POTENTIAL ANTITRUST ISSUES WITH NIL GO'S ALGORITHMIC DETERMINATIONS OF NIL "FAIR MARKET VALUE"

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Abstract

The House *Settlement introduces a new regulatory architecture for college sports: Universities may now share revenue directly with athletes but only within a capped system accompanied by centralized oversight of third-party name, image, and likeness (NIL) transactions. The newly formed College Sports Commission (CSC), working with Deloitte, has operationalized these rules through NIL Go, a data-driven platform that evaluates whether athlete deals fall within a permissible "reasonable range of compensation." This article situates NIL Go within a broader set of industries turning to algorithmic tools to structure markets, including rental housing and hospitality, where shared pricing systems have recently come under judicial antitrust scrutiny. By comparing the CSC's model to these emerging forms of algorithmic coordination, the article identifies the key questions NIL Go raises for universities implementing the settlement and considers how developments in algorithmic-pricing litigation may shape future governance of athlete compensation.*

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INTRODUCTION

The Supreme Court's decision in *NCAA v. Alston*[1] and the class action and settlement that followed in *House v. NCAA*[2] have ushered in a new era in intercollegiate sports. Alongside new roster limits, controls over third-party name, image, and likeness (NIL) deals with college athletes,[3] and $2.576 billion in damages for lost earnings, the *House* Settlement requires the National Collegiate Athletic Association (NCAA) to change its rules and permit—for the first time since its formation in 1906—direct payments from universities to athletes, commonly called "revenue sharing."[4]

But this new right for athletes comes with a catch. The *House* Settlement also created a regime modeled after salary caps in professional sports leagues.[5] It puts a uniform "pool limit" on university revenue sharing, which acts as a ceiling on the amount of revenue schools are allowed (but not required) to distribute to their athletes.[6] The pool limit is ostensibly designed to create more parity between the

1 *See* 594 U.S. 69, 75, 94 (2021) (refusing to grant the NCAA "immunity from the normal operation of the antitrust laws").

2 *See In re* College Athlete NIL Litigation (*House* Lawsuit), No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. June 6, 2025) (granting motion for final approval of class action settlement). The settlement also incorporates two other antitrust lawsuits *Hubbard v. NCAA*, No. 23-cv-01593 (N.D. Cal.) (alleging that the collective refusal of schools to fund pre-2021 athletes the cash academic achievement awards provided to athletes after the Supreme Court's decision in *NCAA v. Alston* violates antitrust law), and *Carter v. NCAA*, No. 23-cv-06325 (N.D. Cal.) (alleging that a variety of NCAA rules prohibiting schools from directly compensating athletes for their athletic services violates antitrust law.) *See* Marc Edelman & Michael A. Carrier, *Of Labor, Antitrust, and Why the Proposed House Settlement Will Not Solve the NCAA's Problem*, 93 Fordham L. Rev. 1603, 1604 (2025).

3 NIL refers to a person's legal right to control and profit from the commercial use of their name, physical appearance, and personal brand. *See, e.g.*, Sara Coello, *What Is NIL in College Sports? How Do Athlete Deals Work?*, ESPN (Mar. 24, 2025), https://www.espn.com/college-sports/story/_/id/41040485/what-nil-college-sports-how-do-athlete-deals-work. NIL deals are typically endorsement contracts, such as when an athlete appears on a Wheaties box or in a Gatorade commercial. They can also include paid personal appearances, social media sponsorships, autograph signings, television contracts, merchandising, and other similar ventures.

4 Fourth Am. Settlement Agreement, at art. 3, § 1, House v. NCAA, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. May 7, 2025), Dkt. No. 958-1 [hereinafter *House* Settlement]. The settlement uses the NCAA's existing Membership Financial Reporting System to define "shared revenue." *Id*. Broadly speaking, it includes revenue from ticket sales, guarantees for away games, media rights, NCAA and conference distributions, royalties, licenses, and advertisements. *Id*.; NCAA, *2025 Agreed-Upon Procedures*, App. A. It excludes revenue from direct government support, institutional support, student fees, booster contributions, third-party benefits like country club memberships and speaker fees, parking and concessions, sports camps, and in-kind contributions. *House* Settlement, *supra*; NCAA, *2025 Agreed-Upon Procedures*, *supra*.

5 *See*, *e.g.*, Nat'l Football League & Nat'l Football League Players Ass'n, Collective Bargaining Agreement, art. 14, § 2 (Mar. 2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf (prohibiting clubs and players from entering into any agreements "that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement.")

6 For the 2025–26 academic year, schools may only spend twenty-two percent of the average

NCAA's member institutions, dampening the advantage of those blessed with larger budgets.[7] However, third-party payments to athletes, like those received from an advertiser or NIL collective, do not count against it. Thus, the *House* Settlement excludes donations from boosters, alumni associations, or corporations from the "Average Shared Revenue" calculations that serve as the basis for the pool limit. The settlement also explicitly allows the NCAA and defendant conferences to "adopt rules that prohibit any transaction, payment, or agreement designed to defeat or circumvent" the pool limit,[8] seemingly to prevent pay-for-play schemes similar to the one that the Los Angeles Clippers are alleged by the National Basketball Association (NBA) to have created to compensate star Kawhi Leonard beyond the NBA's salary cap.[9]

This article explores how the Collegiate Sports Commission's (CSC's) reported use of centralized, algorithm-driven oversight creates antitrust exposure—not only

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shared revenue of "Power Four" conferences and Notre Dame. *House* Settlement, *supra* note 4, at art. 3, § 1(e). The "Power Four" conferences are the Atlantic Coast Conference (ACC), the Big Ten Conference (Big Ten), the Big 12 Conference, and the Southeastern Conference (SEC). They, along with the Pac-12, were defendants in the *House* Lawsuit, and they sit at the top of the NCAA pyramid (at least for football). In 2014, the NCAA gave the Power Four "autonomous" rulemaking authority, meaning they are allowed to adopt rules to allow their schools to provide certain athlete benefits beyond what the NCAA allows without the permission of the NCAA. Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS Sports (Aug. 7, 2014), https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/. *See, e.g.*, Jeffrey F. Levine, Christian D. Hanna, & Tiara Porterfield, *The Big Ten's Legal Duties and Risks: Protecting College Athletes Through the Voluntary Undertaking Doctrine in a Changing Landscape*, 35 Marq. Sports L. Rev. 69, 69 (2024) (using this label); Chris Vannini, *What It Means for Pac-12 to Be Classified as 'Nonautonomous FBS Conference'*, The Athletic (N.Y. Times) (Sept. 12, 2024), https://www.nytimes.com/athletic/5437109/2024/04/22/pac-12-nonautonomous-conference/ (explaining the autonomy given to the power conferences while noting the Pac-12 Conference's loss of that status). The Pac-12 Conference lost its "Power" status due to member defections, but that has afforded them the power and responsibility to set the structure and power of the new system outside of normal NCAA governance. *See, e.g.*, Brandon Marcello, *College Sports Power Conferences Hire MLB Exec to Serve in CEO Role After House v. NCAA Settlement Approval*, CBS Sports (June 6, 2025), https://www.cbssports.com/college-football/news/college-sports-power-conferences-hire-mlb-exec-to-serve-in-ceo-role-after-house-v-ncaa-settlement-approval/ (noting that it was the power conferences—not the NCAA—who hired the CEO for the new College Sports Commission).

7 *See, e.g.*, Press Release, Big Ten Conference, New Era Begins as House Settlement Approved (June 6, 2025), https://nextgen.bigten.org/wsoc/article/blt49fe66a3aced8eb6/ (quoting Big Ten Commissioner Tony Pettiti as stating that the settlement is "designed to bring stability, integrity and competitive balance to college athletics").

8 *House* Settlement, *supra* note 4, at art. 6, § 3.

9 Pablo Torre (@pablofindsout), X/Twitter, *Exclusive: Kawhi Leonard signed a $28M endorsement deal for a "no-show job" with a fraudulent tree-planting company funded by $50M from Clippers owner Steve Ballmer, according to documents obtained by @PabloTorre. "It was to circumvent the salary cap," an inside source says.* (Sept. 3, 2025, 4:02 AM), https://x.com/pablofindsout/status/1963180670810767577. *See also, e.g.*, Shwetha Surendran, *What Is Aspiration, the Company Behind the Kawhi Leonard Deal?*, ESPN (Sept. 13, 2025), https://www.espn.com/nba/story/_/id/46242361/aspiration-company-kawhi-leonard-steve-ballmer-la-clippers (explaining the scandal further); Ryan Young, *Aspiration Investors File Lawsuit Against Clippers Owner Steve Ballmer over Kawhi Leonard Scandal*, Yahoo! Sports (Nov. 3, 2025), https://sports.yahoo.com/nba/breaking-news/article/aspiration-investors-file-lawsuit-against-clippers-owner-steve-ballmer-over-kawhi-leonard-scandal-030344460.html (detailing a lawsuit filed by Aspiration's founders alleging that Clippers owner Steve Ballmer "knew exactly what was happening with the Aspiration-Kawhi Leonard scandal" and "channeled funds through Aspiration" to sign Leonard for beyond the salary cap).

for those entities themselves, but also for the NCAA and its member institutions. The agreements between the conferences and universities to abide by the CSC's rules and excommunicate athletes who violate them are an explicit price-fixing cartel and group boycott under section 1 of the Sherman Act, and their use of an algorithm to police the cartel places it squarely in the zone of several hub-and-spoke conspiracies being challenged in court today.[10] By comparing the NCAA's new scheme to these cases, it becomes clear that the CSC and NIL Go may find difficulty surviving if faced with antitrust scrutiny.[11] Despite those cases existing in different industries and somewhat different contexts, the same theories are in play—especially those related to data sharing and algorithmic coordination.

Part I of this article will provide an overview of the NIL Go system, explaining what the *House* Settlement allows and how the CSC has operationalized the settlement's provisions into a new world order for college sports. Part II surveys the growing legal scrutiny of algorithmic price fixing, focusing on the various actions that have been taken, are currently ongoing, and may yet still be filed against algorithmic price-fixing software firms and their clients and that represent the first major doctrinal tests of this antitrust theory. Part III then applies the logic of that litigation to the evolving NIL landscape, exploring who might bring antitrust claims against the CSC, what theories they might rely on, and how the use of shared pricing algorithms complicates the analysis. The article then concludes by identifying potential exposure points for member institutions and suggesting how they might navigate a compliance environment increasingly shaped by algorithmic price coordination.

I. HOW THE NCAA (TRIES TO) STOP CAP CIRCUMVENTION

A. The New Enforcement Regime

In the first half of 2025, the Power Four conferences used these provisions to create the CSC, tasked with "ensur[ing] that name, image and likeness (NIL) deals made between student-athletes and third parties are fair and comply with the

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10 *See* Second Am. Compl., *In re* RealPage, Inc., Rental Software Antitrust Litigation (No. II), No. 23-md-03071 (M.D. Tenn. Feb. 5, 2024), Dkt. No. 728 (consolidated private class action litigation filed by affected tenants against RealPage and accused conspirator landlords); Am. Compl., United States v. RealPage, Inc., No. 24-cv-00710 (M.D.N.C. Jan. 7, 2025), Dkt. No. 47 (civil enforcement action filed by the U.S. Department of Justice and the Attorneys General of North Carolina, California, Colorado, Connecticut, Illinois, Massachusetts, Minnesota, Oregon, Tennessee, and Washington).

11 Of course, it goes without saying that if Congress were to pass the Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act, the analysis offered by this article would likely be for naught, as the Act permits "interstate intercollegiate athletic associations" like the NCAA and CSC to establish rules related to "prohibited compensation" and treats such rulemaking as lawful under antitrust law. H.R. 4312, 119th Cong. §§ 6(a)(3), 7(a) (2025). However, while as of this writing the SCORE Act is reportedly expected to pass an early December 2025 House vote, its chances in the Senate seem far more bleak. *See infra* note 42. However, arguments that by creating a "'quasi-legislative' body" the *House* Settlement may already qualify as exempt under the Noerr-Pennington Doctrine—which exempts restraints of trade that result from government regulatory action—would almost certainly fail under the precedent set by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), where the Court rejected a Noerr-Pennington defense by a private organization seeking to cloak its horizontal restraints as merely "quasi-legislative" standard-setting. *Id*. at 500–05.

[new] rules."[12] The CSC , in turn, hired accounting firm Deloitte, which created a clearinghouse called "NIL Go."[13] As the CSC's primary oversight tool, the NIL Go system is more than just a clearinghouse—it is the enforcement arm of a newly brokered financial order in college sports. Its mandate is to ensure that athlete compensation from third parties does not become a backdoor route around the cap on institutional payments. To that end, NIL Go and Deloitte are collectively charged with screening and flagging NIL deals that appear inconsistent with the settlement's narrowly defined standards of legitimate compensation. All Division I college athletes are required to submit NIL deals worth $600 or more to the CSC and Deloitte "to determine whether [these] deals are made with the purpose of using a student-athlete's NIL for a valid business purpose and do not exceed a reasonable range of compensation."[14]

But the NCAA and CSC are not concerned with advertisers like Gatorade and Nike. They are concerned with "Associated Entities and Individuals."[15] That terms is defined in the *House* Settlement to capture alumni associations, booster clubs, and NIL collectives.[16] And the settlement specifically allows the NCAA to prohibit deals with those groups that are not "for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the Member Institution." [17] The CSC, deputized by the NCAA to effectuate the settlement, screens all NIL deals to determine first if they are with an "Associated Entity" and second if they are for "a valid business purpose" and within a "reasonable range of compensation."[18] Athletes who go forward with deals that have not been cleared can lose eligibility, and under certain circumstances, their schools can be punished as well.

The CSC defines "valid business purpose" as "the use of the student-athlete's NIL … to sell a good or service to the public for profit."[19] A "reasonable range of compensation" is one "commensurate with compensation paid to similarly situated

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12 *Home*, College Sports Commission, https://www.collegesportscommission.org/ (last visited July 21, 2025).

13 Press Release, College Sports Commission, *A New Era in College Sports Begins: Court Approves Landmark House Settlement, New College Sports Commission Launches* (June 6, 2025), https://www.prnewswire.com/news-releases/a-new-era-in-college-sports-begins-court-approves-landmark-house-settlement-new-college-sports-commission-launches-302475820.html.

14 *Student-Athlete NIL Deals*, College Sports Commission, https://www.collegesportscommission.org/nil (last visited July 21, 2025).

15 *House* Settlement, *supra* note 4, at art. 4, § 3.

16 *Id*. at art. 1, § 1(e). A "booster club" is an organization, also usually comprised of university alumni, that generates money, goods, and services for their schools' athletic programs. They sometimes differ from NIL collectives in that they do not directly pay college athletes or otherwise enter into NIL deals.

17 *House* Settlement, *supra* note 4, at art. 4, § 3.

18 Ross Dellenger, *Monumental Shift: Power Conferences, Not NCAA, to Control Policing Athlete Compensation*, Yahoo! Sports (Feb. 6, 2025), https://sports.yahoo.com/monumental-shift-power-conferences-not-ncaa-to-control-policing-athlete-compensation-172044629.html.

19 *Id*.

individual[s]."[20] The range is determined "based on multiple factors, including but not limited to, the deal's performance obligations, the student-athlete's athletic performance and social media reach, the local market and the market reach of his or her institution and program."[21] Athletes are compared to "similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the institution the student-athlete is currently enrolled in or being recruited to attend."[22] If a deal fails to satisfy these criteria, athletes can attempt to negotiate a new deal, abandon the deal entirely, or appeal the decision through an arbitration process.[23] Athletes and schools who fail to adhere to this process risk losing eligibility for NCAA athletics.[24]

Deloitte has developed an algorithm to manage these reviews, which involve over eight thousand deals valued at $79.8 million.[25] While the specific algorithm used is proprietary, Deloitte's determinations rely heavily not only on the specifics of the athlete and third-party deal, but also on comparisons to "similar types of NIL deals" previously submitted to the clearinghouse.[26] The algorithm has since become the CSC's primary enforcement mechanism against athlete compensation that might circumvent the *House* Settlement's pool limits.[27] It determines what NIL deals the CSC will accept as compliant, effectively substituting data-driven thresholds for the more categorical boycott it initially preferred.[28]

NIL Go presents serious antitrust issues for both the CSC itself and for its institutional stakeholders. Its "anti-circumvention" measures simply replace the NCAA's old compensation cap—a strict prohibition on NIL deals—with a new, higher tech one.

The CSC's focus on "Associated Entities" matters because NIL collectives and

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20 *Id*.

21 *FAQ*, College Sports Commission, https://www.collegesportscommission.org/faq (last visited July 21, 2025).

22 *Id*.

23 *Student-Athlete NIL Deals*, College Sports Commission, https://www.collegesportscommission.org/nil (last visited July 21, 2025).

24 *Id*.

25 College Sports Commission, *UPDATED NIL Deal Flow Report* (Sept. 5, 2025), https://assets.tina.io/29b83311-e587-42b1-861e-87ebde9aa253/UPDATED%20NIL%20Deal%20Flow%20Report%209.5.25%20(2).pdf.

26 *Id*.

27 When the CSC first rolled out NIL Go, it took the position that NIL collectives, usually an association of alumni, or "boosters," who pool funds to pay college athletes for their NIL rights, served no valid business purpose. Ross Dellenger, *House Attorneys, Power Conferences Work Out Deal to Relax NIL Collective Roadblocks*, Yahoo! Sports (July 22, 2025), https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-power-conferences-work-out-deal-to-relax-nil-collective-roadblocks-sources-213706035.html. After receiving significant push back from the NIL collectives and a threat from class counsel in *House* to take the guidance to the appointed special master, the CSC retracted that "guidance" and will put NIL collectives on equal footing with other businesses being evaluated by NIL Go. *Id*. For further discussion, *see infra* notes 45–48 and accompanying text.

28 *Id*.

boosters are the primary source of income for college athletes under the *House* Settlement regime. Yes, the stars of college athletics command huge contracts with the most recognizable brands, but the rank and file of college athletics report far less. According to data from the NCAA, the average value of disclosed NIL deals for the 2024–25 academic year was just under $3000 and the median deal was just under $700.[29] Around eighty percent of those deals are with NIL collectives.[30] Targeting those income sources is targeting college athletes' main source of financial support.

B. Implementation and Compliance

Deloitte's role in the CSC, which primarily involves administering the NIL Go algorithm, has been met with skepticism and scrutiny—in large part due to its role in determining whether a third-party deal is properly within that "reasonable range of compensation."[31] Deloitte has made clear that calculating this value will be achieved through data aggregation, logic models, and algorithmic flagging tools that create acceptable "compensation ranges" for these third-party deals.[32] While the specifics of the algorithm remain a black box, it is expected to include factors like athletic performance, social media reach and following, and the relative market size and "reach" of the athlete's school.[33] For example, while both Georgia State and the University of Georgia are located in the rich Atlanta market, an athlete at Georgia Tech will be considered to have more reach in that area than an athlete at Georgia State due to the greater popularity of the University of Georgia in the area.[34] Preliminary tests of the algorithm against presettlement deals revealed that a startling seventy percent of past deals from NIL booster collectives would have been denied while ninety percent of deals from public companies are approved.[35]

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29 NCAA, *Data Dashboard*, https://nilassist.ncaa.org/data-dashboard/ (last visited July 21, 2025).

30 Opendorse, *NIL at 3: The Annual Opendorse Report*, at 5 (2025).

31 *Id*. *See, e.g.*, Dan Wetzel & Pete Thamel, *Sifting Legitimate NIL Deals from the Darker World of Pay-to-Play*, ESPN (Apr. 2, 2025), https://www.espn.com/college-sports/story/_/id/44491912/ncaa-nil-pay-play-house-settlement (raising a number of questions regarding the challenges of determining an NIL deal's reasonable range of compensation); Tim Heafner, Max Rothman, & Ethan Hicks, *Assessing the 'Fair Market Value' of Affiliated NIL Deals Under the House Settlement*, Sports Bus. J. (May 22, 2025), https://www.sportsbusinessjournal.com/Articles/2025/05/22/assessing-the-fair-market-value-of-affiliated-nil-deals-under-the-house-settlement/ (same); Dan Shanoff, *The Launch of NIL Go Signals a High-Stakes Evolution in College Sports*, The Athletic (N.Y. Times) (June 11, 2025), https://www.nytimes.com/athletic/6418924/2025/06/11/nil-go-deloitte-bryan-seeley-college-sports-commission-moneycall/ (calling the "fair market value" (later changed to "reasonable range of compensation") criteria "hazy").

32 Ross Dellenger, *NCAA's House Settlement Approved, Ushering in New Era Where Schools Can Directly Pay Athletes*, Yahoo! Sports (June 7, 2025), https://sports.yahoo.com/college-football/article/ncaas-house-settlement-approved-ushering-in-new-era-where-schools-can-directly-pay-athletes-011814078.html.

33 *Id*.

34 *Id*.

35 Ross Dellenger (@RossDellenger), Twitter/X (May 13, 2025, at 4:10 PM), https://x.com/RossDellenger/status/1922414102061695476. This is what led to the aforementioned negotiations and policy changes related to how NIL collectives would be evaluated by NIL Go. *See supra* note 27.

Others have critiqued the potential privacy concerns with a required clearinghouse. NIL agent, attorney, and outspoken NCAA critic Darren Heitner pointed out in a blog post that Q&As provided by the NCAA are "silent on controls to prevent downloading or misusing sensitive deal terms outside the scope of compliance review"—a lack of clarity that is a "red flag."[36] He questions whether access to the clearinghouse database will be limited to Deloitte and the CSC "or could schools, conferences, or even individuals who may have the intention to become these agents' rivals peek at these contracts."[37] Even advertisers or NIL collectives who obtained the data could use a separate algorithm to artificially suppress the market rate for college athletes' NIL. He also predicted that the lack of clear confidentiality in the database could lead to issues where an athlete's contract prohibits disclosure and that some brands could be deterred from engaging with college athletes altogether "if they fear their proprietary terms will be exposed."[38]

Many also wonder what state legislatures will continue to do to try to give their in-state schools a competitive advantage. Tennessee, for example, passed a law in May 2025 barring athletic associations like the NCAA and CSC from interfering with a Tennessee athlete's ability to earn compensation or punishing a Tennessee institution "and its affiliated foundation" for activities like paying players.[39] New Jersey passed a similar bill in July 2025,[40] and a similar bill has been proposed in Oregon.[41] Various bills have been proposed at the federal level to curb the inconsistencies of these individual state actions, but only the most recent effort—the Student Compensation and Opportunity through Rights and Endorsements Act (SCORE) Act—has been able to find much traction in Congress (and even this bill seems unlikely to receive bicameral support).[42]

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36 Darren Heitner, *NIL GO Allows for More Overreach than Meaningful Oversight*, LinkedIn (June 27, 2025), https://www.linkedin.com/pulse/newsletter-image-likeness-vol-138-nil-go-allows-more-than-heitner-oueze/.

37 *Id*.

38 *Id*.

39 Tenn. Code Ann. § 49-7-2803 (West 2025). *See* Maddy Hudak, *Tennessee 'Athlete-Friendly' NIL Law Takes Shot at House Settlement*, NIL Daily (Sports Illustrated) (May 18, 2025), https://www.si.com/fannation/name-image-likeness/nil-news/tennessee-athlete-friendly-nil-law-takes-shot-at-house-settlement. Of note, however, the statute explicitly does not create a private cause of action, leaving it to the Tennessee Attorney General to enforce the law if deemed appropriate. Tenn. Code Ann. at § 49-7-2803(b). *See also* Zeigler v. NCAA, No. 25-cv-00226, 2025 WL 1671952, at *4 (E.D. Tenn. 2025) (rejecting an athlete's argument that the new Tennessee statute "augmented Tennessee antitrust law and rendered all of Defendant's eligibility rules illegal in Tennessee").

40 S4439 (N.J. 2025). *See Governor Murphy Takes Action on Legislation*, State of New Jersey: Governor Phil Murphy (July 22, 2025), https://www.nj.gov/governor/news/news/562025/approved/20250722c.shtml (noting that S4439 was signed into law).

41 H.B. 3694 (Or. 2025). *See* Ryan Clarke, *Oregon NIL Bill Passes Senate, Nears Governor's Desk*, The Oregonian (June 2, 2025), https://www.oregonlive.com/sports/2025/06/oregon-nil-bill-passes-senate-nears-governors-desk.html.

42 H.R. 4312, 119th Cong. (2025). The bill would forbid states from maintaining or enforcing any law that counteracts any part of the rest of the bill, which would grant antitrust immunity to the CSC, regulate agents, and disclaim college athlete employment status. *Id*. at § 10. It has received significant opposition from state Attorneys General, labor groups, Democrats, and groups supporting college athletes due to, among other things, the antitrust exemption it would hand

Finally, even more have expressed deep skepticism as to whether the CSC and NIL Go will actually be able to bridle an NIL collective market that reached $1.3

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the NCAA and its members and the manner in which it preempts state law. *See, e.g.*, Letter from Jonathan Skrmetti, Att'y Gen., Tenn., et al., to Hon. Tim Walberg et al., U.S. House of Representatives (July 22, 2025), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2025/pr25-39-letter.pdf (opposition by the Attorneys General of Tennessee, the District of Columbia, Florida, Ohio, and New York); Press Release, Major League Baseball Players Ass'n et al., The Five Major Players Associations Oppose Antitrust Exemption/Liability Shield in College Sports (July 14, 2025), https://nflpa.com/press/the-players-associations-oppose-antitrust-exemption-liability-shield-in-college-sports (labor groups); Jesse Dougherty, *Another One*, WHAT'S UP WITH COLLEGE SPORTS? (July 15, 2025), https://collegesportsmoney substack.com/p/score-act-advances (providing a play-by-play of THE SCORE Act's markup hearing in the House subcommittee for commerce, manufacturing and trade while noting Democrat lawmaker opposition to the bill, including Rep. Yvette Clarke (D-NY) deeming the bill "*The NCAA Wish List Act*"). Despite this opposition, the bill passed both the House Energy and Commerce Committee and the Committee on Education and the Workforce in late July 2025 and as of this writing was scheduled for a full House vote in early December 2025, where it is expected to pass. Ralph D. Russo & Chris Vannini, *SCORE Act Advances Through Committee, Moving College Sports Reform Closer to House Floor*, THE ATHLETIC (N.Y. TIMES) (July 23, 2025), https://www.nytimes.com/athletic/6511289/2025/07/23/score-act-congress-college-sports/; Ross Dellenger (@RossDellenger), X/TWITTER (Nov. 19, 2025, 1:04 PM), https://x.com/rossdellenger/status/1991236231519211916. At the same time, however, given the criticism of the bill, it seems highly unlikely that it will receive the seven Democrat votes needed to pass the Senate—especially after an executive order signed by President Trump placed the issue firmly within the priorities of his administration. *See id.* (noting that the bill passed through committee solely on party lines); Bryan DeArdo, *SCORE Act, a Bill Alter that Would the Landscape of College Sports, Has Been Formally Introduced in U.S. House*, CBS SPORTS (July 10, 2025), https://www.cbssports.com/college-football/news/score-act-a-bill-alter-that-would-the-landscape-of-college-sports-has-been-formally-introduced-in-u-s-house/ (summarizing the bill while noting that even though the bill has two Democrat cosponsors in the House, "the bill has largely been opposed by the Democratic party"); Matt Brown, *MAILBAG! Trump's College Sports EO, CAA FB Realignment, and More*, EXTRA POINTS (July 25, 2025), https://www.extrapointsmb.com/p/mailbag-trump-s-college-sports-eo-caa-fb-realignment-and-more-5e6310f57428f343 (arguing that "the more Trump gets involved, the harder it will be to convince a few Democratic senators to sign on to the SCORE Act, allowing it to break a filibuster"); Noah Henderson, *Fact Sheet: President Donald J. Trump Politicizes College Sports*, COLL. FRONT OFF. (July 25, 2025), https://thecollegefrontoffice.substack.com/p/fact-sheet-president-donald-j-trump ("By tethering the NCAA's preferred policy outcomes to a partisan position in a highly polarized political climate, the Trump administration may be making it harder to build the bipartisan coalition needed to implement them."). *See also* Saving College Sports, Exec. Order 14,322, 90 Fed. Reg. 35821 (July 24, 2025); Adam Luckett, *Executive Order Calls to Save College Sports but the SCORE Act Is Really What Matters*, ON3 (July 25, 2025), https://www.on3.com/teams/kentucky-wildcats/news/president-trump-exceutive-order-nil-ncaa-college-athletics/ (comparing the executive order to the SCORE Act). Even if the bill were to pass, there is also an argument that the power the bill vests with the NCAA violates the private nondelegation doctrine and the Due Process Clause. *See* Sam C. Ehrlich, *The Constitutional Problems with Delegating Legislative Power to College Sports*, 98 ST. JOHN'S L. REV. 211, 247–58 (2025) (summarizing seven federal bills proposed between 2023 and early 2024 while discussing their potential constitutionality under the private nondelegation doctrine); Sam C. Ehrlich & Ryan M. Rodenberg, *The SCORE Act Is Unconstitutional: Private Nondelegation Problems with Congress's Latest Attempt to Regulate College Sports*, 2025 CARDOZO L. REV. DE-NOVO 121, 128-–35 (2025) (applying the same analysis to the SCORE Act while taking into account the Supreme Court's comments on the private nondelegation doctrine in *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. ___, 145 S. Ct. 2482, 2507–09 (2025)). To provide an update during the copyediting process: the scheduled December 2025 House vote was canceled and delayed indefinitely after several House members previously committed to vote for the bill—including the entire Congressional Black Caucus—dropped their support. *See* Amanda Christovich, *How the SCORE Act Vote Fell Apart*, FRONT OFFICE SPORTS (Dec. 4, 2025), https://frontofficesports.com/how-the-score-act-vote-fell-apart/.

billion in 2024–25.[43] A June 2025 article in *The Athletic* (the sports department of the *New York Times*) quoted several unnamed athletic directors and player personnel directors questioning whether the CSC will actually be able to flex power the NCAA had not been able to show for the past several years, especially if (and when) athletes simply do not report their deals (or report their deals inaccurately) to the clearinghouse.[44]

To counter these concerns, the CSC released a memo shortly after it took power making clear its position that NIL collectives—as entities that "ha[ve] a business purpose to pay student-athletes associated with a particular school or schools"—cannot reach deals that meet the "valid business purpose" standard unless the deal facilitates performance at a more "valid" business entity.[45] This guidance, effectively a boycott of the enterprises, was immediately met with harsh critique, with commentators suggesting that the CSC may be risking antitrust litigation in categorically excluding NIL collectives in this fashion.[46] The director of Utah State's NIL collective, the Blue A Collective, noted on social media that a deal he signed with an athlete for $2,333.00 was denied in accordance with this guidance, sparking further critique and discussion.[47] *House v. NCAA* class counsel quickly threw gasoline on this fire with a letter to the CSC threatening to bring the matter in front of Judge Wilken's appointed special master, Magistrate Judge Nathanael Cousins, if the guidance was not retracted, eventually settling when the CSC agreed to drop their categorical exclusion of collective deals eleven days later.[48]

At the same time, it is understandable to some degree why the NCAA and the CSC would firmly insist on including anticircumvention measures alongside the revenue-sharing cap. Almost all of the professional sports leagues that have a salary

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43 NIL at Four: Monetizing the New Reality at 3, Opendorse (June 30, 2025), https://biz.opendorse.com/blog/nil-at-4-the-annual-opendorse-report/. This report also notes that collective spending was up *824 percent* in June 2025, as collectives sought to "front load" athlete payments ahead of the July 1, 2025, start of the first *House* Settlement cap year. *Id.* at 10.

44 Justin Williams, *What I'm Hearing About NCAA Revenue Sharing: $40M Football Rosters, Unintended Consequences*, The Athletic (Jun. 7, 2025), https://www.nytimes.com/athletic/6372328/2025/06/07/college-sports-revenue-sharing-ncaa-house-settlement-changes/.

45 Image posted by Ross Dellenger (@RossDellenger), X/Twitter, *Memo from College Sports Commission to D1 Ads*, https://x.com/RossDellenger/status/1943329431088439396/photo/1.

46 *See, e.g.*, Darrien Starling, *CSC Blocks Collective NIL Deals, Sparks Antitrust Concerns*, Athlon Sports (July 11, 2025), https://athlonsports.com/college/nil-daily/csc-blocks-collective-nil-deals-sparks-antitrust-concerns; Andy Staples, *The New Group Policing NIL Payments Has Left Collectives Little Choice but to Sue for their Survival*, On3 (July 15, 2025), https://www.on3.com/news/the-new-group-policing-nil-payments-has-left-collectives-little-choice-but-to-sue-for-their-survival/.

47 Dalton K. Forsythe (@daltonkf68), X/Twitter (July 10, 2025, 2:58 PM MT), https://x.com/daltonkf68/status/1943414621643378966. The deliverables for the athlete included "social media posts, appearances, and brand promotion" for the collective. *Id.*

48 Ross Dellenger, *House Attorneys Slam NCAA and Power Conferences Over Denied NIL Deals, Issue Legal Warning About Settlement*, Yahoo! Sports (July 11, 2025), https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-slam-ncaa-and-power-conferences-over-denied-nil-deals-issue-legal-warning-about-settlement-205015881.html; Ross Dellenger, *House Attorneys, Power Conferences Work Out Deal to Relax NIL Collective Roadblocks*, Yahoo! Sports (July 22, 2025), https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-power-conferences-work-out-deal-to-relax-nil-collective-roadblocks-sources-213706035.html.

cap have an accompanying anticircumvention provision in the league collective bargaining agreement that makes clear that third-party deals cannot be used to circumvent those caps.[49] And while the use of endorsement deals to circumvent salary caps is extraordinarily rare in professional sports, it is not unprecedented. In 2024, the WNBA (Women's NBA) opened an investigation when the Las Vegas Convention and Visitors Authority announced that they would give each player on the Las Vegas Aces $100,000 to make "appearances on Las Vegas' behalf" and to "wear Las Vegas-centric gear," after previously finding in 2023 that the Aces circumvented the cap through under-the-table payments and impermissible benefits.[50] As of the writing, the NBA is investigating the Los Angeles Clippers for allegedly circumventing their salary cap through a "no-show job" NIL deal that purportedly used money funneled through a now-bankrupt company in which Clippers owner Steve Ballmer had invested.[51]

In the same vein, the Power Four conferences are treating the NIL Go system very seriously and are empowering it with the critical resources, personnel, and tools they say are needed to rein in what they see as an out-of-control NIL labor market. The conferences named former Major League Baseball executive Bryan

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49 *Compare House* Settlement, *supra* note 4, at art. 6, § 3 (allowing the NCAA and/or conference defendants to "adopt rules that prohibit any transaction, payment, or agreement designed to defeat or circumvent, and with the effect of defeating or circumventing, the intention of the Parties as reflected in the terms of this Injunctive Relief Settlement") *with, e.g.*, Nat'l Football League & Nat'l Football League Players' Ass'n, Collective Bargaining Agreement, art. 14, § 2 (Mar. 15, 2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf (prohibiting clubs and players from entering into any agreements "which includes any terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement"); Nat'l Basketball Ass'n & Nat'L Basketball Players' Ass'n, Collective Bargaining Agreement., art. XIII, § 1(a) (July 1, 2023), https://nbpa.com/cba (forbidding "the Players Association, the NBA, nor any Team (or Team Affiliate) or player (or person or entity acting with authority on behalf of such player)" from undertaking any action or transaction "which is, or which includes any term that is, designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by all of the provisions of this Agreement"); Nat'l Hockey League & Nat'l Hockey League Players' Ass'n (June 12, 2013), https://www.nhlpa.com/the-pa/cba (barring players entering into any agreements that are intended to or have the effect of "defeating or Circumventing the provisions of this Agreement" including "provisions with respect to the Team Payroll Range.") *But see* Nat'l Women's Soccer League Players Ass'n & Nat'l Women's Soccer League, Collective Bargaining Agreement (July 30, 2024), https://www.nwslplayers.com/cba (containing no anti-circumvention clause).

50 Jordan Mendoza, *WNBA Investigating Las Vegas Aces After Every Player Received $100,000 in Sponsorship*, USA Today (May 18, 2024), https://www.usatoday.com/story/sports/wnba/2024/05/18/wnba-investigating-las-vegas-aces-100k-sponsorship/73755527007/; Alexa Philippou, *WNBA Rescinds Aces' 2025 1st-Round Pick, Suspends Becky Hammon*, ESPN (May 16, 2025), https://www.espn.com/wnba/story/_/id/37662397/wnba-rescinds-aces-2025-1st-round-pick-suspends-becky-hammon. As *Sports Illustrated*'s Noah Henderson pointed out, the $1.2 million that Las Vegas offered the twelve players in total would have allowed the Aces to effectively exceed the WNBA's salary cap of $1.463 million by eighty-two percent. Noah Henderson, *NIL-Style WNBA Payments Threaten League Integrity, Prompt Investigation*, Sports Illustrated (May 20, 2024), https://www.si.com/college/nil/nil-news/every-sec-football-team-projected-nil-leader-2025.

51 Baxter Holmes, *Report: Clippers Skirted NBA Salary Cap with Kawhi Leonard Payment*, ESPN (Sept. 3, 2025), https://www.espn.com/nba/story/_/id/46146871/report-clippers-skirted-nba-salary-cap-kawhi-leonard-payment. *See supra* note 9.

Seeley as chief executive officer, drawing on Seeley's decade of experience leading MLB's Department of Investigations where he oversaw cases pertaining to domestic violence, performance-enhancing drugs, and age fraud.[52] Seeley added former Washington Nationals chief of staff and senior vice president John Bramlette as the CSC's head of operations and deputy general counsel, expanding the Commission's legal bona fides and manpower.[53] The Power Four have also written into the governing agreements some degree of subpoena power—a much lesser degree of subpoena power than in a courtroom, but one that officials believe would still force access to necessary records in arbitration.[54] And they have worked to compel universities to sign contracts waiving their right to pursue legal challenges against the CSC, even if their state law is contradictory, threatening schools with expulsion from Power Four conferences if they do not sign or breach the agreement.[55] This has already received pushback from the Attorney General for the state of Texas, citing a host of other legal barriers to enforcement of a proposed contract between the CSC and Division I schools.[56]

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52 Pete Thamel & Jeff Passan, *MLB Exec Bryan Seeley to Be CEO of New College Sports Commission*, ESPN (June 6, 2025, 11:20 PM), https://www.espn.com/college-sports/story/_/id/45468012/mlb-exec-bryan-seeley-ceo-new-college-sports-commission.

53 Daniel Libit, *College Sports Commission Taps Another MLB Executive*, Sportico (June 30, 2025), https://www.sportico.com/leagues/college-sports/2025/college-sports-commission-jonathan-bramlette-mlb-nationals-1234858624/.

54 The exact power and procedures by which the CSC will be able to force production is unclear. *Compare* Pete Thamel, *How Proposed CEO Could Dole Out Punishments in College Sports*, ESPN (May 19, 2025), https://www.espn.com/college-sports/story/_/id/45227143/how-proposed-ceo-college-sports-dole-punishments ("Per sources, when cases do end up in arbitration, under the procedures that govern arbitration, subpoena power is a potential option via the discovery process -- an authority that was not available during NCAA investigations") *with* Ralph D. Russo, *Bryan Seeley Is Charged with Enforcing College Sports' New Rules. What's His Plan?*, The Athletic (N.Y. Times) (June 9, 2025), https://www.nytimes.com/athletic/6412743/2025/06/09/bryan-seeley-career-csc-mlb/ (quoting CSC CEO Bryan Seeley saying "We don't have subpoena power. We don't have search-warrant power"). § 7 of the Federal Arbitration Act (FAA), 9 U.S.C. § 7 (1947), does provide that arbitrators "summon in writing any person to attend before them or any of them as a witness and in a proper case" but this power has been interpreted as fairly limited when it comes to summoning nonparties (which in this case would include, for example, third party collectives and boosters). *See, e.g.*, Hay Group v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (reversing a trial court's grant of a subpoena for third party documents, holding that section 7 "clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier"); Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. Det. Mercy L. Rev. 315 (2009) (discussing the process and powers of arbitral subpoenas issued to nonparty witnesses while noting a split in how federal courts interpret section 7).

55 Ross Dellenger, *Power Conferences Working on Contract to Bind Schools to New Enforcement Rules, With Strict Punishments*, Yahoo! Sports (May 19, 2025), https://sports.yahoo.com/college-football/breaking-news/article/power-conferences-working-on-contract-to-bind-schools-to-new-enforcement-rules-with-strict-punishments-005652210.html. As Tulane sports law professor Gabe Feldman notes in the cited article, the enforceability of provisions requiring schools to follow CSC rules over state law is questionable. *Id*. However, for many schools the threat will be enough.

56 Press Release, Tex. Att'y Gen., *Attorney General Paxton Sends Letters to Universities and State AGs to Oppose Unlawful CSC Agreement that Would Hurt Schools and Undermine College Sports* (Nov. 26, 2025), https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-sends-

Seeley and the CSC have been given the authority and flexibility to issue penalties they see fit from "a wide range of options," not just against the athletes' eligibility but against universities, coaches, and administrators as well.[57] Those could reportedly include fines of multiple millions of dollars, suspensions, postseason bans, and even a reduction of transfers a school can acquire from the transfer portal.[58] Yet perhaps the most pressing legal concerns lie not in the penalties themselves, but in the coordinated, data-driven compensation system they are designed to enforce—a system with striking and potentially dangerous parallels in other industries.

II. ALGORITHMIC PRICE FIXING

Just like the CSC, firms across sectors are increasingly deploying software tools that allow independent entities to share pricing logic, exchange competitively sensitive data, and outsource decision-making to algorithmic "clearinghouses." This trend has already drawn antitrust scrutiny, most recently in litigation against RealPage—a property management software firm accused of facilitating horizontal price fixing among its landlord clients through centralized rent-setting algorithms.[59] As the NIL market enters its next phase, the structural and functional similarities between the CSC's enforcement system and prior actions against algorithmic coordination models demand closer examination.

An algorithm is simply a set of steps used to complete a specific task or solve a mathematical problem.[60] A pricing algorithm can use information such as supply, demand, costs, and competitor pricing to maximize a seller's profits.[61] Today, sophisticated pricing algorithms use machine learning and vast amounts of data to perform this function in real time and on a customer-by-customer basis.[62] Often, the data consists of competitively sensitive, highly granular, nonpublic information that is voluntarily submitted by competitors, usually with the understanding that

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letters-universities-and-state-ags-oppose-unlawful-csc-agreement-would; Tex. Att'y Gen., Letter to Texas Universities Regarding CSC Participation Agreement (Nov. 25, 2025) (on file with author), https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-sends-letters-universities-and-state-ags-oppose-unlawful-csc-agreement-would.

57 Ross Dellenger, *What Is NIL Go, and Why Is It the Latest Subject of Debate Among College Sports Leaders?*, Yahoo! Sports (June 13, 2025), https://sports.yahoo.com/college-sports/article/what-is-nil-go-and-why-is-it-the-latest-subject-of-debate-among-college-sports-leaders-120028561.html.

58 *Id*. One struggles to understand how forcing a school to reduce the number of transfers they can take in from the transfer portals would survive antitrust scrutiny, given that many of the findings about the anti-competitiveness of transfer portal restrictions from *Ohio v. NCAA*, 706 F. Supp. 3d 583 (N.D. W.Va. 2023) (enjoining the NCAA from enforcing the "year-in-residence" transfer restriction), would presumably apply. No part of the *House* Settlement granted the NCAA or CSC the ability to impose new restrictions on the transfer portal nor can be read to insulate the NCAA or CSC from scrutiny over such restrictions in any way. Still, the CSC is welcome to try.

59 *See infra* Part III.C.2.

60 *Algorithm*, Merriam-Webster.Com Dictionary, https://www.merriam-webster.com/dictionary/algorithm (last visited July 22, 2025).

61 *See, e.g.*, Marco Bertini & Oded Koenigsberg, *The Pitfalls of Pricing Algorithms*, Harv. Biz. Rev. (Sept.–Oct. 2021), https://hbr.org/2021/09/the-pitfalls-of-pricing-algorithms.

62 *Id*.

everyone in the industry is actively participating.[63] And while these algorithms could be used to increase sales by undercutting competitors or to poach valuable employees with higher wages, they almost universally respond to competitors' higher prices and lower wages by following suit. For example, as *Berkeley Research Group*'s Hassan Faghani recently noted in a white paper,

> Algorithms using reinforcement learning can adopt supracompetitive pricing strategies through trial and error, even in the absence of preprogrammed coordinated pricing strategies. This occurs faster and more effectively in algorithmic pricing than in traditional oligopolies, where firms must rely on market signals or assumptions about competitors.[64]

Algorithms can "quickly observe, synthesize, and respond to vast amounts of sales, purchases, and transaction data," making it much easier to know if a conspirator is "cheating on its cartel partners" by pricing outside of agreed terms.[65] They "tamper[] with price structures,"[66] fostering illegal price-fixing and wage-fixing cartels and helping monopolies illegally maintain their market power over their industries.

In light of the many threats that algorithms pose to free and open markets, their use is increasingly drawing scrutiny from legislatures and law enforcement at the federal and state levels. In a February 2023 speech to GCR Live, then-Principal Deputy Assistant Attorney General Doha Mekki called out industries that facilitate "high-speed, complex algorithms can ingest massive quantities of 'stale,' 'aggregated' data from buyers and sellers to glean insights about the strategies of a competitor."[67] She noted that the Justice Department's concern "is only heightened" when competitors adopt the same pricing algorithms, as studies have shown that these algorithms "can lead to tacit or express collusion in the marketplace, potentially resulting in higher prices, or at a minimum, a softening of competition."[68] In August 2024, the Justice Department, along with several state attorneys general, filed a lawsuit against rental housing software management company RealPage accusing the firm and its clients of distorting markets, harming customers, and creating a monopoly in the market for commercial revenue management software.[69] As a result, firms like RealPage in the rental housing

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63 Maureen K. Ohlhausen, Acting Chairman, U.S. Fed. Trade Comm., Should We Fear the Things that Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing 5 (May 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf.

64 Hassan Faghani, *Algorithmic Pricing, Market Outcomes, and Antitrust Concerns: Lessons from Recent Literature*, Concurrences No. 7-2025, at 3 (2025).

65 Henry Hauser, *Fixing Algorithmic Pricing? Competition Concerns and Solutions*, 23 Colo. Tech. L.J. 1, 11 (2024).

66 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

67 Doha Mekki, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0.

68 *Id*.

69 Compl., United States v. RealPage, Inc., No. 24-cv-00710 (M.D.N.C. Aug. 23, 2024). The Justice

industry and a number of other industries are facing class actions, discussed below, challenging these schemes and the skyrocketing housing costs they allegedly helped create.[70]

Algorithmic price fixing has also drawn the eye of Congress. In February 2024, Senator Klobuchar and eight Democrat cosponsors introduced the "Preventing Algorithmic Collusion Act," which would ban the use of a pricing algorithm "that uses, incorporates, or was trained with nonpublic competitor data" a presumptive violation of section 1 of the Sherman Antitrust Act.[71] While the bill stalled in committee, it was reintroduced in January 2025, demonstrating the continued focus on the issue.[72] Several state legislatures and local city councils are all also taking on pricing algorithms, whether through bans on their use in rental housing, surveillance pricing proscriptions, or more general prohibitions.[73] The state of California recently banned the coercive use of algorithms across markets,[74] and the state of New York banned the use of algorithms to "set or adjust rental prices, lease renewal terms, occupancy levels, or other lease terms and conditions … [for] residential rental properties."[75]

Neither the NCAA nor the CSC have been deterred by these new developments or the multitude of lawsuits challenging older and existing rules. So as the NIL market for college athletes enters its next phase, the structural and functional similarities between the CSC's enforcement system and these lawsuits demand closer examination.

A. Understanding Algorithmic Pricing as Collusion

The Sherman Act is the cornerstone of U.S. antitrust law. The Supreme Court has called it "the Magna Carta of free enterprise"[76] and "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[77]

Department announced a settlement of the lawsuit on in late November 2025. Press Release, *Justice Department Requires RealPage to End the Sharing of Competitively Sensitive Information and Alignment of Pricing Among Competitors*, Dep't of Justice (Nov. 24, 2025), https://www.justice.gov/opa/pr/justice-department-requires-realpage-end-sharing-competitively-sensitive-information-and [hereinafter DOJ Press Release see note 117] . This significance of the settlement is discussed *infra* Section III.C.

70 *See, e.g.*, *In re* Realpage, Inc., Rental Software Antitrust Litigation (No. II), No. 23-md-03071 (M.D. Tenn.).

71 Preventing Algorithmic Collusion Act of 2024, S. 3686, 118th Cong. (2024).

72 Preventing Algorithmic Collusion Act of 2025, S. 232, 119th Cong. (2025).

73 Karen Servidea, *States Weigh Banning Algorithmic Pricing of Residential Rental Properties*, Wolters Kluwer (May 6, 2025), https://business.cch.com/ald/VB_algorithmic-pricing-residential-rental-properties_05-05-2025_locked.pdf; Annie Sciacca, *RealPage Sues Berkeley Over Impending Ban on Rent-Pricing Algorithms*, Berkeleyside (Apr. 3, 2025), https://www.berkeleyside.org/2025/04/03/realpage-sues-berkeley-over-impending-ban-on-rent-pricing-algorithms.

74 Cal. Bus. & Prof. Code § 16729; Assemb. B. 325, 2025-2026 Leg., Reg. Sess. (Cal. 2025).

75 N.Y. Gen. Bus. Law § 340-b; S. 7882, 2025–26 Leg. Sess. (N.Y. 2025).

76 United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

77 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[78] It applies to "any concerted action 'in restraint of trade or commerce,' even if the action does not threaten monopolization."[79] This includes "all forms of combination, old and new."[80] Concerted action, or "agreements," are either horizontal or vertical. Horizontal agreements are "between competitors at the same level of the market structure," like manufacturers of the same product or employers of the same labor.[81] In the CSC context, for example, universities and their respective conferences—who compete in the markets for athletic talent; advertising, broadcasting, and merchandising revenue; student enrollment; and prize money (to name a few)—have entered into horizontal agreements to abide by the rules and regulations promulgated by the NCAA and CSC, including NIL Go's criteria for NIL deals.

Vertical agreements involve "combinations of persons at different levels of the market structure, e.g., manufacturers and distributors."[82] In *RealPage*, the plaintiffs allege individual vertical agreements by the housing owners to use RealPage's pricing algorithms for "pricing and price-monitoring" of their rental properties.[83] The NCAA and CSC similarly have vertical agreements with the athletic conferences and universities related to how NIL deals are governed and evaluated, including conference and university agreement to submit to and abide by that governance.

The combination of these horizontal and vertical agreements is known in antitrust parlance as a "hub-and-spoke" conspiracy.[84] Courts have found "all participants in 'hub-and-spoke' conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade."[85] In college athletics, there are currently three "hubs"—the NCAA, the CSC, and the conferences. There are also two separate sets of "spokes," reaching out to the conferences and then the universities.[86] The horizontal agreements between the universities and between the conferences are known as the "rims" that form the wheels and create significant exposure to liability under the Sherman Act.[87]

B. Presumptive Illegality vs. Fact-Specific Assessments

To understand why the rim of the hub-and-spoke conspiracy is so important, we have to look at how courts differentiate between horizontal and vertical agreements

78 15 U.S.C. § 1 (1890).

79 Am. Needle, Inc. v. NFL, 560 U.S. 183, 191 (2010) (cleaned up).

80 United States v. Union Pac. R.R. Co., 226 U.S. 61, 86 (1912).

81 *Topco*, 405 U.S. at 608.

82 *Id*.

83 *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478, 501, 502-–03 (M.D. Tenn. 2023).

84 *Id*. at 500.

85 United States v. Apple, 791 F.3d 290, 322 (2d Cir. 2015). *See infra* notes 89–91 and accompanying text (discussing per se liability).

86 *Real Page*, 709 F. Supp. 3d at 500–01.

87 *Id*.

under the Sherman Act. Despite section 1's broad language, the Supreme Court has limited its application to concerted action that is "unreasonable."[88] Horizontal agreements are usually considered "per se," or presumptively, unreasonable due to their "pernicious effect[s] on competition and lack of any redeeming virtue."[89] They are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[90] This standard is typically applied to price-fixing, bid rigging, and market allocation agreements between horizontal competitors.[91]

Vertical agreements, on the other hand, are reviewed under the Rule of Reason.[92] This involves "'a fact-specific assessment of market power and market structure' aimed at assessing the challenged restraints' 'actual effect on competition ….'"[93] The Rule of Reason asks "whether the restraint imposed … merely regulates and perhaps thereby promotes competition or whether it … may suppress or even destroy competition."[94] In a hub-and-spoke agreement, this distinction matters because, absent some agreement among the "spokes" (the horizontal competitors), the conduct only receives "rule of reason" analysis, a process that defendants win about 90 percent of the time.[95]

For most hub-and-spoke cases, proving the existence of the horizontal agreements can be extraordinarily difficult when algorithms are involved. Even with direct evidence of information exchanges between competitors, information exchanges are not, standing alone, per se violations of the Sherman Act.[96] They certainly create significant opportunities for price fixing, but courts have required evidence that "the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices" or that "the exchange is made pursuant to an express or

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88 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S. 231 (1918)).

89 *Id*.

90 Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

91 Dep't of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, at 2 (Feb. 2021), https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf.

92 Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), to hold that "[v]ertical price restraints are to be judged according to the rule of reason") The Rule of Reason test provides for a three-step approaching offering shifting burdens of proof, where

1. "[T]he plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition";
2. "If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct"; and
3. "If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."

Law v. NCAA, 134 F. 3d 1010, 1019 (10th Cir. 1998).

93 NCAA v. Alston, 594 U.S. 69, 88 (2021) (quoting Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018)).

94 Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986).

95 *Alston*, 594 U.S. at 97.

96 United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

tacit agreement that is itself a violation of §1 under a rule of reason analysis.'"[97]

Of course, cartels do not typically commit their agreement to fix prices and allocate markets to pen and paper.[98] Instead, it is usually established through circumstantial evidence, which "must include both parallel conduct [for example, simultaneous price increases] and at least one 'plus factor,'" like motive, opportunity to collude, or conduct that would ordinarily be contrary to the party's economic self-interest.[99] Otherwise, courts view parallel price increases (or wage decreases) as a lawful "common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions.'"[100]

Pricing algorithms, usually evaluated as hub-and-spoke conspiracies,[101] are even more challenging. Plaintiff are tasked with proving that market competitors' parallel adoption of pricing algorithms amounts to unlawful concerted action,[102] but "companies need not meet or even communicate directly to demonstrate to each other that they are complying with the agreement."[103] Thus, the question for courts—whether the conduct "joins together separate decisionmakers" and "deprives the marketplace of independent centers of decisionmaking"[104]—becomes harder.

C. Pricing Algorithms in the Courts

Plaintiffs bringing antitrust lawsuits against algorithm operators and users allege that there is a "tacit agreement" to collude between the spokes—via acceptance of an invitation from the algorithm operator to participate in the scheme—with the understanding that their competitors (and codefendants) are doing the same.[105] This type of conduct, though achieved with cutting edge is technology, is hardly novel. As former FTC Commissioner Maureen Olhausen described it, "a group of competitors sub-contracting their pricing decisions to a common, outside agent … is fairly familiar territory for antitrust lawyers."[106] "[A]ntitrust laws do not allow … using an intermediary to facilitate the exchange of confidential business

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97 *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990).

98 *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478, 501 (M.D. Tenn. 2023).

99 *Id*. at 501–02.

100 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007).

101 *See, e.g.*, Duffy v. Yardi Sys., Inc., 758 F. Supp. 3d 1283, 1293 (W.D. Wash. 2024); Cornish-Adebiyi v. Caesars Ent., Inc., No. 23-cv-02536, 2024 WL 4356188, at *4 (D.N.J. Sept. 30, 2024); Gibson v. Cendyn Grp., LLC, No. 23-cv-00140, 2024 WL 2060260, at *2 (D. Nev. May 8, 2024); *In re RealPage*, 709 F. Supp. 3d at 502–03.

102 *See, e.g.*, *Cornish-Adebiyi*, 2024 WL 4356188, at *4; *Gibson*, 2024 WL 2060260, at *2.

103 Hauser, *supra* note 65, at 11.

104 Am. Needle, Inc. v. NFL, 560 U.S. 183, 195 (2010) (quotations omitted).

105 *Gibson*, 2024 WL 2060260, at *2.

106 Ohlhausen, *supra* note 63, at 10.

information."[107] She quipped, "Everywhere the word 'algorithm' appears, please just insert the words 'a guy named Bob.'"[108]

1. Understanding RealPage

The ongoing litigation against RealPage presents an illustrative example. As noted, the firm and some of its largest rental housing clients are facing litigation on multiple fronts, including a joint action filed by the U.S. Department of Justice and the attorneys general of ten states in addition to actions filed separately by other states' attorneys general and private plaintiffs.[109] Many of these lawsuits are still ongoing, and the Tennessee district court hearing the class action claims denied a motion to dismiss the multifamily tenant class members' claims back in 2023.[110] As a result, multiple codefendant landlords have already settled some of the claims arising from their participation with RealPage.[111] In *RealPage*, rental housing owners and operators—who compete in the market for multifamily rental housing—allegedly entered into horizontal agreements to use the same "revenue management software" to fix the cost of housing throughout the United States.[112] The lawsuits argue that RealPage and its clients, which are owners or managers of large multifamily residential properties (such as apartment complexes) that compete against each other, are violating antitrust laws by using RealPage's collection and analysis of the nonpublic and competitively sensitive data of competing properties, via a pricing algorithm, to maintain high rent prices when the supply and demand pressure in a particular market would otherwise lead to decreases in the rental prices offered to potential tenants.

The lawsuits also allege that RealPage's algorithm is not the only part of its operation that artificially inflates housing costs. To foster compliance, RealPage requires the internal revenue managers of its clients to be trained by RealPage to adhere to the reporting and price recommendation acceptance policies.[113] RealPage

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107 *Id*.

108 *Id*.

109 *See* Am. Compl., United States v. RealPage, *supra* note 10.

110 *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. 2023). The court did dismiss claims by a class of student tenants, finding that they did not allege adequate market power. *Id*. at 528–34. Ironically—and demonstrating the small world of major class action antitrust litigation—the lead plaintiff for the student class was Hagens Berman's Steve W. Berman, who is, of course, one of the two lead class counsels in *House*. *See* Motion to Withdraw from Plaintiffs' Steering Comm., *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. Jan. 17, 2024), Dkt. No. 704 (motioning to withdraw Berman and Hagens Berman Sobol Shapiro LLP from the plaintiffs' steering committee after the dismissal of the student housing class claims).

111 *See, e.g.*, Jon Brodkin, *US Sues Six of the Biggest Landlords Over "Algorithmic Pricing Schemes"*, Ars Technica (Jan. 7, 2025), https://arstechnica.com/tech-policy/2025/01/big-landlord-settles-with-us-will-cooperate-in-price-fixing-investigation/ (noting a settlement with Cortland Management that included a cooperation agreement); Mike Scarcella, *DC Attorney General Inks First Settlement in RealPage Price-Fixing Lawsuit*, Reuters (June 2, 2025), https://www.reuters.com/legal/litigation/dc-attorney-general-inks-first-settlement-realpage-price-fixing-lawsuit-2025-06-02/ (noting a settlement with William C. Smith & Co.).

112 *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d at 492, 502.

113 Am. Compl., United States v. RealPage, *supra* note 10, at 3–4.

employs pricing advisors who meet with internal revenue managers daily and review client requests to override RealPage price recommendations (with the power to engage the landlord's regional manager if the RealPage price advisor disagrees with the decision of the internal revenue manager).[114] Additionally, RealPage coordinates meetings and conversations amongst competitors for the purpose of coordinating their activity and ensuring their mutual comfort with the collective mission to enjoy the benefits of the "rising tide" of RealPage's rental price recommendations.[115] To the extent these efforts relate to the pricing for rental listings or similar matters that affect the offerings available to tenants, the lawsuits argue that these acts by RealPage are anticompetitive and unlawful. And, at least in the initial stages, the district court has approved the *RealPage* plaintiffs' legal theories. It largely denied *RealPage*'s motions to dismiss, and the private class action is in discovery, with the cooperation of a number of defendants who reached early settlements.[116]

The Justice Department's settlement of its RealPage lawsuit includes injunctive relief barring a host of activities that reflect the anticompetitive concerns of the business. These include banning the use of "nonpublic, competitively sensitive information" for the operation of RealTime's algorithm; ceasing the use of "active" data for training the algorithm; and removing design features that "align[] pricing between competing users of the software."[117] One can easily see parallels with the CSC's collection of college athletes' nonpublic NIL deals, the input of the information into NIL Go, and setting of what it deems reasonable rates for NIL deals.

2. Lessons from Other Algorithm Challenges

The Department of Justice and Federal Trade Commission have since gotten involved in two other algorithmic price-fixing class actions—one (*Duffy v. Yardi Systems*[118]) involving a competitor to RealPage, and another (*Gibson v. Cendyn Group*[119]) involving a company employing a similar system for the hotel industry. In statements of interest filed in each case, they argued that "an invitation for collective action followed by conduct showing acceptance" has always equated to concerted action within the meaning of section 1.[120] Quoting Supreme Court language from back in 1939, the agency noted that

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114 *Id*. at 27–28.

115 *Id*. at 40.

116 Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), No. 23-md-03071, Dkt. 1247, at 6 (Oct. 1, 2025).

117 DOJ Press Release, *supra* note 69.

118 758 F.Supp.3d 1283 (W.D. Wash. 2024) (denying omnibus motion to dismiss).

119 No. 23-cv-00140, 2024 WL 2060260 (D. Nev. May 8, 2024) (granting motion to dismiss), *aff'd*, 148 F.4th 1069 (9th Cir. 2025). *See infra* notes 172–75 and accompanying text.

120 Brief for the United States in Support of Plaintiffs at 20, Gibson v. Cendyn Grp., No. 24-3576 (9th Cir. Oct. 24, 2024), Dkt. No. 28 [hereinafter *Cendyn* Brief] (citing Interstate Cir. v. United States, 306 U.S. 208, 226–27 (1939); PLS.com v. Nat'l Ass'n of Realtors, 32 F.4th 824, 843 (9th Cir. 2022)); Statement of Interest of the United States at 9, Duffy v. Yardi Sys., Inc., No. 23-cv-01391 (W.D. Wash. Mar. 1, 2024) [hereinafter *Duffy* Brief].

> It [is] enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, … and knowing it, all participated in the plan.[121]

To participate independently, without one's competitors, would be illogical because the algorithm would raise your prices above the market rate. So—particularly when coupled with "plus factors" like parallel price increases, the exchange of confidential and commercially sensitive information, adherence to the algorithm's pricing recommendation, changes in policies to prioritize maximizing revenue over occupancy, acting against their own self-interest, and policing by the operator or competitors to ensure compliance—courts have found these allegations of concerted action sufficient to state a claim under section 1.[122] And at least one has applied the per se standard of liability.[123]

Long-standing Supreme Court precedent also makes clear that the temporal requirements to form an agreement under the Sherman Act are flexible. "[A]n unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators."[124] Second, "[t]he test is not what the actual effect is on prices, but whether such agreements interfere with 'the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'"[125] Thus, compliance does not have to be perfect, and the absence of ultimate success, or some "cheating" on price, will not "absolve [a cartel] from their violation of the law."[126] Third, algorithms can still artificially inflate prices above competitive levels, or in the case of NIL, suppress compensation below competitive levels. As former Assistant Attorney General William Baer explained at a congressional hearing on this topic, rapidly advancing technology allows algorithms to "gather[] publicly available pricing information about its competitors; and 'learn' in nanoseconds that price competition does not get you there, stop[] discounting, and stabilize[] prices—even in markets where the number of firms previously would have made oligopolistic pricing—tacit collusion—unsustainable."[127]

To be sure, these things are not easy to allege or prove. The hoops that plaintiffs must jump through to prove a hub-and-spoke conspiracy are complex and

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121 *Cendyn* Brief, *supra* note 120, at 21 (quoting *Interstate Cir.* 306 U.S. at 226–27 (1939)); *see also Duffy* Brief, *supra* note 120, at 9 (quoting same).

122 Duffy v. Yardi Sys., Inc., 758 F. Supp. 3d 1283, 1292–93 (W.D. Wash. 2024); *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478, 503, 506–07, 510–12, 516 (M.D. Tenn. 2023).

123 *Duffy*, 758 F. Supp. 3d at 1297.

124 *Interstate Cir.*, 306 U.S. at 227.

125 Plymouth Dealers' Ass'n of No. Cal. v. United States, 279 F.2d 128, 132 (9th Cir. 1960).

126 *Id*. at 132–33.

127 Written Testimony of Bill Baer, U.S. Sen. Comm. on the Judiciary, Subcomm. on Competition Pol'y, Antitrust, and Consumer Rts., *Hearing on "The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights"* at 5 (Dec. 13, 2023).

challenging, even before introducing the complexity of a price algorithm. In the two lawsuits attacking the algorithm used by casinos in Las Vegas and Atlantic City, the district courts dismissed the claims, finding allegations of concerted action—particularly with respect to the time between each hotel's adoption of the algorithm, the use of nonmandatory price "recommendations," and the more limited use of confidential information—insufficient.[128] The plaintiffs in *Gibson v. Cendyn* lost their appeal to the Ninth Circuit, in large part because they abandoned their horizontal conspiracy claims,[129] but questions abound, there and in *Cornish-Adebiyi*, about whether the casinos actually agreed with each other to set prices using the algorithm and whether that agreement was binding.

No such questions exist regarding NIL Go. That is what makes the NCAA generally, and the CSC's use of the NIL Go algorithm specifically, so remarkable. Their agreements are explicit, and they carry all of the plus factors seen in *RealPage* and *Duffy* with none of the problems identified by courts in the *Cendyn Group* litigation.

III. NIL GO AS ALGORITHMIC-BASED COLLUSION

A. The CSC's "Hub-and-Spoke-and-Spoke-and-Spoke" Model

With the passage of the *House* Settlement, the NCAA, the CSC, Deloitte, and the conferences and universities have explicitly agreed to three collusive price-fixing mechanisms: first, to limit the amount of revenue they can share with their athletes; second, to restrict the allowable NIL deals to vague "valid business purpose" and "reasonable range of compensation" standards; and, third, to condition athletes' eligibility to participate in NCAA-sanctioned athletic events—and enjoy the economic benefits that follow—on compliance with these rules.

The NIL Go algorithm determines acceptable rates of compensation for college athletes, via the exchange of ordinarily confidential data the athletes are required to submit for analysis. NIL Go's rulings are strictly enforced through the threat of a group boycott.[130] Conferences and schools agree to ban college athletes from

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128 Cornish-Adebiyi v. Caesars Ent., Inc., No. 23-cv-02536, 2024 WL 4356188, at *5 (D.N.J. Sept. 30, 2024); Gibson v. Cendyn Grp., LLC, No. 23-cv-00140, 2024 WL 2060260, at *3, 5 (D. Nev. May 8, 2024). For further discussion, *see infra* notes 172–75 and accompanying text.

129 Gibson v. Cendyn Grp., LLC, 148 F.4th 1069, 1082 (9th Cir. 2025). At the time of writing, the Ninth Circuit was considering a petition for rehearing *en banc*. Oral argument in the case involving Atlantic City casinos, which still involves allegations of horizontal price fixing, was held on September 17, 2025. Cornish-Adebiyi v. Caesars Ent. Inc., No. 24-3006 (3d Cir.).

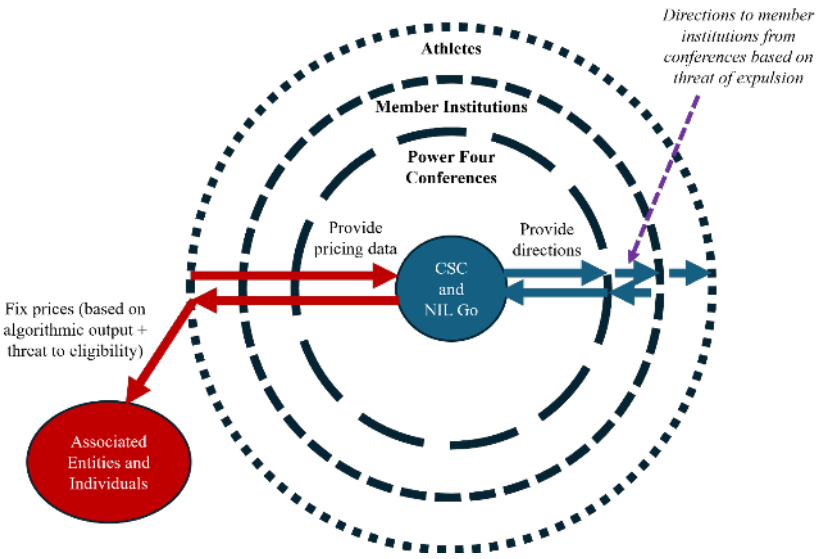
130 Group boycotts by horizontal competitors, like price-fixing cartels, are usually per se unlawful. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998). The NIL Go scheme is one such agreement. It is a hub-and-spoke agreement to exclude athletes, universities, boosters from college athletics generally, and the market for college athletes' NIL rights specifically, if they do not adhere to NIL Go restrictions. This is, in the words of the Supreme Court, "what may be called a group boycott in the strongest sense: A group of competitors threaten[ing] to withhold business from third parties unless those third parties would help them injure their directly competing rivals." *Id.*

The NIL Go group boycott is remarkably similar to the one found unlawful by the Supreme Court in *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941). The cartel

play if they fail to rescind an NIL deal that exceeds them[131]—and conferences are in turn threatening schools who do not go along with the scheme with expulsion.[132] The agreements are published on the internet and openly agreed and adhered to. They are direct evidence of a horizontal agreement to artificially suppress athletes' NIL earnings below competitive levels and boycott schools and athletes that don't adhere to the scheme.

The end result is a well-defined multilayered hub-and-spoke (or, in this case, "hub-and-spoke-and-spoke-and-spoke") conspiracy with antitrust-relevant information and directives flowing in two different directions, as demonstrated by Figure 1:

FIGURE 1: NIL GO AND THE CSC AS A "HUB-AND-SPOKE-AND-SPOKE-AND-SPOKE" MODEL OF PRICE COORDINATION.



involved a guild of clothing designers, manufacturers, suppliers, and retailers to boycott retailers who colluded to push back against manufacturers who systematically flooded the market with lower priced copycat designs. *Id*. at 461. Much like the vilification of the NIL collectives and boosters within college athletics, the guild called the rival manufacturers' practices "unethical and immoral, and [gave] it the name of 'style piracy.'" *Id*. AT 462–63. It also had a number of other anticompetitive rules, like a prohibition on retail advertising (similar to prior NCAA rules banning NIL agreements) and regulation of the amount and availability of discounts that retailers could offer (similar to current NCAA rules governing NIL). Finally, the guild employed secret shoppers, auditors, and an elaborate tribunal (like the CSC and Deloitte) to ensure compliance. *Id*.

The Court found this conduct contrary to the Sherman Act in a multitude of ways, including by narrowing who guild members could do business with, boycotting violators, and requiring disclosure of sensitive commercial information. *Id*. AT 464. IT ALSO REJECTED THE GUILD'S CLAIM THAT THEIR ATTEMPTS TO STOP "piracy" justified the boycott: "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." *Id*. at 467–68.

131 *See* Student-Athlete NIL Deals, *supra* note 14 (advising that athletes will lose eligibility if they continue with rejected NIL deals).

132 Dellenger, *supra* note 55.

The anticircumvention provisions in the *House* Settlement operate similarly as a horizontal maximum price-fixing mechanism and group boycott. While the relationships between the NCAA, the CSC, conferences, schools, athletes, and third parties may contain vertical elements, the functional outcome is horizontal: conferences and schools, through the CSC, coordinate around shared limits on athlete compensation by collectively rejecting NIL deals that exceed an algorithmically defined "reasonable range of compensation." Though framed as cap enforcement, the system effectively restrains third parties from paying market rates and suppresses athlete compensation across the board, with athlete reporting requirements serving as the enforcement trigger. This is a clear restraint of trade. In fact, in any other market, this would be per se illegal under section 1 of the Sherman Act.[133] It indisputably gives rise to a colorable claim under the Sherman Act by either the athletes or the NIL collectives and boosters excluded and restrained by the rules. It may also be a violation of California's new ban on the coercive use pricing algorithms, given that the CSC conditions both athlete and university eligibility for NCAA athletics on participation and compliance.[134]

At first blush, antitrust litigation by a booster or collective against the CSC, the schools and their conferences, or the NCAA based on the *House* Settlement's anticircumvention measures could be seen as a rather strange and perhaps unlikely application of antitrust law. In the third-party NIL market, athletes act as sellers of their NIL rights while the third parties act as buyers. From the booster's perspective, it follows that the anticircumvention measures create a price *ceiling* for those offered NIL rights.

True, affected associated entities and individuals are inarguably *saving* money by being artificially prevented from paying more than the "reasonable range of compensation" of a prospective NIL deal. Yet of course, and as discussed, these boosters do not see this development as a positive, considering that their goal is to actually pay more, as a form of institutional or competitive support. The result is paradoxical: Boosters may be receiving some financial benefit from NIL Go, but it is one they did not ask for and do not want. The anticircumvention provisions in the *House* Settlement operate as a horizontal maximum price-fixing mechanism and potential group boycott,[135] and they are suffering some form of harm.

And it is well established that antitrust law is not exclusively concerned with cartels that set price floors.[136] Price maximizing cartels can also violate the Sherman Act—a fact that the Supreme Court has made this clear in *Arizona v. Maricopa County Medical Society*, rebutting the dissent's argument that maximum price-

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133 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

134 CAL. BUS. & PROF. CODE § 16729 (2025).

135 The potential of a group boycott was manifested with the CSC's initial "valid business purpose" guidance (*see supra* notes 27 and 45–48 and accompanying text), but softens significantly with the rescission of that guidance. The risk still remains depending on how the rules are practically enforced moving forward.

136 *See* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000) ("Every precedent in the field makes clear that the interaction of competitive forces, not price-rigging, is what will benefit consumers.").

fixing schemes can have significant procompetitive and pro-consumer benefits.[137] The majority wrote that this argument "indicates a misunderstanding of the per se concept" as even if there were benefits to the scheme there are other, legal ways to accomplish the same goals.[138] Regardless, the Court also reasoned that making the per se rule clear serves to also "enhance the legislative prerogative to amend the law."[139] The arguments made by the doctors "are better directed to the Legislature" as "Congress may consider the exception that we are not free to read into the statute."[140] Barring that, the Supreme Court made clear that all horizontal price-fixing initiatives—including horizontal *maximum* price-fixing initiatives—must be found as per se violations of antitrust law.[141]

Thus, plaintiffs may have antitrust injury, and properly state a claim under the Sherman Act, when they are harmed by those schemes.[142] As the Ninth Circuit noted, "[w]hen horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs." Moreover, antitrust law is not exclusively concerned with effects on price. Anticompetitive effects can include decreased output, lower quality goods or services, loss of choice, stifled innovation, and barriers to entry. Here, the NIL Go algorithm is a significant barrier to entry for NIL collectives and is arguably protecting lower quality NIL collectives that offer poorer terms to college athletes for their NIL rights and services from more innovative and better financed competitors.

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137 457 U.S. 332, 349–54 (1982). *Maricopa County* involved a challenge to an agreement by a group of physicians to set maximum fees that they can claim in full payment for health services provided to policyholders of specific insurance plans. *Id*. at 335–36. Both the Ninth Circuit and three dissenting Supreme Court justices wrote that the clear and obvious benefits of the scheme to the public interest needed to be discussed in analyzing the scheme's legality under antitrust law, or at minimum more needed to be done to fully flesh out those benefits as compared to the anticompetitive effect of the price fix. *See id*. at 367 (Powell, J., dissenting) ("In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that may have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them"); Arizona v. Maricopa Cty. Med. Soc'y, 643 F. 2d 553, 560 (9th Cir. 1980) ("We believe this recognizes that a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law. . . . There is sufficient probability of the challenged practice in this case being sheltered by this principle to justify our refusal to brand it as a per se violation.").

138 *Maricopa Cty. Med. Soc'y*, 457 U.S. at 349–54.

139 *Id*. at 354–55.

140 *Id*.

141 *Id*.

142 *See* State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (applying the Rule of Reason to vertical price maximizing schemes); *Maricopa Cty. Med. Soc'y*, 457 U.S. at 348 (applying the per se rule to horizontal price maximizing schemes). "A plaintiff may assert antitrust injury from '[c]oercive activity that prevents [consumers] from making free choices between market alternatives,' as well as restraints that *artificially erect barriers to market entry* and *protect lower quality products*." CollegeNET, Inc. v. Common Application, Inc., 711 F. App'x 405, 406 (9th Cir. 2017) (citations omitted).

B. Setting the Standard of Review: Per Se Illegal or Rule of Reason?

As a horizontal maximum price-fixing arrangement, the anticircumvention provisions in the House Settlement revenue-sharing cap fall squarely within the scope of the Supreme Court's reasoning in *Maricopa County Medical Society*: that horizontal maximum price fixing is per se unlawful, regardless of any claimed procompetitive justifications.[143] At the same time, however, counterbalancing Supreme Court precedent casts doubt on whether plaintiffs challenging the NIL Go system will find success arguing based on the per se test. Defenders of these measures have an ace up their hole—doctrine from *NCAA v. Board of Regents*[144] pushing courts away from declaring the rules of sports leagues per se illegal, especially when those rules are focused around creating competitive balance on the playing field.[145] Taking the Court's reasoning from *Regents*, college sports "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all," making the per se test inapplicable for some restraints in competitive sports.[146]

The *Alston* decision grappled with this exception to per se liability, and other dicta in that decision praising amateurism, head on. The NCAA argued that *Board of Regents* fully blessed its amateurism rules and that its rules should be given "at most an 'abbreviated deferential review.'"[147] The Supreme Court rejected this gambit, writing that while they "do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive," just because "*some* restraints are necessary to create or maintain a league sport does not mean all 'aspects

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143 *Maricopa Cty. Med. Soc'y*, 457 U.S. at 349–54. The *Maricopa County* court pushed the defenders of the scheme to petition Congress for a legislative exemption, *id*. at 346, making it resonate particularly strongly in the college sports context. This line of reasoning directly mirrors the Court's approach in *Alston*, where it rejected the NCAA's implicit plea for antitrust immunity and left policy-based exception-making to Congress. *See* NCAA v. Alston, 594 U.S. 69, 94-96 (2021) ("This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.").

144 468 U.S. 85 (1984).

145 *Id*. at 100–04. *See also* Law v. NCAA, 134 F. 3d 1010, 1017 (10th Cir. 1998) (holding in analyzing an NCAA rule capping the salaries of particular men's basketball coaches that while "[h]orizontal price-fixing is normally a practice condemned as illegal *per se* . . . courts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product, even if such restraints involve horizontal price-fixing agreements"); Smart v. NCAA, Nos. 22-cv-02125, 23-cv-00425, 2023 WL 4827366 (E.D. Cal. 2023) (holding in analyzing an NCAA rule forbidding certain "volunteer" coaches from receiving compensation that such a rule "would [generally] be a per se violation of § 1 as horizontal price fixing" but that "in the context of the NCAA, courts typically apply a quick-look analysis"). *But see* Shields v. World Aquatics, Nos. 23-15092, 23-15156, 2024 WL 4211477, at *2 (9th Cir. Sept. 17, 2024) (finding that the district court erred "in concluding that a rule of reason analysis was necessary because courts lack experience with 'the rules of a governing body for international and Olympic sports'" and that while "[i]t is true that sports leagues and joint venture restrictions are unique antitrust contexts that are generally analyzed under the rule of reason," the defendant organizations were "not a joint venture sports league, but an association of independent national federations" and thus the per se rule applied).

146 *Alston*, 594 U.S. 69, at 101.

147 *Id*. at 91.

of elaborate interleague cooperation are.'"[148] It refused to give the challenged restrictions a "quick look" and instead made clear that "[t]he NCAA's rules fixing wages for student-athletes f[ell] on the far side of the line," requiring a "fuller review."[149] NCAA (or in this case CSC) rules fixing third-party compensation for athletes would undoubtedly be treated under the same principle—especially when those rules are set up to better effectuate "rules fixing wages" for said athletes.[150] Thus, *Alston* tells us that, if the per se test is inappropriate to analyze antitrust issues with NIL Go, either a quick look test used "as a path to condemnation, not salvation" or (more likely) the full Rule of Reason test must be the focus.[151]

C. NIL Go Under the Rule of Reason—Can the Rules Pass the Test?

Even if a court finds that the per se standard does not apply, the CSC's NIL Go restrictions will face significant hurdles under the Rule of Reason: that they limit NIL deals to a "fair going market price is immaterial."[152] As the Supreme Court has noted,

> [I]n terms of market operations[,] stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.[153]

The compensation limits "provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases."[154] They also intentionally "discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs."[155] NIL collectives, the newest entrants into the market for college athletes' NIL and an important source of revenue for athletes, are being forcibly removed from the market. These are blatantly anticompetitive effects that go to the heart of the Sherman Act.

The burden will thus fall on the NCAA to offer a procompetitive justification. Amateurism is unlikely to suffice. It was wholly rejected in *Alston*.[156] In another

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148 *Id*. at 90 (quoting Am. Needle v. NFL, 560 U.S. 183, 199 n.7 (2010)).

149 *Id*. at 88. "Quick looks" are reserved for restraints that sit "at opposite ends of the competitive spectrum." *Id*. Some may be "so obviously incapable of harming competition that they require little scrutiny." *Id*. Others are so obviously anticompetitive that they are "condemned as unlawful per se or rejected after only a quick look." *Id*. at 89.

150 *Id*.

151 *Id*. at 91–92.

152 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

153 *Id*.

154 Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 348 (1982).

155 *Id*.

156 *Alston*, 594 U.S. at 93–96 (declining to immunize amateurism-based restrictions from antitrust law); *id*. at 101–02 (noting that amateurism must merely be seen as a procompetitive justification

recent case challenging the NCAA's amateurism rules under the Fair Labor Standards Act, the Third Circuit rejected the argument that amateurism precluded a finding that college athletes could be employees, saying it would "not use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools."[157] The Tenth Circuit almost twenty years ago similarly refused to extend the concept of amateurism to assistant coaches in a lawsuit that successful challenged rules limiting their salary.[158] Finally, in the same *Board of Regents* decision that called amateurism a "revered tradition," the Supreme Court found that "rules that restrict output are hardly consistent with this role" and invalidated the NCAA's broadcasting restrictions under the Sherman Act.[159]

And, of course, the Supreme Court made clear in *Alston* that *Board of Regents* was not a declaration that "the NCAA's compensation restrictions [were] procompetitive both in 1984 and forevermore."[160] The NCAA offered no "consistent definition" of amateurism for the *Alston* court, and its defense that amateurism was a procompetitive justification for the challenged restraints was rejected.[161] Thus, the limits on compensation challenged in that case, which the Supreme Court called "admitted horizontal price fixing in a market where the defendants exercise monopoly control," failed the Rule of Reason.[162]

The NCAA would alternatively point to the need to preserve competitive balance as a key rationalization for the rules. This would not be a slam dunk of a procompetitive justification—an excellent 2006 law review piece by Professors Salil K. Mehra and T. Joel Zuercher found that the competitive balance argument in Rule of Reason analysis has yielded a circuit split and overall criticized the use of the concept as a defense to antitrust scrutiny.[163]

And in this specific context there are certainly arguments to be made that the competitive balance rationales supporting the revenue-sharing cap—along with the NIL Go anticircumvention measures used to sustain it—are fairly weak when considering the broader state of competitive balance in college sports and could even be countered as pretextual. The revenue-sharing cap and anticircumvention measures do nothing to address the vast discrepancies in revenue that university athletic departments receive, either naturally through their individual markets and donor bases or more artificially through whether a school is blessed enough

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under the Rule of Reason and that the district court properly held that the NCAA's failure to "adopt any consistent definition" of amateurism weakened it as a justification). *See also id.* at 109 (Kavanaugh, J. concurring) (deeming the NCAA's amateurism argument "circular and unpersuasive," framing it as "colleges may decline to pay student athletes because the defining feature of college sports … is that the student athletes are not paid").

157 Johnson v. NCAA, 108 F.4th 163, 182 (3d Cir. 2024)

158 Law v. NCAA, 134 F.3d 1010, 1022 n.14 (10th Cir. 1998).

159 NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

160 *Alston*, 594 U.S. at 93.

161 *Id*. at 100–01.

162 *Id*. at 86.

163 *See generally* Salil K. Mehra and T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 Berk. Tech. L.J. 1499 (2006).

to be included in a conference with a $5 million per school television deal or, with respect to the SEC and Big Ten, a $50 million or more per school television deal.[164] Direct (and above-the-table) athlete pay is only the newest of a long history of financial arms races between college athletic programs; the schools who have been able to hire the biggest-name coaches, build the flashiest facilities, and afford the best nutrition programs have dominated college sports well before the *House* Settlement and NIL.[165]

It also does nothing to address the pervasive and intentional biases in playoff seeding systems that are (increasingly)[166] set to prioritize strength of schedule over actual performance, thus favoring teams in conferences with stronger perceived strengths of schedule and disfavoring teams who have little means of boosting their strength of schedule without a rarely offered invitation to one of those conferences. Regardless of whether there is a revenue-sharing cap or not, the Big Ten and SEC conferences will dominate in many sports (particularly the revenue sports of football and basketball)—a fact that pushes back strongly against the invocation of competitive balance to justify the cap and its anticircumvention measures. In fact, the NIL Go scheme will only exacerbate the problem by making it more difficult for schools with traditionally "weaker" programs but wealthier alumni to bolster their rosters through this recruitment tool.[167]

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164 *Compare* Matt Brown, *The American Athletic Conference is Reportedly Getting a Healthy Raise Without Sacrificing Flexibility*, SB Nation (Mar. 19, 2019), https://www.sbnation.com/college-football/2019/3/19/18273232/aac-television-deal-espn-conference-realignment (noting that the American Athletic Conference (AAC) television contract pays just short of $7 million per school) *with* Pete Thamel, *Big 12 Nears Six-Year, $2.28B TV Extension Deal With ESPN, Fox*, ESPN (Oct. 30, 2022), https://www.espn.com/college-football/story/_/id/34910144/big-12-nears-six-year-228b-tv-extension-deal-espn-fox (noting that the Big 12 television contract pays about $31.7 million per school) *with* Daniel Libit, *SEC's Total Revenue Dips While Payouts Jump in FY24*, Sportico (Feb. 6, 2025), https://www.sportico.com/leagues/college-sports/2025/sec-conference-tax-return-2024-sankey-1234826842/ (citing SEC tax returns to show that the conference paid out $52.5 million to each school in fiscal year 2024) *with* Adam Rittenberg, *Big Ten Completes 7-year, $7 Billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc ("The Big Ten is projected to eventually distribute $80 million to $100 million per year to each of its 16 members.").

165 *See, e.g.*, Dick Harmon, *It's Getting Expensive to Stay in College Football Arms Race*, Deseret News (July 28, 2024), https://www.deseret.com/sports/2024/07/28/college-football-arm-race-extensive-financial-resources/ (giving several examples of programs spending more and more to compete with other programs outside of athlete pay); Rodney Fort, *College Athletics Spending: Principals and Agents v. Arms Race*, 2 J. Amateur Sport 119 (2016) (same); Adam Hoffer et al., *Trends in NCAA Athletic Spending: Arms Race or Rising Tide?*, 16 J. Sports Econ. 576 (2015) (same); William Tsitsos & Howard L. Nixon II, *The Star Wars Arms Race in College Athletics: Coaches' Pay and Athletic Program Status*, 36 J. Sport & Social Issues 68 (2012) (same); John R. Than & Lawrence L. Wiseman, *Fiscal Fitness? The Peculiar Economics of Intercollegiate Athletics*, Capital Ideas (Feb. 1990), https://files.eric.ed.gov/fulltext/ED323823.pdf (same).

166 David Ubben & Ralph Russo, *CFP Leadership Says There's No Leading Contender for Playoff Format in 2026*, The Athletic (N.Y. Times) (June 18, 2025), https://www.nytimes.com/athletic/6436485/2025/06/18/college-football-playoff-schedule-strength-selection-meetings/ ("[College Football Playoff (CFP) executive director Rich] Clark said CFP staff met with data provider SportSource Analytics and some outside sources, including a mathematician from Google, to examine the statistics they provide the committee—with a focus on strength of schedule.").

167 This is admittedly the genesis of the argument that college sports have become the "Wild Wild

Finally, the argument for competitive balance ignores that the salary caps used in professional sports leagues are arrived at through collective bargaining with the players' unions. The revenue-sharing caps enforced by the CSC were agreed upon pursuant to a class action settlement and received significant objections from groups advocating for college athletes.[168] They do not include trade-offs, such as guaranteed scholarships, health care, or improved safety standards. They only use the highest earning schools' revenue as a basis for calculating the cap, skewing the limits into a higher range that smaller schools will never be able to meet.[169] And they do not give athletes the leverage afforded by labor law to strike in case of bargaining impasse or receive the minimum benefits provided by employment law.[170] Worse still, the NIL Go algorithm uses criteria that were unilaterally arrived at by the CSC and Deloitte. Athletes and boosters had no seat at the table to discuss what would be reasonable. As a result, there are no statutory or nonstatutory labor exemptions available to insulate the NCAA, the CSC, the conferences, or the universities from liability under the Sherman Act.[171] And there are sure to be considerably less restrictive ways to ensure parity between the schools and the conferences.

Still, if a court did find this "competitive balance" rationale persuasive at Step 2 of the Rule of Reason analysis, another critical issue arises—one that implicates both Step 1 and Step 3 of the analysis: the unique structure of the NIL Go anticircumvention mechanism, which relies on algorithmic logic and competitively sensitive pricing data to restrict market behavior. In this light, the concern is not just what the rules do, but how they do it, since the use of a centralized algorithm to evaluate and enforce "reasonable range of compensation" thresholds introduces a coordinated pricing logic across conferences and schools. This structure raises the possibility that the CSC, NIL Go, conferences, and member institutions are engaged not just in traditional horizontal price fixing, but in a more modern and diffuse form of algorithmic collusion—one that both resembles the structure currently under scrutiny in multiple courts, legislatures, and attorneys general offices across the country and also goes even further, using its formulas not just to artificially suppress compensation but also to boycott an entire group of competitors that were previously an innovative, robust, and dynamic part of the market.

West," destabilizing rosters by allowing athletes to chase the most lucrative NIL deals and transfer on a whim. *See, e.g.*, Kevin Sherrington, *Texas Tech, Maryland on Opposing Ends of NIL's Wild, Wild West Impacting College Sports*, Dallas Morning News (July 24, 2025), https://www.dallasnews.com/sports/college-sports/2025/07/24/texas-tech-maryland-on-opposing-ends-of-nils-wild-wild-west-impacting-college-sports/. However, there are a number of less restrictive means to mitigate this problem. For example, the NCAA could limit the availability of third-party NIL deals to a recruiting window similar to the transfer portal. And, as discussed *infra* notes 200–01 and accompanying text, all of this could be negotiated pursuant to collective bargaining and benefit from already existing statutory and nonstatutory labor exemptions.

168 *See Tracker*, The College Sports Litigation Tracker, https://www.collegesportslitigationtracker.com/tracker (last visited July 24, 2025) (collecting these objections).

169 *House* Settlement, *supra* note 4, at art. 3, § 1(e). *See supra* note 6.

170 *See generally, e.g.*, Sam C. Ehrlich & Neal C. Ternes, *The Paradox of 'Non-Union Unions': The Risks of Extending Antitrust Immunities without Labor Law's Protections*, 62 Am. Bus. L.J. 95 (2025) (contemplating the harms of nonemployee collective bargaining to worker leverage).

171 *Id*. at 99–102.

D. The Particular Problem with the CSC's Algorithmic Maximum Price Fixing

One of the first judicial tests for algorithmic price-fixing cases, *Gibson v. Cendyn Group*,[172] did not go particularly well for the plaintiffs. The plaintiff hotel guests had alleged a price-fixing conspiracy focused around a hub-and-spoke model with the pricing recommendation algorithm—offered by a hospitality revenue management software company called Cendyn—at the center.[173] However, the court found that the plaintiffs failed to adequately allege that the defendants in direct competition with each other, the hotel casinos, had entered into an agreement, finding that the pricing software outputs were merely nonbinding recommendations.[174] In other words, there was no agreement to abide by the "fixed" price set by the algorithm—the plaintiffs did not "allege that each spoke—Hotel Defendants—ever agreed to charge a price that the hub—Cendyn—demanded them to charge."[175]

Allegations against Deloitte and the CSC over alleged third-party NIL price fixing would not suffer from such a deficiency. While this particular scheme has, as illustrated in Figure 1 above, more layers than the Cendyn or RealPage hub-and-spoke conspiracy, it still operates as a hub-and-spoke but simply with more "hubs" and more "spokes." Deloitte and the CSC, running the pricing algorithm at the center, operate as the hub, providing information to the conferences, schools, and athletes themselves as to what athletes are permitted to charge interested third parties for their NIL services.[176] The conferences and schools act as additional enforcement mechanisms for the CSC, putting pressure on the athletes—the instruments of the price fix—to report deals while agreeing to accept and enforce punishments levied by the CSC.[177] Indeed, the power conferences have pushed their schools into a horizontal agreement to abide by the CSC's mandates over countervailing state law if necessary.[178]

And the CSC's directions are just that—mandates, not recommendations. While the CSC's decisions to prohibit NIL deals are appealable and framed as nonbinding, athletes that accept deals rejected by the CSC face potential enforcement consequences up to and including the loss of eligibility.[179] Similarly, schools that act to circumvent the revenue-sharing cap by facilitating NIL deals outside of NIL Go's parameters face their own punishment, including multimillion dollar fines, a reduction in transfers that a school can acquire from the portal, and

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172 Gibson v. MGM Grp., No. 23-cv-00140, 2024 WL 2060260 (D. Nev. 2024) (dismissing initial complaint). *See also supra* notes 119–28 and accompanying text.

173 *Id*. at *3.

174 *Id*.

175 *Id*. Of course, it is worth noting that the nonbinding nature of the arrangement should not have been dispositive and ignores the power of algorithms, discussed in Part III to distort pricing structures and rob the market of independent decision makers.

176 Dellenger, *supra* note 32.

177 *Id*.

178 *Id*. *See also* Dellenger, *supra* note 55. However, as discussed earlier, at least one state attorney general has directed its schools not to sign this agreement. *See supra* note 56 and accompanying text.

179 Dellenger, *supra* note 32.

postseason bans.[180] And for schools who follow conflicting state law over CSC mandates, the participation agreement that the CSC is pushing power conference schools to sign means that schools that so much as "support, advocate for or lobby for any change in federal, state or local law that would alters its obligations under" the CSC participation agreement "risk[] the loss of conference membership and participation against other power league programs"—or, in other words, a group boycott.[181] This activity is far closer (and even far beyond) the allegations of "conduct to facilitate and enforce the implementation of the pricing recommendations" that was sufficient to survive a motion to dismiss in the renter cases.[182]

As in those cases, the CSC's system only works if each athlete "divulges its confidential and commercially sensitive pricing," allows the CSC "to determine the price" of each NIL deal, and then "adopts that price with very little, if any, second guessing."[183] And while the court in *Gibson* agreed with the defendants that "Plaintiffs' failure to plausibly allege the exchange of confidential information from one of the spokes to the other through the hub's algorithms" was a "fatal defect" in the hub-and-spoke conspiracy claim, that failure is decidedly not the case in this new system.[184] Through the *House* Settlement, the CSC is requiring all Division I athletes to disclose any NIL deal over $600 to the system—regardless of whether the agreement is made with an associated entity or individual or even if the athlete is at a school that does not opt in to the settlement agreement[185]—almost certainly in part to acquire the information needed to train the NIL Go algorithm and compare incoming deals to "similar types of NIL deals struck between an athlete and the third party."[186]

And the data is very clearly confidential and commercially sensitive. Agents and third parties have already complained about the need to disclose this pricing and contract information, fearing accidental or intentional public disclosure by Deloitte.[187] Indeed, several states have acted to exempt athlete NIL deals from public disclosure laws.[188] With several algorithmic price-fixing cases distinguishing

180 *Id*.

181 Dellenger, *supra* note 55; Tex. Att'y Gen., Letter to Texas Universities Regarding CSC Participation Agreement, *supra* note 56, at 2.

182 Duffy v. Yardi Systems, 758 F. Supp. 3d 1283, 1294 (W.D. Wash. 2024).

183 *Id*. at 1292.

184 Gibson v. Cendyn Grp., LLC, No. 23-cv-00140, 2024 WL 2060260, at *5 (D. Nev. May 8, 2024)

185 *FAQ*, College Sports Commission, https://www.collegesportscommission.org/faq/ (last visited July 6, 2025) ("All NCAA Division I student-athletes must report third-party NIL deals with compensation that equals or exceeds $600 . . . A third-party NIL deal is any deal with an external payor, meaning *any entity not owned or controlled by the student-athlete's institution* … all Division I student-athletes, *regardless of whether or not their school has opted in to revenue sharing*, will have to report third-party NIL deals valued at $600 or more in the aggregate into the NIL Go platform.") (emphasis added).

186 Dellenger, *supra* note 32.

187 JC Shelton, *Brands May Walk Away from NIL if NCAA Doesn't Fix This One Rule*, NIL Daily (Sports Illustrated) (June 27, 2025), https://www.si.com/college/nil/nil-news/brands-may-walk-away-from-nil-ncaa-doesnt-fix-this-one-rule-section-e; Heitner, *supra* note 36.

188 *See, e.g.*, H.B. 378 (N.C. 2025) (signed into law on July 1, 2025); HB 25-1041 (Colo. 2025) (signed

between the policing of public prices and more sensitive private prices,[189] NIL pricing information falling by state law into the latter category is clearly relevant and material when discussing the antitrust implications of that forced disclosure.

In this respect, NIL Go's algorithmic price fixing very much mirrors—and even goes beyond—the schemes challenged in *Duffy*, *Cendyn*, and *RealPage*. Indeed, as noted earlier, the NIL Go scheme carries all of the "plus factors" identified by the Supreme Court in *Twombly* like parallel price increases (or, in this case, parallel price decreases), the exchange of confidential and commercially sensitive information, mandatory adherence to the algorithm's pricing recommendation, changes in policies to only allow deals that are priced lower than what the free market may otherwise provide, acting against their own recruiting self-interests, and strict policing by the operator or competitors to ensure compliance.[190]

Compare NIL Go to just some of the allegations in the RealPage cases, for example. The amended complaint filed by the United States and the state attorneys general alleges that landlords submit sensitive, nonpublic competitor pricing information so that RealPage's algorithm can establish a "market range" for landlords.[191] This allows landlords to "effectively agree to outsource their pricing function to RealPage with auto acceptance" making it so that RealPage's algorithm "and not the free market, determines the price that a renter will pay."[192] Similarly, college athletes are required under the *House* Settlement to both submit *their* sensitive market information and outsource *their* pricing functions so that their services are only offered within the Deloitte algorithm's determination of a "reasonable range of compensation" rather than what the free market would otherwise bear.[193]

Similarly, the government plaintiffs in *RealPage* have alleged that RealPage (1) created procedures that make it much more difficult and time consuming to use

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into law on Mar. 28, 2025); S.B. 4439 (N.J. 2025) (passed both houses June 30, 2025); H.B. 4643 (Mich. 2025) (pending).

189 *See, e.g.*, *In re* Passenger Vehicle Replacement Tires Antitrust Litig., 767 F. Supp. 3d 681, 716 (N.D. Ohio 2025) ("Accordingly, because plaintiffs do not offer any explanation of how the exchange of unspecified non-public information could be useful in policing co-conspirators' presumably public prices, the bare allegation that defendants may have been able to do so does not bolster the plausibility of the alleged conspiracy."); Cornish-Adebiyi v. Caesars Ent., Inc., No. 23-CV-02536, 2024 WL 4356188, at *5 (D.N.J. 2024) ("What is more, the specific sources quoted by the Amended Complaint seem to confirm that the pricing recommendations at issue were never based on the confidential, proprietary data of their competitors. And the Casino-Hotels' 'supply and demand data' to which Plaintiffs allude appears to be publicly available information.").

190 Duffy v. Yardi Sys., Inc., 758 F. Supp. 3d 1283, 1292–93 (W.D. Wash. 2024); *In re* RealPage, Inc., Rental Software Antitrust Litig. (No. II), 709 F. Supp. 3d 478, 503, 506–07, 510–12, 516 (M.D. Tenn. 2023). *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007). *See also In re* Musical Instruments & Equip. Antitrust Litig., 798 F. 3d 1186, 1194 (9th Cir. 2015) ("Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.").

191 Am. Compl., United States v. RealPage, *supra* note 10, at 18.

192 *Id*. at 3.

193 *Student-Athlete NIL Deals*, *supra* note 14.

a price that was not recommended by RealPage; and (2) employs price advisors that train clients, encourage their use of the price recommendations, and review their requests to override price recommendations—both to ensure adherence to the algorithm's pricing recommendation and police compliance.[194] The college sports industry has a similar setup, with compliance officers trained by the NCAA at each school, the CSC's compliance enforcement, and the difficulty of an athlete challenging the rejection of a deal by the NIL Go system.

And finally, the government plaintiffs have also alleged in *RealPage* that RealPage encourages landlords to adhere to price recommendations, even if doing so leaves them below full occupancy or if the algorithm recommends prices that are above a weakened market, clearly pointing toward the idea that these landlords are acting against their self-interests by aligning with RealPage's algorithmic recommendations.[195] For the CSC, the self-interest plus factor is obvious. Even if the industry as a whole has an interest in ensuring competitive balance (or, more cynically, tamping down labor costs), athletes clearly have an interest in higher-priced NIL deals, and the schools themselves have an interest in allowing third parties like boosters and collectives to pay those labor costs for them and to use their resources to recruit the best athletic talent for their programs.

These structural parallels matter not only because of how NIL Go is designed, but also because of how antitrust law treats enforcement—even when it is uneven, imperfect, or incomplete. So even if NIL Go compliance turns out to be uneven—if athletes misreport, schools look the other way, or state laws interfere—the system's legal risk does not disappear. A price-fixing conspiracy need not be airtight to violate the law. So long as an arrangement creates a "coercive business climate" in which actors knew of the price fix, "understood the consequences of failure to comply and thus generally complied" with such an arrangement will go beyond the "safe harbor" of "announcement plus mere refusal to deal."[196] A hole-filled conspiracy is still a conspiracy.

In summation, the NIL Go algorithm also runs afoul of a principle that guides every antitrust lawsuit: "In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation'

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194 Am. Compl., United States v. RealPage, *supra* note 10, at 24.

195 *Id*. at 52–53 ("RealPage succinctly summarized for landlords the effect of using AIRM and YieldStar in down markets: it 'curbs [clients'] instincts to respond to down-market conditions by either dramatically lowering price or by holding price when they are losing velocity and/or occupancy.' These tools instill pricing discipline in landlords, curbing normal fully independent competitive reactions by substituting them with interdependent decision-making.") *See also id*. at 57–58 ("In other words, when market conditions weaken and the model calculates that a price decrease is warranted, this guardrail kicks in and recommends keeping the recent rent even though it is suboptimal. This asymmetry favors price increases over price decreases.").

196 Yentsch v. Texaco, 630 F.2d 46, 53 (2d Cir. 1980). *See also* United States v. Colgate, 250 U.S. 300, 307–08 (1919) (holding that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" and the right to "announce in advance the circumstances under which he will refuse to sell").

of the Nation's resources."[197] By restricting the purpose and value of NIL deals to those unilaterally deemed acceptable by the CSC, it deprives schools, athletes, advertisers, and boosters of a free market place; takes allocation of athlete and booster resources out of the free market and into the hands of administrators; and does so with no discernible benefit to consumers and significantly more restrictions than competitive balance on the playing field requires.

E. Potential Plaintiffs: What Litigation Does the House *Settlement Stop and What Litigation Does It Not Stop?*

Of course, in addressing potential litigation challenging NIL Go, one must first address the elephant in the room: the protections for the new system baked into the *House* Settlement. The *House* lawsuit alleged that NCAA rules prohibiting students from profiting from their NIL violated federal antitrust laws.[198] Yet the *House* Settlement explicitly permits NCAA rules that continue to prohibit NIL deals with associated entities that do not meet the NCAA's chosen criteria, a clear horizontal agreement to limit compensation available to college athletes.[199] These types of restraints are permissible in professional leagues only because of the statutory and nonstatutory labor exemptions that permit and protect collective bargaining.[200] That path is, for a variety of reasons, not clearly possible or probable in the current college sports athletic environment.[201]

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197 NCAA v. Alston, 594 U.S. 69, 73 (2021).

198 Third Cons. Amend. Class Action Compl., at ¶ 7, House v. NCAA, No. 20-cv-03919, 2025 WL 1675820 (Sept. 26, 2024), Dkt. 533-1.

199 *House* Settlement, *supra* note 4, at art. 4, § 3. The pure salary cap question—that is, schools banding together through the *House* Settlement to establish a ceiling for how much they are permitted to pay the players—is also an obvious horizontal agreement in restraint of trade and thus a potential antitrust problem. *See supra* note 81 and accompanying text (discussing horizontal agreements). *See also* Law v. NCAA, 134 F.3d 1025 (10th Cir. 1998) (holding an NCAA rule imposing a cap on so-called restricted earnings coaches in college basketball violated antitrust law).

200 *See* The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq.; section 6 of the Clayton Act, 15 U.S.C. § 17; and section 20 of the Clayton Act, 29 U.S.C. § 52 exempt labor unions from the Sherman Act's prohibition of restraints of trade. They serve the express goal of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151. There is also a "judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions." Brown v. Pro Football, Inc., 518 U.S. 231, 254 (1996) (Stevens, J. dissenting). "[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." *Id*.at 237.

201 *See, e.g.*, Wood v. NBA, 809 F. 2d 954, 959 (2d Cir. 1987) ("We may further assume that were [the salary cap, college draft, and prohibition of player corporations] agreed upon by the NBA teams in the absence of a collective bargaining relationship with a union representing the players, they would be illegal and plaintiff would be entitled to relief.") A path to collective bargaining in college sports may be hypothetically possible through creative positioning (*see* Joseph Sabin et al., *'Entertaining' a New College Athlete Unionization Structure*, 34 J. Legal Aspects Sport 26 (2024)), but is undeniable that both practical and legal challenges stand firmly in the way. For one, neither side seems particularly interested in collective bargaining, with unionization efforts among athletes existing only in isolated efforts. *See, e.g.*, Nw. Univ., 362 NLRB 1350 (2015); Amanda Christovich, *'We Want to Be Paid': Inside Dartmouth Men's Basketball's Historic Union Effort*, Front Off. Sports (Mar. 9, 2024), https://frontofficesports.com/we-want-to-be-paid-inside-

With college athletes lacking a true collective bargaining arrangement, the *House* Settlement takes a different path, relying on class action settlement terms, release clauses, and collateral estoppel to try to ensure that the college sports industry's new path is protected from legal challenge moving forward.[202] Yet it is unquestionable that relying on class action settlement release clauses does not provide anything close to the same level of legal insulation as a collective bargaining agreement or legislative antitrust exemption, leading everyone from journalists,[203] scholars,[204] and the Justice Department,[205] to point out the potential weak spots in the *House* Settlement moving forward. Indeed, the order approving the settlement did not declare them valid under section 1 of the Sherman Antitrust Act. Judge Wilken instead simply declined to engage in a Rule of Reason analysis

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dartmouth-mens-basketballs-historic-union-effort/; Daniel Libit, *UAB Commitment to Athletes.org Draws Attention—and Scrutiny*, Sportico (Apr. 30, 2024), https://www.sportico.com/leagues/college-sports/2024/uab-athletes-org-commitment-jim-cavale-1234777345/. Similarly, school personnel are seemingly only interested in collective bargaining if they can do so without athletes becoming employees. *See, e.g.*, Shehan Jeyarajah, *Notre Dame AD Calls for Collective Bargaining Rights for College Athletes: 'I Think It's Worth Considering'*, CBS Sports (Oct. 17, 2023), https://www.cbssports.com/college-football/news/notre-dame-ad-calls-for-collective-bargaining-rights-for-college-athletes-i-think-its-worth-considering/; Seth Emerson, *Collective Bargaining in College Sports: Is It a Third Rail or an Inevitability?*, The Athletic (N.Y. Times) (May 29, 2025), https://www.nytimes.com/athletic/6389566/2025/05/29/collective-bargaining-college-sports-danny-white/. *But see* Ross Dellenger, *Could Collective Bargaining Be the Answer for College Sports? Some ADs Are Ready to Say the Quiet Part Out Loud*, Yahoo! Sports (June 30, 2025), https://sports.yahoo.com/college-football/article/could-collective-bargaining-be-the-answer-for-college-sports-some-ads-are-ready-to-say-the-quiet-part-out-loud-120029195.html (demonstrating that while some are still pushing for nonemployee collective bargaining, some—most notably Tennessee athletic director Danny White—are more accepting of a reality where college athletes are employees). With nonemployee collective bargaining being both not supported under the law and functionally problematic (*see* Sam C. Ehrlich & Neal C. Ternes, *The Paradox Of 'Non-Union Unions': The Risks of Extending Antitrust Immunities Without Labor Law's Protections*, 62 Am. Bus. L.J. 95, 97–112 (2025) (discussing the legal and practical problems with nonemployee collective bargaining while using college sports as a case study)) and even employee collective bargaining likely foreclosed due to wide variances in which states allow and do not allow public sector employee bargaining (*see* Karen Weaver, *Can College Athletes Unionize Within a Conference? State Laws Will Dominate Until After The 2024 Election*, Forbes (Oct. 27, 2024), https://www.forbes.com/sites/karenweaver/2024/10/27/can-college-athletes-unionize-within-a-conference-state-laws-will-dominate-until-after-the-2024-election/), college athlete collective bargaining seems off the table—at least for now.

202 *See generally* Scott White, Sam C. Ehrlich, & Ryan Rodenberg, *Regulating College Sports and Collateral Estoppel*, 103 Tex. L. Rev. Online 202 (2025) (contemplating the reach and scope of the *House* Settlement's release clause through the lens of collateral estoppel).

203 *See, e.g.*, Pete Thamel & Dan Murphy, *Why an NCAA Antitrust Settlement Will Leave Lots of Questions Unanswered*, ESPN (May 16, 2024), https://www.espn.com/college-football/story/_/id/40158775/ncaa-house-antitrust-settlement-billions-dollars-unanswered-questions; Eric Prisbell, *After House Settlement Filing, a Deep Dive into an Unsettled State of Play*, On3 (July 30, 2024), https://www.on3.com/nil/news/after-house-v-ncaa-settlement-filing-a-deep-dive-into-an-unsettled-state-of-play/.

204 *See, e.g.*, *generally* Edelman & Carrier, *supra* note 2.

205 Statement of Int. of United States of America at 9, *In re* College Athlete NIL Litigation, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. Jan. 17, 2025), Dkt. No. 595 [hereinafter DOJ Brief] ("All parties agree that even if the Court approves the Proposed Settlement under Rule 23, the Salary Cap Rule is not immune from future antitrust scrutiny by a potential party that is not bound by its terms.").

of the agreement,[206] finding that sort of adjudication irrelevant to the settlement approval process.[207] And let it not be said that stakeholders are unaware of these issues, as clearly evinced through their continued lobbying to Congress to protect the settlement's terms through federal legislation.[208]

Judge Wilken was clear in her opinion and order granting final approval of the settlement that she does not believe the release clause in the settlement applies to claims challenging the implementation of terms of the injunctive relief portion of the settlement, including the revenue-sharing cap and its anticircumvention measures.[209] However, the NCAA likely will not see it that way. Indeed, they have already signaled in a letter to the Department of Justice that they may seek to use collateral estoppel as an affirmative defense against any challenges to the revenue-sharing cap.[210] Such a strategy may have limited success—in the words of Judge Wilken, the NCAA "may make these arguments but that does not mean they will be successful."[211] But the risk must be addressed regardless.[212]

Even if the settlement agreement does not release any future claims by athletes based on implementation of the injunctive relief terms, the settlement does give Judge Wilken's courtroom (and her appointed special master, Magistrate Nathanael Cousins) exclusive jurisdiction "to resolve all disputes that may arise concerning compliance with, the validity of, interpretation or enforcement of the terms and conditions of this Injunctive Relief Settlement."[213] Additionally, the agreement provides

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206 *See supra* notes 93–95 and accompanying text (discussing Rule of Reason analysis).

207 *In re* College Athlete NIL Litig., No. 20-cv-03919, 2025 WL 1675820, at *25 n.8, *28 n.10, *29 n.13, *37 (N.D. Cal. June 6, 2025).

208 Daniel Libit, *House v. NCAA May Be Settled, but Congress Is Not*, SPORTICO (June 12, 2025), https://www.sportico.com/leagues/college-sports/2025/congressional-hearing-house-v-ncaa-bilirakis-trahan-1234856306/. As discussed *supra* note 42, the SCORE Act represents Congress's latest and furthest effort to do so.

209 *In re College Athlete NIL Litig.*, 2025 WL 1675820, at *27.

210 DOJ Brief, *supra* note 205, at 10 ("The NCAA, however, has taken the position that it may use the Proposed Settlement in the future as a defense to antitrust liability in a case brought by a future plaintiff seeking to achieve more fulsome protection for the free and fair market opportunities of student athletes than the Proposed Settlement affords.").

211 *In re College Athlete NIL Litig.*, 2025 WL 1675820, at *37.

212 Indeed, it would not be the first time the NCAA has tried to lump even completely unrelated antitrust litigation within the *House* Settlement's terms. In March 2024, the NCAA invoked collateral estoppel as an affirmative defense in their answer to the complaint in *Brantmeier v. NCAA*—a case challenging NCAA rules barring athletes from receiving prize money from external competitions in their sports. Answer to Complaint at 42-43, Brantmeier v. NCAA, No. 24-cv-00238 (M.D.N.C. June 26, 2024). *See* White, Ehrlich, & Rodenberg, *supra* note 202, at 214–15. The NCAA even sought to consolidate *Brantmeier* and an athlete eligibility rule case, *Bewley v. NCAA*, with *House* in the Northern District of California, but was unsuccessful. *In re* Coll. Athlete Comp. Antitrust Litig., 730 F. Supp. 3d 1378, 1380 n. 1 (J.P.M.L. 2024) (noting that the NCAA considered *Brantmeier* and *Bewley* related cases). *See also* Bewley v. NCAA, No. 23-cv-15570, 2024 WL 113971 (N.D. Ill. 2024) (denying preliminary injunction to athletes who had been barred from college sports after receiving NIL-related compensation while attending a high school-level basketball academy).

213 *House* Settlement, *supra* note 4, at art. 6, § 1(b). *See also* Notice of Intent to Appoint Magistrate Judge Nathanael Cousins as Special Master, *In re* College Athlete NIL Litigation, No. 20-cv-03919 (N.D. Cal. June 9, 2025), Dkt. No. 981 (appointing Magistrate Judge Cousins as a special master

that any such disputes asserted on behalf of athletes "shall be prosecuted exclusively by Class Counsel."[214] And even for issues where Hagens Berman and Winston & Strawn wish to challenge CSC actions like they did with the CSC's categorical exclusion of NIL collective deals under the "valid business purpose" provision,[215] the settlement provides a process for challenges specific to adopted rules related to settlement circumvention—a category of rules that very likely would include the rules discussed throughout this article.[216] This process necessarily involves arbitration and the special master, making any sort of private litigation likely to draw a motion to compel arbitration.[217]

As such, antitrust actions by the athletes themselves face a difficult path at the outset. But the athletes are not the only parties involved in the promulgation of rules restricting their third-party NIL deals. Indeed, two categories of third parties whose interests have been potentially affected by the revenue-sharing cap come to mind.

The first is the government. In the waning days of the Biden administration, the Justice Department submitted a statement of interest to the *House* docket arguing that the settlement merely "replaces an agreement among competitors to cap compensation for use of college athletes' NIL at $0 with an agreement among competitors to cap compensation at 22% of average revenue" and thus "raise important questions about whether the settlement is fair, reasonable, and adequate."[218] While the Trump administration did not pick up this attack once taking office,[219] they could at a later date, and a state Attorney General could make a similar case in litigation. States leading challenges to objectionable rules in college sports is hardly unprecedented; antitrust litigation led by state Attorneys General achieved injunctive relief that forced the NCAA to significantly loosen its restrictions on athlete transfers[220] and abolish rules prohibiting athletes from negotiating NIL deals prior to enrollment.[221] Indeed, a statement issued by the Attorneys General of Tennessee, New York, Ohio, Florida, and the District of Columbia in opposition to the SCORE Act argued that the act's enshrinement of the *House* Settlement "attempts to shield the NCAA from accountability by precluding States from challenging how its new College Sports Commission determines what constitutes

charged with overseeing disputes concerning the injunctive relief).

214 *House* Settlement, *supra* note 4, at art. 6, § 1(c).

215 *See supra* note 48 and accompanying text.

216 *House* Settlement, *supra* note 4, at art. 6, § 3.

217 *Id*.

218 DOJ Brief¸ *supra* note 205, at 5–8.

219 They did not rescind the brief, but they did not take Judge Wilken up on her offer to speak at the final approval hearing. *See* Order Regarding Hearing on Motion for Final Approval of Proposed Settlement at 2, *In re* College Athlete NIL Litig., No. 20-cv-03919 (N.D. Cal. Mar. 4, 2025), Dkt. No. 723 (noting "Objector the United States" as one of the only objectors the court will call upon during the hearing; no representative for the United States appeared or otherwise spoke at the hearing).

220 State of Ohio v. NCAA, 706 F. Supp. 3d 583 (N.D. W.Va. 2023).

221 State of Tennessee v. NCAA, 718 F. Supp.3 d 756 (E.D. Tenn. 2024).

acceptable third-party NIL payments under the vague 'reasonable range of compensation' and 'valid business purpose' standards in the new third-party NIL compensation system."[222]

But while the Justice Department and the states may not feel it necessary to get involved, a third group exists that could certainly feel that their interests are trampled in some regard by the settlement's revenue share cap: the boosters and collectives identified as "Associated Entities and Individuals" within the settlement terms.[223] These groups are specifically targeted—both by the settlement itself and by later-issued (and since revoked) CSC guidance[224]—with their NIL deals subjected to a stringent clearinghouse prior restraint where their prospective business partner athletes risk losing eligibility if they move forward with a deal that the clearinghouse rejects.[225] And the door is wide open to a claim by these affected entities, as Judge Wilken made clear in a footnote in her final approval order that not only was she declining to opine on the legality of the cap itself, but also that "the question of whether the third-party Associated Entity NIL provisions violate the Sherman Act has not and will not be adjudged."[226]

Even with the "Associated Entities and Individuals" term making the range of NIL deals narrower than it was in the original settlement,[227] including everyone who has ever been a member of an NIL collective or a school's booster club, the range of affected deals is still quite broad.[228] This, correspondingly, makes the list of potential parties potentially harmed by NIL Go broad as well. And while one might argue that these entities can avoid CSC ire by simply engaging in deals that are within a "reasonable range of compensation" and for a "valid business

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222 Skrmetti et al., *supra* note 42, at 3. For discussion of the SCORE Act, *see supra* note 42.

223 *House* Settlement, *supra* note 4, at art. 1, § 1(c).

224 *See supra* notes 47–48 and accompanying text.

225 *See* Ross Dellenger, *Do College Football Coaches Think New Enforcement Arm Will Work? LSU's Brian Kelly: 'It Is Not a Slap on the Wrist'*, YAHOO! SPORTS (Feb. 24, 2025), https://sports.yahoo.com/college-football/article/do-college-football-coaches-think-new-enforcement-arm-will-work-lsus-brian-kelly-it-is-not-a-slap-on-the-wrist-200619854.html ("Deals rejected for a second time are referred to the CEO and enforcement staff and are then processed through an appeals system via court-overseen arbitration. . . . Athletes who lose arbitration cases and still accept compensation in the rejected deal are deemed ineligible.").

226 *In re* College Athlete NIL Litig., 2025 WL 1675820 at *25 n.8.

227 The "Associated Entities and Individuals" term did not exist in the original settlement agreement; the original agreement instead simply used "Boosters (individually or collectively) of a Member Institution," defining "booster" by incorporating by reference NCAA Bylaws 8.4.2, 13.02.16, and 13.02.16.1. *See* Settlement Agreement at art. 1, § 1(c), art. 4, § 3(a), *In re* College Athlete NIL Litig., No. 20-cv-03919 (N.D. Cal. July 26, 2024), Dkt. No. 450-3. Such a broad definition—and an lack the right to appeal through neutral arbitration (rather than to the NCAA)—was objectionable to Judge Wilken, and the parties amended the settlement accordingly. *See* Pl. Supp. Br. in Support of Motion for Preliminary Settlement Approval at 1, *In re* College Athlete NIL Litigation, No. 20-cv-03919 (N.D. Cal. Sept. 26, 2024), Dkt. No. 534.

228 *House* Settlement, *supra* note 4, at art. 1, § 1(c)(a–b) (including any "individual who is or was a member, employee, director, officer, owner, or agent of" an entity that exists "in significant part" to either "promot[e] or support[] a particular Member Institution's intercollegiate athletics program or student-athletes; and/or creating or identifying NIL opportunities solely for a particular Member Institution's student-athletes").

purpose" (i.e., not pay-for-play), that goes against the very nature of many of these individuals' and entities' interests (they want to continue to serve their favored schools by incentivizing the most talented athletes to go there) and the very purpose of the Sherman Act, free and open competition. Importantly, these boosters were not parties to the *House* litigation, nor were they class members. Thus, they may not be bound by the *House* Settlement's arbitration provisions and could initiate their own lawsuits challenging the settlement's legality—namely, its restraints on their ability to participate in the market for college athlete's NIL.[229] One quoted personnel director stated definitively that "[i]f you tell a booster or business owner they can't give a star player $2 million, there will be lawsuits."[230]

As such, it is clear that the CSC's authority will be tested—and tested soon. And whether that authority is properly given or properly used is not the only potential legal issue that may soon face the CSC. After all, the CSC and NIL Go model do not just introduce a new compliance framework for college sports. They also shift that compliance model into a new age of *algorithmic pricing coordination and enforcement*—an area where the CSC does not stand alone.

IV. CONCLUSION

It is crystal clear that the CSC and the NCAA were prepared for the inevitable legal challenges of their new revenue-sharing system. They hired experienced lawyers with management experience in professional sports, built out a complex enforcement apparatus, and attempted to preempt legal risk by embedding arbitration clauses, waiver agreements, and state-law workarounds into the very structure of the settlement.

But the clarity of their own exposure does not insulate their institutional partners. On the contrary, general counsels at universities now face the difficult task of navigating this new compliance regime in a legal environment where algorithmic price coordination—particularly when backed by enforcement threats and group pressure—sits squarely in the crosshairs of regulators and plaintiffs' attorneys. And if NIL Go is ultimately found to be an illegal hub-and-spoke conspiracy, universities may not be able to hide behind the settlement's structure or point fingers at the CSC—they may instead find themselves as spokes held liable for participating in the wheel.

For general counsel at participating institutions, the most immediate risk is not just litigation—it is embedded liability within the everyday administration of NIL deals. By signing settlement participation agreements, compelling athletes to submit contracts to NIL Go, and enforcing the CSC's determinations internally, universities are no longer passive observers of a centralized compliance model. They are active participants. Each decision to approve, deny, or discipline based on an algorithmic "reasonable range of compensation" determination could be framed as evidence of a coordinated scheme—particularly if enforcement is

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229 A Sherman Act claim is just one of many that might be available to boosters. There are a number of state law claims that they could make, including tortious interference with a contract and state unfair competition laws.

230 Williams, *supra* note 44.

shown to align across institutions or was undertaken in reliance on confidential data circulated through the CSC. Even absent a formal agreement between schools, plaintiffs could plausibly argue that the structural pressure and mutual commitments among member institutions amount to a horizontal understanding with market-restraining effects.

The full legal implications of NIL Go—and of algorithmic compliance more generally—are still unfolding. What is clear, however, is that the convergence of sensitive pricing data, centralized enforcement, and algorithm-driven decision-making presents novel risks that extend well beyond traditional NCAA compliance models. For now, the CSC and its affiliated vendors remain the focal point of those concerns. But the broader use of algorithmic pricing and benchmarking tools in college sports—whether in NIL administration, scholarship allocation, or internal budget modeling—may eventually draw similar scrutiny.[231] University general counsels would be well advised to treat NIL Go not as an isolated development but as an early example of a compliance landscape increasingly shaped by opaque logic and shared data.

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231 Although this article has focused primarily on the centralized enforcement architecture created by Deloitte, NIL Go, and the CSC, another potential algorithmic antitrust concern may lie in the institutional-level tools as well: the GM software tools that help athletic departments determine how to allocate their own revenue-share budgets. These companies offer software products that use data from opt-in peer institutions to generate athlete-specific compensation recommendations—which perhaps may even be more fitting the RealPage litigation model. *See, e.g.*, *Basepath Introduces New Technology: Basepath General Manager*, BASEPATH (June 6, 2024), https://basepath.com/basepath-introduces-new-technology-basepath-general-manager/ (advertising the software as providing insights on "fair market value" using "aggregated NIL contract data"); *Help: NIL Benchmarks*, TEAMWORKS GENERAL MANAGER, https://help.teamworks.com/generalmanager/s/article/NIL-Benchmarks (last visited June 25, 2025) ("General Manager's new NIL Benchmarks leverages de-identified NIL transaction data—not estimates or self-reported numbers. Our NIL Benchmarks are based on actual dollars paid through Teamworks and Basepath—the most widely used NIL platforms in college athletics. This makes it the most accurate and reliable NIL market data available."). It is not believed that these platforms are designed to enforce any sort of compliance with price fixing—which may very well position the developers and their users outside of any antitrust risk. *See* Gibson v. Cendyn Group, No. 23-cv-00140, 2024 WL 2060260 (D. Nev. 2024). *See also supra* notes 172–75 and accompanying text. However, the fact they employ competitively sensitive nonpublic data to give pricing recommendations is still potentially problematic should the antitrust landscape shift in the future. Full identification of these risks is better suited for future research when more information is known, both on how these software tools are proliferated and operated and on how future courts will treat the sharing of nonpublic competitively sensitive data for pricing recommendations (rather than pricing fiats) moving forward.