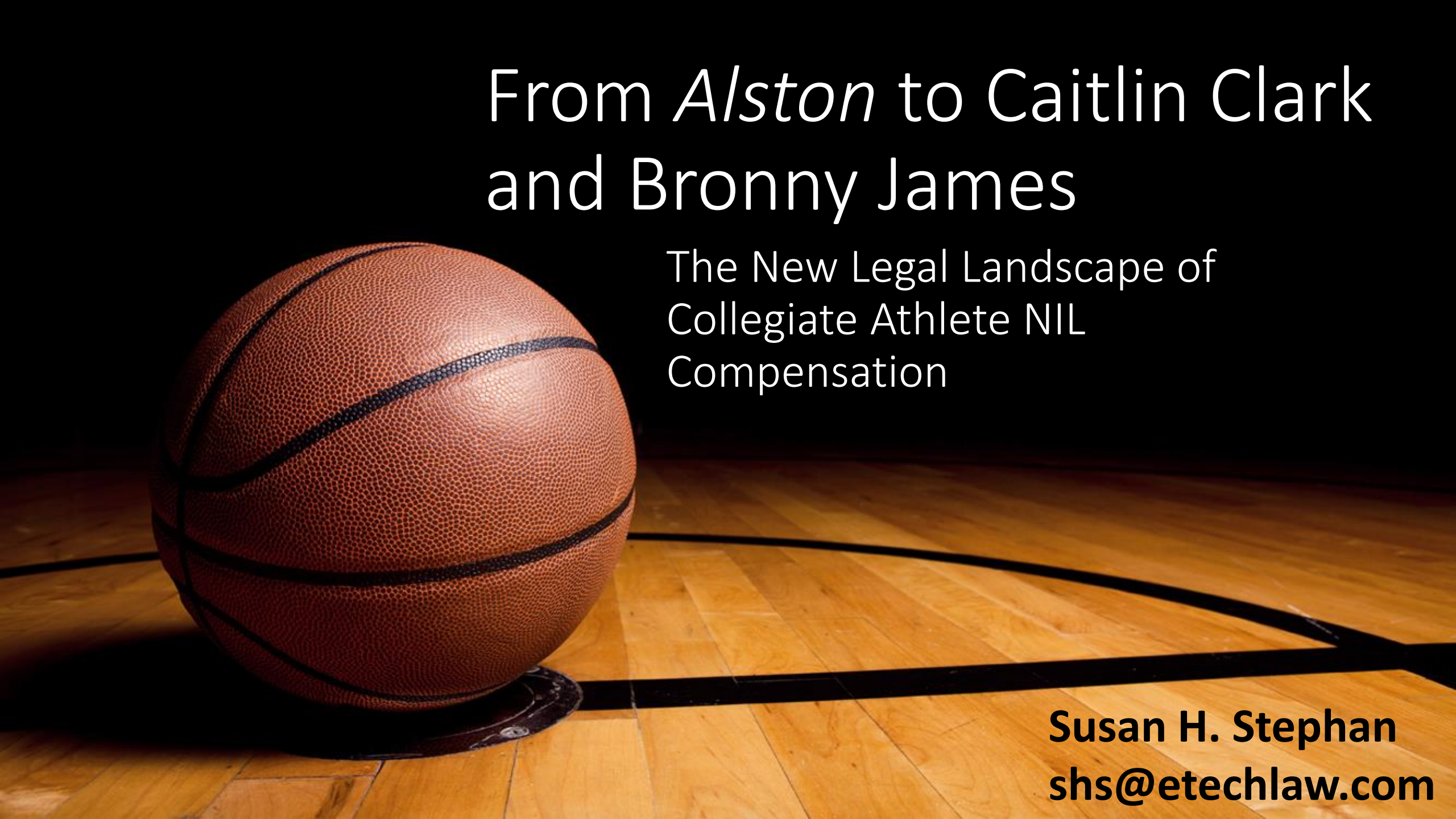

From *Alston* to Caitlin Clark and Bronny James

The New Legal Landscape of Collegiate Athlete NIL Compensation

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Overview

- Brief Name, Image and Likeness (NIL) Landscape Recap
- The Courts: *O'Bannon*, *Alston*, and a current Tennessee/Virginia, et. al Challenge
- NCAA Proposed and Existing Restrictions
- Minnesota's NIL Exchange and Student Resources
- Future of Student-Athletes and NIL

NIL Stats

At one point, Bronny James had the highest valuation in On3's NIL database at $7.2 million; now: $3.7 mil

- Shedeur Sanders (CO football) $4.1 mil
- Livvy Dunne (LSU gymnastics) $3.9 mil
- (MN's own) Paige Bueckers: (UConn) $1 mil
- And…Caitlin Clark (pre-WNBA): $3.1 mil ($76,535 in WNBA wages - $97,952 in year 4)
  - Nike
  - Gatorade
  - State Farm
  - Bose
  - Buick
  - Topps
  - Panini America
  - Shoot-A-Way
  - Hy-Vee
  - H&R Block
  - Goldman Sachs
  - The Vinyl Studio

In 1984, the Court found that horizontal restraints on competition were "essential if the product is to be available at all." "…the integrity of the product cannot be preserved except by mutual agreement." (*National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984))

But how far can those restraints go?

Fast forward to June 2021 when the Supreme Court weighed in on the claims of then-current and former student athletes in the *Alston* case regarding the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." Specifically, they alleged that the NCAA's rules violated § 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies "in restraint of trade or commerce." 15 U.S.C. § 1.

Predecessor to *Alston*: *O'Bannon*

- *Alston* began on the heels of *O'Bannon v. NCAA* , 802 F.3d 1049 (9th Cir. 2015) (*cert. den* October 3, 2016). This case involved a class of former college athletes who challenged the NCAA's use of the images and likeness of its former student athletes for commercial purposes without compensation. Gist: NCAA violated **Sherman Act Section 1** and schools should be allowed to offer full cost-of-attendance scholarships to athletes, cover cost-of-living expenses that were not then part of NCAA scholarships, and be permitted to compensate athletes between $1,000 and $5,000 per year of eligibility for Name Image and Likeness (NIL).

Why didn't the NCAA settle with O'Bannon et al.?

The Sherman Act

15 U.S.C. § 1 says:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…

Overall analytical approach

Most antitrust restraints are analyzed under a rule of reason analysis requiring

- Determination of market power
  - Relevant product market defined: cross-elasticity of demand (SSNIP for merger)
  - Relevant geographic market defined: Area of effective competition in which the seller operates, and to which the purchaser can practicably turn for supplies
- Balance assessment of pro and anticompetitive effects

Under rule of reason, once plaintiff establishes prima facie case of illegality by presenting market power and facially anticompetitive restraint, THEN

- Defendant can rebut by proving legitimate business justification or efficiency benefit
- THEN plaintiff has the burden of showing less restrictive alternative for achieving same justification/efficiencies

The most dangerous practices are deemed illegal *per se* (a rule of administrative convenience)

The (these days elusive) *per se* rule:

Illegal *per se* "classic" category:

- If a practice usually results in significant adverse competitive effects
- Rarely is justified by significant redeeming virtues
- When less restrictive alternatives are often available

Under a strict *per se* approach, illegality is determined without regard to these traditional criteria:

- Market power
- Purpose
- Anticompetitive effect
- Consideration of justifications

When do we do a Full Rule of Reason Analysis?

- When there are pro-competitive and pro-consumer features asserted
- When anticompetitive effects of restraints are "far from intuitively obvious"
- **Might** be more likely with a non-profit, or in re professional ethics, or even professional associations generally?

Recall that regarding the NCAA, in 1984 the Court found that despite market power and a clear restraint on trade (regarding restrictions on individual teams negotiating broadcast contracts), horizontal restraints on competition in college athletics were "essential if the product is to be available at all" and "…the integrity of the product cannot be preserved except by mutual agreement." (*National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984))

- Court ultimately found that in limiting the number of live broadcasts, the NCAA was attempting to artificially increase the value of live tickets, in the same way that a monopolist seeks to manipulate the market by limiting output. NCAA lost, but it received the benefit of the rule of reason.

There also is a “Quick Look” Rule of Reason Analysis

- An intermediate standard (between full rule of reason & *per se*) that applies when *per se* is inappropriate but where “no elaborate industry analysis is required to demonstrate the anticompetitive character” of the restraint
  - When an observer “with even a rudimentary understanding of economics” could conclude that the arrangement would have an anticompetitive effect on customers, markets
    - Harm is presumed
    - If no pro-competitive justifications offered by defendants, they lose

NCAA v. Alston, 141 S. Ct. 2141 (U.S. 2021)

Student athletes in this case alleged that limits on education-related compensation create an illegal restraint of trade under antitrust laws in the case of "admitted horizontal price fixing in a market where the defendants exercise monopoly control." It does not specifically address Name Image and Likeness (NIL) issues but definitely added fuel to the fire.

- The opinion's comprehensive factual background features a history of U.S. intercollegiate athletics, its growth, efforts to maintain amateurism, the ability of colleges and administrators to profit significantly from the commercial exploitation of NCAA competition, and it concludes that the NCAA has become "a massive business."

The NCAA admitted monopsony (buy-side monopoly) power, and for the Supreme Court's review, its only remaining defense is preserving amateurism and Court should take a "quick look" to find the NCAA in the clear

The Court did not buy it. A 9-0 Supreme Court ruled that the NCAA violated antitrust law by limiting education-related compensation for its student-athletes.

Justice Kavanagh's concurrence:

- "The NCAA's business model would be flatly illegal in almost any other industry in America…All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks**. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law'**…And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work... Traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law." [emphasis added]

Legislative response in *Alston*'s aftermath:

So far, 31 states + D.C. (but not Minnesota) have implemented NIL legislation or executive orders. (***Are we worried about disparities created by varying state allowances?***)

- Many use on California's 2019 "Fair Pay to Play Act," the first state NIL law enacted, as a model
- Minnesota's NIL bill — **House Bill 3329** — was introduced in 2020 but did not progress ([135A.184] STUDENT ATHLETE COMPENSATION AND 1.7 REPRESENTATION.)
- The Minnesota State High School League (MSHSL) does have an **NIL policy** as of June 2022

Also, various (7 or so) bills with respect to NCAA athletes and NIL are pending in Congress.

NCAA response:

There should be federal legislation and uniformity but until then, we will make our own rule. *See*, the **NCAA Interim Policy** and **NCAA adopts interim name, image and likeness policy.**

The NCAA announced the policy after the Supreme Court ruled that the NCAA could not prohibit moderate payments to student athletes. The NCAA decided that June that collegiate athletes could profit from their name, image, and likeness, allowing athletes to secure sponsorships for the first time in the league's history.

Original Policy Focus

- Athletes can engage in NIL activities in compliance with state laws, and colleges can be a resource for NIL legal questions.
- Athletes can use professional service providers to help navigate NIL activities.
- Student-athletes in states without NIL laws can still engage in such activities without violating NCAA rules.
- States, individual colleges and athletic conferences may impose reporting requirements.

Then the NCAA issued **supplemental guidance** in 2023 and a **proposal** in January 2024, which it started enforcing pretty quickly. Here is one of the more controversial bits:

"Finally, the proposal prohibits an NIL entity from engaging in any contact, correspondence or other communication with or providing any benefits to a prospect, potential transfer or any individual associated with them, until the prospect signs a letter of intent, participates in summer activities or practices with the team, or enrolls at the school and attends classes."

- NCAA Media Center, *Division I Council approves NIL disclosure and transparency rules* (January 10, 2024).

Where is the NCAA now?

- In January 2024, the NCAA refined its NIL position by proposing a ban on high school recruits and athletes in the transfer portal from engaging in NIL discussions before they enroll in an institution of higher education.
- On January 31, the State of Tennessee and the Commonwealth of Virginia filed an antitrust case against the NCAA in the Eastern District Court of Tennessee, alleging that the enforcement of NCAA restrictions NIL would violate the Sherman Act, resulting in harm to the States and to the welfare of their athletes
  - US DOJ and Florida, New York and the District of Columbia joined earlier this month
  - Amended Complaint: **Tennessee et al. v. NCAA, 3:24-cv-33 (May 1, 2024)**

From *Tennessee et al. v. NCAA*, 3:24-cv-33 (May 1, 2024)

COUNT
Violations of Section 1 of the Sherman Act

. . .

50. The NCAA has entered into an illegal agreement to restrain and suppress competition in the relevant markets through the adoption and enforcement of the NIL-recruiting ban, which prohibits prospective college athletes and collectives from open and transparent interactions relating to NIL compensation and thus denies these athletes the ability to effectively negotiate their NIL rights at the very time they would best be able to maximize the value of those rights.

51. These restrictions fail the rule of reason applicable to antitrust claims. See *Alston*, 141 S. Ct. at 2155.

52. The NCAA, by and through its officers, directors, employees, agents or other representatives, and its member institutions, have entered into an illegal horizontal group boycott of prospective college athletes who contract and negotiate NIL agreements with collectives.

Group Boycott as Antitrust Law Violation: Concerted refusal by traders to deal with other traders; classically, a group of business competitors seeking to benefit economically by excluding other competitors from the marketplace.

- In theory a classic horizontal boycott would be illegal *per se*, but there are more and more exceptions

February 23, 2024 TRO

"…Plaintiffs' Motion for Preliminary Injunction [Doc. 2] is GRANTED. It is hereby ORDERED that, effective immediately, Defendant NCAA; its servants, agents, and employees; and all persons in active concert or participation with the NCAA, are restrained and enjoined from enforcing the NCAA Interim NIL Policy, the NCAA Bylaws, or any other authority to the extent such authority prohibits student-athletes from negotiating compensation for NIL with any third-party entity, including but not limited to boosters or a collective of boosters, until a full and final decision on the merits in the instant action.

It is further ORDERED that, effective immediately, the NCAA is restrained and enjoined from enforcing the Rule of Restitution (**NCAA Bylaw 12.11.4.2**) as applied to the foregoing NIL activities until a full and final decision on the merits in the instant action."

- ***Tennessee and Virginia v. NCAA*, Case 3:24-cv-00033-DCLC-DCP, Memorandum Opinion and Order (2-23-2024)**

Where are Student Resources Now?

Sports & NIL Clinic at UMN Law

"Student attorneys in the Sports & NIL Clinic will work with and assist clients attending institutions across the Upper Midwest, notably student-athletes and social media influencers, in navigating the rapidly changing landscape of name, image, and likeness. Specifically, student attorneys in the clinic will work with these clients as it relates to partnerships with brands and being able to leverage the clients' newly recognized Name, Image and Likeness (NIL) rights. The Sports & NIL Clinic is a placement clinic, and clients will be entering into representation agreements with attorneys at Fredrikson & Byron, P.A."

- **https://law.umn.edu/course/7350/sports-name-image-and-likeness-clinic**

NIL collectives are support networks for college athletes where donors pool together money to compensate athletes for their name, image and likeness. These independent organizations generate NIL deals for athletes at specific schools while operating separately from the schools themselves so that schools are not paying students directly.

The Official NIL Partner of Cincinnati Athletics

“The Cincy Reigns Name/Image/Likeness (NIL) Collective is a fundraising apparatus which helps the University of Cincinnati Bearcats fan base, alumni network, businesses and donors offer direct financial support to UC’s student athletes.

“While Cincy Reigns exists exclusively for the benefit of Bearcats student-athletes and fans, it cannot be legally “affiliated” with the University of Cincinnati. Accordingly, Cincy Reigns is a third party corporation that works closely with UC compliance, licensing, legal and UC’s sports marketing professionals to protect UC student-athletes and ensure compliance with all NCAA and UC NIL policies and guidelines.

“Pursuant to Executive Order 2021-10D issued by Governor Mike DeWine, UC student athletes may not enter into deals with any company that sells tobacco, nicotine, or marijuana products. In addition, UC student athletes may not endorse gambling or sports betting entities either. Finally, UC student athletes cannot do any deals with businesses engaged in the ‘sale, rental, or exhibition for any form of consideration of adult entertainment that is characterized by an emphasis on the exposure or display of sexual activity.’”

- **https://cincyreigns.org/about-us/**

Obligatory Mention of AI

“The biggest problem in the AI economy is truth. How do we believe what we see, read, or hear? For student athletes interested in NIL partnerships (or any student) at the University of Cincinnati, one of their biggest challenges is ‘how do I prove my achievements outside of the classroom to potential brand sponsors or future employers?’

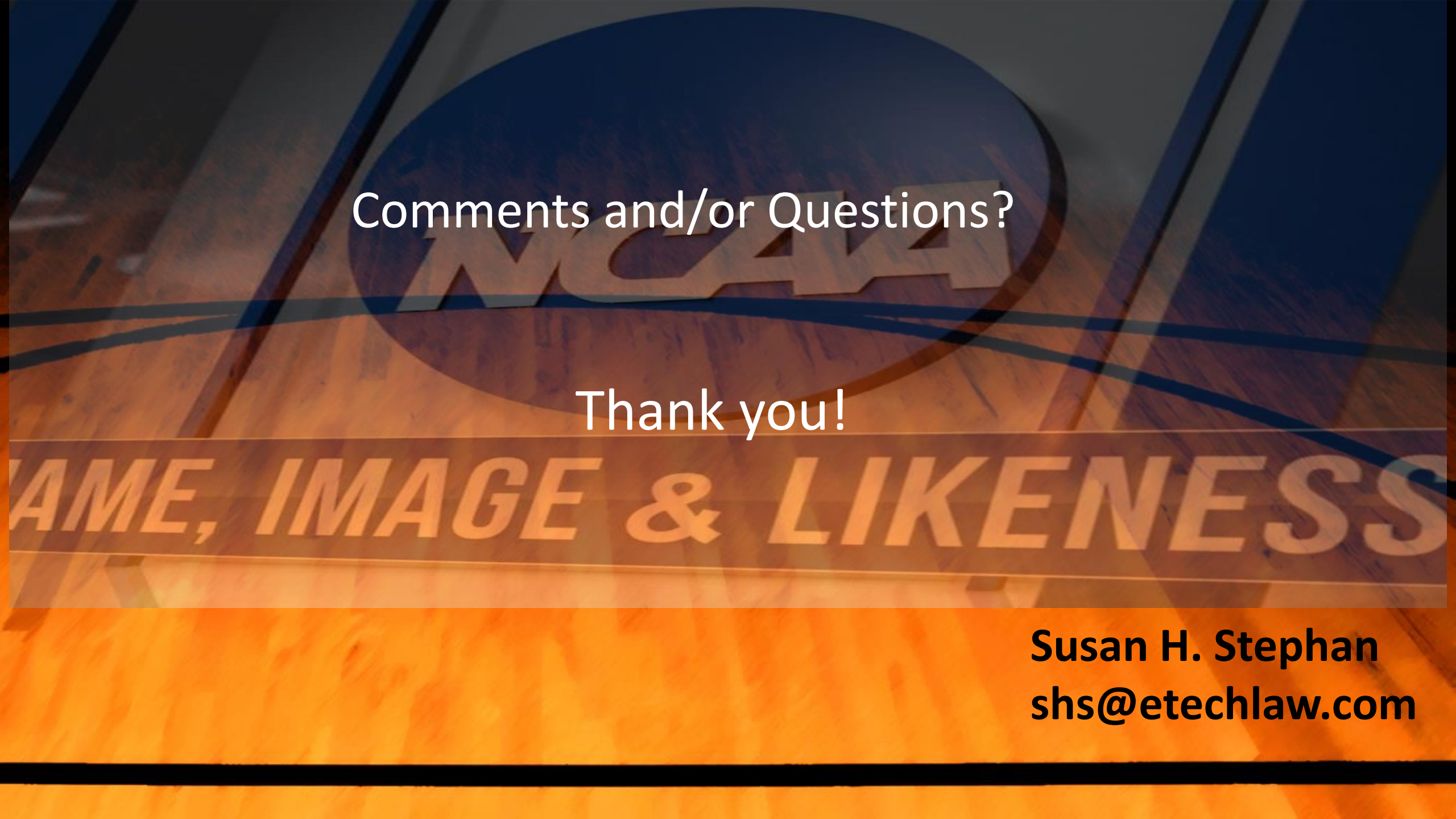
“Companies want to partner with, and eventually hire, students with a good reputation that matches their brand. And alumni and donors want to help students develop life skills and make progress to graduation.

“And so…Carbon Copy Assets [is] building a loyalty platform that rewards students for volunteering in the community, meeting with their professors and mentors, attending career fairs and student organizations, creating a social media presence, and developing life skills - like financial literacy and legal literacy. All of these are attested on a blockchain, an immutable and publicly verifiable record of accomplishments. Corporate brands and alumni can immediately see the ROI of their investments.”

- Michael Jones, Kautz-Uible Assistant Professor of Economics, University of Cincinnati, ***LinkedIn Post*** (May 9, 2024)

Amateurism: Just a Couple of the Many Future Topics

- In December 2023, NCAA president Charlie Baker proposed a policy allowing Division I schools to pay athletes directly through NIL deals (implemented as early as August 2024, if passed).
  - Would likely end need for collectives
  - Schools have more say in NIL money distribution
- The National Labor Relations Board (NLRB) ruled in February 2024 that basketball players at Dartmouth College are considered employees under U.S. labor law and have the right to unionize (NLRB refused request to reopen matter, and Dartmouth will likely appeal to Fed court).
  - NLRB found Dartmouth men's basketball student-athletes to be employees under Section 2(3) of the NLRA because they perform work that benefits Dartmouth and receive compensation in the form of apparel and equipment, support, and other fringe benefits and because Dartmouth "exercises significant control over the basketball players' work."
  - See also *scholarship football players at Northwestern University* (NLRB said yes on employee issue but rejected unionization bid)
    - NLRB found that the unique nature of sports leagues, where leagues maintain substantial control over the actions of individual teams, makes it difficult, if not impossible to attain stability when players of only one team are bargaining with just that team. Didn't want to mess with stability so declined jurisdiction



Comments and/or Questions?

Thank you!

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