

COMMENT

THE STARS ARE (RE)ALIGNING: EXTENDING TITLE IX TO NCAA CONFERENCE REALIGNMENT IN THE NIL ERA

NATHAN LOAYZA*

Almost fifty years after Congress enacted Title IX, the NCAA adopted its interim Name, Image, and Likeness (NIL) policy, permitting college athletes to be compensated for use of their NIL. While some athletes gain significantly from the NIL regime, most athletes do not capture its benefits. Further, earnings under the NIL regime are distinctly stratified between men's and women's sports. The vast majority of NIL money flows to football and men's basketball. Athletes in other programs—especially women's sports—struggle to find space in the NIL market.

Today, the NCAA is approaching a groundbreaking settlement that will reshape the NIL system. If finally approved, the proposed settlement in *House v. NCAA*, a class action lawsuit challenging the NCAA's prior prohibition on compensating athletes for use of their NIL, will create two significant changes. First, universities will be allowed to facilitate NIL deals between student athletes and third parties. Second, universities will be allowed to participate in a revenue sharing program in which they can directly pay student athletes a portion of the schools' annual athletic revenue, including money from television broadcast rights.

Conference realignment, the process by which universities reorganize themselves into different athletic conferences for financial gain by bargaining for larger television broadcast deals, will amplify gendered consequences of the NIL regime and any inequities arising from the post-*House* revenue sharing system. Conference realignment will expose the NIL "winners" to larger media markets while imposing travel-based "human costs" on the NIL "losers," who are unable to offset these costs by generating NIL money. Likewise, by increasing the revenue schools receive from selling their broadcast rights, conference realignment will directly impact inequities in revenue sharing earnings between male and female athletes.

This Comment explores the effects of NCAA conference realignment on student athletes in the NIL era and emphasizes that these effects should be considered when implementing a revenue sharing system like that proposed in the *House* settlement. This Comment argues that by exacerbating sex-based

* J.D. Candidate, University of Wisconsin Law School, 2025. I would like to extend my thanks to Professor Andrew Norman, who provided thoughtful insight during the writing process and brought a critical eye to my work. Special thanks go to Juliet Jacques and Zach Renier for their hard work during the editing process. I would also like to thank my father, Matthew Loayza, for my love of learning and love of sports. Most importantly, I owe unending gratitude to my fiancée, Marah Bengtson, whose support I credit for any and all success I enjoyed during law school.

disparities baked into the current NIL regime and likely to be perpetuated by future policies, universities' conference realignment decisions constitute disparate impact discrimination under Title IX. These decisions disproportionately impact female athletes by exacerbating NIL earning disparities and neglecting to consider travel-based costs for female athletes. Universities do not engage in conference realignment out of educational necessity, but rather to maximize profits generated from contracts for television broadcast rights. To ameliorate the gendered impacts of conference realignment, this Comment urges the NCAA to address the underlying gender disparities in the NIL regime. In doing so, this Comment analyzes the proposed *House* settlement and recommends that the *House* settlement confront looming Title IX problems by creating a revenue sharing system for university-facilitated NIL and athletic revenue based on Title IX's proportionate equality standard.

Introduction	1369
I. The Hat Trick of Issues: Title IX, NIL, and Realignment....	1372
A. Title IX on Paper and in Practice.....	1372
1. Title IX on Paper: An Overview of the Title IX Law.....	1372
2. Title IX in Practice: Football's Effects on Women's College Athletics Programs	1374
B. NIL's Troubled Past and Uncertain Future	1375
C. A Play-by-Play of Conference Realignment	1381
II. Universities' Conference Realignment Decisions Could Violate Title IX by Exacerbating Earning Disparities Between Male and Female Athletes	1383
A. Conference Realignment Will Impose Costs on All Student Athletes, but Will Only Benefit Some	1384
1. Conference Realignment Will Impose Travel-Based Costs on Athletes.....	1384
2. Conference Realignment Will Amplify Benefits for Only Some Athletes	1386
B. Analyzing Universities' Conference Realignment Actions Under Title IX.....	1388
1. The Department of Education Could Find that Universities' Conference Realignment Actions Violate Title IX Under a Disparate Impact Theory .	1390
2. Educational Institutions Cannot Likely Establish that Conference Realignment Is an Educational Necessity	1392
III. Calling an Audible: The <i>House</i> Settlement Should Address NIL Disparities by Implementing Revenue Sharing Policies Based on Title IX's Proportionate Equality Standard.....	1397
Conclusion	1399

INTRODUCTION

In 1980, “[b]ack when the Big Ten was actually 10 teams,” the furthest a college athlete would need to travel for an in-conference competition was between Columbus, Ohio, and Minneapolis, Minnesota—a 627-mile-long road trip.¹ Since August 2024, the “Big Ten” actually comprises eighteen teams.² Now, the furthest distance a college athlete will travel for an in-conference competition will be from New Brunswick, New Jersey, to Eugene, Oregon—a 2,463-mile-long plane ride.³ It would be shorter to fly from New Brunswick to Caracas, Venezuela.⁴

The National Collegiate Athletic Association (NCAA), which oversees the highest level of collegiate athletics,⁵ is organized into several conferences.⁶ NCAA conferences are comprised of educational institutions which agree to compete against each other and share profits generated by television contracts.⁷ While conference realignment has been an ongoing phenomenon since the Big Ten’s formation in 1896,⁸ educational institutions and their sports teams are now realigning themselves with different NCAA conferences at a greater rate than any time in recent memory.⁹

In August 2024, the Big Ten Conference welcomed the University of California Los Angeles, the University of Southern California, the

1. Jim Sergent, *NCAA Conference Realignment Shook up Big 10, Big 12 and Pac-12. We Mapped the Impact*, USA TODAY, <https://www.usatoday.com/story/graphics/2023/08/17/ncaa-conference-realignment-impact/70570750007/> [https://perma.cc/6B69-AYQN] (Jan. 15, 2024, 4:47 PM).

2. Nicole Auerbach & Scott Dochterman, *Big Ten Reveals New Football Scheduling Model for 18-Team League: How This Changes the Conference*, ATHLETIC (Oct. 5, 2023), <https://theathletic.com/4934079/2023/10/05/big-ten-football-schedule-matchups/>.

3. Sergent, *supra* note 1.

4. TRAVELMATH, <https://www.travelmath.com/distance/from/New+Brunswick,+NJ/to/Caracas,+Venezuela> (last visited Sept. 11, 2024).

5. *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited Sept. 11, 2024).

6. Eric Lynch, *Breaking Down the NCAA Realignment*, JOHNS HOPKINS NEWS-LETTER (Sept. 10, 2021), <https://www.jhunewsletter.com/article/2021/09/breaking-down-the-ncaa-realignment> [https://perma.cc/5GS3-RB8D].

7. *Id.*

8. *See infra* Section I.C.

9. The process by which schools change conference membership within the NCAA is referred to as conference realignment. For a discussion of the history of conference realignment in the NCAA, see Stewart Mandel, *College Football Conference Realignment Timeline: 124 Years of Drama, Money, and Bitterness*, ATHLETIC (July 14, 2023), <https://theathletic.com/4662822/2023/07/14/college-football-conference-realignment-history/>.

University of Oregon, and the University of Washington into its fold.¹⁰ Likewise, the Southeastern Conference (SEC) welcomed the University of Texas and the University of Oklahoma as new members in July 2024.¹¹ What does this mean for student athletes? Expanding conferences requires athletes to travel significantly further: To put the amount of extra travel in perspective, a Power Five athletic director estimated that “West Coast schools will need to factor an extra \$10 million in travel expenses into their annual budget for non-football teams.”¹² When college athletes travel more for competitions, they suffer harms such as the loss of in-class learning opportunities, “the physical and mental toll of added miles and time during the season, fewer chances to play in front of family and friends,” and other factors that have “a ripple effect on academics.”¹³

Under Title IX, which prohibits sex-based discrimination at federally funded institutions,¹⁴ universities’ conference realignment actions could give rise to a disparate impact discrimination claim. Realignment actions will likely confer greater benefits to male athletes by exacerbating inequities in how Name, Image, and Likeness (NIL) compensation has been allocated in the past and will likely be allocated in the future. Further, universities make conference realignment decisions despite the potential negative impacts of realignment on female athletes. First, conference realignment will disproportionately impose travel-related costs on female athletes relative to male athletes.¹⁵ Conference realignment decisions are motivated by financial considerations tied largely to exclusively male football programs¹⁶ that compete once per week. But this seemingly ignores the travel-related impacts on many female athletes who participate in sports that compete multiple times per week. For example, a women’s softball team that

10. Nicole Auerbach, *Tony Petitti’s 18-Team Big Ten: Why Divisions “Don’t Really Work” and CFP Format Thoughts*, ATHLETIC (Sept. 7, 2023) [hereinafter Auerbach, *18-Team Big Ten*], <https://theathletic.com/4840166/2023/09/07/big-ten-expansion-tony-petitti/>.

11. The Athletic Staff, *Texas, Oklahoma Given Marquee Home Opponents in 2024 SEC Schedule*, ATHLETIC (June 14, 2023), <https://theathletic.com/4610003/2023/06/14/texas-oklahomas-sec-schedule-teams/>.

12. Jeff Schultz, *It’s Time for College Football To Leave Conferences and Let Other Sports Make Sense*, ATHLETIC (Aug. 9, 2023), <https://theathletic.com/4759133/2023/08/09/college-football-realignment-schultz/>. The Power Five refers to a group of major collegiate conferences: the Big Ten, the SEC, the Atlantic Coastal Conference (ACC), the Big 12, and the Pac-12. However, following the recent realignment of many Pac-12 teams, the name “Power Four” more aptly describes the state of the major conferences.

13. *Id.*

14. 20 U.S.C. § 1681(a).

15. *Infra* Section II.A.1.

16. *Infra* Section I.C.

competes multiple times per week, and therefore has greater travel requirements, will incur higher costs than a men's football team that plays once per week and does not have to travel as often.

Of course, some men's sports—for example, baseball—compete multiple times per week as well.¹⁷ So, why frame the issue as “men's sports versus women's sports,” not “football versus every other sport, male or female?” As will be discussed further in Section I.A.2, the size and success of men's football programs gives them a gravity that—to ensure Title IX compliance—universities must craftily plan around by artificially bolstering the number of athletic opportunities they purport to offer female athletes.¹⁸ In this way, the very presence of men's football programs makes the structure of college athletics, as a whole, inherently gendered. The harms resulting from conference realignment actions motivated by men's football programs are thus similarly gendered.

Second, conference realignment will generate opportunities for student athletes to profit from their NIL and will disproportionately funnel money to male athletes relative to female athletes.¹⁹ Larger conferences created by conference realignment will in turn create larger broadcast markets, more publicity, and more competition for student athletes, thereby increasing the size of the NIL “pie” from which student athletes can earn money.²⁰ Moreover, the NCAA may soon allow schools to share broadcast revenue with student athletes following the *House v. NCAA* settlement, discussed further below.²¹ By creating larger broadcast markets, conference realignment will directly impact the amount of money available to be shared with student athletes. But historically, the NIL system disproportionately allocates money between male and female student athletes, and the proposed *House* settlement makes no attempt to ensure revenue is shared in a Title IX-compliant manner.²² Absent change, conference realignment is likely to exacerbate earning inequality between male and female athletes. If new policies do not properly calibrate how student athletes are compensated, conference realignment will inflict harms on female athletes without correspondingly allowing female athletes to reap the rewards brought by the new NCAA landscape.

This Comment explores how educational institutions' conference realignment actions may violate Title IX by exacerbating inequities

17. See, e.g., Ryan Rosenblatt, *College Baseball 101*, SBINATION: BRUINS NATION (Feb. 8, 2010, 12:00 PM), <https://www.bruinsnation.com/2010/2/8/1300310/college-baseball-101> [<https://perma.cc/3T8B-MLAQ>] (explaining that the UCLA Men's Baseball team typically competes twice per week).

18. *Infra* Section I.A.2.

19. *Infra* Section II.A.2.

20. *Infra* Section II.A.2.

21. *Infra* Section I.B.

22. *Infra* Section I.B.

inherent in the current NIL system and likely to be perpetuated in the future. Part I introduces the Title IX law; outlines the introduction, subsequent explosion, and future developments of the NIL system; and discusses the history and present wave of conference realignment. Part II analyzes how, by engaging in conference realignment, educational institutions may violate Title IX and its implementing regulations by disproportionately conferring benefits to male athletes relative to female athletes and neglecting to consider the cost of conference realignment on female athletes. Part III argues that to minimize the disparate impact of conference realignment on student athletes, the NCAA should commit to fixing the upstream problem of the NIL system. In doing so, Part III evaluates a recently proposed settlement agreement in *House v. NCAA*, a class action lawsuit challenging the NCAA's NIL policies on antitrust grounds, and recommends a modification to the revenue sharing model proposed in the agreement. Finally, this Comment concludes by reflecting on the importance of college athletics and the principles of Title IX.

I. THE HAT TRICK OF ISSUES: TITLE IX, NIL, AND REALIGNMENT

This Part provides background information relevant to discussing why conference realignment actions may violate Title IX. Section A describes relevant portions of the Title IX law and ways universities attempt to structure their athletics programs to remain Title IX compliant. Section B reviews the inequities of the current NIL system. Section C introduces the concept of conference realignment and explains the impetus for the current wave of conference realignment.

A. Title IX on Paper and in Practice

This Section provides a brief overview of Title IX. First, this Section discusses how Title IX operates as an antidiscrimination law. Second, this Section briefly explores how the presence of football programs requires universities to cleverly structure their athletics programs to remain Title IX compliant.

1. Title IX on Paper: An Overview of the Title IX Law

Congress passed Title IX of the Education Amendments Act ("Title IX") in 1972.²³ Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

23. 20 U.S.C. § 1681.

the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁴ Part of Title IX’s regulatory scheme focuses on effectuating Title IX’s proscription of sex-based discrimination “with respect to intercollegiate athletic activities” in federally assisted educational programs.²⁵ Title IX addresses sex discrimination in intercollegiate athletic activities by mandating that educational institutions provide equal opportunity to the sexes across three categories: “(1) athletic scholarships; (2) benefits and services; and (3) effective accommodation of students’ interests and abilities.”²⁶

Title IX’s regulations govern the award of scholarships by mandating that federally funded educational institutions “provide reasonable opportunities” for scholarships proportional to “the number of students of each sex” participating in college athletics programs.²⁷ Title IX’s regulations next provide that federally funded institutions must ensure the benefits and opportunities of athletics programs are equally available to student athletes of both sexes.²⁸ The regulations list several factors against which to measure whether athletics-related benefits and opportunities are being provided equally:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.²⁹

24. § 1681(a).

25. Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

26. Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1116 (2023) (citing Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979)).

27. 34 C.F.R. § 106.37(c)(1) (2024).

28. Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71414.

29. § 106.41.

Notably, this is an illustrative rather than exhaustive list.³⁰ Under the regulations, the Director of the Office for Civil Rights (OCR) has discretion to expand the list of equal treatment factors.³¹ Thus, in theory, Title IX reaches numerous other benefits and opportunities related to college athletics.

Lastly, the regulations require that educational institutions “accommodate effectively the interests and abilities of students . . . to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.”³² The discretionary, open-ended nature of the regulations serve to enable the OCR to prevent and remedy sex discrimination occurring in educational activities. On paper, latitude in expanding the list of equal treatment factors seems useful to ensure female athletes receive the opportunities they are entitled to under Title IX; in practice, however, the Title IX rules do not always protect these opportunities.

2. Title IX in Practice: Football’s Effects on Women’s College Athletics Programs

Title IX requires that universities award scholarships proportionately between male and female athletes.³³ Football rosters are large: The NCAA currently allows each university to award a maximum of eighty-five athletic scholarships to men’s football.³⁴ To remain compliant with their Title IX obligations and ensure athletic opportunities are offered on a proportionately equal basis between male and female athletes, universities can offset the size of football rosters by either cutting other men’s athletic programs or adding women’s athletic programs.³⁵

Instead of cutting men’s programs, some universities have attempted to exploit loopholes and artificially inflate the number of athletic

30. Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71415.

31. *Id.*

32. *Id.* at 71417.

33. Boston, *supra* note 26, at 1116.

34. See Michelle Brutlag Hosick, *DI Council Lifts Football Signing, Initial Counter Limits for Two Years*, NCAA (May 18, 2022, 6:20 PM), <https://www.ncaa.org/news/2022/5/18/media-center-di-council-lifts-football-signing-initial-counter-limits-for-two-years.aspx>.

35. See Off. for C.R., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two> [https://perma.cc/Z675-8DEP]; Patrick J. McAndrews, *Keeping Score: How Universities Can Comply with Title IX Without Eliminating Men’s Collegiate Athletics Programs*, 1 BYU EDUC. & L.J. 111, 131–35 (2012) (detailing attempts by Illinois State University and the University of North Dakota to remain Title IX compliant by cutting men’s athletic programs).

opportunities offered to women.³⁶ For example, Florida State University (FSU) counted indoor track and field and outdoor track and field as separate athletic programs.³⁷ For roster purposes, FSU counted every outdoor women's track and field athlete twice—even though over half of the team had never competed indoors.³⁸ The University of Michigan listed 43 players on its women's basketball roster—29 of these players were actually men that signed up to practice with the women's team.³⁹ The University of Wisconsin holds an “open house” each year to attract women to “walk-on” to the women's crew team.⁴⁰ For the 2018–19 season, Wisconsin listed 165 rowers on women's crew.⁴¹ But only 57 competed in a varsity contest, and 64 of these rowers never competed in a single race, scrimmage or otherwise.⁴² “Roster stuffing” of this kind is reportedly commonplace at Division I schools with football programs.⁴³

These examples demonstrate that under Title IX, college football programs are a heavy thumb on the scale of proportional equality in college athletics. Universities offering football programs therefore must fundamentally alter how they structure their women's athletic opportunities. Accordingly, while conference realignment inflicts harms broadly on men's and women's sports, the impacts of college football are inherently gendered. This principle should be kept in mind when examining university practices and policies driven by college football, such as NIL and conference realignment.

B. NIL's Troubled Past and Uncertain Future

On July 1, 2021, the NCAA implemented an interim policy allowing student athletes to profit from their NIL.⁴⁴ Prior to the interim NIL policy, the NCAA considered student athletes amateurs and allowed them to receive only a “scholarship and stipend” for playing their respective

36. See Kenny Jacoby, Lindsay Schnell, Rachel Axon, Steve Berkowitz, Dan Wolken & Nancy Armour, *Title IX Was Intended To Close the Gender Gap in College Athletics. But Schools Are Rigging the Numbers.*, USA TODAY, <https://www.usatoday.com/in-depth/news/investigations/2022/05/26/college-sports-title-ix-and-dark-illusion-gender-equity/7438716001/> [https://perma.cc/7X9U-Y7EF] (Dec. 15, 2022, 5:05 AM).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

sport.⁴⁵ But pressured by a groundswell of state legislation authorizing student athletes to leverage their NIL,⁴⁶ and Justice Brett Kavanaugh’s invitation for challenges to NCAA restrictions on student athlete compensation in *NCAA v. Alston*,⁴⁷ the NCAA retreated from its formerly staunch position on student athlete amateurism. Under the NCAA’s interim NIL policy, student athletes could leverage their online presence and on-field performance to contract with outside parties, obtaining sponsorships and other endorsement deals.⁴⁸ Indeed, student athletes have effectively leveraged NIL opportunities, collectively earning over \$900 million in just year one of the NIL policy.⁴⁹ Since then, the NIL market has grown and will likely continue to grow at an exponential rate.⁵⁰ For some athletes, NIL can be extremely lucrative: NIL valuations for the top NIL earners total in the millions of dollars.⁵¹

NIL collectives—collections of donors that are “structurally independent”⁵² of universities—have become integral to the growing NIL landscape. NIL collectives account for about twenty percent of NIL transactions by volume but are responsible for about eighty percent of

45. Jay Bilas, *Why NIL Has Been Good for College Sports ... and the Hurdles That Remain*, ESPN (June 29, 2022, 7:00 AM), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/3H3U-PGVM].

46. By July 13, 2021, twenty-eight states had passed laws permitting student athletes to exploit their NIL in some form. See *NIL State Laws*, NIL NETWORK, <https://www.nilnetwork.com/nil-laws-by-state/> [https://perma.cc/6WU5-VATB] (Aug. 27, 2022).

47. 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring) (“The NCAA is not above the law.”); Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, SPORTS ILLUSTRATED (June 29, 2021), <https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling> [https://perma.cc/QFX4-YEU8] (“Justice Kavanaugh seemed to be inviting the next plaintiff . . . to ‘bring it on’ to the Supreme Court . . .”).

48. See *Interim NIL Policy*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf (last visited Sept. 11, 2024).

49. Josh Schafer, *NIL: Here’s How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO FIN. (July 1, 2022, 1:59 PM), <https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html> [https://perma.cc/BD4W-QSD9].

50. See OPENDORSE, NIL AT 3: THE ANNUAL OPENDORSE REPORT 3 (projecting the NIL market to be worth \$2.55 billion by June 30, 2026).

51. See *On3 NIL 100*, ON3 NIL, <https://www.on3.com/nil/rankings/player/nil-100/> (last visited Sept. 11, 2024) (updated every Wednesday).

52. *Name, Image, and Likeness (NIL) Collectives*, IRS: TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/> [https://perma.cc/DK2T-7PSL] (Aug. 20, 2024).

the NIL money student athletes receive.⁵³ There are three dominant categories of collectives: (1) marketplace collectives; (2) donor-driven collectives; and (3) dual collectives.⁵⁴ Marketplace collectives facilitate NIL deals by “connect[ing] and creat[ing] opportunities” between athletes and businesses.⁵⁵ Donor-driven collectives “pool[] together booster and support funds” and effectively “wash” the donor money, “paying . . . players in an NCAA-compliant manner.”⁵⁶ Dual collectives operate as a hybrid of the other two categories and “feature both a marketplace and offer a place for supporters to place their donations.”⁵⁷ One example of an NIL collective is “Rising Spear,” Florida State University’s dedicated third-party NIL collective.⁵⁸ Rising Spear helps Florida State athletes “access monetization opportunities” with “donors, businesses, and community partners” to fully leverage their NIL.⁵⁹

Under the NCAA’s interim NIL policy, educational institutions were disallowed from facilitating a meeting between a prospective athlete and a collective⁶⁰ or otherwise “us[ing] NIL transactions to compensate for athletic participation or achievement or as an improper inducement.”⁶¹ Yet using NIL as a recruiting factor was commonplace at the NCAA’s largest universities.⁶² Indeed, one athletic director stated

53. Sam Weber, *NIL at Two: Two Years of Name, Image and Likeness in College Sports*, OPENDORSE 7 (July 21, 2023), <https://biz.opendorse.com/wp-content/uploads/2023/06/NILatTwo.pdf> [<https://perma.cc/45AD-MQZK>]; Dan Whateley & Margaret Fleming, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, BUS. INSIDER (Sept. 19, 2023, 2:25 PM), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals>.

54. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [<https://perma.cc/M9EV-MNHQ>].

55. *Id.*

56. *Id.* By diverting donor funds to pay student athletes, donor-driven collectives operate outside the realm of true arms-length transactions for use of an athlete’s NIL, such as Adidas paying a student athlete for appearing in a commercial. See, e.g., Audrey Kemp, *Adidas & Hailey Van Lith Quell the Anxieties of College Athletes in ‘You Got This,’* DRUM (Mar. 18, 2024), <https://www.thedrum.com/news/2024/03/18/adidas-hailey-van-lith-quell-the-anxieties-college-athletes-you-got> [<https://perma.cc/K99S-EV3Q>]. Thus, while donor-driven collectives fall under the “NIL” umbrella, their “wink and a nod” transactions create a pay-for-play system not originally contemplated by the NIL policy.

57. Nakos, *supra* note 54.

58. RISING SPEAR, <https://risingspear.com/> (last visited Sept. 11, 2024).

59. *Id.*

60. Nakos, *supra* note 54.

61. *Name, Image and Likeness Policy: Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited Sept. 11, 2024).

62. Boston, *supra* note 26, at 1135.

that NIL was the “No. 1 priority” for the school and that the school had to put themselves “in the best position possible to attract the best talent,” which would largely “hinge on . . . Name, Image, and Likeness.”⁶³ From the advent of NIL to the present day, NIL has been an enormous factor in schools’ recruitment of college athletes, despite the NCAA’s prohibition on institutional involvement with NIL collectives.⁶⁴

Recent developments have put the state of NCAA NIL policy in flux. In February 2024, the U.S. District Court for the Eastern District of Tennessee enjoined the NCAA from enforcing its prohibition on schools’ use of NIL as a recruiting inducement.⁶⁵ In April 2024, the NCAA ratified a new NIL policy which went into effect on August 1, 2024.⁶⁶ Under the NCAA’s new NIL policy, member schools are able to directly facilitate NIL deals between student athletes and third parties.⁶⁷ However, member schools may neither directly pay student athletes for use of their NIL nor use NIL deals as a recruiting inducement.⁶⁸ The NCAA’s comment to the new rule clarifies that member institutions will have discretion over whether and how they will facilitate NIL deals within the bounds of the rules.⁶⁹

Recent developments in the courtroom may result in the NCAA’s new NIL policy being short lived. On July 26, 2024, the NCAA and classes of student athletes submitted a proposal to settle *House v. NCAA*, a class action brought by Grant House, a former Arizona State University swimmer, that challenged the NCAA’s prohibition on compensating

63. *Id.* at 1135–36 (quoting Tim Sullivan, *Louisville’s Interim AD Josh Heird Plans New Department Devoted to Getting Athletes Paid*, COURIER J. (Jan. 21, 2022, 4:34 PM), <https://www.courier-journal.com/story/sports/college/louisville/2022/01/21/louisville-athletics-make-standalone-nil-department-help-recruit/6608187001> [<https://perma.cc/AQ5T-4D3U>]).

64. See Bill Carter, *The Impact of NIL on College Recruiting and why Alabama’s New Advantage Center Is a Case Study*, SPORTS BUS. J. (Feb. 21, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/02/21-Carter.aspx> [<https://perma.cc/NM6V-3J4D>].

65. *Tennessee v. NCAA*, No. 24-CV-00033, 2024 WL 755528, at *1 (E.D. Tenn. Feb. 23, 2024); Darius Walker, Jr., *Tennessee Federal Court Issues Preliminary Injunction Blocking NCAA’s NIL Restrictions*, OGLETREE DEAKINS (Mar. 12, 2024), <https://ogletree.com/insights-resources/blog-posts/tennessee-federal-court-issues-preliminary-injunction-blocking-ncaas-nil-restrictions/> [<https://perma.cc/7L5B-PTCF>].

66. Meghan D. Wright, *DI Council Approves NIL Reforms, Permits School Assistance with NIL Activity*, NCAA (Apr. 17, 2024, 6:32 PM), <https://www.ncaa.org/news/2024/4/17/media-center-di-council-approves-nil-reforms-permits-school-assistance-with-nil-activity.aspx>.

67. *Id.*

68. *Id.*

69. *Name, Image And Likeness Activities—Role of Institutions*, NCAA, <https://web3.ncaa.org/lstdbi/search/proposalView?id=107893> (last visited Aug. 2, 2024).

student athletes for their NIL on antitrust grounds.⁷⁰ The court denied preliminary approval to the July 26, 2024, settlement agreement and directed the parties to “go back to the drawing board.”⁷¹ On September 26, 2024, the parties submitted an amended settlement agreement, though the settlement agreement’s core terms remained essentially unchanged.⁷² Yet on October 7, 2024, the court granted preliminary approval to the September 26, 2024, amended settlement agreement.⁷³ If the court grants final approval to the settlement agreement, the NCAA and Division I conferences⁷⁴ will pay out over \$2.5 billion to athletes in back pay for athletes’ lost opportunities for broadcast NIL (BNIL),⁷⁵ third-party NIL, and “additional compensation” dating back to 2016 due to the NCAA’s prior prohibition on paying student athletes for their NIL.⁷⁶ The settlement money will be distributed amongst three settlement classes: a “Football and Men’s Basketball Class”; a “Women’s Basketball Class”;

70. David Steele, *NCAA’s \$2.8B NIL Deal, Revenue-Sharing Plan Sent to Judge*, LAW360 (July 26, 2024, 8:52 PM), <https://www.law360.com/articles/1858421/ncaa-s-2-8b-nil-deal-revenue-sharing-plan-sent-to-judge>; Plaintiffs’ Notice of Motion & Motion for Preliminary Settlement Approval at 4–5, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. July 26, 2024) (No. 450) [hereinafter Plaintiffs’ Notice of Motion].

71. Dorothy Atkins, *NCAA’s \$2.78B NIL Deal Misses 1st Shot at Initial OK*, LAW360 (Sept. 5, 2024, 10:01 PM), <https://www.law360.com/articles/1876372>.

72. *Compare* Amended Stipulation & Settlement Agreement, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Sept. 26, 2024) (No. 535-1), with Plaintiffs’ Notice of Motion, *supra* note 70.

73. Revised Order Granting Plaintiffs’ Motion for Preliminary Settlement Approval as Modified at 2–3, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Oct. 7, 2024) (No. 544).

74. The only conferences that were named defendants in the *House* litigation were the Power Five conferences. *NCAA Student-Athlete Settlement Proposal Takes Its Best Shot at Resolving Three Antitrust Cases*, DUANE MORRIS (Aug. 1, 2024) [hereinafter *NCAA Student Athlete Settlement Proposal*], https://www.duanemorris.com/alerts/ncaa_student_athlete_settlement_proposal_takes_best_shot_resolving_three_antitrust_cases_0824.html [<https://perma.cc/494A-S9BA>]. Yet, the Power Five conferences will pay only \$664 million as part of the settlement agreement, whereas the twenty-seven other conferences comprising Division I athletics—who are not parties to the litigation—will be responsible for paying \$990 million. *Id.*

75. The plaintiffs’ BNIL theory is predicated on the idea that each television broadcast of an athletic contest “itself constitutes a use of [the competing athletes’] NIL rights.” Defendants’ Joint Opposition to Plaintiff’s Motion for Class Certification at 6, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Apr. 28, 2023) (No. 249); see also Class Action Complaint, ¶ 16, *House v. NCAA*, No. 20-CV-03919 (N.D. Cal. June 15, 2020) (No. 1).

76. *NCAA Student-Athlete Settlement Proposal*, *supra* note 74. The “additional compensation” claims stem from *Carter v. NCAA*, which challenged the NCAA’s prohibition on payments for athletic services on antitrust grounds. Plaintiffs’ Notice of Motion, *supra* note 70, at 5. *Carter* was subsequently consolidated with the *House* litigation. *Id.* at 3.

and an “Additional Sports Class,” which represents the remainder of Division I student athletes.⁷⁷

Further, the settlement agreement proposes a ten-year-long permissive revenue sharing system under which NCAA schools may create a benefits pool and pay student athletes up to twenty-two percent of the “Pool” amount.⁷⁸ The “Pool” amount is the average annual athletic revenue generated by Power Five conference schools and is estimated at upwards of \$20 million per year.⁷⁹ Athletic revenue counts, among other things, revenue generated from selling media rights, including distributions of money from conferences to member schools as part of a broadcast television deal.⁸⁰ Member schools will have unilateral discretion to determine whether and to what extent benefit pool funds will be disbursed to individual student athletes, so long as schools’ policies are consistent with rules promulgated by their respective conferences.⁸¹

Since student athletes were allowed to receive compensation for their NIL, NIL earnings between male and female athletes have been far from equal. Data from the first year NCAA athletes were compensated for their NIL shows that 93% of all NIL money from donors goes to men’s athletics.⁸² Over 80% of all NIL money goes to football and men’s basketball programs alone.⁸³ By contrast, the top earning sport for women, women’s basketball, receives only 6.4% of NIL compensation,

77. Amended Stipulation & Settlement Agreement, *supra* note 72, at 5–6, 15–16.

78. Amended Injunctive Relief Settlement at 9–12, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Sept. 26, 2024) (No. 535-1). Because the proposed revenue sharing model is permissive, smaller Division I schools that do not generate as much revenue as the Power Five schools would not be required to engage in revenue sharing. Recruiting competition will incentivize better-resourced Division I schools to participate in revenue sharing. See Justin Williams, *What’s the Future of NIL Collectives After the House v. NCAA Settlement?*, ATHLETIC (Aug. 1, 2024), <https://www.nytimes.com/athletic/5672150/2024/08/01/nil-collectives-ncaa-lawsuit-settlement/?redirected=1>.

79. See Plaintiffs’ Notice of Motion, *supra* note 70, at 8–9.

80. Amended Injunctive Relief Settlement attach. 1 at 19, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (Sept. 26, 2024) (No. 535-1).

81. Amended Injunctive Relief Settlement, *supra* note 78, at 12–13. Given that the recent wave of conference realignment has shifted the balance of power between schools and their respective conferences, it is unclear whether conferences will be willing or able to implement rules that meaningfully restrict member schools’ discretion in implementing revenue sharing policies.

82. *NIL: One Year of Name, Image and Likeness*, OPENDORSE 6, https://opendorse.com/wp-content/uploads/2022/07/N1L_Full_063022_3.pdf [<https://perma.cc/P73D-QY8K>].

83. *NIL Insights*, OPENDORSE, <https://opendorse.com/nil-insights/> [<https://perma.cc/CQ7R-2C7Y>].

followed by women's volleyball at 1.5%.⁸⁴ Not all female athletes are losing out, however. One NIL tracking organization estimates that Olivia "Livvy" Dunne, Louisiana State University's social-media-famous gymnast,⁸⁵ will earn up to \$3.2 million in 2023.⁸⁶ Yet Dunne is a clear outlier in the general schema of female athletes' NIL earnings. In the aggregate, female athletes are earning less than male athletes; indeed, of the estimated top hundred NIL earners in 2023, only six are female, and nothing indicates that this disparity will change in the near future.⁸⁷ The glaring disparity in NIL earnings between male and female athletes reflects historic inequities carried forward by the NIL system, and writ large, "that historic trend of men getting more, [and] being seen as more important."⁸⁸

One cannot understate the extent to which NIL policy is an unsettled area of sports law. The NCAA's new NIL policy is not likely to take final shape before the *House* litigation settles. Nonetheless, it is clear that since the NCAA's adoption of the interim NIL policy in 2021, NIL earnings have been disproportionately funneled to male athletes relative to female athletes, and the proposed *House* settlement indicates this disparity is not likely to change in the near future. As discussed below, while the *House* litigation and the NCAA's new NIL policy are reshaping the NCAA's legal landscape, conference realignment is concurrently reshaping the NCAA's geographical landscape. To create an equitable NIL regime, decision-makers should be aware of the effects of conference realignment on student athletes.

C. A Play-by-Play of Conference Realignment

Conference realignment refers to the process by which universities change conference membership within the NCAA. Conference realignment is by no means a new phenomenon; in fact, controversies surrounding conference realignment are almost as old as the conferences themselves.⁸⁹ In 1899, only three years after the formation of the

84. *Id.* Men's basketball receives over twice as much NIL money as women's basketball. *See id.*; Carly Wanna, *Men Make Twice as Much Money as Women Under the NCAA's New Rules that Allow College Basketball Players To Cash In*, *FORTUNE* (Mar. 16, 2023, 2:54 PM), <https://fortune.com/2023/03/16/how-much-do-college-basketball-players-make-ncaa-men-twice-as-much-women-nil/>.

85. On3, an NIL valuation site, touts Livvy Dunne as the "most followed NCAA athlete on social media." *Livvy Dunne*, ON3, <https://www.on3.com/db/livvy-dunne-162353/> [<https://perma.cc/YG9Q-UAML>].

86. *On3 NIL 100*, *supra* note 51.

87. *Id.*

88. Wanna, *supra* note 84.

89. *See Mandel*, *supra* note 9.

conference today known as the Big Ten, drama stirred following the conference's decision to fold three additional schools into its ranks.⁹⁰ Over a century later, the Big Ten continues to grow. In August 2024, the Big Ten added the University of California Los Angeles, the University of Southern California, the University of Oregon, and the University of Washington,⁹¹ expanding a historically Midwestern⁹² conference into a bi-coastal super-conference of eighteen member institutions. Other conferences are also expanding, such as the SEC, which added the University of Oklahoma and the University of Texas in July 2024.⁹³ But realignment inevitably comes at a cost to the conferences from which universities transfer. The most striking example is the Pac-12, which was “stripped for parts” and left with only two member schools in 2024.⁹⁴

Why is the current wave of realignment happening? Perhaps unsurprising to those familiar with college sports, the answer boils down to “money and egos.”⁹⁵ Schools engage in conference realignment to negotiate and profit from larger television contracts,⁹⁶ an opportunity which expanded in 1984 after the Supreme Court's ruling in *NCAA v. Board of Regents*.⁹⁷ During the latter half of the twentieth century, the NCAA regulated television broadcasting of football games, worrying that unregulated broadcasting would decrease in-person attendance at football games.⁹⁸ Among other regulations, the NCAA's television plan mandated that only one football game could be broadcast per area, per week; additionally, each team was limited to two television appearances per season.⁹⁹ The Supreme Court held that the NCAA's television regulation

90. *Id.*

91. Auerbach, *18-Team Big Ten*, *supra* note 10.

92. Mandel, *supra* note 9.

93. The Athletic Staff, *supra* note 11.

94. Ralph D. Russo, *Analysis: Conference Realignment Has Mangled the College Sports Map, But to What Benefit?*, ASSOCIATED PRESS (Sept. 1, 2023, 5:09 PM), <https://apnews.com/article/acc-pac12-conference-realignment-sec-big-ten-big-12-009aa5779eee91e99cb837dc95dbd7f2>.

95. Schultz, *supra* note 12.

96. Seth Emerson, *Emerson: Big Ten Adding Washington, Oregon Another Cash Grab amid Leaders' NIL Hypocrisy*, ATHLETIC (Aug. 4, 2023), <https://theathletic.com/4748841/2023/08/04/big-ten-realignment-washington-oregon-nil/>; Nicole Auerbach, *Florida State Board of Trustees Threatens To Leave ACC Over Media Revenue Imbalance*, ATHLETIC (Aug. 2, 2023), <https://theathletic.com/4744003/2023/08/02/florida-state-acc-realignment/>; Nicole Auerbach & Stewart Mandel, *The Future of College Football, Inc.: Where the Sport's Money and Management Go from Here*, ATHLETIC (Sept. 27, 2022), <https://theathletic.com/3627099/2022/09/27/college-football-ncaa-breakaway-revenue-sharing/>.

97. 468 U.S. 85 (1984).

98. *Id.* at 89–90.

99. *Id.* at 90.

violated the Sherman Act,¹⁰⁰ leaving institutions in control over their television rights. Universities with significant brand cachet could exercise that control through realignment—by concentrating in the same conference, universities could collectively negotiate for more larger broadcast deals.¹⁰¹ Since *Alston*, conference realignment has proliferated.¹⁰²

The current wave of conference realignment will expand the geographical size of television markets as conferences such as the Big Ten and SEC collect high-viewership member schools. When conferences gain access to larger markets and television audiences, they can negotiate larger contracts with television networks.¹⁰³ For instance, in 2024, the Big Ten will have a media market about double the size of the SEC's,¹⁰⁴ and will earn over \$1 billion per year from its newest television contract, compared to the roughly \$300 million per year the SEC will earn from its newest contract.¹⁰⁵ As educational institutions continue to consolidate into larger conferences, educational institutions are likely to see their television contract earnings increase commensurately with the sizes of the conferences to which they belong.

II. UNIVERSITIES' CONFERENCE REALIGNMENT DECISIONS COULD VIOLATE TITLE IX BY EXACERBATING EARNING DISPARITIES BETWEEN MALE AND FEMALE ATHLETES

Universities' conference realignment decisions violate Title IX by exacerbating the sex-based disparities inherent in the existing NIL system. First, this Part will consider the likely effects of conference realignment in the context of an NIL system that disproportionately benefits male athletes relative to female athletes. Second, this Part will discuss why those effects could lead to the Department of Education finding that universities' conference realignment actions constitute

100. *Id.* at 119–20.

101. See Michael Beach, *Game of Dollars: TV Deals Drive College Football Realignment*, CROSS SCREEN MEDIA (Sept. 1, 2023), <https://crossscreen.media/state-of-the-screens/game-of-dollars-tv-deals-drive-college-football-realignment/>.

102. Mandel, *supra* note 9 (discussing the tectonic change in conference realignment since 2021). For a discussion of *Alston*, see *supra* note 47 and accompanying text.

103. Beach, *supra* note 101.

104. Scott Hirko, *A Different Way to Look at Power 5 Media Deals: By Media Market*, LINKEDIN (July 7, 2022), <https://www.linkedin.com/pulse/different-way-look-power-5-media-deals-market-scott-hirko-ph-d-/> [<https://perma.cc/846Z-NPVX>].

105. *Current College Sports Television Contracts*, BUS. COLL. SPORTS, <https://businessofcollegesports.com/current-college-sports-television-contracts/> [<https://perma.cc/GHX4-T7XX>] (Mar. 19, 2024).

disparate impact discrimination under Title IX and its implementing regulations.

A. Conference Realignment Will Impose Costs on All Student Athletes, but Will Only Benefit Some

In 2024, several schools changed conferences within the NCAA—but what does this mean for student athletes? By engaging in conference realignment, educational institutions are expanding the geographical scope of their conferences.¹⁰⁶ In doing so, conference realignment imposes onto student athletes certain travel-associated costs. These costs, to an extent, may be offset by increased NIL opportunities. But in the context of an NIL system that disproportionately benefits male athletes, the core bargain of conference realignment is inequitable with regard to how it affects male and female athletes. It is this scheme—imposing similar costs on all student athletes, but disproportionately granting benefits to some—that lies at the heart of the looming Title IX problem with conference realignment.

1. Conference Realignment Will Impose Travel-Based Costs on Athletes

One of the greatest costs of conference realignment is that student athletes will have to travel significantly further for competitions hosted by schools within the conference.¹⁰⁷ Although the prospect of increased travel may seem innocuous from an outside perspective, the increased travel requirements brought about by conference realignment impose heavy “human costs” on student athletes.¹⁰⁸ Human costs refer to noneconomic, hard to quantify harms such as “social costs” and “psychological damage.”¹⁰⁹ The human costs of conference realignment universities impose on their student athletes include more time out of the classroom due to increased travel distances, increased feelings of jetlag and tiredness, and negative impacts on mental health.¹¹⁰

Student athletes who have personally experienced the costs of conference realignment or have seen such costs on the horizon have

106. *Supra* Section I.C.

107. *See supra* Section I.C.

108. Susan M. Shaw, *The Human Cost of Conference Realignment*, FORBES (Oct. 3, 2023, 8:47 AM) [hereinafter Shaw, *The Human Cost*], <https://www.forbes.com/sites/susanmshaw/2023/10/03/the-human-cost-of-conference-realignment/?sh=1c39779e1e09>.

109. *Id.*

110. *Id.*

spoken out against universities continuing to engage in conference realignment. Morgan Scott, a University of Oregon softball player, asked: “Anyone going to talk about all the other sports that play multiple games in a weekend? What happened to mental health of student athletes being important? The balance of practice, travel, school, and having a social life is already hard enough. Why add even more stress?”¹¹¹ Paige Sinicki, one of Morgan’s teammates, said: “I picked to play in a high-level softball conference where being close to home would allow my parents to come watch my games. It’s unfortunate to hear that my senior year I’ll be playing as far as New Jersey-Rutgers as well as other east coast schools.”¹¹² And Nya Harrison, a Stanford women’s soccer player, stated:

From the point of view of a Stanford athlete, conference realignment would have a negative impact on us overall. . . . Taking midterms and finals on the road, having to make up 2-3 hour labs, etc., is not sustainable. Conference realignment would result in worsening mental health of college athletes who will have less sleep due to more traveling and more make-up work.¹¹³

Statistical data supports the three student athletes’ concerns: In a survey of 108 student athletes, the majority echoed concerns about the travel-based impacts conference realignment would have on student athletes’ mental health.¹¹⁴ Indeed, inadequate sleep is associated with “depression, suicide, and risk-taking behavior.”¹¹⁵ Moreover, sleep deficiency is correlated with poorer academic performance.¹¹⁶ The

111. Morgan Scott (@Morgan_Scott11), X (Aug. 4, 2023, 6:49 PM), https://twitter.com/Morgan_Scott11/status/1687611701976289280 [https://perma.cc/FW9Q-33PA].

112. Paige Sinicki (@paige_sinicki), X (Aug. 4, 2023, 6:16 PM), https://twitter.com/paige_sinicki/status/1687603515760488454 [https://perma.cc/N4X6-77VQ].

113. *NCPA Presses Colleges, Conferences, and Congress for Regional College Athletic Conferences*, NAT’L COLL. PLAYERS ASS’N (Sept. 7, 2023), <https://www.ncpanow.org/releases-advisories/ncpa-presses-colleges-conferences-and-congress-for-regional-college-athletic-conferences> [https://perma.cc/9WJ6-KQ8D].

114. Dean Golembeski, *Conference Realignment Poses Mental and Physical Risks to College Athletes*, BESTCOLLEGES (Aug. 22, 2022), <https://www.bestcolleges.com/news/analysis/conference-realignment-poses-mental-physical-risks-to-college-athletes/> [https://perma.cc/7AR6-2JYU].

115. *NCPA Presses Colleges*, *supra* note 113.

116. See Teddy Amenabar, *The Less College Students Sleep, the Worse Their Grades, Study Finds*, WASH. POST (Feb. 13, 2023, 3:17 PM),

travel-related costs of conference realignment are real and measurable and should be accounted for when determining whether university policies meet their Title IX obligations.

The costs of conference realignment will likely be felt across gendered lines. Realignment decisions are being made with respect to exclusively male football programs that compete once per week on Saturdays.¹¹⁷ Athletes competing in other sports such as soccer, volleyball, softball, and track and field will inevitably shoulder a greater burden because their sports compete more than once per week and often compete on weekdays. And while this implicates both men's and women's programs, as mentioned above, it is impossible to ignore the gendered effects of football on other athletic programs. Thus, while football, a male sport, is driving conference realignment decisions, many other sports, and many female athletes, experience the worst consequences.

2. Conference Realignment Will Amplify Benefits for Only Some Athletes

Conference realignment will also provide some NIL-related benefits that, to an extent, may offset some of the travel-associated costs imposed on student athletes. By increasing the geographic scope of traditionally regional conferences, student athletes will have access to larger markets and more publicity. Student athletes will not only be physically competing in more locations across the country but will also be broadcast to larger television audiences. Increased publicity should increase competition between NIL funding sources, as student athletes with increased exposure are more desirable targets for NIL deals.

Consider the following hypothetical.¹¹⁸ Two four-star¹¹⁹ prospect quarterbacks from Salem, Oregon, are being heavily recruited by

<https://www.washingtonpost.com/wellness/2023/02/13/sleep-college-hours-gpa-grades/> (“[E]very lost hour of average nightly sleep at the start of an academic term was associated with a 0.07-point drop in a student’s end-of-term GPA.”); H. Craig Heller et al., *The Negative Effects of Travel on Student Athletes Through Sleep and Circadian Disruption*, 39 J. BIOLOGICAL RHYTHMS 5, 12 (2024) (“Even a few hours of sleep deprivation can eliminate the gains made in learning that day.”).

117. Shaw, *The Human Cost*, *supra* note 108.

118. For an example of a similar hypothetical, see *Conference Realignment in the NIL Era*, CACE (July 30, 2021), <https://caceanswers.com/blog/2021/7/30/conference-realignment-in-the-nil-era> [<https://perma.cc/MBV7-4BF2>].

119. The “star” system is used to rate football recruits on a scale of zero, two, three, four, or five stars. Four-star prospects are highly talented and are considered to be within the top 300 high school football players in the United States. *Football Recruiting Rankings*, NCSA COLL. RECRUITING, <https://www.ncsasports.org/articles-1/football-recruiting-rankings> [<https://perma.cc/SLP8-3ML9>].

colleges during their senior year of high school. The first quarterback, whose awesome quarterback play causes most people refer to him only by his first name—Oberon—commits to the University of Oregon. The second quarterback, Orion Statham, is equally skilled and commits to Oregon State University. During his freshman year at Oregon, Oberon has a successful year, leading his team to nine wins and a bowl game. During his freshman year at Oregon State, Orion Statham plays just as well and enjoys equal success.

Then, Oregon leaves the Pac-12 and joins the Big Ten, while Oregon State remains in the Pac-12. Despite Oberon and Orion Statham's identical quarterbacking prowess, Oberon will likely be able to make more NIL money throughout the rest of his college career simply by virtue of playing in a conference with a larger media market. Due to Oregon's conference realignment actions, Oberon will compete in front of tens of thousands of football fans across the country, as he travels each Sunday to games in New Brunswick, New Jersey; Los Angeles, California; Ann Arbor, Michigan; and elsewhere around the United States. Conversely, Orion Statham will not have nearly the same reach as Oberon. So when a brand like Coca-Cola—which is interested in being broadcast into the living rooms of as many soda-drinking Americans as possible—wants to strike an NIL deal with a star quarterback, Oberon will be able to leverage his national audience and obtain more money than Orion Statham.

This hypothetical illuminates how some students who find themselves in expanding conferences will have access to “enhanced NIL opportunities.”¹²⁰ These opportunities, namely “more significant endorsement deals and sponsorship agreements,” will naturally follow the new “media landscape” in which student athletes will find themselves situated due to conference realignment.¹²¹ Yet because the NIL system disproportionately funnels money to male athletes, projected benefits of conference realignment will be distributed along gendered lines.¹²²

The same problem is likely to exist in a post-*House* NIL system if the court grants final approval to the September 26, 2024, amended settlement agreement. Currently, the proposed revenue sharing model makes no attempt to ensure revenue is shared fairly between male and female athletes. As conference realignment generates larger

120. *Financial Implications of Conference Realignment*, WIRE, <https://thewire.signingdaysports.com/football/financial-implications-of-conference-realignment/> [https://perma.cc/Z33Y-DWCJ].

121. *Id.*

122. *Supra* Part I.

television broadcast contracts,¹²³ the average annual athletic revenue from which the shared benefits pool is calculated will increase.¹²⁴ But nothing indicates that universities will attempt to distribute shared athletic revenue in an equitable manner. Indeed, history teaches that “the NCAA’s broadcast agreements, corporate sponsorship agreements, corporate sponsorship contracts, distribution of revenue, organizational structure, and culture all prioritize Division I men’s basketball over everything else in ways that create, normalize, and perpetuate gender inequities.”¹²⁵ Moreover, absent guidance from the settlement agreement, some believe Title IX would not reach payments under the proposed revenue sharing model because revenue payments would effectively be “NIL payments via broadcast rights.”¹²⁶ By failing to provide direction on how member schools should implement revenue sharing in a Title IX-complaint manner, the settlement agreement creates a high risk that athletic revenue will be generated at the expense of female athletes and “shared” by disbursing athletic revenue almost exclusively to male athletes.

In sum, conference realignment is likely to harm the majority of student athletes to some extent, whereas only the winners of the NIL system—primarily male football and basketball players—will be made better off. These gendered effects lie at the heart of conference realignment’s impending Title IX issue.

B. Analyzing Universities’ Conference Realignment Actions Under Title IX

Universities’ conference realignment actions may violate Title IX because they confer greater benefits to male athletes and fail to consider harm caused to female athletes. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation

123. See *supra* Section I.C.

124. See Plaintiffs’ Notice of Motion, *supra* note 70, at 8–9; Amended Injunctive Relief Settlement app. A at 11–12, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (Sept. 26, 2024) (No. 535-1).

125. Objection to Settlement Agreement & Opposition to Motion for Preliminary Settlement Approval at 10–11, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Aug. 9, 2024) (No. 475) (quoting KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW PHASE I: BASKETBALL CHAMPIONSHIPS 2 (Aug. 2, 2021), <https://ncaagenderequityreview.com/> [<https://perma.cc/YD5S-5364>]).

126. See Justin Williams, *What I Heard at Big 12 Spring Meetings: Settlement Fallout, ‘Value Creation’ on Everyone’s Minds*, ATHLETIC (May 31, 2024), <https://www.nytimes.com/athletic/5533116/2024/05/31/big-12-spring-meetings-revenue-sharing/>. However, some Title IX experts suggest Title IX would implicate schools’ revenue sharing policies regardless of whether payments made under revenue sharing were classified as NIL payments. *Id.*

in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹²⁷ Title IX prohibits federally funded educational institutions from implementing policies or programs that treat men and women in a discriminatory manner.¹²⁸ In addition to prohibiting disparate treatment discrimination, Title IX also prohibits disparate impact discrimination.¹²⁹ Unlike disparate treatment discrimination, which occurs when someone is treated less favorably because of a protected characteristic such as sex, disparate impact discrimination occurs when the effects of a facially neutral policy systematically fall on a protected class.¹³⁰ When creating Title IX, Congress drew heavily upon Title VI, the racial discrimination law.¹³¹ Accordingly, Title VI law is of significant interpretive relevance when analyzing Title IX discrimination claims.¹³² In practice, courts have “essentially ‘borrowed’ the Title VI regulations relating to disparate impact in adjudicating Title IX cases.”¹³³

In Title VI cases, courts have held that plaintiffs do not have a private right of action to enforce Title VI regulations under a disparate impact theory.¹³⁴ In other words, if a plaintiff wants to sue in court, they must allege intent to discriminate.¹³⁵ If they cannot establish discriminatory intent, would-be plaintiffs must seek relief under Title VI’s regulations, which “validly proscribe activities that have a disparate

127. 20 U.S.C. § 1681(a).

128. *See id.*; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704–09 (1979).

129. *See Sharif ex rel. Salahuddin v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345, 360–61 (S.D.N.Y. 1989).

130. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (noting the difference between disparate treatment discrimination and disparate impact discrimination in a Title VII context).

131. Title IX “was patterned after Title VI of the Civil Rights Act of 1964.” *Cannon*, 441 U.S. at 694–95 (1979). Indeed, Title IX uses near “identical language to describe the benefited class” as Title VI, and “[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.” *Id.* at 694–96. Further, because there are significant similarities between Title IX and Title VII, Title VII is also of interpretive significance to issues arising under Title IX. *See Overview of Title IX: Interplay of Title IX with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, C.R. DIV., U.S. DEP’T JUST., <https://www.justice.gov/crt/title-ix> [<https://perma.cc/FA2U-NPCA>] (select subsection from table of contents) (Sept. 14, 2023).

132. *Cannon*, 441 U.S. at 694–96.

133. Jane Bloom Gris , *Question #1: Is There A Gender Gap in Performance on Multiple Choice Exams? A. Always B. Never C. Most of the Time*, 43 WOMEN’S RTS. L. REP. 140, 188 (2021) (citing *El-Attar v. Miss. State Univ.*, No. Civ.A. EC91326SD, 1994 WL 1890215, at *3 (N.D. Miss. Sept. 13, 1994)).

134. *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001).

135. *Id.*

impact on racial groups.”¹³⁶ Likewise, although the Supreme Court has been silent on whether there exists a cause of action under Title IX based on disparate impact,¹³⁷ several lower courts have followed Title VI jurisprudence, only recognizing a private right of action under Title IX in disparate treatment cases—that is, where the plaintiff alleges discriminatory intent.¹³⁸ Thus, unless the Supreme Court affirmatively establishes a private right of action in Title IX discriminatory impact cases, the only likely recourse for prospective plaintiffs challenging a policy under a disparate impact theory is to seek administrative relief through the Department of Education under Title IX’s implementing regulations.

To establish disparate impact discrimination under Title IX, the Department of Education must find that an educational institution receiving federal funds has a facially neutral practice or policy that disproportionately impacts people on the basis of sex.¹³⁹ A prima facie finding of disparate impact discrimination shifts the burden to the educational institution to show that they had a “substantial legitimate justification”—in essence, an “educational necessity”—for the discriminatory practice or policy.¹⁴⁰ If they can do so, the educational institution will be held liable only if there is either “an equally effective alternative practice which has a less of a discriminatory impact,” or if there is “proof that the legitimate practices are a pretext for discrimination.”¹⁴¹

1. The Department of Education Could Find that Universities’ Conference Realignment Actions Violate Title IX Under a Disparate Impact Theory

The Department of Education could find that universities’ conference realignment actions violate Title IX’s implementing regulations and disparately impact female athletes relative to male athletes. First, engaging in conference realignment is a facially neutral policy because it involves a school changing membership between NCAA conferences without any reference to sex or gender. Second, the

136. *Id.* at 281.

137. Zoë Seaman-Grant, *Title IX and the Alleged Victimization of Men: Applying Twombly to Federal Title IX Lawsuits Brought by Men Accused of Sexual Assault*, 28 MICH. J. GENDER & L. 281, 296 (2022).

138. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 223–26, 250–52 (2005).

139. *See Sharif ex rel. Salahuddin v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989).

140. *See id.*

141. *See id.*

Department of Education could find that engaging in conference realignment disproportionately impacts student athletes on the basis of sex.¹⁴² Section 106.41 of the Title IX Regulations provides that educational institutions receiving federal funds and operating college athletics programs must “provide equal athletic opportunity for members of both sexes.”¹⁴³ The Director of the Office for Civil Rights determines the availability of equal athletic opportunity via reference to a variety of factors, including, but not limited to:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.¹⁴⁴

Universities’ conference realignment actions could implicate section 106.41 by providing disparate athletic opportunities to male and female athletes in the form of publicity. Under the publicity factor, subfactors of publicity equivalence between male and female athletes include but are not limited to: (1) the availability and quality of sports information personnel (*i.e.*, sports media staff); (2) access to other publicity resources; and (3) the quantity and quality of publications and other promotional devices featuring men’s and women’s programs.¹⁴⁵

NIL opportunities could fit into the category of “other publicity resources” or “other promotional devices.” A brand advertisement featuring a student athlete certainly generates publicity for the athlete by broadcasting them to television audiences, and they are designed to promote both the athlete and sponsor. Indeed, “[p]ublicity is a reciprocal benefit with respect to NIL” because NIL “provides market exposure for

142. *See supra* Section II.A.

143. 34 C.F.R. § 106.41 (2024).

144. *Id.*

145. Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71417 (Dec. 11, 1979).

athletes that can be used to generate even more NIL opportunities.”¹⁴⁶ In the aggregate, conference realignment is likely to provide male athletes with many more NIL opportunities than female athletes.¹⁴⁷ By exacerbating disparities in how NIL opportunities are distributed amongst male and female athletes, universities’ conference realignment actions would deny female athletes equal access to “publicity resources” or “promotional devices” and thus fail to provide female athletes equal athletic opportunity under section 106.41.

Further, if the pool of shared benefits proposed in the *House* settlement is not fairly distributed to female athletes relative to male athletes, the Director of the OCR could find that universities’ conference realignment actions deny equal athletic opportunities under a new factor. Section 106.41’s list of ten equal treatment factors is “not exhaustive.”¹⁴⁸ Thus, the Director of the OCR may, at her discretion, expand the list of equal treatment factors to address gender equity issues that Title IX’s implementing regulations did not explicitly anticipate¹⁴⁹—for example, unequal payments from an athletic revenue sharing system. Interpreting section 106.41 liberally and expanding the list of equal treatment factors would further two core purposes of Title IX: “avoid[ing] the use of federal resources to support discriminatory practices,” and above all, “provid[ing] individual citizens effective protection against those practices.”¹⁵⁰ Conference realignment actions are likely to exacerbate earning inequalities between male and female athletes with respect to NIL. Conference realignment would also exacerbate any earning inequalities arising under the revenue sharing system proposed in the *House* settlement. Accordingly, the Department of Education could find that engaging in conference realignment constitutes a facially neutral policy that disproportionately impacts student athletes on the basis of sex.

2. Educational Institutions Cannot Likely Establish that Conference Realignment Is an Educational Necessity

At this point, the educational institution engaging in conference realignment would bear the burden of showing that there is a “substantial legitimate justification” that makes engaging in conference realignment an “educational necessity.”¹⁵¹ Despite university officials’ attempts to

146. Boston, *supra* note 26, at 1139.

147. *Supra* Section II.A; *see also* Shaw, *supra* note 108.

148. Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71415.

149. *Id.*

150. *Cannon v. Univ. of Chi.*, 441 U.S. 667, 704 (1979).

151. *Sharif ex rel. Salahuddin v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989).

frame conference realignment in terms of a broader educational collaborative mission with their new fellow conference members,¹⁵² it is unlikely that educational institutions would be able to make this showing. All evidence indicates that universities' hunts for bigger television contracts drive the current wave of conference realignment.¹⁵³ This follows the historical trend of conference realignment chasing television money; ever since educational institutions could control their own television rights post-*Board of Regents*, conference realignment has been driven by the desire to acquire "new, large media markets in order to secure bigger and better media deals."¹⁵⁴ Engaging in conference realignment is a prudent business move. But federally funded educational institutions are not businesses and securing larger media deals is not an educational necessity.¹⁵⁵ First and foremost, college athletics programs are educational programs. Unfortunately, educational institutions engaging in conference realignment are neglecting their "unique responsibilit[ies]" to their students and viewing college athletics as a product to package and sell without considering the impact on the student athletes who make the programs possible.¹⁵⁶

Proponents of conference realignment may dispute the discriminatory impact of conference realignment in two ways. First, proponents of conference realignment could argue that while conference realignment gives male athletes access to bigger markets and more NIL opportunities, similarly situated female athletes will be playing in the same conference as the male athletes and will therefore have the same access to the benefits of realignment. If it is true that conference realignment will lead to top-earning male athletes earning larger NIL deals, so too should the NIL deals of top-earning female athletes increase. If educational institutions choose not to engage in conference realignment, then female athletes who do have NIL deals in place will lose out on access to larger markets, more publicity, and the chance to

152. E.g., *University of Oregon To Join Big Ten Conference in 2024*, OR. NEWS (Aug. 4, 2023, 2:36 PM), <https://around.uoregon.edu/content/university-oregon-join-big-ten-conference-2024> [<https://perma.cc/QG7H-3N9Y>] (University of Oregon President Karl Scholz: "The connections we will make with some of the leading research institutions in the world will provide new opportunities for our students, staff, faculty, and university stakeholders.").

153. See *id.*; sources cited *supra* note 96.

154. Thomas A. Baker & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 342 (2016).

155. Susan M. Shaw, *Money Has Torn the Pac-12 Apart. Student-Athletes Are Left Holding the Pieces*, FORBES (Aug. 8, 2023, 6:06 AM) [hereinafter Shaw, *Money Has Torn*], <https://www.forbes.com/sites/susanmshaw/2023/08/08/money-has-torn-the-pac-12-apart-student-athletes-are-left-holding-the-pieces/?sh=52c47e4e65c1>.

156. *Id.*

leverage their NIL for more money. Enjoining conference realignment actions under Title IX would thus be counterproductive because doing so would leave female athletes materially worse off.

This argument fails to recognize that Title IX and its accompanying regulations reflect Congress's policy determination that discriminatory practices and policies are normatively wrong—and should therefore be prohibited—because they affect people differently based on a protected characteristic. This is true even when the discriminatory practice or policy provides some material benefit to those they discriminate against. For example, consider a hypothetical school-funding system implemented in a highly segregated school district. The hypothetical school-funding system allocates surplus money to schools by providing schools with a certain amount of “bonus” funding based on year-over-year improvement in standardized test scores. While facially neutral with respect to race, if this funding program has the effect of giving predominantly White schools twenty-five percent extra funding compared to the previous year and predominantly Black schools only two percent extra funding, the program could be objectionable under Title VI's implementing regulations. This would be true even though in the absence of the funding program, the predominantly Black schools would have less money. Total exclusion from benefits is unnecessary under a disparate impact claim because the harm recognized by a theory of disparate impact discrimination is the disproportionate exclusion from benefits. Like the hypothetical school-funding formula, the fact that conference realignment will lead to monetary gain for some female athletes should not preclude a finding of disparate impact discrimination when, in the aggregate, the rate of gain between male and female athletes will be extremely disproportionate.

Second, proponents of conference realignment might argue that the majority of NIL money has thus far been distributed by NIL collectives and businesses that are—in theory—independent from the educational institutions. The presence of NIL collectives and businesses as third parties outside of the control of educational institutions breaks the causal chain between educational institutions' conference realignment actions and the disparate impact on female athletes. Accordingly, the Department of Education should not hold educational institutions responsible for any third-party activities that may result from the educational institutions' conference realignment actions.

But historically, NIL sources such as collectives and businesses have not in fact operated independently from educational institutions. Despite NCAA rules to the contrary,¹⁵⁷ NIL sources intertwined with educational

157. *Name, Image and Likeness Policy: Question and Answer*, *supra* note 61.

institutions in the process of recruiting student athletes.¹⁵⁸ As educational institutions competed for top recruits, they continued to push the envelope of NIL involvement under the interim NIL policy. For example, The Ohio State University created an “Edge Team,” which was designed to be “an internal advisory group whose members can assist student athletes with access and resources to successfully pursue NIL opportunities.”¹⁵⁹ Ohio State allowed the “Edge Team” to “work with companies and brands to assist in the NIL process.”¹⁶⁰ And in January 2024, the NCAA found that a football coach at Florida State University ran afoul of the NCAA’s NIL-related ethical conduct rules by driving a prospect to a meeting with a booster who was also the CEO of an NIL collective.¹⁶¹ During the coach-facilitated meeting, the booster offered the prospect NIL deals in the ballpark of \$180,000 per year as a recruiting inducement.¹⁶² The NCAA subsequently sanctioned Florida State University and the football coach for violating the interim NIL policy.¹⁶³

Post-*House*, schools will likely remain intertwined with NIL collectives and businesses that offer “third-party” NIL contracts. Under the proposed settlement and the NCAA’s new NIL policy, athletics departments may bring NIL collectives in-house to facilitate third-party NIL deals between businesses and student athletes.¹⁶⁴ The proposed settlement contemplates disclosure of third-party NIL contracts in excess of \$600 and evaluates whether such contracts are “true NIL”—meaning that they provide fair, market-value compensation for use of an athlete’s NIL, not mere “pay-for-play inducements.”¹⁶⁵ But schools’ track records under the interim NIL policy suggest that “those with the means and

158. See *supra* text accompanying notes 53–60.

159. Ezzat Nsouli & Andrew King, *How Schools and Private Entities Have Engaged in NIL Activity*, SQUIRE PATTON BOGGS (July 19, 2022), <https://www.sports.legal/2022/07/how-schools-and-private-entities-have-engaged-in-nil-activity/> [<https://perma.cc/UZ5H-YGKH>]; Boston, *supra* note 26, at 1146. For an even more egregious example, see the University of Florida (UF) officially partnering with the “Gator Collective,” an NIL collective for UF student athletes. *Id.*

160. Nsouli & King, *supra* note 159.

161. Meghan Durham Wright, *NIL-Related Recruiting Violation Occurred in Florida State Football Program*, NCAA (Jan. 11, 2024, 7:22 PM), <https://www.ncaa.org/news/2024/1/11/media-center-nil-related-recruiting-violation-occurred-in-florida-state-football-program.aspx>.

162. *Id.*

163. Ross Dellenger, *Sources: NCAA Levies Significant Penalties on Florida State for NIL Recruiting Violations*, YAHOO! SPORTS (Jan. 12, 2024), <https://sports.yahoo.com/ncaa-levies-significant-penalties-on-florida-state-for-nil-recruiting-violations-002044903.html> [<https://perma.cc/JK2S-XH25>].

164. Williams, *supra* note 78.

165. *Id.*

motivations will find ways to cut corners” and use NIL to engage in pay-for-play recruiting.¹⁶⁶ Indeed, administrators and coaches in college athletics are skeptical that the *House* settlement will be able to quash under-the-table recruiting inducements masked as true NIL.¹⁶⁷ Thus, the threat of sex discrimination in college athletics still looms large. When educational institutions play active roles in facilitating NIL deals, it is considerably harder to accept the argument that it is unfair to hold schools responsible for the discriminatory effects of the NIL system they facilitate. Given schools’ pervasive involvement in facilitating NIL contracts, the presence of a third-party NIL source should not break the chain of causation and preclude a finding of disparate impact discrimination.

Moreover, even if educational institutions were truly independent from NIL sources and did not work with NIL sources to facilitate deals, “schools have been held accountable by multiple regulatory bodies for both unethical and illegal actions by third parties.”¹⁶⁸ For example, the NCAA sanctioned Southern Methodist University for violating NCAA prohibitions on impermissible recruiting inducements.¹⁶⁹ Moreover, in ensuring compliance with Title IX, the OCR has required public secondary schools to remedy boosters’ disparate provision of resources to boys’ athletics teams relative to girls’ teams.¹⁷⁰ Lastly, a Florida district court held that an educational institution (in that case a high school) could not avoid liability on the grounds that the booster club for boys’ athletics teams is simply “more successful” in fundraising than the booster club for girls’ athletics teams.¹⁷¹ According to the court, an educational institution is “responsible for the consequences” of the disparate funding system to which it “acquiesced.”¹⁷² While a court has not yet applied the rationale of that case to an institution of higher education, logically, the distinction is not legally significant. The history of Title IX enforcement indicates that holding educational institutions responsible for conference realignment actions that exacerbate a disparate NIL system, even when third parties are involved in that system, would not be a novel solution.

A finding of disparate impact discrimination would likely involve a broad interpretation of Title IX’s implementing regulations. But Title

166. *Id.*

167. *Id.*

168. Boston, *supra* note 26, at 1142.

169. *Id.*

170. *Id.* at 1144.

171. *Daniels v. School Bd. of Brevard Cnty.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).

172. *Id.*

IX's dual purposes—"avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens effective protection against those practices"—indicate that decision-makers should embrace a liberal reading of the implementing regulations, not shy away from it.¹⁷³ Providing effective protection against discriminatory practices is only possible if we are cognizant of the way conference realignment "affect[s] women's sports in particular," which in turn requires "looking at the outcomes of decisions, not their intent."¹⁷⁴

III. CALLING AN AUDIBLE: THE *HOUSE* SETTLEMENT SHOULD ADDRESS NIL DISPARITIES BY IMPLEMENTING REVENUE SHARING POLICIES BASED ON TITLE IX'S PROPORTIONATE EQUALITY STANDARD

Universities' conference realignment actions may violate Title IX because they exacerbate gendered disparities that are inherent in the current NIL system and are likely to be perpetuated post-*House*.¹⁷⁵ Thus, the easiest way to avoid Title IX issues stemming from conference realignment would be to fix the upstream problem of the disparate allocation of NIL money and revenue sharing payments.

While the *House* settlement is a pivotal development in promoting fair compensation for student athletes, it misses an opportunity to advance the ball on Title IX. Rather than punt on this issue, the NCAA should avoid future litigation by using the settlement agreement to create a Title IX compliant NIL environment. To ensure Title IX compliance, the settlement agreement should incorporate the proportional equality standard from Title IX's regulation of athletic scholarships into the distribution of shared revenue from the benefits pool. Title IX's implementing regulations prohibit universities from discriminating against student athletes on the basis of sex when providing financial assistance.¹⁷⁶ This encompasses athletic scholarships, for which educational institutions must provide reasonable opportunities to members of each sex "in proportion to the number of students of each sex" participating in college athletics.¹⁷⁷ Educational institutions comply with these regulations if, when dividing the amount of available aid by the number of male or female athletes, the amount of aid allocated to male and female athletes is substantially equal.¹⁷⁸ As recognized by the

173. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

174. Shaw, *supra* note 108.

175. *See supra* Section II.A.

176. 34 C.F.R. § 106.37(a)(1) (2024).

177. § 106.37(c).

178. Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979).

OCR, university policies that make available benefits which are “financial in nature” should be subject to the proportionate equality standard.¹⁷⁹ Thus, importing the proportionate equality standard for scholarships into the revenue sharing system proposed in the *House* settlement accords with Title IX’s goals.

Likewise, the settlement agreement should require universities to pool university-facilitated NIL payments together and distribute university-facilitated NIL funds proportionately to male and female athletes. Under this proposal, all university-facilitated NIL money generated during a given year would be held in a pool as escrow. At the end of the year, the pool money would be distributed to male and female student athletes proportionately to their representation in the university’s population of student athletes. For example, imagine Hypothetical University has 700 college athletes, of which 371 are men and 329 are women. During the year, Hypo U. generates \$25 million in NIL money through boosters, brand deals, and merchandise sales, which is placed into the university’s enhanced educational fund. At the end of the year, Hypo U. allocates 53% of the \$25 million pool, or \$13.25 million, to the male athletes, who represent 53% of the school’s student athletes. Likewise, the female athletes would receive 47% of the fund, or \$11.75 million. Such a system would be compliant with Title IX’s implementing regulations because male and female athletes are allocated financial benefits at proportionately equal rates.

Class counsel in the *House* litigation argue that addressing Title IX issues in the settlement is unnecessary¹⁸⁰ because the settlement excludes Title IX claims from release.¹⁸¹ But just because the NCAA is not required to address Title IX issues at this juncture does not mean they should punt on them. Even if the Title IX issues are orthogonal to the antitrust claims at the core of the *House* litigation, why should the NCAA treat exacerbating Title IX issues as the cost of resolving antitrust issues? Rather than create future problems to be resolved in the next blockbuster litigation, the NCAA should attempt to mitigate Title IX issues while it has the chance.

In the face of uncertainties accompanying the state of NIL, the role of Title IX, and the effects of conference realignment, the impending

179. Boston, *supra* note 26, at 1163 (quoting Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979)).

180. Thy Vo, *Female Athletes Say \$2.6B NCAA Deal ‘Vastly Favors’ Men*, LAW360 (Aug. 12, 2024, 8:30 PM), <https://www.law360.com/articles/1868735> (quoting attorneys for the class arguing that Title IX objections to the proposed settlement are “misplaced” and that “[d]iscrimination issues are for a different forum to address”).

181. Plaintiffs’ Supplemental Brief in Support of Motion for Preliminary Settlement Approval at 23, *In re Coll. Athlete NIL Litig.*, No. 20-CV-03919 (N.D. Cal. Sept. 26, 2024) (No. 534).

House settlement provides an important opportunity to reevaluate the future of student athlete compensation. If the NCAA is committed to Title IX compliance, it must strongly consider creating a new NIL environment based on Title IX's proportionate equality standard. Distributing shared revenue and university-facilitated NIL money under Title IX's proportionate equality standard would adequately compensate female athletes for the harms imposed by conference realignment. Moreover, using the settlement agreement as a vehicle to establish a set of policies that are clear, nondiscriminatory, and enforceable would help avoid future Title IX litigation. In contrast, punting on the Title IX issue would tacitly encourage practices that conflict with the purposes of Title IX and the best interests of student athletes. College athletes and administrators understand change is needed.¹⁸² Now, the NCAA needs to step up to the plate.

CONCLUSION

For a significant period of the twentieth century, collegiate athletic conferences grew concurrently with disparities between men's and women's participation in college athletics.¹⁸³ Then, in the late 1970s, Congress enacted Title IX,¹⁸⁴ and while the size of conferences continued to grow, gendered disparities in college athletics began to shrink. Today, conference realignment is causing conferences to expand, and due to the growth of NIL, gendered disparities are expanding concurrently. Now, the legal landscape of college athletics is ripe for change, creating another opportunity to shrink such disparities.

College athletics are fundamentally educational programs: They are a means for college students "to participate in one form of campus life."¹⁸⁵ Fairness in college athletics is therefore important because it implicates not just leisure or money, but education and the "personal growth" that comes with the opportunity to experience extracurricular activities.¹⁸⁶ For spectators, college sports play an important role in

182. See *supra* Section II.A.1; Ralph D. Russo, *Revenue-Sharing with Major College Football Players Seems 'Inevitable.' How Could It Be Done?*, ASSOCIATED PRESS (Sept. 12, 2023, 12:30 PM), <https://apnews.com/article/college-athletes-revenue-sharing-726b9a5a8aa9a28575fe8001ee19582d> (Notre Dame Director of Athletics Jack Swarbrick: "I don't hear a lot of ideas that have Title IX at the forefront. They need to. That's important.").

183. See Mandel, *supra* note 9.

184. 20 U.S.C. § 1681.

185. Shaw, *Money Has Torn*, *supra* note 155.

186. *Id.*

American culture.¹⁸⁷ But if we also value the education and personal growth that participation in college sports instills in student athletes, it becomes incumbent upon us to be acutely aware of the gendered effects of sports policy. This, in keeping with the spirit of Title IX, requires “looking at the outcomes of decisions, not their intent.”¹⁸⁸

187. For example, every year, Americans fill out between sixty million and one hundred million brackets for the NCAA’s March Madness tournament. Madison Williams, *Has Anyone Ever Had a Perfect March Madness Bracket?*, SPORTS ILLUSTRATED (Mar. 12, 2023), <https://www.si.com/college/2023/03/12/has-anyone-ever-had-perfect-march-madness-ncaa-tournament-bracket> [https://perma.cc/PAP6-HCQB]. And in 2023, the most-watched college football game totaled almost twenty-eight million viewers. *College Football TV Ratings*, SPORTS MEDIA WATCH, <https://web.archive.org/web/20240114220507/https://www.sportsmediawatch.com/college-football-tv-ratings/>.

188. Shaw, *The Human Cost*, *supra* note 108.