# FARA Annual Meeting Presentation
# Legal and Policy Updates Nov. 16, 2023


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*All opinions are my own and do not reflect any institution to which I'm affiliated.*

# Multiple Legal Challenges to Current Framework for Division I College Sports (1/3)

***1) In re College Athlete NIL Litigation*** (often called *House v. NCAA*) in the U.S. District Court for the Northern District of California. Recently certified as a class action, antitrust case concerns revenue from TV broadcasts, video games and forgone NIL opportunities pre-2021 and challenges to NCAA and Power Five conferences rules.

**2) Dartmouth College Men's Basketball Players** Petition to National Labor Relations Board to form a union under the National Labor Relations Act.

**3) National College Players Association's unfair labor practice charge** regarding USC football, and men's and women's basketball players. Allegation is USC, Pac-12 and NCAA are joint employers of student athletes under National Labor Relations Act.

# Multiple Legal Challenges to Current Framework for Division I College Sports (2/3)

**4) *Johnson v. NCAA*** in the U.S. Court of Appeals for the Third Circuit on interlocutory appeal. Plaintiffs argue the NCAA and member schools are joint employers of student athletes and in violation of the Fair Labor Standards Act, which guarantees minimum wage and overtime pay for qualified employees, as well as applicable state minimum wage and unjust enrichment laws.

**5) What does NIL mean** in a world of **collectives** that in some instances appear to operate as pay-for-play recruiting and retention vehicles and now ***Bewley & Bewley v. NCAA*** (U.S. District Court in Northern District of Illinois) in which former Overtime Elite players argue their OTE compensation was permissible NIL.

**6) New state laws**, including in Texas, Missouri and Oklahoma, that limit how the NCAA can enforce NIL-related policies (and that, in my opinion, could be challenged as violating the Commerce and Contract Clauses of the U.S. Constitution).

# Multiple Legal Challenges to Current Framework for Division I College Sports (3/3)

**7) Antitrust and amateurism implications of Power Five conference realignment** and possible consolidation into Power Four (or fewer).

**8) *Choh et al .v. Brown University et al*** in U.S. District Court for Connecticut. Plaintiffs argue Ivy League policy forbidding athletic scholarships violates antitrust law.

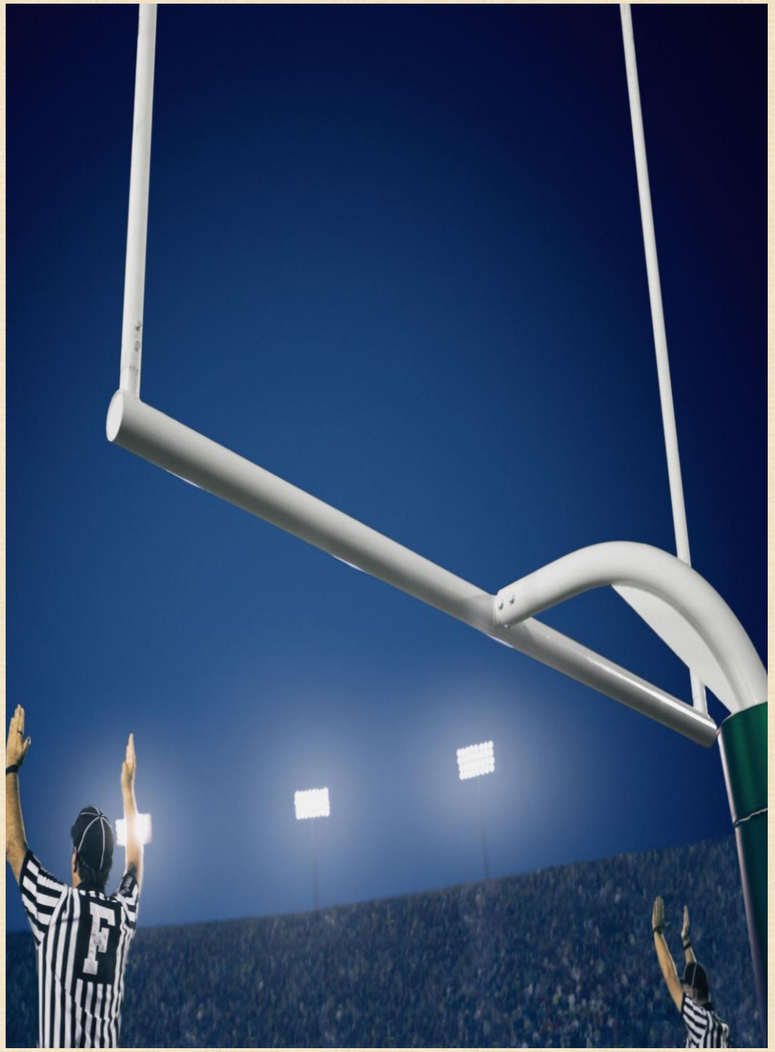
**9) Defend and win in court or hope for help from a divided and dysfunctional Congress?**

# *1. In re College Athlete NIL Litigation (House v. NCAA and Power Five)*

- U.S. District Court for the Northern District of California.

- The NCAA and Power Five conferences (and their members) are accused of violating antitrust law by **(1)** unlawfully restricting NIL especially prior to 2021, **(2**) denying compensation student athletes would have received from video game publishers if eligibility rules permitted them to appear in games, and **(3)** preventing conferences from sharing broadcasting revenue with student athletes.

- Judge Claudia Wilken found plaintiffs' attorneys make a plausible argument plaintiffs are owed at least 10% of the value of the broadcast rights for their sports since their NIL appears in those broadcasts ("broadcast NIL" or "BNIL") and the number is consistent with pro sports group licensing royalty rates.



# *In re College Athlete NIL Litigation*

- Judge Wilken certified three damages classes and they encompass football and men's basketball players, women's basketball players, athletes in other sports starting in 2016 and all D1 student athletes who competed or will compete from June 15, 2020 (when the complaint was filed), to the date of judgment in the case, which is set to go to trial on Jan. 27, 2025.

- These three classes collectively include more than 14,500 individuals.

- Potential damages could be in the billions of dollars, given the value of media rights/TV deals.

- If NCAA is forced to change rules to allow Power Five conferences to share TV money with student athletes, it would (obviously) be a major change.

# *In re College Athlete NIL Litigation*

- Defenses include: (
  - NIL is individualized, with some student athletes earning a lot through NIL and others not earning anything (so not a good fit for a class action);
  - NIL has led to some student athletes staying in school, so we don't know who would have stayed prior to 2021 if NIL had been allowed.
  - Media rights contracts for pro leagues do not separately pay athletes in those leagues, so why would they with athletes in college.
  - The proposed changes would trigger legal problems under other areas of law (including Title IX).

- The million—maybe billion-–dollar question: **<u>How</u> can this case be settled out of court?** It's now a class action that has advanced past a motion to dismiss and into pretrial discovery. As a result, the plaintiffs and their attorneys have a lot of bargaining power.

# 2. Dartmouth Men's Basketball

In 2023, Dartmouth College men's basketball players petitioned the NLRB to form a union. The university has objected on grounds the basketball players are not employees.

The university also can't negotiate with the players or would run afoul of membership obligations to the NCAA and Ivy League.

If college athletes at Dartmouth—a school known where the men's basketball team brought in just $26,000 in ticket sales in the most recent fiscal year —are employees, which Division I athletes would *not* meet that bar?

As a member of the Ivy League, Dartmouth does not pay athletic scholarships. Players insist they receive other forms of compensation (equipment, apparel, tickets to games) not available to classmates and that, in some ways, they have better deal than other DI athletes since they (arguably) get a 4-year ride to an Ivy League school even if they quit hoops.

They also detail how the university controls their time and note that some of their classmates are Dartmouth employees, including unionized dining hall student workers.

# Dartmouth NLRB Proceeding

During recent proceeding, the players challenged Dartmouth's argument that its men's basketball team is a money-loser. The team lost $855,000 on total expenses of $1.31 million in the most recent financial year—data which suggests the university does view the team as part of a commercial enterprise.  Yet the players maintain that the university uses the team and its players for fundraising purposes, including to help secure a recent $50 million gift.

Also, although Dartmouth men's basketball is not among the nation's top programs and is not a feeder school for the NBA, there is still interest in Ivy League sports, as evidenced by the conference securing a 10-year contract with ESPN.

There is also no requirement in the NLRA that employment recognition hinges on the would-be employer being profitable or that if would-be employees form a union, their bargaining unit would have to establish it generates more revenue than it incurs expenses.

Laura Sacks, director of the NLRB's regional office in Boston will decide whether the players are employees, a decision that could be appealed to the NLRB and eventually to federal court.

# The Reason Why the Dartmouth Matter is So Important is **TIMING**

- It is moving quickly—a lot faster than the litigations or the USC NLRB matter—and will set precedent for private colleges on whether student athletes are employees and can form unions.
- BUT next year's Presidential election could play a key factor. If President Biden is not re-elected, his successor and their nominees could have different views on relevant labor law.

# 3. NLRB Proceeding in California

In 2023, Mori Rubin, the NLRB regional director of Region 31 (Los Angeles), issued an unfair labor practice complaint that USC, the Pac-12 and the NCAA are joint employers of Trojans football and men's and women's basketball players.

The complaint followed a review of unfair labor practice charge filed by the National College Players Association (NCPA). There is no standing requirement to file a charge.

The NCPA asserts that the NCAA, conference and USC control the relationship between the athletes and the athletic participation and that the athletes function as workers whose time and energies are directed towards generating revenue for the NCAA, conference and school.

This argument draws from a memo issued in 2021 by NLRB general counsel Jennifer Abruzzo, who opined that college athletes are employees under Section 2(3) of the NLRA and common law tests for employment.

Abruzzo reasoned that college athletes render revenue-generating services to their schools, which compensate them via scholarships and stipends and control them through applicable NCAA, conference and school rules.

# NLRB Proceeding in California

USC, the Pac-12 and the NCAA counter Rubin's complaint by contending First Amendment rights would be violated if a college were compelled to articulate a policy it rejects arguing NLRA employee recognition of college athletes would cause USC to violate state workers' compensation laws, the FLSA, federal immigration laws, the Internal Revenue Code and Title IX.

The common law definition of "employee" is imprecise, and centers on "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." This definition has been applied by courts in examining employee recognition under the NLRA.

Commentators have observed U.S. courts have been frustrated by a lack of more precise guidance on how to apply the definition.

# NLRB Proceeding in California

If USC, the Pac-12 and NCAA are deemed joint employers of USC football and basketball players and if that finding withstands appeals, other Trojans athletes could claim they too are employees, as could athletes who play in similarly high-profile programs at private colleges.

The potential repercussions extend beyond private colleges, too. On one hand, state labor laws—and not the NLRA—would determine whether an athlete at a public university is an employee of their school.

On the other hand, if conferences and the NCAA are joint employers of college athletes, athletes at private colleges could assert that even if their school is not their employer, their conference and the NCAA are their employers.

# 4. *Johnson v. NCAA*

*Johnson* is led by former Villanova football player Ralph "Trey" Johnson and other current and former DI college athletes.

They argue the NCAA and member schools are their joint employers and in violation of the Fair Labor Standards Act, a federal law that guarantees minimum wage and overtime pay for qualified employees, as well as applicable state minimum wage and unjust enrichment laws.

The gravamen of the case is that if work-study classmates who labor at games in food concessions, ticket taking and event security are FLSA employees, why isn't the same true of athletes who play in those games?

The presence of a scholarship doesn't automatically distinguish these two sets of students—many work-study students are, like athlete classmates, on scholarship.

# *Johnson v. NCAA*

U.S. District Judge John Padova (Pennsylvania) denied a motion to dismiss in 2022.

U.S. Third Circuit took case on an interlocutory appeal to answer "Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics."

# *Johnson v. NCAA*

In February 2023, Third Circuit panel heard oral arguments. Judges asked or commented on:

- Why is the NCAA comfortable with athletes at the service academies being paid.
- Why are student athletes under a level of control not faced by their classmates.
- They referenced how the athletes can't pursue certain areas of study because they would conflict with the athletics' schedule.
- They also mentioned that a student can hire an agent for professional music or arts but an athlete cannot.
- They even noted that student athletes in many states can lawfully bet on sports whereas their athlete classmates are forbidden from doing so.

Ruling is expected soon and will send case back to Judge Padova.

# 5. What does NIL even mean anymore?

- NIL derives from the right of publicity, which forbids the commercial use of another person's identity without their consent.
- When this kind of unconsented use occurs—and that unconsented use is often called "misappropriation"—the person victimized is owed monetary damages.
- This right is determined by state law—meaning there is no national or federal right of publicity. It depends on what state you are in.
- Student athletes are now able to receive NIL payments for the commercial use of their name, image or likeness for sponsorships, influencing, endorsements and other promotional arrangements under certain conditions.

# Has NIL Morphed Into Pay-for-Play?


COLLEGE FOOTBALL

**Taulia Tagovailoa was offered $1.5 million by mystery SEC team to transfer**

# NIL Collectives: What Are They?

They vary, but they are generally groups of supporters of a school's athletic program that arrange NIL deals for recruits in hopes of inducing them to attend the aligned school.

Collectives are criticized for facilitating so-called "NIL" deals for recruits when these deals are, according to some commentators, "clearly disconnected from the actual value of an athlete's publicity rights" and are instead a "backdoor form of pay for pay."

In October 2023, one NIL group supporting one school's athletic program presented a leased Ram 1500 Big Horn truck (retail value $61,000) to each of the 85 scholarship players on the football team.

# *Bewley & Bewley v. NCAA* (filed last month in U.S. District Court in Illinois)

- Two former Overtime Elite brothers whose NCAA eligibility was recently denied argue their OTE compensation ($100,000) counts as permissible NIL and thus they should be NCAA eligible.
- If OTE compensation—which presumably reflects money to play a sport, a.k.a. labor—is permissible NIL, what else might be?
- NIL and play-for-play could become one.

# 6. States adopting laws preventing NCAA from enforcing NIL Rules

In 2023, Texas, Missouri and Oklahoma were among the states adopting laws that restrict or limit the NCAA from prohibiting schools from using associated fundraising groups to raise money for NIL.

These laws make it unlawful for the NCAA to fully ensure that member schools are not using NIL as a ruse for pay-for-play.

The NCAA could seek injunctions to block enforcement of these laws on grounds they unlawfully interfere with two provisions in Article I of the U.S. Constitution: **The Commerce Clause** (Section 8) and **The Contract Clause** (Section 10).

The Commerce Clause vests Congress with the exclusive power to regulate interstate commerce and, as interpreted by courts, prohibits states from affecting the economy in ways that substantially interfere with other states' economies.

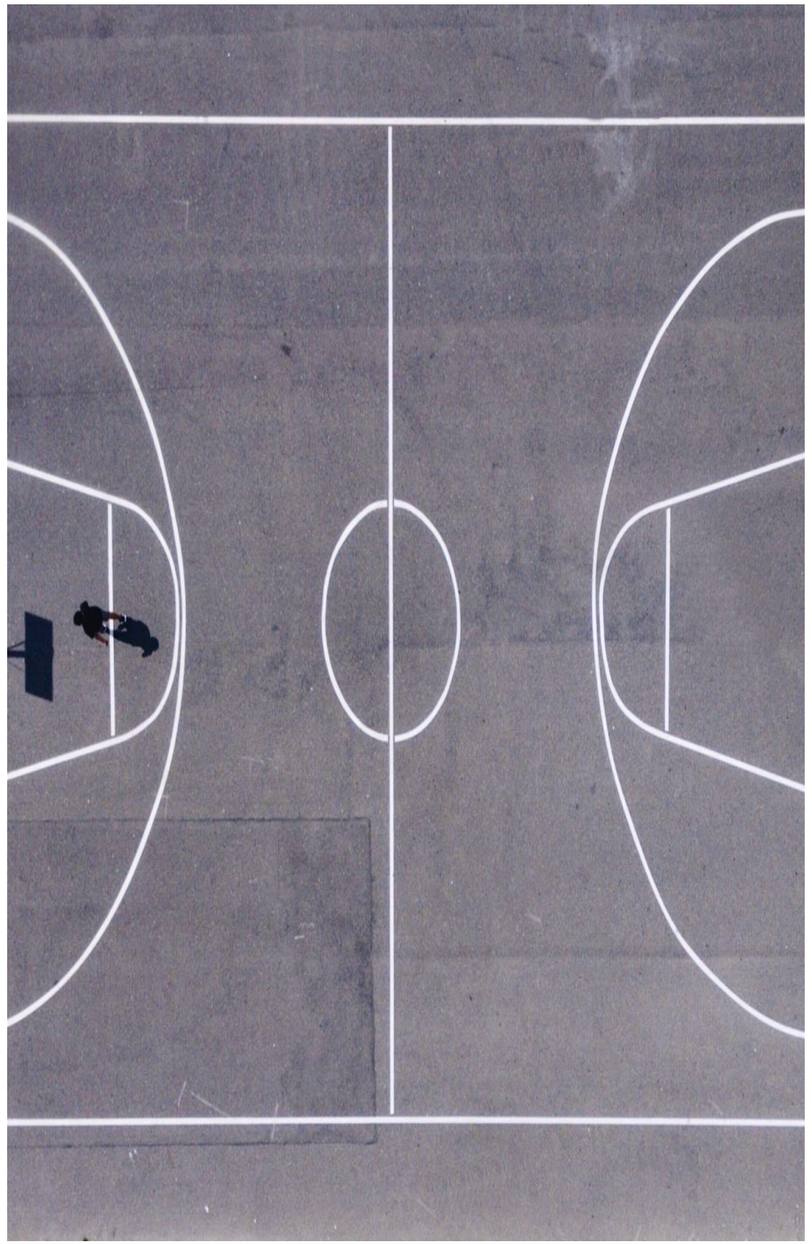
The Contract Clause forbids states from impairing a contractual obligation of contract unless there is a substantial connection to a public value.

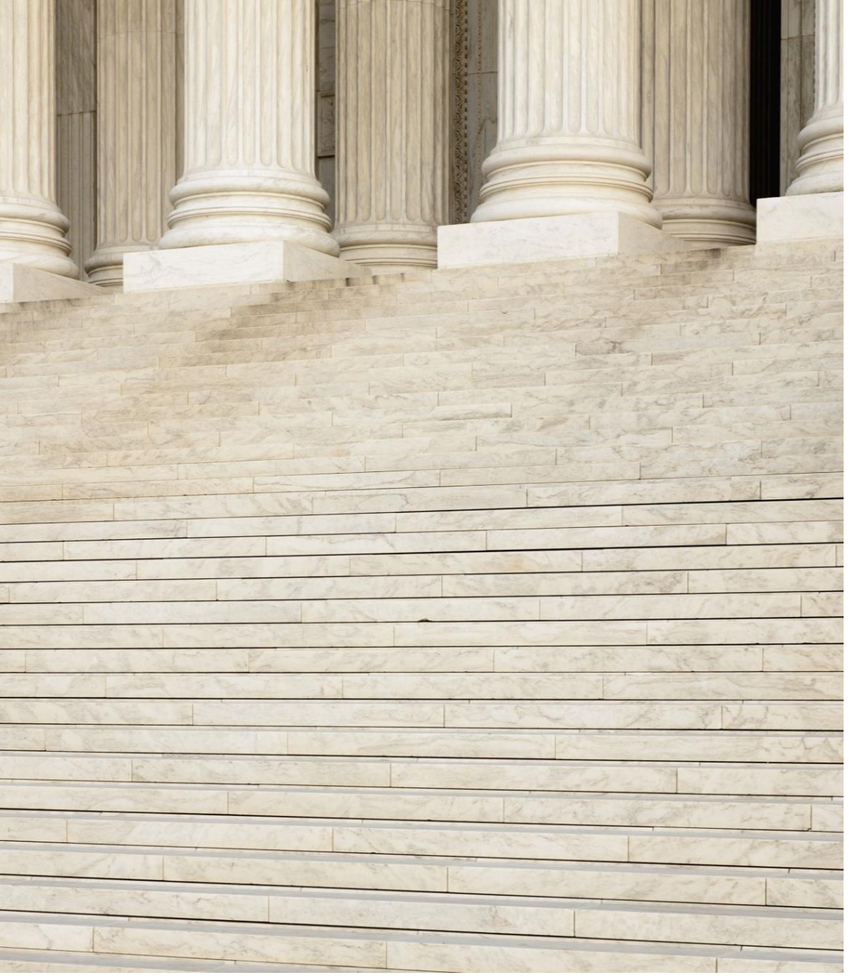
This playbook is not new to the NCAA.

In the early 1990s, the NCAA successfully petitioned courts to restrain a Nevada statute that had required an impartial hearing officer to determine if a member school violated an NCAA rule.

The statute was enacted in the aftermath of the NCAA investigating and punishing UNLV and its men's basketball coach, Jerry Tarkanian, for pay-for-play violations.

The statute interfered with NCAA membership rules, which contemplated the NCAA's committee on infractions having jurisdiction.





In *Miller v. NCAA*, the Ninth Circuit sided with the NCAA.

The statute conflicted with the Commerce Clause because it prevented the NCAA, a national membership association, from applying the same membership rules in every state unless it adopted Nevada's statute in those 49 states.

From that lens, Nevada would effectively coerce the NCAA to alter its operations (and resulting economic activity) in other states.

The statute was also problematic to the courts since it might have spawned a potential **patchwork problem**: Other states could adopt their own statutes regarding NCAA investigations and due process, thus making it impossible for the NCAA to apply a uniform, national standard.

The statute was also incompatible with the Contract Clause since it impaired the contractual relationship between the NCAA and member schools in Nevada.

U.S. District Judge Howard McKibben noted that “every NCAA member has voluntarily and contractually agreed to abide by [NCAA] rules and regulations.”

If Nevada colleges were given an “unfair competitive advantage over other members,” McKibben explained, the result would prove “both inconsistent with the core purpose of the NCAA and indirectly allow Nevada institutions to circumvent the central substantive requirements it contractually agreed to honor.”

# 7. Conference Realignment & *NCAA v. Alston*

In *Alston*, Justice Neil Gorsuch wrote that when members agreed not to pay student athletes for academic-related expenses, it constituted price-fixing.

He explained the NCAA and its members are subject to ordinary antitrust scrutiny, and that setting a price at $0 is illegal—especially, Gorsuch underscored, "in a market where the defendants exercise monopoly control."

**Less noted, Gorsuch stressed that an individual conference, through its members, can adopt amateurism rules as the conference sees fit**—they just can't all do it en masse.

Gorsuch literally wrote *Alston* "applies only to the NCAA and multiconference agreements." He further emphasized "individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still."

Gorsuch’s underlying logic was straightforward.

When 1,200 member schools and conferences act to restrain competition in some way, the impact on college sports is national and often profound.

When one conference and its dozen or so members do the same, the impact is far more limited. Other conferences, after all, could decide the same issue differently.

## But What Happens if Conferences Merge?

If conference realignment brings about super conferences that resemble the NCAA in terms of controlling college sports or at least a sizable portion of it, Gorsuch's distinction between the NCAA and a conference **could collapse**—and with it the judicial deference conferences currently enjoy.

The potential consequences are far-reaching.

Power Five conferences could eventually adopt rules recognizing college athletes as employees, while smaller conferences might stick to the student-athlete model. Some conferences might also explore revenue sharing with athletes or different rules for NIL. The degree to which a conference is confident its actions would withstand judicial scrutiny would shape that conference's willingness to innovate.

# 8. *Choh et al. v. Brown University et al.*

In 2023, a group of former Brown University men's basketball players and current women's basketball players sued the Ivy League, arguing that Ivy League schools have, under antitrust law, unlawfully conspired to adopt a rule prohibiting athletic scholarships.

Ivy League argues there is no antitrust issue because the athletes could go to other elite schools that do offer athletic scholarships. Ivy League also notes language in *Alston* allowing conferences to set their own rules.

# 9. Hesitation to Restrict Collectives Due to Fear of Antitrust Litigation post-*Alston*

Enforcement of rules barring pay-for-play might spark antitrust lawsuits with the basic argument members conspired to interfere with athletes' right of publicity.

But defendants would be poised to prevail. NCAA restrictions on competition are evaluated under "rule of reason," where the court evaluates the facts and balances the pro-competitive and anti-competitive aspects of a restraint. Most antitrust lawsuits analyzed under Rule of Reason fail.

According to Professor Maurice Stucke, an antitrust law scholar, "the empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose." Stucke cites one empirical study finding antitrust defendants prevailed **97 percent of the time**.

# Reasonable Rules Pass Antitrust Scrutiny

Plaintiffs won *O'Bannon v. NCAA* and *NCAA v. Alston* because of blanket prohibitions on student athlete compensation.

*O'Bannon* concerned pay for likenesses in video games and *Alston* concerned schools being able to help athletes more with education-related expenses.

Neither decision held the NCAA can't prohibit pay-for-play. Just the opposite. In *Alston*, Justice Gorsuch explicitly stated the NCAA can craft rules that regulate compensation of athletes so long as they are reasonable—tellingly, he wrote a "no Lamborghini rule" would be perfectly acceptable.

Application of membership rules to punish schools, coaches and student athletes for engaging in prohibited play-for-play under the thinly-veiled guise of NIL should withstand antitrust scrutiny, in my opinion.

# Congress: Don’t Bet On It

**KEY POINTS**

- There have been more than 20 bills introduced in Congress since 2019 related to NIL or college athletes as employee.
- The NCAA wants Congress to pass a federal NIL bill and declare that college athletes are not employees.
- None of the bills has advanced past committee.
- None of the bills has received a floor debate.
- None of the bills has been the subject of a legislative hearing.
- None of the bills has been voted on.
- We are entering a presidential election year where attention will be focused on a rematch between President Biden and former President Trump, and members of Congress will be back in their home districts—and not in Congress—to campaign.
- Until recently, the House of Representatives lacked a Speaker!

# 10. Thank you!

**Special thanks to Lynda Wray Black for inviting me and welcoming me to the FARA community.**

*Photograph: My daughter, Willa, and me in Sydney, Australia last month.*