaints or EEOC charges, Thomas fails to show a causal connection. For this reason, his retaliation claim cannot survive." The Court ended by expressing "sympathy for the personal loss suffered by Thomas" but he failed to "present enough evidence of racial discrimination and retaliation to survive summary judgment".

Editorial

Thomas is unlikely to find solace in the Supreme Court. An unpublished opinion is not likely destined to be one of the eighty or so cases that body currently accepts. It is ironic that Thomas complained about his treatment by women supervisors. Surely that was not contemplated by Congress when it passed Title VII decades ago.

Team Thomas had issues. There was little reason to have raced to the courthouse. Thomas was entered an Alabama tiger-den and suing a well-heeled and prominent defendant. That required careful attention to detail, seemingly missing here. There was ample time to research and craft a complaint. Perhaps the decision to use a 20-page declaration was to save the expense of going through the deposition, or because Thomas had not covered all of the points that counsel wished to use in filing and opposing summary judgment motions. It did not impress the court. There were also internal issues as his legal team did not remain constant. One counsel began the case and later withdrew. Another came in, and substituted out a year later, and there were two more motions to be substituted out.

Thomas may be in the right, but neither court saw the "mosaic." Should any reader think this article intends to convey a pro Auburn sentiment, rest assured that if Auburn never wins another football game, it will be neither here nor there to the author. Anger, even righteous anger, is no substitute for fulfilling the required legal tests.

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Mark Termini Associates, Inc. v. Klutch Sports Group, LLC: Request for Arbitration Denied

By Christian Dennie

Mark Termini and his associated entity (collectively "Termini") filed suit against Klutch Sports Group, LLC and Rich Paul (collectively "Klutch") asserting that Termini is entitled to unpaid commissions for Termini's assistance in negotiating NBA player contracts and marketing deals. Termini and Klutch entered into a written agreement whereby Termini agreed to "provide contract negotiation, business advisory and other administrative and support services" to Klutch. In exchange, Klutch agreed to pay twenty-five percent (25%) of Klutch's gross fee collected for Klutch's clients. In the lawsuit, Termini claims he was the lead negotiator for NBA player contract negotiations, but Klutch took public credit for agreements negotiated by Termini to enhance Klutch's reputation and Klutch's value. Termini further claims that Klutch refused to pay the full amounts owed under the terms of the written agreements. Termini filed suit asserting claims for breach of contract and an accounting. In response, Klutch filed a motion to compel arbitration and, alternatively, to dismiss under Rule 12(b)(6). This blog will focus only on the motion to compel arbitration.

Klutch argued that there is a valid arbitration clause and moved to compel arbitration under the terms of the Federal Arbitration Act. The parties agreed the written agreement executed by the parties does not contain an arbitration provision. However, Klutch pointed to the NBPA Regulations asserting that certified player agents agree to arbitrate disputes as outlined in the NBPA Regulations. Section 5 of the NBPA Regulations states as follows:

[I]t is the intention of the NBPA that the arbitration process shall be the exclusive method for resolving any and all disputes that may arise from denying certification to an applicant or from the interpretation, application or enforcement of these Regulations and the resulting [Standard Player Agent Contract ("SPAC")] between Player Agents and individual Players.

This will ensure that those disputes—which involve essentially internal matters concerning the relationship between individual Players, the NBPA in

its capacity as their exclusive bargaining representative, and Player Agents performing certain delegated representative functions relating particularly to individual Player compensation negotiations—will be handled and resolved expeditiously by the decision-maker established herein, without need to resort to costly and time- consuming formal adjudication. The NBPA Regulations identify three types of disputes that are subject to arbitration and state as follows: (1) "[t]he NBPA denies an Application and the applicant wishes to appeal from that action;" (2) "[a] dispute arises with respect to the meaning, interpretation, or enforcement of a SPAC . . . entered into between a Player and the Player Agent;" and (3) "[a] dispute arises between two or more Player Agents with respect to their individual entitlement to fees owed, whether paid or unpaid, by a Player who was jointly represented by such Player Agents. In such cases, at the Player's option, any fees paid or payable by the Player after the dispute arises shall be placed in escrow pending final resolution of such dispute, and paid out of escrow in accordance with the Arbitrator's decision."

Klutch argued the dispute at issue falls within the scope of point 3 above. The Court, however, stated the claims asserted by Termini do not fall "within the substantive scope of claims subject to arbitration under the NBPA Regulations." The Court noted that Termini's claims do not raise any issue as to "their individual entitlement to fees owed, whether paid or unpaid, by a Player" as addressed in Section 5(3) of the NBPA Regulations. Further, the Court stated the claims at issue are not resulting from a dispute regarding the payment of fees from a player, but result from allegations of fees owed by Klutch to Termini for services allegedly rendered by Termini under the terms of the written agreement between the parties. The dispute addresses Termini seeking payment from Klutch for services rendered to Klutch. Accordingly, the Court denied Klutch's motion to compel arbitration.

For any questions, contact **Christian Dennie** at **cdennie@denniefirm.com.**

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NFL Stuffs Plaintiff at the Goal Line in Video Privacy Protection Act Case

A federal judge from the Southern District of New York has granted the NFL's motion to dismiss a lawsuit brought by a fan, who sued the league, pursuant to the Video Privacy Protection Act (VPPA).

The ruling hinged on the court's determination that the fan was not a consumer of "a video tape service provider" as required of claims brought under the Act.

By way of background, the NFL operates three similarly named products or services – a website called NFL.com, a phone application called the NFL App, and a digital subscription called NFL+. On NFL.com and the NFL App, users can watch video content. NFL+, meanwhile, offers access to exclusive video content on a subscriber's desktop, tablet, and mobile device. Video content available on NFL+ includes both live and prerecorded content.

An individual may register for NFL.com by signing up for an online newsletter. To do so, an individual provides personal information including name, email address, and ZIP code. To register for NFL+, a user must provide her first name, last name, date of birth, and country; she also has the option of providing her ZIP code. The NFL tracks the IP address used to initiate a subscription to NFL.com or NFL+, thus linking the IP address — and the corresponding physical location — with a specific individual. Also, any NFL+ subscriber that uses the NFL App provides the NFL with a unique device-identification number, geolocation data, and other information.

NFL.com has a privacy policy, which states that the defendant "may collect" certain "types of information when you register with or use our Services . . . [or] access various content or features," including "[c]ontact information," "[d]emographic information," and "[r]eal-time [g]eolocation information." The Privacy Policy also states that Defendant "may use" this information "for a variety of purposes" and provided examples of such uses.

NFL.com also has a terms-and-conditions agreement, Section 19 of which is captioned "Choice of Law, Arbitration, and Class Action Waiver." It states, among other things, that:

"Any proceedings to resolve or litigate any dispute will be conducted solely on an individual basis. Neither

you nor the NFL will seek to have any dispute heard as a class action or in any other proceeding in which either party acts or proposes to act in a representative capacity. No arbitration or proceeding will be combined with another without the prior written consent of all parties to all affected arbitrations or proceedings."

The NFL collects and shares the data and personal information of users of NFL.com and the NFL App with third parties through cookies, software-development kits (SDKs), and tracking pixels.

As pertinent here, Plaintiff Brandon Hughes alleges that the NFL installed Facebook's tracking pixel (Pixel) on NFL.com and the NFL App. When a digital subscriber enters NFL.com or the NFL App and watches a video, the Pixel sends certain information to Facebook, including the name of the video, its URL, and the viewer's Facebook identification number (the FID). "Similarly, the NFL App can share user data with Facebook, through the use of one or more of Facebook's SDKs," according to the complaint.

Facebook uses the information obtained through the Pixel to show targeted advertisements. The plaintiff alleges the NFL purposefully incorporated the Pixel code on NFL.com and the NFL App, knew that the Pixel would disclose information to Facebook, and financially benefitted from disclosing this information to Facebook. Furthermore, the information transmitted to Facebook is not anonymized. Thus, Facebook can either add the data to the information it already has for specific users or use the data to generate new user profiles.

Hughes, an Illinois resident, has been a digital subscriber of NFL.com from 2020 to the present. He has had a Facebook account since 2006. By virtue of his NFL.com digital subscription, Hughes receives emails and other communications from the NFL. Also, "[d]uring the relevant time period," Hughes "has used his NFL.com digital subscription to view Video Media through NFL.com and the NFL App."

When watching videos on NFL.com, Hughes was logged into his Facebook account; when watching videos on the NFL App, he had the Facebook mobile app also installed on his phone. Consequently, when Hughes watched videos on either platform, "Plaintiff's Personal Viewing Information was disclosed to Facebook."

Hughes "was a digital subscriber of NFL+ during, at least, August 2022." Through his NFL+ subscription, he received "access to content and features available only to NFL+ subscribers." He viewed an unidentified number of videos that were "only provided through the NFL App to NFL+ subscribers." Hughes never gave the NFL "express written consent to disclose his Personal Viewing Information." Also, he allegedly did not discover that the NFL disclosed his Personal Viewing Information to Facebook until August 2022.

The lawsuit was filed in the Northern District of Illinois on September 14, 2022.

During the course of the litigation, on August 7, 2023, the Court granted a motion to dismiss in Salazar v. National Basketball Ass'n, 685 F. Supp. 3d 232 (S.D.N.Y. 2023), a case involving a similar claim under the VPPA. Of relevance here, that ruling was appealed to Second Circuit. In light of this, Hughes asked the court to stay any ruling until the Second Circuit could decide the Salazar appeal.

Leading to the instant opinion, the NFL moved to dismiss the claim, pursuant to Federal Rule of Civil procedure 12(b)6, or failure to state a claim.

Addressing the question of a stay first, the court found that "the interests of (the NFL) … and the public in resolving cases in a reasonably timely fashion outweigh countervailing considerations."

In its analysis, the court noted that the NFL claims that Hughes "fails to allege facts to support three elements of his claim: (1) that Plaintiff is a 'consumer' of a 'video tape service provider'; (2) that Defendant 'disclose[d]' 'personally identifying information'; and (3) that this disclosure was made 'knowingly.'"

Of significance, the court agreed with the NFL on the first point and did not address the other two.

The VPPA defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider," according to the court. "Neither party asserts that (Hughes) is a renter or purchaser. Instead, the parties focus on whether (he) is a subscriber," wrote the court.

"For substantially the same reasons stated in Salazar, (Hughes) does not plausibly allege that his NFL.com subscription 'renders him a consumer of goods or services from a video tape service provider under the VPPA.' Unlike in Salazar, however, (Hughes) asserts an additional basis for qualifying as a 'subscriber' and, thus, as a 'consumer': his subscription to NFL+."

Specifically, he alleges that as part of his subscription to NFL+, he received "access to content and features only available to NFL+ subscribers." He also claims that he watched videos through the NFL App, and that "some of the viewed content was only provided through the NFL App to NFL+ subscribers.

"Thus, (Hughes) sufficiently alleges that 'the video content he accessed was exclusive to a subscribership.' These allegations, however, establish only that (he) was a 'consumer'; they do not establish that (Hughes) was a consumer of 'a video tape service provider.'"

The court agreed with the NFL that Hughes failed "to plead that he viewed prerecorded video content through NFL+, (and thus) has insufficiently alleged that he was a consumer of a 'video tape service provider.' … This failure is fatal to the Second Amended Complaint."

Hughes v. NFL; S.D.N.Y.; Case No. 1:22-cv-10743 (JLR); 9/5/24

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Court Rebuffs Racing Team Owned by Jordan in Lawsuit Against NASCAR

A federal judge from the Western District of North Carolina has denied 23XI Racing LLC and Front Row Motorsports' bid for a preliminary injunction in a case that in which the teams, co-owned by basketball legend Michael Jordan, were seeking permission to participate in NASCAR's Cup Series. Meanwhile, the lawsuit, alleging that NASCAR monopolized "premier stock car racing and the terms of the 2025 Charter Agreements, which allow teams to participate in its racing events," continues.

The plaintiffs are represented by the nation's premier antitrust lawyer for the spirts industry, Jeffrey Kessler of Winston & Strawn.

In 2016, NASCAR implemented a Charter Agreement system that guaranteed each chartered car entry into every Cup Series race for the term of the Charter Agreement. The 2016 Charter Agreements expired on December 31, 2020. If the teams gave NASCAR written notice, then the 2016 Charter Agreements could be renewed and extended until December 31, 2024.

Teams can compete in NASCAR's events without a charter, but they must qualify for one of the open, non-chartered spots, which generate revenue from prize money and sponsorships.

In October 2020, 23XI acquired a 2016 Charter and began racing one car, according to the complaint. In the fall of 2021, 23XI purchased a second 2016 Charter. In 2016, Front Row received two 2016 charters from NASCAR and signed two corresponding Charter Agreements, which run through December 31, 2024. As such, both teams currently race two full-time cars in the Cup Series and both teams are in the process of acquiring a third charter. Joint negotiations for the 2025 Charter Agreements began in 2022, and in March 2024, NASCAR began negotiating with teams individually. The final 2025 Charter Agreements include a release provision that is the subject of this lawsuit, according to the complaint.

The plaintiffs allege this release provision will bar them from bringing antitrust claims arising out of the formation of the 2025 Charter Agreements against the defendant. The open team agreements also include this provision. Plaintiffs 23XI and Front Row are the only two teams that did not sign the 2025 Charter Agreements. At the hearing, NASCAR represented it withdrew the offered 2025 Charter Agreements to the plaintiffs 23XI and Front Row, and "therefore there are no pending negotiations."

In seeking a preliminary injunction, the plaintiffs are asking for the following:

- Defendants and their agents, servants, employees, attorneys, and all persons in active concert or participation with Defendants, shall grant two NASCAR Cup Series Charter Member Agreements to 23XI

Racing with the same terms as the NASCAR Cup Series Charter Member Agreements that NASCAR offered to 23XI on September 6, 2024;

- Defendants and their agents, servants, employees, attorneys, and all persons inactive concert or participation with Defendants, shall grant two NASCAR Cup Series Charter Member Agreements to Front Row Motorsports with the same terms as the NASCAR Cup Series Charter Member Agreements that NASCAR offered to Front Row Motorsports on September 6, 2024; and
- Defendants and their agents, servants, employees, attorneys, and all persons in active concert or participation with Defendants, shall be enjoined from enforcing Section 10.3 of any NASCAR Cup Series Charter Member Agreement that is granted, or transferred (pursuant to the pending transactions with Stewart-Haas Racing, LLC), to either Plaintiff as a defense to any antitrust claim that either Plaintiff is pursuing in this action.

Before reviewing the argument, the court noted that for a plaintiff to be successful in its bid for a preliminary injunction it must show: (1) a likelihood of success on the merits; (2) a strong prospect of irreparable harm if the injunction is not granted; (3) the balance of equities favors the movant; and (4) an injunction is in the public's interest. *Winter v. Nat. Res. Def. Council,* Inc., 555 U.S. 7, 24 (2008).

The plaintiffs allege that without a preliminary injunction, they "will face irreparable harm through several avenues. First, the plaintiffs assert they will 'risk' losing sponsors if competing as open teams. Specifically, the plaintiffs allege that there is a risk their sponsors 'could abandon [them] if they have to compete as open teams and do not qualify for all of their races.' For instance, 23XI's sponsorship agreements require that each sponsored car runs in every Cup Series race, so failure to qualify for a race could reduce the amount of sponsorship money it receives. Second, the plaintiffs allege they will 'risk' the loss of their drivers. Both teams allege their drivers may leave if they do not have access to a chartered car. For example, 23XI driver Tyler Reddick is permitted to terminate his contract with the team if there is no Charter

Agreement in place for his car. Third, the plaintiffs assert that racing as open teams 'could threaten [their] continued existence.' Both teams allege they will lose substantial amounts of revenue without charters. Fourth, the plaintiffs allege they may lose goodwill with fans and sponsors if they fail to qualify for a race. Finally, the plaintiffs allege that 'NASCAR has the power to exclude open competitors completely' under the 2025 Charter Agreement."

The court, however, was unpersuaded.

"Although the plaintiffs have alleged that they will face a risk of irreparable harm, they have not sufficiently alleged present, immediate, urgent irreparable harm, but rather only speculative, possible harm," wrote the court. "That is, although the plaintiffs allege they are on the brink of irreparable harm, the 2025 racing season is months away—the stock cars remain in the garage.

"First, the plaintiffs have not alleged a 'present prospect' that they will be harmed by the loss

of sponsors. Instead, they have alleged a possibility that they will lose sponsorship agreements. Such potential harm of loss of sponsorship is too speculative to give rise to a preliminary injunction.

"Second, Plaintiffs have not alleged a 'present prospect' of the loss of their drivers. Instead, they allege that their drivers may leave if Plaintiffs compete as open teams. Presently, this harm is too speculative to merit a preliminary injunction.

"Third, although injunctive relief may be available 'where the moving party's business cannot survive absent a preliminary injunction.' The plaintiffs have not alleged that their business cannot survive without a preliminary injunction. Instead, they allege that their businesses may not survive without a preliminary injunction. This allegation does not indicate an 'impending threat of [Plaintiffs'] operations not surviving the pendency of this matter.' *Eco Fiber Inc. v. Vance,* No. 3:24-cv-465-FDW-DCK, 2024 WL 3092773

"Fourth, although loss of goodwill may justify injunctive relief, *Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 442 F. App'x 776, 785 (4th Cir. 2011), at this stage, Plaintiffs have alleged only a potential loss of goodwill, contingent on a host of events occurring, including speculation about how third parties may or may not act.

"Finally, the possibility that NASCAR may exclude open teams, is merely speculative. Based on the parties' representations at the hearing, the Court understands the plaintiffs could sign open contracts today

and continue racing in 2025. Instead, they have chosen not to because they have been unable to negotiate a contract without the provision of which they complain. As such, this speculative harm does not warrant the extraordinary relief of a preliminary injunction."

23XI Racing LLC and Front Row Motorsports, INC., v. NASCAR et al.; W.D.N.C; CASE NO. 3:24-CV-00886-FDW-SCR; 11/8/24

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Articles

Did LSU Prioritize Winning Over Player Health? Greg Brooks Jr. Thinks So

By Joseph M. Ricco IV

Former Louisiana State University (LSU) football player and team captain Greg Brooks Jr. has filed a lawsuit against LSU, its Board of Supervisors, and Our Lady of the Lake Regional Medical Center, alleging that negligence and medical malpractice have left him permanently disabled. Brooks, who played safety, claims that LSU's head coach Brian Kelly, former safeties coach Kerry Cooks, and other staff ignored serious neurological symptoms he was experiencing—such as dizziness and nausea—which delayed the diagnosis of a brain tumor. According to Brooks, the coaching staff and trainers not only failed to provide the urgent medical care he needed but also pressured him to keep practicing, which further endangered his health. By the time doctors discovered the tumor, Brooks underwent surgery that, he says, went tragically wrong, leaving him unable to walk, use his right hand, or communicate effectively. This article will explore the details of Brooks' claims and the potential outcomes that could follow the case's resolution.

The Allegations

Greg Brooks Jr.'s lawsuit claims that LSU's coaching staff, athletic trainers, and medical personnel failed him, leading to his life-altering disabilities. In early August 2023, Brooks says he began experiencing serious neurological symptoms. He reported dizziness, nausea, and headaches to his coaches and trainers multiple times. Instead of referring him to a neurological specialist, LSU's staff allegedly treated his complaints with basic remedies and cleared him to continue practicing. Brooks argues that this lack of immediate action delayed critical diagnostic measures and led to devastating consequences. Head coach Brian Kelly, former safeties coach Kerry Cooks, and head athletic trainer Owen Stanley are named in the lawsuit as key figures responsible for neglecting Brooks' health concerns. Brooks claims he was told he could sit out of practice, yet he was warned that his position on the team might be at risk if he did so. Feeling pressured, he continued to practice and play through the symptoms. He ultimately participated in LSU's first two games of the season. It wasn't until September 13, 2023—over a month after his symptoms started—that an MRI finally revealed a tumor in his brain.

Following this diagnosis, Brooks underwent surgery, which he claims was mismanaged. He alleges the procedure, performed by Dr. Brandon Gaynor, led to multiple strokes and serious neurological damage. The lawsuit states that LSU's medical partner, Our Lady of the Lake Regional Medical Center, had recommended Dr. Gaynor for the surgery. Brooks says the operation left him unable to walk, use his right hand, or communicate clearly. He further accuses LSU of adding to his distress by disclosing private health information publicly and using his Name, Image, and Likeness (NIL) without his consent. According to Brooks, LSU's actions prioritized the school's athletic interests over his health and well-being.

The Road Ahead

The outcome of Greg Brooks' case could have significant implications for college sports programs and their approach to athlete health and safety. If LSU and its affiliates are found liable, the ruling may reinforce

a precedent for stricter medical protocols and oversight within athletic departments nationwide. Colleges could be pushed to adopt more rigorous policies that prioritize player well-being over competitive demands, especially when athletes report symptoms that suggest serious health risks. Such a result could also highlight the potential liabilities that universities face when their sports programs are perceived to disregard the medical needs of student-athletes.

This case may also shine a light on the relationship between universities and their medical partners. With Brooks' allegations of malpractice against Our Lady of the Lake Regional Medical Center, questions could also arise about how health providers are vetted and recommended to athletes. In the event of a ruling in favor of Brooks, schools may be compelled to reexamine how medical decisions are made and communicated to athletes and their families, especially in high-stakes environments. Additionally, this case could impact how colleges use players' Name, Image, and Likeness rights, reinforcing the importance of maintaining trust and transparency in the handling of private health information.

As Brooks' case heads to court on February 10, 2025, it stands as a reminder of the risks and responsibilities inherent in college athletics. The lawsuit encapsulates pressing issues around player safety, medical ethics, and institutional accountability, drawing attention to the balance universities must strike between athletic performance and athlete care. The trial's outcome could ripple across collegiate sports programs, potentially reshaping policies that affect student-athletes nationwide. Whatever the decision, it will serve as a critical moment for the future of player health and safety in college athletics.

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Personal Publicity or Competition? Self-Promoter Banned from Future NYC Marathons

By John Wendt

Anyone who has trained for a marathon knows how hard it is. Anyone who has run a marathon knows how brutal it is. You train, you prepare, you even visualize how the race will go – what will happen, even what could go wrong. You know it will be crowded and there will be jostling, especially at the beginning of the race coming out of the corral. But does your visualization include running into two electric bikes on the closed course or being blocked from getting water by a bike? This happened at the recent New York City Marathon. The NYC Marathon is run by New York Road Runners (NYRR) "whose vision is to build healthier lives and stronger communities through the transformative power of running [and who are dedicated] to transforming the health and well-being of our communities through inclusive and accessible running experiences, empowering all to achieve their potential."[1]

Matt Choi is a former college football player, content creator, entrepreneur, and fitness enthusiast who has successfully competed in a number of marathons. As his website states he "operates a media company that helps him showcase his fitness challenges and workouts by creating content at scale…[and] continues to push his body mentally, physically, and spiritually to be an example of what humans can accomplish if they shift their mindset and step out of their comfort zone."[2] His sponsors include Hoka, Nike, REI, adidas and Therabody.

On Sunday, November 3, 2024, Choi ran the NYC Marathon in just under three hours (2:57:15), a very respectable time for an amateur runner. The issue was that to promote himself and his brand Choi encouraged his followers to "Follow me around on the course."[3]

1 New York Road Runners, *New York Road Runners Our Vision and Mission*, New York Road Runners (2024), https://www.nyrr.org/ (last visited Nov 7, 2024).

2 Matthew Choi, *Matthew Choi*, Matthew Choi (2022), https://matthchoi.co/ (last visited Nov 5, 2024).

3 Brittany Miller, *Influencer Banned from NYC Marathon after Camera Crew Followed Him on E-Bikes*, The Independent (2024), https://www.independent.co.uk/life-style/influencer-nyc-marathon-

To do so he decided to have his brother and his videographer ride on electronic bikes with a live feed of his entire race and to keep him on pace for a sub-3-hour finish. Race rules mandate that "any camera mount or rig that isn't attached directly to the head or torso" is prohibited.[4] Videos on social media showed the two on e-bikes weaving through the runners including some tight stretches of the course.[5] Additionally the NYRR and event are also covered by the USA Track and Field Competition Rules. Under Rule 144, "Pacing in running or walking events by persons not participating in the event…"[6]

Immediately after the race Choi and his entourage were roundly criticized on social media. One commentator said, "This is super dangerous and he's an a******* doing it. He is the worst kind of runner and bad for the sport."[7] Choi later admitted that the two bikes blocked runners from accessing water stations, and several commenters on his Instagram account claimed that they were clipped by his brother and videographer during the run.[8]

The NYRR released a statement after the race stating, "After a review and due to violations of World Athletics rules, and New York Road Runners' Code of Conduct and Rules of Competition, NYRR has disqualified Matt Choi from the 2024 TCS New York City Marathon and removed him from the results. He has been banned from any future NYRR races."[9]

Choi apologized on his Instagram page and would not appeal the disqualification and ban saying, "I f***ed up. This wasn't a video I was planning on making. But I have no excuses, full stop. I was selfish on Sunday to have my brother and my videographer follow me around on the course on e-bikes and it had serious consequences…We endangered other runners, we impacted people going for PB's (personal bests), we blocked people from getting water. And with the New York City Marathon being about everyone else and about the community, I made it about myself. And for anyone I impacted, I'm sorry. I just got really excited about the thought of hitting Sub 3 New York and I got overzealous about getting all the shots."[10] He also said that he would not appeal the disqualification and ban, "Although there's an opportunity to appeal it, I'm not going to. I made my bed so I'm gonna lay in it."[11]

Yet, Choi had done the same thing last year at the Austin Marathon in Texas.[12] After the Austin race he claimed that he that he had permission from the organizers and criticizing his actions would actually hurt marathon running. "My media crew does their best job at staying out of the way of the runners…The intent of my content has always been around raising awareness around the sport of running…If we can't show elements of running, especially competition day, it won't continue to grow to new audiences."[13] After the NYC Marathon Choi also said, "This isn't the first time being called out for using e-bikes to shoot content but that stops here. It won't happen again. My word is my bond."[14]

Choi also created controversy in 2023 for running in the Houston Marathon with someone else's bid, a violation of race rules sometimes known as "Bib-mulling" when someone who runs in another's place to hit a qualifying standard securing a spot in a future race – or qualifying by proxy. Some said that for Choi it was a way to get personal recognition without complying to the race's rules.[15] Choi's explanation was that

banned-e-bikes-b2642037.html (last visited Nov 5, 2024).

4 New York Road Runners, *Prohibited Items*, (2024), https://www.nyrr.org/run/guidelines-and-procedures/prohibited-items (last visited Nov 5, 2024).

5 Annie Correal, *Matt Choi, Running Influencer, Is Banned From New York Marathon Over E-Bike Filming, The New York Times, Nov. 5, 2024, https://www.nytimes.com/2024/11/05*/nyregion/matt-choi-influencer-banned-nyc-marathon.html (last visited Nov 5, 2024).

6 USA Track and Field, *2023 USATF Competition Rules,* 2023, https://www.flipsnack.com/USATF/2023-usatf-competition-rules/full-view.html (last visited Nov 7, 2024).

7 TheRealWaldo, Matt Choi's Brother Did It Again*, r/RunNYC (2024), www.reddit.com/r/R*unNYC/comments/1givi0w/matt_chois_brother_did_it_again/ (last visited Nov 5, 2024).

8 Patrick Redford, *Influencer Guy Disqualified And Banned From NYC Marathon For Bringing Bikes Onto Course*, (2024), https://defector.com/influencer-guy-disqualified-and-banned-from-nyc-marathon-for-bringing-bikes-onto-course (last visited Nov 5, 2024).

9 Sarah Lorge Butler, I*nfluencer Disqualified From NYC Marathon After He Ran With Unauthorized E-Bikes*, Runner's World (2024), https://www.runnersworld.com/news/a62810736/matt-choi-dq-nyc-marathon/ (last visited Nov 5, 2024).

10 Miller, *supra* note 3.

11 *Id*.

12 Correal, *supra* note 5.

13 Alex Schiffer, *Influencer Matt Choi DQ'd and Banned From NYC Marathon,* (2024), https://frontofficesports.com/matt-choi-influencer-nyc-marathon-ban/ (last visited Nov 5, 2024).

14 Miller, *supra* note 3.

15 Vinay Patel, *"Influencers Ruin Everything": Who Is Matt Choi And*

he simply forgot to sign up for the race and a friend who was injured gave Choi his bid. Choi said, "As someone that's still new in the running community, I never heard the term 'bib mule' until just a few days ago…My intent was not to qualify for another person or cheat the system—I honestly just wanted to run… I apologize to anyone who may have been affected or offended by my actions. Running has completely changed my life and it's a community I'm thankful to be a part of."[16]

Historically in the morning before the NYC Marathon race, cyclists would ride the entire closed course unimpeded.[17] Then the course would be completely closed and cleared. But last year a cyclist hit a pedestrian so this year race officials warned cyclists that anyone attempting to ride the course this year would be removed. NYRR posted on social media that "Anyone attempting to ride the course ahead of the Marathon — starting in Bay Ridge, Brooklyn — will be diverted and removed by the authorities…We ask that everyone adhere to this restriction."[18] So with the entire route closed and cleared, how could two individuals on e-bikes make it on to the course? Did they think they could not ride the course ahead of the Marathon, but they then could ride the course during a crowded Marathon?

Ben Parker is the co-founder of Runna, a top running app that sponsors Choi. Parket is a top masters marathoner and a professional running coach. Runna also has a partnership with NYRR.[19] Parker agreed to run alongside Choi pacing him for a sub-3-hour race. Parker said that the company had photographers stationed throughout the course and at the finish line. He also said that he did not know about the e-bikes and was surprised and upset by their presence. Parker also denied knowing that Choi had done this before and that in the future the company would do a better job in screening their ambassadors. "Our ethos and entire mission is about inspiring and supporting runners around the world on and off the race course, and so we are deeply uncomfortable with what happened on Sunday. We expect all of our ambassadors and entire community to adhere to race safety rules and respect the safety of other athletes. Running should be for everyone. We will ensure nothing like this happens again, and thank you for your patience." Parker was also very succinct: "We want to be clear that this was not something that we at Runna knew was going to happen, or support as a company, and we have decided to terminate our relationship with Matt effective immediately."[20] Yet Parker who knows the rules, has competed in many marathons, and who has a partnership with NYRR still didn't stop this circus once during the entire 26 miles?

NYRR tells runners that "The safety and security of runners, volunteers, spectators and staff is New York Road Runners' highest priority. Additionally, to ensure the safest event environment possible, runners should familiarize themselves with our guidelines for prohibited items… It is New York Road Runners' goal to be sure that we are implementing the needed security features while causing minimal impact on your race-week experience."[21] NYRR also tells all runners to "Please review NYRR's Rules of Competition and Code of Conduct for complete rules, regulations, and standards of conduct at NYRR events."[22] There should be no question that runners, including Choi, did not know the rules.

A question has to be raised as to why the New York Police Department (NYPD) did not remove Choi and his entourage. NYPD noted that they had bulked up security to keep runners and spectators safe with an increased physical presence, barriers, snipers and even

Why Is He Banned From Future NYC Marathons, International Business Times UK (2024), https://www.ibtimes.co.uk/influencers-ruin-everything-who-matt-choi-why-he-banned-future-nyc-marathons-1728240 (last visited Nov 7, 2024).

16 Chris Hatler, *Matt Choi Apologizes for Using Another Runner's Bib At Houston Marathon*, (2023), https://www.runnersworld.com/news/a42636583/matt-choi-race-bandit/ (last visited Nov 5, 2024).

17 Andrew Keh, *New York Marathon Cracks Down on Cyclists' Pre-Race Joyride,* The New York Times, Oct. 16, 2024, https://www.nytimes.com/2024/10/16/nyregion/nyc-marathon-bicycle-race.html (last visited Nov 5, 2024).

18 *Id*.

19 Vinay New York Road Runners, *An Interview with Runna Co-Founder and Head Coach Ben Parker,* (2024), https://www.nyrr.org/tcsnycmarathon/getinspired/photos-and-stories/2024/runna-head-coach-ben-parker (last visited Nov 7, 2024).

20 taeyongii, *Runna Has Terminated Their Relationship with Matt Choi*, r/RunNYC (2024), www.reddit.com/r/RunNYC/comments/1gk7jtq/runna_has_terminated_their_relationship_with_matt/ (last visited Nov 5, 2024).

21 New York Road Runners, *Security Measures and Prohibited Items,* (2023), https://www.nyrr.org/tcsnycmarathon/runners/security-measures (last visited Nov 6, 2024).

22 *Id*.

helicopters. NYPD Chief of Staff Tarik Sheppard said that top executives would be monitoring the race in the Joint Operations Center with access to more than 60,000 cameras. The NYPD Highway Patrol would also be escorting all the runners the entire course. NYPD Sgt. Juan Swystun said, "It's an observation for all the runners, whether it's the elite all the way down to the amateur, making sure everyone's safe and there's nothing along the ordinary happening along the route."[23] Chief Sheppard said, "These events are what really separates New York from a lot of other police departments across the country...This is what we're experts at."[24]

In the marathon running world Choi's notoriety and antics are well known.[25] NYRR even selected him as a panel speaker for the marathon expo before the race! [26] With over 60,000 cameras monitoring the race, increased police and highway patrol that can contact each other immediately, no one noticed or stopped two guys with high visibility vests on e-bikes? NYRR has to conduct a serious post-race analysis and prepare for next year's event.

John T. Wendt serves as a member of the Court of Arbitration for Sport (Lausanne, Switzerland), the American Arbitration Association, and on the JAMS Panel to hear cases under HISA's Anti-Doping and Medication Control (ADMC) Program. He serves as Professor Emeritus of Ethics and Business Law in the Opus College of Business at the University of St. Thomas and has taught and published extensively in the field of sports law.

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23 Dan Krauth, *NYPD Bulking up Security with Thousands of Runners and Spectators Participating in TCS NYC Marathon*, ABC7 New York (2024), https://abc7ny.com/post/tcs-nyc-marathon-nypd-bulking-security-race-course-thousands-runners-spectators-participating-event/15497568/ (last visited Nov 6, 2024).

24 *Id.*

25 Correal, *supra* note 5.

26 *Id.*

The Ongoing Controversy Over Native American Imagery in the NFL

By Joseph Stipp

In recent years, the sports world has grappled with the complex issue of cultural appropriation, particularly concerning the use of Native American names and imagery in professional sports. The controversy reached a boiling point in 2020 when the Washington Redskins changed their name to the Washington Commanders due to longstanding criticism and legal action levied against them.[27] This change marked a significant turning point for the conversation around Native American representation in sports as one of the most prominent teams in the world's leading sports league took direct action.[28] Now, attention has shifted to the Kansas City Chiefs, a franchise with incredible success over the last few years, who has faced mounting pressure to reconsider its use of Native American symbols and chants.[29]

The name change of the Washington Redskins was the end result of years of lawsuits, public outcry, and increasing pressure from various groups. Primarily, Washington faced legal challenges regarding their trademark of the name. These challenges culminated in 2014 when the U.S. Patent and Trademark Office canceled the Redskins trademark, stating that the name was disparaging to Native Americans.[30] This ruling was a significant victory for advocacy groups, like the Native American Guardians Association, which had long campaigned against the use of the Redskins name and had filed numerous lawsuits against the organization.[31] In the following years, pressure continued to mount as many sponsors and public figures began to withdraw

27 *Pro-Football, Inc v. Blackhorse*, 112 F. Supp. 3d, 439 (E.D. Va. 2015).

28 Rosa Sanchez, *NFL's Washington Redskins to change name following years of backlash*, ABC News (July 13, 2020), **https://abcnews.go.com/US/washington-redskins-change-years-backlash/story?id=71744369#:~:text=The%20decision%20comes%20**amid%20the,are%20offensive%20towards%20Native%20Americans.

29 Noreen Nasir, *For Native American activists, the Kansas City Chiefs have it all wrong*, AP News (February 10, 2024), **https://apnews.com/article/super-bowl-native-american-mascot-chiefs-41397b038e03c01865d42a3f77766c98**.

30 *See Pro-Football*, 112 F. Supp. at 441.

31 *Native Am. Guardian's Ass'n v. Wash. Commanders*, 3:23-cv-186 (D.N.D. 2024).

their support as well.[32] In 2020, amid a broader social movement regarding racial justice and equality, the team announced it would retire the Redskins name and logo.[33]

While the Washington Redskins chose to transition to the Commanders and apologize for the long-time use of their name, the Kansas City Chiefs have remained under public scrutiny for their continued use of Native American imagery and a seemingly lackluster response to calls for change. When asked for comment immediately following Washington's announcement, the Chiefs refused to answer any questions about the situation.[34] Since then, the Chiefs have been criticized for their use of an arrowhead as their primary symbol, traditions stemming from Native American culture, and their name itself.35 Given the considerable recent success of the Chiefs with multiple visits to the Super Bowl and three championships, their continued use of this imagery has risen to the forefront of lingering questions regarding racial dynamics in the NFL.

In 2023, activists highlighted their continued discontent with the Chiefs by protesting the team's branding outside of the 2023 Super Bowl.36 In large demonstrations, protestors alleged that the use of the Chiefs name was derogatory toward Native Americans and perpetuated the issue of cultural appropriation.37 One of the most controversial practices by the Chiefs was consistently mentioned: the use of the "tomahawk chop." The tomahawk chop chant is a staple at Chief's games, where fans slash their arms downward in a chopping motion repetitively at the same time. The chant has become a fan favorite for many but has been heavily criticized by critics who label it as a stark reminder of cultural appropriation.38 Although the Chiefs have taken some action in the past such as banning headdresses and Native American style face paint at their stadium, they are yet to address any calls for the removal of the chop.39

The Kansas City Chiefs current situation raises several legal questions about the appropriate nature of using Native American symbolism and imagery in sports. While there is not any specific federal or state laws preventing their use, a number of legal frameworks exist that could impact a team's ability to use Native American imagery. First, as societal norms continue to evolve, anti-discrimination laws may increasingly play a critical role in determining the viability of team names and logos that have culturally significant origins. If people begin to perceive the Chiefs branding as disparaging, then it could face significant legal challenges as public sentiment continues to shift against the use of these types of names and images. Second, as companies and sponsors become more socially aware, there might be a rise in pushback against sponsoring organizations like the Chiefs. As sponsors increasingly consider the public's perception of their associations, they might withdraw support of the Chiefs due to public outcry. These moves could exert significant financial pressure on the Chiefs and lead to changes amongst their name and images. Third, mounting political pressure has been levied at a number of organizations with tribal affiliations, including the Chiefs. In 2024, Deb Haaland, the first indigenous US Secretary of the Interior, directly called on the Chiefs to change their mascot out of respect for Native Americans and their culture.40 If this type of political pressure increasingly grows, it will force many professional teams, like the Chiefs, to make decisions quickly. Currently, despite these factors at play, the Chiefs have continuously

32 Eric Levenson, *These teams faced pressure to change their Native American names. Here's what's happened since*, CNN (December 14, 2020), **https://www.cnn.com/2020/12/14/us/cleveland-washington-native-american/index.html**.

33 Tommy Beer, *Washington Redskins Officially Announce They Will Change Team Name*, Forbes (July 15, 2020), **https://www.forbes.com/sites/tommybeer/2020/07/13/washington-redskins-officially-announce-they-will-change-team-name/**.

34 *Redskins, Indians considering new names. Is it time for the chiefs to make a change*, The Kansas City Star (July 7, 2020), **https://web.archive.org/web/20200718041018/https://www.kansascity.com/opinion/editorials/article244043712.html**.

35 *Id*.

36 Ellie Willard, *'It dehumanizes us': Native activists protest Chiefs' name and logo near State Farm Stadium,* Arizona Central Republic News (February 12, 2023), **https://www.azcentral.com/story/news/local/arizona/2023/02/12/native-activists-protest-chiefs-name-and-logo-near-state-farm-stadium/69879098007/**.

37 *Id*.

38 *Id*.

39 *Carron J. Phillips, The NFL Must Ban Native Headdress And Culturally Insensitive Face Paint in the Stands*, Deadspin (November 27, 2023), **https://deadspin.com/roger-goodell-kansas-city-chiefs-fan-black-face-native-1851048905/**.

40 Casey Cep, *Deb Haaland Confronts The History of the Federal Agency She Leads,* The New Yorker (April 29, 2024), **https://www.newyorker.com/magazine/2024/05/06/deb-haaland-confronts-the-history-of-the-federal-agency-she-leads**.

denied any plans to change their name, mascots, or practices such as the tomahawk chop.

Moving forward, the ongoing controversy among the Chiefs provides a meaningful opportunity for dialogue regarding the issue of cultural representation in sports. Ultimately, the goal should be to create an environment where all fans feel respected and represented, and where sports can promote a platform of unity rather than division. Franchises like the Chiefs have a unique role in our society as they navigate the nuances of representing and celebrating the culture of Native Americans while simultaneously dealing with the pressures of a changing world. If the Chiefs are able to engage with advocates and understand the implications of their branding decisions, then they can be at the forefront of a pathway forward to a more respectful and inclusive representation of Native cultures in the NFL.

Joseph Stipp is a 3L at the University of North Carolina-Chapel Hill School of Law, where he has gained valuable insights into NCAA compliance and regulations. He recently completed a summer associate position at the law firm Starnes Davis Florie in Birmingham, Alabama, which serves as general counsel for the University of Alabama, the SEC, and a number of other NCAA schools. These experiences gave him a deep understanding about legal issues facing collegiate athletics and professional sports and Joseph has accepted a full-time position with the firm, furthering his commitment to the intersection of sports.

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An Institutional Guide to Implementing productive NIL program

By Mark Koesterer, Founder, The Players NIL

Building a robust Name, Image, and Likeness (NIL) education platform for college athletes is critical in the evolving landscape of collegiate sports. With proposed changes, such as potential revenue-sharing models, salary caps, and the reclassification of athletes as employees, athletic administrators must not only accommodate elite Division I athletes but also support those at mid-major, Division II, and Division III institutions. These athletes, including those in non-revenue sports, have marketing potential that can be maximized with the right tools and guidance. In this essay, we outline a step-by-step plan for administrators to develop a comprehensive NIL education platform, emphasizing inclusivity for all athletes.

Step 1: Conduct a Needs Assessment Across Athletic Divisions

The first step is for athletic departments to understand the diverse needs of athletes across divisions. Unlike top-tier programs, athletes at mid-major, Division II, and Division III schools may lack the resources and brand recognition that facilitate NIL opportunities. Administrators should conduct surveys, focus groups, and one-on-one interviews with athletes across divisions and sports to assess current NIL understanding, financial literacy, social media presence, and interest in local endorsements.

Implementation Tip: Develop a standardized assessment tool for athletic departments to gauge athletes' NIL readiness, specific knowledge gaps, and regional market opportunities. This data should guide customized programming.

Step 2: Develop a Modular NIL Education Curriculum

Athletes' needs will vary widely, so a modular curriculum that covers the essentials of NIL is critical. Core modules should include:

NIL Basics and Legalities: Provide a foundational understanding of NIL rights, contract structures, and intellectual property.

Brand Building and Social Media Strategy: Given that 80% of NIL deals hinge on social media, educating athletes on personal brand development, content strategy, and engagement metrics will be crucial.

Financial Literacy and Tax Education: Revenue from NIL deals often comes with tax obligations that many college athletes are unfamiliar with. Modules should cover budgeting, savings, and tax implications.

Ethics and Professionalism in Deals: Athletes should understand the ethical considerations and long-term impact of choosing partnerships, especially in deals tied to local businesses.

Each module should be adaptable so that athletes with varying NIL ambitions and resources can access relevant information at different stages of their collegiate careers.

Implementation Tip: Offer these modules as online courses that athletes can complete at their own pace, but include regular, in-person workshops for a more interactive experience. Consider collaborating with local financial advisors, marketing professionals, and legal experts to lead workshops.

Step 3: Implement a Mentorship Program with Alumni and Local Business Leaders

For athletes without access to national endorsement deals, partnerships with local businesses can be a powerful alternative. Administrators can facilitate these connections through a mentorship program, matching athletes with alumni and community leaders who have experience in branding, entrepreneurship, and local business. This can be especially beneficial for Division II and Division III athletes who may not otherwise have access to significant marketing resources.

Implementation Tip: Create a network database of alumni and local business leaders who are interested in supporting athlete development. Host quarterly mentorship events where athletes can meet and learn from these mentors.

Step 4: Create Partnerships with Social Media Platforms and Marketing Firms

Social media is central to NIL's success, yet not all athletes have the skills or confidence to market themselves online. Partnering with social media platforms, digital marketing firms, or influencer agencies can help provide workshops and one-on-one coaching sessions on building an authentic brand and engaging effectively with followers. Such partnerships can also give athletes access to digital tools that track and analyze their social media engagement, helping them understand and maximize their reach.

Implementation Tip: Encourage social media partners to offer athletes a "pro account" that includes analytic insights, content planning resources, and creative support. This can be made available through discounted or institutional subscriptions funded by athletic departments.

Step 5: Provide Access to Legal and Financial Advising Services

The prospect of contracts, taxes, and long-term financial management is often overwhelming for college athletes. This step is essential, as many athletes may be vulnerable to entering exploitative agreements without understanding the fine print. Administrators should make financial and legal advisory services available for athletes to review contracts, understand licensing rights, and manage income responsibly.

Implementation Tip: Set up a rotating schedule of "NIL office hours" where athletes can meet with legal and financial experts on campus or virtually. Encourage these advisors to offer resources specifically tailored for non-Division I athletes and those engaged in non-revenue sports who may face different NIL challenges and opportunities.

Step 6: Implement Inclusivity Initiatives for Non-Revenue and Non-Collective Model Athletes

Athletic administrators must ensure that NIL opportunities do not exclusively benefit high-profile athletes. This is especially important in mid-major, Division II, and Division III schools where many athletes do not have national exposure. To support these athletes, athletic departments should focus on local and regional endorsements that can be achievable for athletes across all sports and divisions.

Local Sponsorship Facilitation: Work with local businesses to build sponsorship packages aimed at non-revenue athletes, highlighting the unique appeal these athletes bring as community figures.

Recognition Programs: Develop platforms within the institution to promote athlete achievements, such as social media highlights, local media features, and "Athlete of the Month" programs, which boost the visibility of athletes who might not otherwise attract attention.

Implementation Tip: Create a "NIL Opportunity Board" that lists local sponsorships and community partnership opportunities, ensuring access for athletes in less visible sports.

Step 7: Establish a Revenue-Sharing Model to Support All Athletes

If the college adopts revenue-sharing or collective compensation models, non-collective athletes should still benefit from the platform. One approach is to establish an institutional fund, supported by revenue generated through NIL-related initiatives, to provide

resources, financial support, and opportunities for all athletes, including those in non-revenue-generating sports.

Implementation Tip: Allocate a percentage of revenue from NIL initiatives (such as social media promotions or apparel sales) to a fund for athletes in non-revenue sports. This fund can cover costs related to NIL education, travel for partnership events, and personal development resources.

Step 8: Monitor, Evaluate, and Adapt the NIL Education Platform

Athletic administrators must regularly evaluate the effectiveness of their NIL education programs to ensure they are meeting athletes' needs. This involves tracking participation rates, reviewing athlete feedback, and assessing program outcomes, such as the number of athletes who successfully secure NIL deals or show improvement in financial and branding literacy.

Implementation Tip: Conduct bi-annual evaluations using athlete surveys and adjust the curriculum based on feedback and emerging trends. Ensure that the program evolves alongside changes in NIL regulations and market demands, staying current with best practices in digital branding, financial management, and partnership-building.

Conclusion

The NIL era has highlighted the vast marketing potential of all college athletes, regardless of their division or revenue-generating ability. By implementing a comprehensive, inclusive NIL education platform, athletic administrators can empower athletes across the collegiate ecosystem. This platform should encompass a robust curriculum, mentorship, local partnerships, and resources tailored to varying levels of athletic exposure. Through this approach, administrators can help every athlete—not just the stars of revenue sports—realize their full NIL potential, enhancing both their personal development and the reputation of collegiate athletics.

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Women Professional Soccer Players call on FIFA to end partnership with Saudi Aramco

By John T. Wendt

"This sponsorship is much worse than an own goal for football: FIFA might as well pour oil on the pitch and set it alight."[41] So says an open letter from over 125 women professional soccer players from over 20 countries to FIFA president Gianni Infantino regarding FIFA's sponsorship agreement with Saudi Arabia's oil and gas giant Aramco.

Saudi Arabia is the world's leading exporter of oil and Aramco is the world's largest oil company. The market value of Aramco is approximately $2 trillion. Saudi Arabia's Public Investment Fund (PIF) was founded in 1971, but "reborn"[42] in 2015 under the direction of Saudi Crown Prince Mohammed bin Salman with the mandate to help implement his "Vision 2030" diversifying the kingdom's economy from strictly oil dependency.[43] Saudi Arabia and PIF has been heavily involved in sports, including among others, golf, horseracing, Formula 1 racing, boxing, tennis.[44]

On April 25, 2024 FIFA announced that Aramco became their "Major Worldwide Partner exclusive in the energy category, with sponsorship rights for multiple events including the highly anticipated FIFA World Cup 26 and especially the FIFA Women's World Cup 2027 in Brazil.[45] FIFA President Gianni Infantino noted that "This partnership will assist FIFA to successfully deliver its flagship tournaments over the next four years and, as is the case with all our commercial

41 Sophie Junge Pedersen et al., *Letter to FIFA*, (2024), https://athletesoftheworld.org/fifa-x-saudi-aramco (last visited Oct 21, 2024).

42 Public Investment Fund, *Public Investment Fund - Our History*, (2024), https://www.pif.gov.sa/en/who-we-are/our-history (last visited Oct 23, 2024).

43 George Hay & Karen Kwok, *Breakingviews - Saudi's $700 Billion PIF Is an Odd Sort of Sovereign Fund*, Reuters, Sep. 21, 2023, https://www.reuters.com/breakingviews/saudis-700-bln-pif-is-odd-sort-sovereign-fund-2023-09-21/ (last visited Oct 23, 2024).

44 Joey D'Urso, *Saudi Arabia's Takeover of World Sport: Football, Golf, Boxing and Now Tennis?*, The New York Times, Feb. 1, 2024, https://www.nytimes.com/athletic/5237849/2024/02/02/saudi-arabia-sport-investments/ (last visited Oct 23, 2024).

45 FIFA, *Aramco and FIFA Announce Global Partnership*, (2024), https://inside.fifa.com/about-fifa/commercial/media-releases/origin1904-p.cxm.fifa.com/aramco-and-fifa-announce-global-partnership (last visited Oct 23, 2024).

agreements, enable us to provide enhanced support to our 211 FIFA member associations across the globe."[46] At the same time the President and CEO of Aramco Amin H. Nasser claimed that "Through this partnership with FIFA we aim to contribute to football development and harness the power of sport to make an impact around the globe. It reflects our ambition to enable vibrant communities and extends our backing of sport as a platform for growth. Our existing relationship with the Saudi football team Al-Qadsiah, our support for women's golf through the Aramco Team Series, and our backing of F1 in Schools each demonstrate the possibilities of such partnerships to create pathways for opportunity, positively impact society and promote development at the grassroots level."[47] FIFA is also expected to announce in December 2024 that Saudi Arabia will host the 2034 Men's World Cup.[48] Saudi Arabia has also expressed an interest in hosting the 2036 Women's World Cup.[49]

On October 21, 2024, a group of over 125 women professional soccer players sent the open letter addressed to FIFA president Gianni Infantino entitled "Aramco sponsorship is a middle finger to women's football" calling on FIFA to reconsider or end its partnership with ARAMCO on humanitarian and environmental grounds.50 Critics of Saudi Arabia allege that the kingdom is using the PIF to "sportswash" – using high-profile events and investments in sports to improve its international reputation.51 The letter states, "Exactly a year ago, many of us came together to play at the pinnacle of our sport in the Women's 2023 World Cup. The inclusivity and sustainability of that World Cup set a new standard for football, and one which FIFA should be looking to build on. Instead of a step forward, having Saudi Aramco as the sponsor for the next World Cup in 2027 would be a stomach punch to the women's game, undermining decades of work from fans and players around the globe. A corporation that bears glaring responsibility for the climate crisis, owned by a state that criminalises (sic) LBGTQ+ individuals and systematically oppresses women, has no place sponsoring our beautiful game."52

The letter asks FIFA three questions, how can FIFA justify the sponsorship given their human rights commitments, how can FIFA justify the sponsorship given its climate commitments, and whether FIFA will commit to setting up a sponsorship review panel with player representation. 53 Finally, the players ask FIFA to "reconsider this partnership and replace Saudi Aramco with alternative sponsors whose values align with gender equality, human rights and the safe future of our planet" and set up a review committee with player representation to evaluate the ethical implications of future sponsorship deals. 54

Among the signees are U.S. and Portland Thorns defender Becky Sauerbrunn and Dutch international and Manchester City striker Vivianne Miedema. Sauerbrunn voiced concern for women who are currently imprisoned in Saudi Arabia stating, "The safety of those women, the rights of women, LGBTQ+ rights and the health of the planet need to take a much bigger priority over FIFA making more money."55 Miedema said, "This letter shows that as players this is what we don't want to stand for and accept within women's football. It's simple: this sponsorship is contradicting FIFA's own commitments to human rights and the planet…"56

One of the letter's lead signatories, Inter Milan midfielder and Danish national team player Sofie Junge Pedersen said, "We think that it's quite absurd that we, as female football players, are asked to promote on our shirt, Saudi Aramco as a sponsor…The human

46 *Id*.

47 *Id*.

48 Reuters, *Women Footballers Call on FIFA to End Partnership with Saudi Aramco*, (2024), https://www.reuters.com/sports/soccer/women-footballers-call-fifa-end-partnership-with-saudi-aramco-2024-10-21/ (last visited Oct 21, 2024).

49 Arwa Mahdawi, *Saudi Arabia Wants to Host the Women's World Cup – but Should It?*, The Guardian, Dec. 16, 2023, https://www.theguardian.com/commentisfree/2023/dec/16/womens-world-cup-saudi-arabia (last visited Oct 27, 2024).

50 Pedersen et al., supra note 1.

51 Fahad Abuljadayel & Christine Burke, Saudi Arabia Is Splurging on Sports. Is It Working?, (2024), https://www.bloomberg.com/news/articles/2024-03-10/saudi-arabia-is-splurging-on-sports-is-it-working (last visited Oct 24, 2024).

52 Pedersen et al., supra note 1. ¶6

53 Id. ¶12

54 Id. ¶11

55 Associated Press, Becky Sauerbrunn and over 100 Women's Soccer Players Protest FIFA Deal with Saudi Oil Giant Aramco, (2024), https://apnews.com/article/fifa-saudi-arabia-aramco-becky-sauerbrunn-cb41913acfa00adba988cf73e0fc70b7 (last visited Oct 21, 2024).

56 Id.

rights violation there, the discrimination against women that the Saudi authorities stand for…It's just absurd and very shocking for me that we are asked to do that when these are not our values and also not FIFA's own values."57 Finally, Dutch international and Ranger FC midfield, Tessel Middag said, "FIFA has a human rights policy and sustainability policy in place – it just needs to uphold them. The facts about Saudi Arabia – the women who are incarcerated, the criminalization of LGBTQ+ relationships, the polluting of the planet – are hard facts that cannot be washed away. Values are not just words on the page – FIFA needs to follow through on the values it says it holds… It's simple – human rights for Saudi women and a safe planet for all of us are so much more vital than money for FIFA. There is no bigger benefit than rights and our planet."58

FIFA responded by saying that it values its partnership with Aramco as well as other sponsors and that "FIFA is an inclusive organisation (sic) with many commercial partners also supporting other organisations (sic) in football and other sports…Sponsorship revenues generated by FIFA are reinvested back into the game at all levels and investment in women's football continues to increase, including for the historic FIFA 2023 Women's World Cup and its groundbreaking new distribution model."59 On their website, Inside FIFA, the organization states that, "FIFA embraces its responsibility to respect human rights across its operations and relationships…(and that it is) committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights."60 FIFA is not new to controversies. In 2023 FIFA was prepared to announce that "Visit Saudi" the kingdom's national tourism board would be a sponsor for the 2023 Women's World Cup but reversed the decision after backlash from players and organizers.61 Aramco has yet to respond to the players' demands.

If their demands are not met, the players may resort to further actions, including a possible boycott. As Vivianne Miedema said, "I think you've seen over the past couple of years that women's teams are not scared to stand up for what they believe in."62

John T. Wendt serves as a member of the Court of Arbitration for Sport (Lausanne, Switzerland), the American Arbitration Association, and on the JAMS Panel to hear cases under HISA's Anti-Doping and Medication Control (ADMC) Program. He serves as Professor Emeritus of Ethics and Business Law in the Opus College of Business at the University of St. Thomas and has taught and published extensively in the field of sports law.

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The Inevitable Evolution of NIL Rights Continues to Reconfigure the Economies of Collegiate Athletics

By William M. Sullivan, Jr., Alex G. Anderson and Jake Mitchell

As 2024 comes to a close, permutations in the arena of name, image and likeness (NIL) impacting collegiate athletics continue unabated.

Most prominently, Northern District of California District Judge Claudia Wilken preliminarily approved the proposed settlement agreement to resolve the trio of pending antitrust cases known colloquially as *Carter, House,* and *Hubbard*. While a number of judicial hurdles must be cleared before the settlement is finalized and implemented, Judge Wilken's ruling is a significant step toward a new system of rules and athlete compensation for collegiate athletics.

Relatedly, the University of Tennessee (UT) became the first Division I program to announce that it was

57 Sarah Leavitt, Women's Soccer Players Slam FIFA's Partnership with Saudi Aramco over Human Rights, Environmental Concerns, CBC News, Oct. 21, 2024, https://www.cbc.ca/news/world/fifa-saudi-arabia-aramco-women-letter-1.7357644 (last visited Oct 21, 2024).

58 Samindra Kunti, Women's Soccer Players Demand FIFA Drop Aramco Sponsorship, Forbes (2024), https://www.forbes.com/sites/samindrakunti/2024/10/21/womens-soccer-players-demand-fifa-drop-aramco-sponsorship/ (last visited Oct 21, 2024).

59 Reuters, *supra* note 8. Some of FIFA's other major partners include Adidas, Coca-Cola and Visa.

60 FIFA, *Inside FIFA, Human Rights & Anti-Discrimination,* (2024), https://inside.fifa.com/social-impact/human-rights (last visited Oct 27, 2024).

61 Sean Ingle, *Fifa Admits Defeat over Saudi Sponsorship of Women's World Cup,* The Guardian, Mar. 16, 2023, https://www.theguardian.com/football/2023/mar/16/fifa-defeat-saudi-sponsorship-womens-world-cup-plans-infantino (last visited Oct 27, 2024).

62 Mathias Brück, *Female Footballers Speak out against FIFA-Saudi Deal,* dw.com (2024), https://www.dw.com/en/female-footballers-speak-out-against-fifa-saudi-deal/a-70568958 (last visited Oct 27, 2024).

implementing a "talent surcharge" on football season ticket prices. While couched in broader terms of supporting athletics, the initiative is designed to maintain Tennessee's competitive advantage while accounting for "revenue sharing" with its student-athletes.

Finally, states continue to act on NIL in the absence of federal legislation. In September, Georgia Governor Brian Kemp issued an executive order permitting direct revenue sharing between schools and athletes and prohibiting the National Collegiate Athletic Association (NCAA) (and others) from taking adverse actions against schools within the state for a variety of NIL-related activities. Contemporaneously, Pennsylvania's senate passed a resolution asking Congress to regulate NIL at the federal level. The legislature's proclamation echoed NCAA President Charlie Baker's renewed plea for intervention, made days before.

Carter, House, and *Hubbard* Settlement Receives Preliminary Approval

As Pillsbury **covered at the time**, in late May of 2024, the NCAA, the five "power" collegiate athletics conferences, and the plaintiffs to three federal antitrust lawsuits (*In re College Athlete NIL Litigation*, 4:20-cv-03919-CW (N.D. Cal. 2020)) publicly announced they had agreed to terms to settle those cases (the "Settlement").

In broad terms, the Settlement contained two components: (i) backwards-looking payment of nearly $2.8 billion in damages to former student-athletes; and (ii) prospective injunctive relief allowing for annual revenue distribution directly to student-athletes and, among other changes, regulating third-party NIL compensation.

The parties filed the complete set of Settlement documents with the court in July along with a motion asking presiding District Judge Claudia Wilken to grant the settlement "preliminary approval." At the court's September 5, 2024, hearing on the motion, Judge Wilken articulated pointed concerns about the components of the Settlement that sought to restrict an athlete's ability to freely negotiate and enter into contracts with third parties (such as a collective or local business) for use of the athlete's name, image and likeness.

The pertinent Settlement provisions required:

- Mandatory reporting of third-party NIL deals in excess of $600;
- Payments through such deals reflect accurate market value compensation for the athlete's name, image and likeness;
- Submission of such NIL deals to a third-party clearing house to assess whether they accurately reflected market compensation for the use of the athlete's name, image and likeness; and
- An arbitration system to adjudicate disputes between an athlete and/or school and the NCAA as to whether a particular NIL deal satisfies those requirements.

During the hearing, Judge Wilken directed the parties to address those concerns in supplemental filings. On September 26, 2024, the parties "clarified" the contemplated NIL regulatory scheme through modest amendments to the Settlement. Instead of applying to third-party NIL agreements with "boosters," the restrictions would only apply to NIL contracts between an athlete and an "Associated Entity or Individual." That defined term includes:

- Individuals who have donated (collectively) more than $50,000 to a school;
- An entity (and its representatives) that exists "in significant part" to "promot[e] or support[]" a school's athletics program or student-athletes;
- An entity (and its representatives) that creates or identifies NIL opportunities; and
- Those asked to assist in recruiting or retaining student-athletes.

In practice, the "clarified" Settlement would still capture NIL collectives, many local businesses, and the vast majority of fans and alums that donate meaningful amounts.

Separately, on October 7, 2024, Judge Wilken granted the Settlement preliminary approval and set a final hearing date of April 7, 2025. In the interim, members of the class of plaintiffs will be permitted to formally object to the terms of the Settlement.

Separately, on October 23, 2024, the court in *Fontenot v. NCAA* et al., 1:23-cv-03076-CNS-STV, granted a joint request of the parties to stay that case through the date on which Judge Wilken "issues a ruling on the final approval of the House settlement." *Fontenot* is unrelated to the *Carter, House,* and *Hubbard* cases, but similarly alleges that the NCAA and athletic

conferences violated federal antitrust law by conspiring to enact rules prohibiting athletes from receiving compensation for the use of their name, image and likeness, including through the distribution of media broadcast revenues.

Revenue Distribution Cap Set for Year One of the Settlement

On November 1, 2024, Ross Dellenger of Yahoo Sports reported via X (formerly known as Twitter) that the "power" conferences are projecting that schools will be permitted to distribute up to $20.5 million to student-athletes in the first year of the Settlement:

The Settlement establishes that, during its 10-year term, schools will be able to annually distribute up to 22% of what is defined as the "Average Shared Revenue." An oversimplification of the defined term is the average revenue of a "power" conference school in the prior year. The Settlement calls for annual 4% increases and several recalculations of the appropriate "Average Shared Revenue" figure.

Assuming that the Settlement receives final approval, is implemented in 2025, and the projected $20.5 distribution limit does not change, the first five years of the Settlement would proceed as follows:

Settlement Year	Calendar Year	Revenue Sharing Cap
One	2025	$20.5 million
Two	2026	$21.32 million (an increase of 4%)
Three	2027	$22.17 million (a further increase of 4%)
Four	2028	Recalculate the appropriate dollar figure for 22% of "Average Shared Revenue"
Five	2029	Settlement Year Four amount x. 1.04

The projected $20.5 million distribution cap reported by Yahoo Sports is lower than what the industry consensus predicted—between $22 and $23 million.

The University of Tennessee Implements "Talent" Surcharg

On September 10, 2024, UT Athletic Director Danny White announced **in a YouTube video address** to alums and fans that the university will implement a "10% talent fee" on 2025 football season ticket prices.

White's prepared remarks did not specifically invoke the Settlement. However, White directly referenced name, image and likeness compensation and proclaimed that UT would strive to be a leader in "revenue sharing." White also tied resources (and revenue) to competitive advantage, stressing that "[t]his will give our teams the best chance to be successful and bring championships home to Rocky Top."

UT becomes the first school to implement such a ticket surcharge or transparently pass anticipated "revenue sharing" costs on to fans and alums. In the weeks that followed UT's announcement, other schools have not taken similar actions—yet.

Nevertheless, with the Settlement receiving preliminary approval, many Division I schools are preparing to take part in voluntary revenue sharing with athletes to some degree. As noted above, schools are projected to be allowed to distribute up to $20.5 million in the first year of the Settlement. Schools are, accordingly, examining additional avenues through which to generate revenue either to distribute to student-athletes or to offset other operational costs.

UT's "talent" fee becomes perhaps the first—and most prominent—such stream.

Georgia Governor Signs Executive Order Permitting Direct Revenue Sharing

Changes to the national NIL landscape also continue to occur at the state level. On September 17, 2024, Governor Brian Kemp took **unilateral executive action** to enhance existing statutory NIL rights and curb enforcement of private organization rules restricting those rights.

Pursuant to Gov. Kemp's two-page executive order, the NCAA, athletic conferences or any other

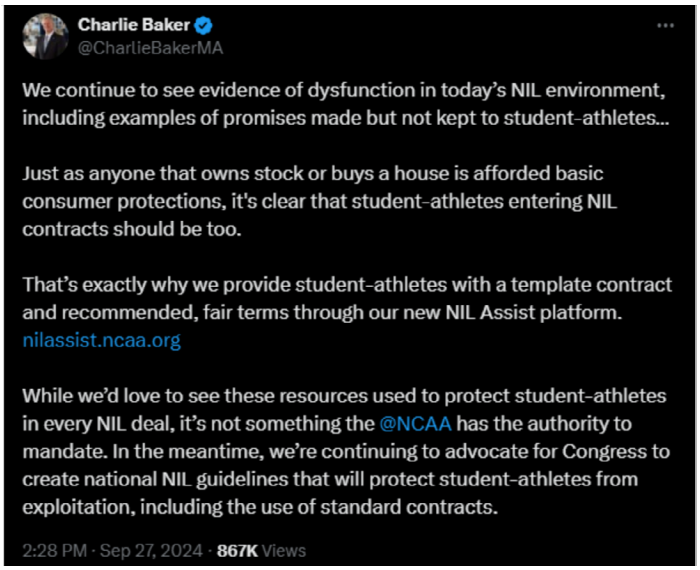
entity with authority over intercollegiate athletics are prohibited from taking "adverse action" against any post-secondary educational institution within Georgia for "facilitating compensation, offering compensation, or compensating an intercollegiate student-athlete for the use of such student-athlete's NIL[.]" The upshot of the governor's action is that, under Georgia law, schools are entitled to directly compensate their student-athletes for the use of their name, image and likeness, and can lend assistance to help athletes secure NIL agreements with third parties. The only restriction is that schools cannot use state funding to compensate their athletes.

Georgia now joins Virginia (covered by Pillsbury here) as the only other state to proactively permit under state law direct student-athlete payments from schools. Georgia was a relatively early adopter of NIL legislation, passing state law nearly two months before the NCAA lifted its restrictions on such compensation in June of 2021.

The expiration of the executive order is expressly tied to the "effective date" of either the Settlement or the implementation of federal NIL legislation.

Continued Calls for Congressional Intervention

Finally, there are continued entreaties for Congressional action in the area of NIL and athlete compensation. On September 27, 2024, NCAA President Charlie Baker again called for federal NIL regulation:



Baker's statement came in the wake of a well-publicized, but anecdotal, instance of an athlete deciding to withdraw from competition and transfer to another school. The genesis of the athlete's decision was reported to be, at least in part, a disagreement over NIL payments.

Twelve days later, on October 9, the Senate of Pennsylvania adopted Resolution No. 350, authored by Senate Appropriations Committee Chair Scott Martin (R-Lancaster). Sen. Martin's resolution expressly "[u]rg[ed] the Congress of the United States" along with the NCAA to "pursue legislative remedies that would help provide uniformity of the name, image and likeness policy across the states."

The brief legislative "request" cited the 2021 Supreme Court's 2021 decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021) and the NCAA Division I Council's adoption of new NIL legislation in January 2024.

Pennsylvania has had NIL legislation in effect since July 1, 2021, which broadly allows college athletes to be compensated for the use of their name, image and likeness. Pennsylvania law, similar to the Settlement's terms, requires that NIL payments be "commensurate with the market value of the student athlete's name, image or likeness" and "may not be provided in exchange" for "participat[ion] or perform[ance] at a particular institution of higher education." The legislation, however, does not go on to further define what constitutes "market value" and does not establish any mechanism to review or assess whether a particular agreement satisfies such requirement. On December 7, 2022, the Pennsylvania Interscholastic Athletic Association approved allowing high school athletes to be compensated for their NIL with certain restrictions.

Senator Martin's resolution passed 49-0 with one abstention.

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NFL General Counsel Jeff Pash Discusses Sunday Ticket Litigation and Offers Advice for Aspiring Sports Lawyers

By Scott Young

London. Munich. Mexico City. When you think "American Football," these aren't exactly the first locations that come to mind.

Nevertheless, since 2007, the National Football League has officially hosted more than 50 regular season games overseas as part of its NFL International Series.

Before a standing room only audience of students at Harvard law School this fall, NFL Executive Vice President and General Counsel Jeff Pash (Harvard 1980) discussed his work to help "grow the game" on the league's behalf. He also shared examples of how cultural differences in these new locations can present unexpected challenges.

"We recently played a game in Brazil. Of course, fans go to games here in the U.S. with their faces painted in team colors all the time," recalled Pash. "You can't do that in Brazil. The police won't let you in if you have your face painted. So, we literally had to station people at the gates for these fans from Philadelphia who came painted to help wipe the face paint off as they were trying to get in."

Jointly hosted by Harvard Law's **Journal of Sports and Entertainment Law** and the **Committee on Sports and Entertainment Law**, the conversation with Pash touched on new legal issues affecting the league, reflections on his exceptional career, and his advice for students interested in the world of professional sports.

Prompted by second-year law student Caleigh Sturgeon, who moderated the event, Pash discussed his perspectives on the recent NFL Sunday Ticket litigation — an antitrust claim originally filed by a class action of satellite TV customers, which was resolved in early August. The plaintiffs' antitrust claim alleged satellite customers had paid unfairly inflated prices since the NFL began licensing exclusive rights to out-of-market football games to DirecTV in 1994.

According to Pash, the Sunday Ticket case involved a variety of unique factors and legal issues that

Credits: Loren Granger

set it apart from the usual lawsuits brought against the league. Although the plaintiffs had strung together a series of pretrial victories, in court, Pash noticed their initial momentum fading fast.

"During the trial, the judge was very critical of the plaintiffs' case on numerous occasions," said Pash. "That was unexpected because, to that point, he really had not done much in our favor," including, he noted, his decision to certify the class of litigants over the NFL's objections.

"Ultimately, though, I think the plaintiffs made a very big mistake in how they tried this case," he added. And the judge seems to have agreed.

Under the jury's initial $4.8 billion verdict in favor of the plaintiffs, each professional football team would have owed the certified class of satellite customers $449.6 million. Moreover, under the treble damages rule, the league also faced the possibility of paying as much as $14.39 billion in damages.

However, U.S. District Court Judge Philip S. Gutierrez overturned the verdict by approving the NFL's J.N.O.V. motion, a 'Hail Mary' pass usually only granted in exceptional circumstances. According to Pash, the plaintiffs were expected to present a case based on straightforward arguments and standard financial damage calculations. But the reasoning and testimony that followed, he said, were anything but.

"Instead, they were all over the place. They brought in all kinds of theories, and they had experts who basically seemed like they were making it up as they went along," said Pash.

Credit: Lorin Granger

After hearing testimony given by the plaintiffs' expert witnesses, Pash recalled hearing the judge express regret over his decision to allow them to be considered "expert witnesses" in the first place. "We were about three-quarters of the way through the trial when the judge mentioned, 'I think I should have granted [the defendants'] Daubert motions,'" referring to the legal standard for determining when expert testimony is admissible in court.

According to Pash, the way the jury calculated the $4.8 billion in damages also played a significant role in the court's decision. In his order reversing the verdict, Judge Gutierrez ruled the jury had misapplied financial data related to the discounted price Sunday Ticket customers received for signing up for DirecTV.

"What the jury did to determine damages was take the difference between the average price for the Sunday Ticket package and the list price, and multiplied that by the number of subscribers," said Pash. In doing so, he said, jurors calculated damages using numbers that were unrelated to the antitrust allegations at issue. "The judge correctly found that reasoning completely irrational and unsupported by any evidence, so we were able to convince court to throw the case out."

The lunchtime conversation also provided Pash an opportunity to discuss the league's recent decision to grant private equity firms limited permission to invest in NFL franchises. Although the recent announcement was met with consternation among some fans, Pash explained the league's motivation for opening the door to funds acquiring up to 10% of an NFL team's value.

"We did it because franchise values were getting to a point where it was creating problems in terms of financing transactions and issues in terms of succession," said Pash. "Take a team like the Pittsburgh Steelers or New York Giants, that has been family-owned for the better part of a century. When the original owner passes away, there's a gigantic state tax with ownership fragmented among many family members."

"The private equity option gives a vehicle for some family members, if they want to exit at a fair price, to allow succession to go forward and avoid estate complications," he said. "It gives the investors very little decision-making power or governance rights, while providing teams additional source of capital that I think will help franchises better manage these challenges."

Pash, who announced his plan to retire this past May, also took questions from the students in attendance on a variety of topics including the gambling industry, union relations, and player conduct and safety. Before the lunch concluded, he thanked the Journal of Sports and Entertainment Law, the Committee on Sports and Entertainment Law, and Harvard Law lecturer Peter Carfagna for the opportunity to share his experience with students.

His final word advice for students interested in sports law as a career.

"Don't worry. Don't worry about being a sports lawyer," advised Pash. "If you want to be a sports lawyer, don't worry about being a sports lawyer right now. When you go to a firm and start your work there just be a good litigator, or be good IP lawyer, or be good at corporate finance. Be a good tax lawyer, or be a good international voice, and there will be a place in the sports world for you."

This article initially appeared in *Harvard Law Today*.

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Can Schools Stop Students From Praying Before or After Sporting Events?

School prayer has been an issue facing school districts for decades, especially when it comes to before or after sporting events. Cases have arisen in the lower courts in which public school educators or students have wanted to pray in various contexts and, as a result, the courts created a reasonably helpful — albeit far from perfect — set of tests and factors to be considered to determine when praying on school property is appropriate. Until June 2022, the law was reasonably clear, but due to pressure from various sources, school administrators are now grappling with the issue.

Frank S. Ravitch is a professor of law and the Walter H. Stowers Chair of Law and Religion at Michigan State University's College of Law, where he also directs the Kyoto Japan Program. He is a world-renowned law and religion scholar and has studied how the First Amendment applies in school settings. Ravitch answers questions on the balance of school prayer and what the First Amendment protects.

Answers are excerpts from an article originally published in *The Conversation*.

Question: What is the history of previous rulings?

Answer: Prior to the 1960s, public school prayer was common in some states, and it was connected to significant discrimination against Catholics and other religious groups. Several state courts held that public school prayer violated state constitutions by favoring one religion over others. Still, in many states the practice continued until 1962 and 1963, when the U.S. Supreme Court ruled that school-sponsored classroom prayer and Bible reading violates the First Amendment of the U.S. Constitution. Contrary to assertions made by modern school prayer advocates, however, this does not mean students can never pray in schools. Students have a constitutionally protected right to say private prayers and the school cannot interfere with this unless the prayer how infringes on the rights of other students.

A good way to view the distinction is through the example of a group of devout students who want to say grace before lunch in the school cafeteria. These students would have the right to do so individually or as a group at the same table or area. They would not have the right, however, to go to the front of the cafeteria and do it, thus interfering with other students' lunchtime. Nor would the school be able to have a student do so. Or at least that is the understanding based on every Supreme Court precedent from 1962-2022.

In June 2022, the Supreme Court decided that a public school football coach could pray at the 50-yard line right after games. In that case, because the coach prayed after the game at a time when players and coaches were free to do what they wanted before heading to the locker room, the primary issue was about freedom of speech when the speech is religious. The court treated the coach's prayer as private speech with which the government cannot interfere under the Free Speech Clause and the Free Exercise Clause of the First Amendment without meeting strict requirements. Yet, for some reason the court decided to also use the case as an opportunity to overturn nearly fifty years of precedent under the Establishment Clause, including precedent relevant to school prayer. That case has been highly criticized, and the Supreme Court did not explain the impact of the decision for other situations such as school prayer in classrooms or school events, which had been addressed in several earlier cases.

Q: What are the constitutional issues at hand?

A: Freedom of religion was important to the framers who wrote the U.S. Constitution. That's why the First Amendment contains two separate provisions dealing with religion: the Establishment Clause and the Free Exercise Clause.

The Establishment Clause forbids the government from "establishing" a religion. That is, the government cannot set up a religion, promote or favor one religion over another or — at least until June 2022 — endorse one religion over others or over nonreligion.

The Free Exercise Clause states Congress cannot make a law that prohibits the "free exercise" of religion: As citizens, we have the right to follow the practices of the religion of our choice. The government, generally, cannot interfere with how we practice our religious beliefs, within reason, and cannot force citizens to practice religion.

Q: What can students do if they want to practice religion in school?

A: Students do have the right, within limits, to pray in school. But a student's right to pray cannot interfere with the rights of other students. As explained above, if a student wants to say grace before meals or pray before a class or between classes, that is protected by the Constitution.

Moreover, if a student wants to say a silent prayer anytime, including in class — before taking an exam, for instance — that's their right. The Constitution doesn't restrict private thought. Many states have interpreted their constitutions, or passed laws, to require schools to work with students so they can practice their faith and still meet class requirements.

But what about students who need accommodation to pray during the school day? If a rule or law applies the same to everyone, the Free Exercise Clause does not require a state or a public school to make exceptions to accommodate someone's religious practices, according to the Supreme Court.

Most public school students who need an exception will usually get one either because the school chooses to accommodate them or because the state has passed a religious freedom restoration act (or interprets the state constitution) to require accommodations for religious

practices that are substantially interfered with by general laws or rules. In most schools, a devout Jewish student who needs to pray three times a day facing toward Jerusalem, or a Muslim student who prays five times a day while facing toward Mecca, will be allowed to do so. They might get a short break during class, for example, or a class schedule that allows time outside of class for prayer.

Q: When can the government's interests prevail?

A: Sometimes a state — or a public school — will have a "compelling interest," that is, a really strong reason, for telling people they can't follow their religious beliefs. For example, the state's interest in making sure a seriously ill child receives medical care is a strong enough reason to deny the free exercise rights of parents who believe seeking medical attention is against God's will, even if it means their child dies.

Even when there is a really good reason for a law or rule, the state — or the school — must show there isn't some other way of getting the same result that doesn't have as big an impact on a religious practice. For example, if the parents object to only one form of medical treatment based on religion, but there is another treatment that could help their child equally well, the state could not interfere.

Therefore, religious students who need accommodations will usually be able to get them, but those accommodations cannot violate a compelling government interest unless there is no other way for the government to meet that interest without interfering with the religious practice.

Q: How does the type of school affect school prayer policy?

A: To be clear, the First Amendment of the Constitution applies to actions by the government. Because public schools are funded by the state, their actions are viewed as state actions. Private schools do not usually receive direct state funding, so the requirements of the First Amendment do not apply to most private schools. This is why, for example, a Catholic school can require all students to attend Mass.

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Gaming Director at Scholastic Esports Federation Discusses Texas' Progressive Approach to Esports

Patrick Neff is a gamer masquerading as a PhD candidate in Sports Management at Texas A&M University with a focus on esports organizations and scholastic esports. Previously, he has taught every technology area at the middle and high school levels. He hopes that his research will bring new perspectives and understanding to the value of esports in schools.

He has a bachelor's degree in Political Science from Sam Houston State University and a master's degree in Educational Technology from Texas A&M University. His passions revolve around educating students and supporting scholastic esports in Texas and nationwide. He has served as a VP of the Board and Gaming Director for the Texas Scholastic Esports Federation since early 2020. In addition to starting an esports program at Ball High School in Galveston, he presented to the University Interscholastic League Legislative Council on adding esports across Texas, and has presented to a group of ADs at the Texas Athletic Directors' Association's main office on how to incorporate esports into current programs.

What follows is an exclusive interview with him.

Question: What is the Texas Scholastic Esports Federation and what is its mission?

Answer: The Texas Scholastic Esports Federation is, to quote our mission statement, dedicated to making esports an accessible, inclusive, and equitable path to college, career, and military readiness for all Texas students. To put it more simply, we want kids in Texas to have the opportunity to participate in esports in whatever way they want so that they can get the same kind of benefits we see in other team sports and extracurricular activities. The organization itself is made up of, on the operational side, current and former educators who volunteer their time and efforts to make all of our events happen, from seasons of play online to in-person local tournaments to big state-wide championships each year.

Q: What are the biggest challenges to achieving that mission?

A: There are a couple of major challenges that we have faced in getting this off the ground and then expanding it. The first big hurdle was just making the case for the existence of esports programs in schools. There is a general view in education (and society, really) that video games are at best a waste of time, students spend too much time in front of screens, and that video games have a host of bad effects including laziness and violence. Overcoming these views is often a school by school and district by district process that involves showing the benefits, getting buy in from administrators, and finding passionate teachers who are willing to do the job for free.

The second major challenge is that putting on events and having adults willing to support programs costs time and money, and strongly believe in keeping things as cheap as possible so that kids don't get priced out of participation. We have gotten by on the goodwill and volunteer hours of educators, but our growth has meant that we need to find more sources of income to make things work.

Finally, the esports industry is a complex space with some unique challenges that most of us didn't understand when we started this, and that have continued to pop up from time to time. We have had to manage working across school districts, dealing with state laws in Texas related to certain foreign companies (I'll discuss later in another question in detail), and the ownership and copyright legal landscape that we never even considered when we started this thing.

Q: How do you support the students (just participation, or do you also support them when it comes to being entrepreneurial in terms of new businesses or games)?

A: Our main pathway of support is through providing participation in esports. This looks like everything from putting on our own events to providing support when schools want to put on their own events. In addition, we do a lot of teacher training and provide support for starting new clubs and teams that help the students. Right now, we are piloting curriculum with the state of Texas to have esports courses that cover the industry and provide students with an understanding of the opportunities and careers available to them. Finally, we work to connect our students to collegiate programs, many of whom offer scholarships that can help pay for college.

Q: Does the Federation interact with the legal community in any way?

A: On a day-to-day basis, we don't have much interaction with the legal community (and hope to keep it that way!). Joking aside, there have been some interactions around setting up our organization as a 501(c)3 nonprofit, and we have occasionally asked for guidance and advice as we come across things that we don't know about. Some very kind and supportive parents or friends in the legal profession have done some pro bono work for us in the past.

Q: Are there legal issues that come up at any point, and what would they be?

A: There are a couple of very big legal issues that have come up and that we have done our best to navigate. The first is around ownership and copyright of games and how we interact with them. In 2020, Riot Games changed their community guidelines to limit who could offer scholastic competitions of their game League of Legends. This change specifically barred us from offering the title except under very restrictive limitations. We as an organization determined that we would be better off not offering the title at all, and did not do so until those guidelines were changed a couple of years later. During this time, we had a number of conversations around the idea of fair use in education. It is my belief that there is a case to be made that scholastic esports would meet the criteria for a fair use exception and that we could run it without permission, but we have never made the attempt to break the rules and litigate that claim.

Another major legal issue that arose more recently popped up when the state of Texas passed a law around the use of software developed and owned by certain companies based in China. The most obvious and well-known example is that TikTok, owned by Bytedance, is banned on pretty much all state networks. That same bill also included a company called Tencent. Tencent Gaming owns, fully or partially, a number of developers who put out esports games, and those games can be restricted on state networks as well. This has been a concern for both public school IT departments and colleges, and it seems to still be somewhat vague, with different groups interpreting things in different ways.

Q: How would you describe your role in the Federation?

A: I am lucky enough to have been one of the founding members of TEXSEF and have served in a number of roles. In our early days, I was the competition director and oversaw our broadcasting. I have served on the board of directors since the creation of the organization as well. Much of the day-to-day has shifted to others who are still active educators, as I left teaching to get my PhD and am now a college professor. I still attend board meetings and some of our bigger events, contributing where I can to the organization.

Q: Does betting or wagering ever come into play in esports and the work of the Federation?

A; In our work, betting and wagering isn't something we address or deal with most of the time. Given our focus on middle and high school competitions, we don't see much in the way of wagering. In the broader professional esports setting, you absolutely can gamble on everything from who will win a competition to stat outcomes, just like any professional sport.

Q: If so, what trends are you seeing?

A: I can't speak to specifics around gambling in esports, but the growth of the industry and the increase of money in the space is almost guaranteed to see more gambling around the competitions that happen. I suspect we're going to see a "point shaving" type scandal in one of the big games in the next couple of years. An interesting point of uniqueness around esports is that the game developers often own and operate the competitions, and they rarely make money on the pro scene itself. It's effectively a form of marketing for their in-game product, so they don't necessarily offer the same oversight as a traditional sport that is concerned with the integrity of the game. This could open the door to more abuses down the road before anything becomes standardized.

Q: Anything we missed?

A: Probably the most important thing is what I just mentioned around gambling, but on a broader scale. Right now, esports is not self-sustaining yet and is seen mostly as a way to market these games by the developers. This means that there is no consistency around how things are run, no oversight authority beyond the developers themselves. The NCAA decided not to try to do esports because it was too complicated to deal with each developer. More recently, the Saudi Public Investment Fund has begun to partner with groups like the International Olympic Committee and just recently hosted an Esports World Cup that saw games across a number of developers being played by teams from all over the world. It's anyone's guess as to what impact this might have or what comes next, but it might finally signal a shift towards more traditional sport approaches being applied to esports competitions in the next few years.

Q: Is there a national Federation?

A: Not in the sense most people would likely picture. A number of states have a similar organization to ours, that is educator run and non-profit. Some states have hired an outside organization like PlayVS or Generation Esports to manage their state esports competitions, and many states don't have anything official, so they participate in an online competition run by one of those above-mentioned groups or one of the others that exist. TEXSEF and a number of other state organizations have come together to form the Interstate Scholastic Esports Alliance, or ISEA, that advocates for scholastic esports and provides a forum for mutual support. There are more than a dozen organizations that are official members, and a few more that participate on some level but haven't joined (yet). In many ways, it's the wild west out there.

Q: Any other states that are as advanced as Texas?

A: There are a number of other states with similar, well-developed organizations doing esports. New Jersey, Ohio, Oklahoma and many more have done amazing things in their own space around esports and education. Wisconsin has one of the longest running scholastic esports organizations in the nation. No two look exactly the same, from offering different titles to running their organizations in different ways. But we wouldn't be where we are or who we are without their support and advice. One of the best things about the ISEA and scholastic esports in general is that everyone just wants to see it succeed and see kids benefit. Because of this, when we try something that works, we share it. When we make mistakes, we warn each other. This space is growing because it is collaborative.

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Sports Lawyer Josh Goldberg Joins Polsinelli

Josh Goldberg, who focuses his sports law practice on representing athletes, NIL collectives, and other sports entities, has joined Polsinelli as an associate in its Miami office.

Goldberg, previously at Greenspoon Marder, also regularly advises founders on intellectual property and branding matters. He has managed extensive trademark portfolios for large franchisor companies to start-ups looking to protect their intellectual property and enhance their growth.

In the NIL space, he works with collectives, athletes, brands, institutions and other stakeholders looking to navigate the constantly changing NIL landscape. In 2023, Goldberg became one of the youngest adjunct law professors in the country when he developed a Sports Law and NIL course centered around NIL, the NCAA and the sports influencer and media economy at Florida International University's College of Law.

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Mass General Brigham and Concussion Legacy Foundation Scientists Identify New Concussion Sign

Concussion researchers have recognized a new concussion sign that could identify up to 33% of undiagnosed concussions. After a hit to the head, individuals sometimes quickly shake their head back and forth. Although it has been depicted in movies, television, and even cartoons for decades, this motion has never been studied, named, and does not appear on any medical or sports organization's list of potential concussion signs. A new study, led by Concussion Legacy Foundation (CLF) CEO and co-founder Chris Nowinski, PhD, says it should.

The study, published October 23rd in Diagnostics, reveals that when athletes exhibit this movement, which Nowinski and senior author Dan Daneshvar, MD, PhD, co-chair of Sports Concussion at Mass General Brigham, have named a Spontaneous Headshake After a Kinematic Event or SHAAKE, athletes report they had a concussion 72% of the time. Among football players, the relationship was even stronger, with 92% of SHAAKEs associated with a concussion. A SHAAKE is usually initiated within seconds or minutes of an impact, involves lateral rotation side to side at a rate of 2 to 8 movements per second, typically lasts less than two seconds, and does not occur for another reason such as a form of communication.

Nowinski recognized SHAAKE as a concussion sign after Miami Dolphins quarterback Tua Tagovailoa's controversial undiagnosed concussion during a game on September 25, 2022. After Tagovailoa's head hit the ground, he rapidly shook his head side to side two separate times, before stumbling and collapsing. At the time, doctors attributed the collapse to a prior back injury, so he was not diagnosed with a concussion. Had SHAAKE been considered a sign of concussion after this injury, he may have been diagnosed and prevented from playing in a game the following Thursday, where he lost consciousness after experiencing a suspected second concussion in four days and was removed from the field in a stretcher.

"Sports and medical organizations should immediately add SHAAKE to their lists of potential concussion signs," Nowinski said. "Coaches, medical professionals, and concussion spotters should be trained to recognize when a SHAAKE happens and remove athletes for further assessment. It's an easy change, with no downside, that could prevent catastrophic outcomes and save careers."

For the study, 347 current and former athletes between the ages of 18 and 29 were surveyed. They were shown video examples of SHAAKEs and asked about their experiences with them. 69% reported exhibiting a SHAAKE, and 93% of those reported a SHAAKE in association with concussion at least once. Athletes reported exhibiting SHAAKEs a median of five times in their lives.

"In the athletes we studied, about three out of every four SHAAKEs happened because of a concussion," said Daneshvar, who also serves as Chief of Brain Injury Rehabilitation in the Department of Physical Medicine and Rehabilitation at Spaulding Rehabilitation and Harvard Medical School. "Based on our data, SHAAKE is a reliable signal

that a concussion may have occurred, like an athlete clutching their head after contact, being slow to get up, or losing their balance. Just like after these other concussion signs, if athletes exhibit a SHAAKE, they should be removed from play and evaluated for a potential concussion."

The three most common reasons athletes reported for exhibiting a SHAAKE were "disorientation or confusion" (25%), "a feeling like you needed to jumpstart your brain" (23%), and "changes to your perception of space or perception of your body in space" (14%). Other reasons athletes reported for exhibiting a SHAAKE associated with a concussion included headache, dizziness, inability to keep their train of thought, and changes to vision, hearing, or balance. Reasons athletes exhibited a SHAAKE that are not associated with concussion include neck pain, chills, pain that was not a headache, and an emotional reaction to the preceding event.

"Studies consistently show that an unacceptably high number of their concussions are not voluntarily reported by athletes, either because they don't realize they have a concussion or because, in the heat of the moment, they don't want to be removed from the game," said Robert Cantu, MD, CLF medical director and study co-author. "It is critical we take every potential concussion sign seriously to ensure the health and wellbeing of athletes."

The main limitation of the study is the potential for recall bias due to survey participants self-reporting prior concussions. Most respondents were from the United States and Canada, and it is unclear if SHAAKE varies by country or culture. Future prospective studies are needed to validate these findings.

Authorship: In addition to Nowinski, Cantu, and Daneshvar, study authors include Samantha C. Bureau (CLF), Hye Chang Rhim (Spaulding); and Ross D. Zafonte, DO (University of Missouri).

Conflict of Interest: Nowinski reported nonfinancial support (travel reimbursement) from the NFL Players Association (NFLPA), NFL, World Rugby, WWE, and AEW (All Elite Wrestling); he has served as an expert witness in cases related to concussion and CTE and is compensated for speaking appearances and serving on the Players Advocacy Committee for the NFL Concussion Settlement. He also serves as an advisor and options holder for Oxeia Biopharmaceuticals, PreCon Health, and StataDx outside the submitted work. Daneshvar serves as an expert witness in legal cases involving brain injury and concussion and serves as an advisor and options holder for StataDx outside the submitted work. He receives funding from the Football Players Health Study at Harvard University, which is funded by the NFLPA and evaluates patients for the MGH Brain and Body TRUST Center, sponsored in part by the NFLPA.

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Attorney General Asks U.S. Supreme Court to Limit Girls' Sports Teams to Biological Females

South Carolina Attorney General Alan Wilson joined 23 other states in asking the U.S. Supreme Court to hear an Arizona case to protect girls' and women's sports.

"Sports teams are divided by sex to begin with to give girls a level playing field so they're not competing against boys," Attorney General Wilson said. "Arizona's law restricting girls' sports teams to biological females is just common sense, and it protects girls from competing against bigger, stronger males who identify as females."

Attorneys general from 24 states are asking the U.S. Supreme Court to hear the case on Arizona's law after a federal appeals court ruled the law likely violates the Constitution's Equal Protection Clause.

In their friend-of-the-court brief to the Supreme Court, the attorneys general argue that their states also have laws or policies like Arizona's that restrict girls' sports teams to biological females.

"Basing the distinction on biology rather than gender identity makes sense because it is the differences in biology—not gender identity—that call for separate teams in the first place: Whatever their gender identity, biological males are, on average, stronger and faster than biological females. If those average physical differences did not matter, there would be no need to segregate sports teams at all," they write in their brief.

They're asking the Supreme Court to hear the case and reverse the lower court's ruling, to make

it clear that the Constitution does not prohibit states from saving women's sports from unfair competition and providing meaningful athletic opportunities for girls and women.

Joining Attorney General Wilson are the attorneys general from Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

You can read the brief here.

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News Briefs

Squires Named Chief Venues and Operations Officer of FIFA World Cup 2026 New York New Jersey Host Committee

Sports Lawyer William (Bill) D. Squires, who serves as President of his company - The Right Stuff Consulting, has been named Chief Venues and Operations Officer at FIFA 2026 Men's World Cup New York New Jersey Host Committee. Reporting directly to the New York and New Jersey Host Committee Officers, he will be "responsible for the strategic planning, execution, and management of all aspects related to FIFA World Cup 2026 match venues and operations within the New York and New Jersey region. This role works directly with FIFA and on behalf of the New York New Jersey Host Committee to oversee facility and venue preparations, match-day operations, and logistics to ensure a seamless FIFA World Cup 2026 NYNJ experience."

Chicago Cubs Seek Corporate Counsel

The Chicago Cubs are seeking to hire Corporate Counsel to work in the legal depart of the iconic franchise. The Cubs describe the position as "a critical player in the Chicago Cubs Legal Department and will provide legal support to business units across the Chicago Cubs organization and its affiliated entities. The position will report directly to the Associate General Counsel and will provide support on all legal matters, including drafting, reviewing and negotiating routine agreements, assisting in corporate and transactional workload, and litigation support. This position will require excellent business judgment, adept problem-solving and strategic thinking, with an ability to work independently and collaboratively in a collegial, fast-paced environment." To apply, click here.