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## Privacy Is the Price to Pay to Be a College Athlete: Drug Testing & Mandatory Consent to Information Disclosures Revisited After Alston

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## I. Introduction

In order to be eligible to participate in collegiate athletics, student-athletes<sup>1</sup> are required to relinquish various privacy protections that are otherwise legally afforded to American citizens. The National Collegiate Athletic Association (“NCAA”) is the governing body for intercollegiate sports in the United States and is responsible for setting forth the controlling regulations and policies that shape the landscape of student-athlete privacy.<sup>2</sup> The NCAA’s current policies include mandatory drug testing and consent to information disclosures, raising significant concerns regarding the balance of safeguarding student-athlete privacy and the preservation of integrity for intercollegiate athletics.

This paper will analyze the efficacy of the NCAA’s historic origins, current policy, and how it imposes on student-athletes privacy rights. First, this paper will explore the NCAA student-athlete drug testing policy and its potential infringement on their Fourth Amendment right to privacy. Then, this paper will inquire into other potential infringements to a student-athletes privacy through mandatory FERPA and HIPAA disclosures. This paper will then provide a rule of reason antitrust analysis on the NCAA’s current drug testing procedures.<sup>3</sup> Finally, it will demonstrate why the NCAA’s drug testing policy needs to be revisited in light of the *NCAA v. Alston*<sup>4</sup> case.

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<sup>1</sup> Although student-athletes may be perceived as a demeaning term, it is a term of art used to describe collegiate students who are involved in a sport.

<sup>2</sup> The NCAA is a private association that has voluntary membership for collegiate institutions and functions as the most significant governing body for certain competitions. It includes 1,098 colleges and universities with 102 athletic conferences. See NCAA, *What Is the NCAA?*, NCAA.ORG, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx>. There are other governing bodies, such as the NAIA and the NJCAA, but they are significantly smaller compared to the NCAA. See Support, *Breaking Down College Athletic Associations and Divisions*, FIELDLEVEL.COM (2024), <https://support.fieldlevel.com/en/articles/5887372-breaking-down-college-athletic-associations-and-divisions>.

<sup>3</sup> A rule of reason analysis is necessary to conduct when analyzing the NCAA student-athlete drug policy because it has potential anti-competitive effects which may constitute an antitrust violation.

<sup>4</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

The goal of this paper is to highlight how much a student-athlete has to give up in order to participate in an activity that America bonds over. Although it is of the utmost importance to maintain integrity, how far is too far? Furthermore, when can the line be drawn when playing in an NCAA competition is no longer a privilege for a student-athlete, but an economic right? The ruling in *Alston*<sup>5</sup> may require courts to give these policies a second look.

## II. Student Athlete Drug Testing: History, Fourth Amendment Privacy Challenges & Current Procedures

Student-athlete drug testing has been the center of a contentious debate for the past three decades. The NCAA established its mandatory drug testing policy for student athletes in 1986.<sup>6</sup> The drug policy was established to combat the war on drugs while promoting the health, safety, and wellness of NCAA participants. The most significant challenge to the NCAA drug testing policies arises from the student-athletes right to privacy, which is afforded to them by the Fourth Amendment and its state constitutional equivalent.

Student-athletes have found the NCAA drug testing policy to be significantly intrusive.<sup>7</sup> One author described how personal the testing is: “subjects are required to disrobe from the area of their armpits to their knees, exposing their genitals, and produce a specimen of at least 100 millimeters while under visual observation.”<sup>8</sup> Because of the tests intrusive and private nature, the NCAA’s policy has been challenged on numerous occasions. This section will analyze the

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<sup>5</sup> *Id.*

<sup>6</sup> Mark Asher, *NCAA Approves Testing for Drugs*, WASHINGTONPOST.COM (Jan 14, 1986), <https://www.washingtonpost.com/archive/sports/1986/01/15/ncaa-approves-testing-for-drugs/625c9fae-0b63-4f4e-85ed-7ad1beaf7099/>.

<sup>7</sup> The first challenge to the NCAA drug testing policy was brought by Simone LeVant, who was an NCAA athlete on the Stanford Women’s diving team. She called the test “obtrusive, unreasonable, and a constitutional invasion of privacy” and criticized the NCAA for failing to offer less obtrusive methods. Doug Cress, *Diver Decided NCAA Testing Was Invasion of Privacy*, WASHINGTONPOST.COM (March 14, 1987), <https://www.washingtonpost.com/archive/sports/1987/03/15/diver-decided-ncaa-testing-was-invasion-of-privacy/21f8d7a5-7e9e-46f9-9d4a-bc47ecbf2031/>.

<sup>8</sup> Margaret E. Ciccolella, “*Right to Privacy*” Challenges to NCAA Drug Testing, JOURNAL OF LEGAL ASPECTS OF SPORT VOL. 2 NO. 2 (1992), <https://journals.iupui.edu/index.php/jlas/article/view/21843>.

NCAA’s drug policy, the privacy implications it has on student athletes, and cases that have allowed the policy to remain today.

**i. When and Why Did the NCAA Create a Drug Policy?**

The NCAA is a non-profit organization that was created in 1906 “to provide health, well-being, opportunities, and lifelong success to college athletes.”<sup>9</sup> The NCAA has designed numerous programs, provisions, and procedures since its inception that participating athletes must follow to qualify for NCAA competitions.<sup>10</sup> The 1986 mandatory drug testing program set forth by the NCAA was created to deter college athletes from using substances in efforts to prevent competitive advantage or mental and physical harm on the athlete.<sup>11</sup>

In 1970, the NCAA then created the Drug Education Committee in response to the increasing concern of substance abuse by college athletes.<sup>12</sup> Then, in 1971, the NCAA denounced the use of non-therapeutic drugs since it was in flagrant violation of the NCAA’s code of conduct.<sup>13</sup> In 1989, the NCAA required member institutions to implement year-round testing as a requirement to participate in conferences and championship games.<sup>14</sup>

**ii. What Constitutes a Fourth Amendment Violation in the Student-Athlete Drug Testing Context?**

The Fourth Amendment of the Constitution gives citizens the “right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>15</sup> The Fourth Amendment is applied to the states by the Fourteenth Amendment and guarantees that citizens

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<sup>9</sup> Dedrick Conway, *Interscholastic and Collegiate Drug Testing Is Not A Violation of the Fourth Amendment*, MEDIUM.COM (Dec. 29, 2022), <https://dedrickconway.medium.com/interscholastic-and-collegiate-drug-testing-is-not-a-violation-of-the-fourth-amendment-f3cff9606c7a>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> U.S. Const. amend. IV.

are protected against unreasonable searches and seizures by the government.<sup>16</sup> The right to privacy that is protected by the Fourth Amendment is implicated when an actor infringes on an individual's expectation of privacy that society would consider to be reasonable.<sup>17</sup> The NCAA's drug testing policy can be viewed as a potential Fourth Amendment violation since it requires a search of an individual's urine without a warrant.

When determining whether a Fourth Amendment violation has occurred in the NCAA drug testing policy context, there must be an analysis of (1) whether the policy constitutes a search, (2) whether the search is unreasonable, and (3) whether the policy is implicated by a state or private actor.

#### **a. What Is a Search?**

To determine whether an individual's right to privacy has been infringed, the first question to ask is whether there was a search. A search occurs whenever there has been an intrusion on an individual's expectation of privacy that is considered reasonable.<sup>18</sup> Drug testing an individual's urine constitutes a Fourth Amendment search. First, the chemical analysis of the test reveals private medical facts about an individual and second, the process to obtain the urine involves visual monitoring of the act of urination which obviously implicates a privacy interest.<sup>19</sup> This has allowed the Supreme Court to hold that drug testing by means of urinalysis is a search.<sup>20</sup> When a search is present, it needs to be based on "probable cause."<sup>21</sup> However, the modern trend

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<sup>16</sup> See *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>17</sup> *Id.*

<sup>18</sup> See *United States v. Katz*, 389 U.S. 347 (1967).

<sup>19</sup> See *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602, 617 (1989).

<sup>20</sup> *Id.*

<sup>21</sup> The Supreme Court frequently grapples with the definition of "probable cause." See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("Ordinarily, a search., must be based upon 'probable cause' to believe that a violation of the law has occurred."); *Illinois v. Gates*, 462 U.S. 213, 230-39 (1983); see also Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS* 173-98 (7th ed. 1990) (discussing cases); Comment, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking for an American*

is that probable cause is not necessary when the search is considered reasonable under the circumstances.<sup>22</sup>

### **b. When Is a Search Unreasonable?**

In order for an individual's constitutional right to privacy to be implicated, the search must be considered unreasonable. There is not a rigid test to determine whether a search is reasonable. Instead, courts are required to balance the intrusion of the individual's right to privacy against the compelling interest of the government to search.<sup>23</sup> Compelling interests that have rendered a search to be reasonable include: providing fair and equitable competition, preserving the health and safety of participating student-athletes, and deterring drug use.<sup>24</sup>

Courts have interpreted reasonableness differently in contexts of mandatory drug testing of student-athletes. The court in *O'Holloran* determined reasonableness by using a two-prong test.<sup>25</sup> First, the court determined whether the urine testing of student-athletes would turn up evidence of drug use.<sup>26</sup> The court found that drug use by any athlete is inappropriate, and testing the student for drugs by way of a urine sample would indicate whether an athlete was using.<sup>27</sup> Second, the court determined whether the search, as conducted by way of a urine sample, was reasonably related in scope to the individual's interference of privacy.<sup>28</sup> The court found that the NCAA's interest in preserving integrity and protecting the student-athletes health and safety

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*Standard*, 21 GA. L. REV. 467, 471 (1986) (authored by Robert M. Keenan III); Note, *School Drug Tests: A Fourth Amendment Perspective*, supra note 47, at 281-86.

<sup>22</sup> See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1051 (1983); *United States v. Place*, 462 U.S. 696, 703 (1983); see also Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984) (authored by Ronald F. Wright); Comment, supra note 49, at 471.

<sup>23</sup> See *O'Holloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988).

<sup>24</sup> Margaret E. Ciccolella, "Right to Privacy" Challenges to NCAA Drug Testing, JOURNAL OF LEGAL ASPECTS OF SPORT VOL. 2 NO. 2 (1992), <https://journals.iupui.edu/index.php/jlas/article/view/21843>.

<sup>25</sup> See *O'Holloran*, 679 F. Supp. at 1002.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

outweighed the minimal intrusion imposed by requiring the student-athlete to submit to a urine collection.<sup>29</sup> This scale-balancing approach has allowed the NCAA's tests to be found reasonable in light of it being a search. Ultimately, the court's reasoning is that the expectation of privacy alleged is significantly diminished in athletic programs and the relative encroachment is outweighed by the notable health and safety interest of the student-athlete and the necessity of fair competition for intercollegiate competition.<sup>30</sup>

### **c. Is The NCAA a State or Private Actor?**

It is important to determine the NCAA's status as a state or private actor since it hinges on whether the NCAA is bound to Fourth Amendment requirements when it tests participating student-athletes for a broad spectrum of drugs. Only state or government actors are subject to the Fourth Amendment when carrying out a search; private actors are not confined to such standards and can veer away from the strict requirements of the Fourth Amendment. This section will conduct an analysis on the NCAA's current actor status. The modern view is that the NCAA is a private actor, which means it is free to deviate from the constitutional expectations when conducting a search. However, this was not always the case.

In 1975, the Fifth Circuit found that the NCAA is a state actor because it was charged with regulating intercollegiate athletics.<sup>31</sup> The *Parish* court justified this holding because it believed that the government would control intercollegiate athletics if the NCAA no longer existed.<sup>32</sup> Additionally, the state institutional members of the NCAA played a "substantial, although admittedly not pervasive, role" in the NCAA's funding and decision making

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<sup>29</sup> The court found that the scope of the program was fully tailored to address the need of preserving the integrity of competition and the court refused to substitute its judgement as to time, place, and manner restrictions for the expertise of those who developed the NCAA's program. *Id.* at 1005.

<sup>30</sup> *Id.*

<sup>31</sup> *See Parish v. NCAA*, 506 F.2d 10288 (5th Cir. 1975).

<sup>32</sup> *Id.*



authority.<sup>33</sup> One author justified this finding by highlighting the NCAA's government-like role in college athletics.<sup>34</sup> The NCAA has been given power and authority to control all aspects of the conference and competition requirements, as well as the student-athlete drug program.<sup>35</sup> The NCAA has the rulemaking authority and permits or outlaws certain conduct and makes the final decision on student eligibility.<sup>36</sup> Further, the NCAA drug testing labs provide the data to determine whether a student-athlete has been using drugs.<sup>37</sup> Although these reasons are compelling to find NCAA as a state actor, the modern view is that NCAA is a private actor.

After *Parish*, courts have overruled cases that attribute NCAA actions to the state. The court in *Arlosoroff v. NCAA* described the NCAA's actions as a voluntary association of public and private institutions.<sup>38</sup> The NCAA is a private body, whose member institutions are comprised of public and private universities.<sup>39</sup> The fact that more than half of the NCAA's member institutions are public, and are responsible for more than half of its revenues, does not alter its character as a voluntary association between private and public universities.<sup>40</sup> The *Arlosoroff* court reasoned that "if the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action."<sup>41</sup> Therefore, the NCAA's functions as a regulatory body of intercollegiate athletics represent private action, and not state action.<sup>42</sup>

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<sup>33</sup> *Id.* at 1032; see also *Howard Univ. v. NCAA*, 510 F.2d 213, 219-220 (D.C. Cir. 1975)

<sup>34</sup> John M. Evans, *The NCAA Drug Program: Out of Bounds but Still in Play*, JOURNAL OF LAW AND EDUCATION, VOL. 19 No. 2, 161-191 (1990).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *Arlosoroff v. Nat'l Collegiate Athletic Ass'n*, 746 F.2d 1019 (4th Cir. 1984).

<sup>39</sup> *Id.* at 1021.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1022.

<sup>42</sup> *Id.*

This holding was later refined by the court *NCAA v. Tarkanian*,<sup>43</sup> which held that the NCAA is *not* a state actor. At issue in *Tarkanian* was whether the NCAA acted as a state actor when it imposed a two-year suspension from televised and postseason play on the University of Nevada, Las Vegas (“UNLV”) based on thirty-eight NCAA rule violations.<sup>44</sup> UNLV’s basketball coach, Jerry Tarkanian, was responsible for ten of these violations,<sup>45</sup> so the NCAA required his removal during the probation period.<sup>46</sup> UNLV complied and Tarkanian sued the NCAA.<sup>47</sup> Tarkanian’s primary argument was that the NCAA was a state actor since UNLV, which is a state actor, delegated a function to the NCAA when it complied with Tarkanian’s removal.<sup>48</sup> However, this argument failed on the merits and the court ruled that UNLV’s decision to comply with the NCAA was not a delegation of state action.<sup>49</sup> Specifically, the court found that because the NCAA is at odds with the state, it cannot be considered a state actor.<sup>50</sup> Although this case was important in distinguishing what type of actor the NCAA is for Fourth Amendment analysis, it failed to discuss what the drug testing policy is like for public schools who are part of the NCAA.

**iii. Modern Fourth Amendment Challenge to the NCAA Drug Policy: *Hill v. NCAA***

As mentioned earlier, the NCAA drug testing policies have caused numerous court challenges across the country. It has become increasingly difficult to contest the constitutionality of the NCAA’s drug testing policy it imposes on its member institutions because the current

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<sup>43</sup> See *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988) (emphasis added).

<sup>44</sup> *Id.*

<sup>45</sup> Most of the violations concerned illegal recruiting practices, but the most serious charge was that Tarkanian attempted to frustrate the NCAA’s investigation by getting people to “change their story.” *Tarkanian*, 488 U.S. at 186 n.9.

<sup>46</sup> *Id.* at 186.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 191-92.

<sup>49</sup> *Id.* at 195.

<sup>50</sup> *Id.* at 196.

judicial trend finds the NCAA to be a private actor. This section will analyze an important case involving this topic, *Hill v. National Collegiate Athletic Association*.<sup>51</sup>

The most notable and modern challenge against the NCAA student-athlete drug testing policy was the case of *Hill*.<sup>52</sup> In *Hill*, students at Stanford University asserted that the NCAA's student athlete drug testing program violated their right to privacy per the California Constitution and asked the court for injunctive relief.<sup>53</sup> The student's argued that the urination samples, testing of those samples, and inquiries into each athlete's medical history violated their privacy interest.<sup>54</sup> Stanford University intervened on behalf of the students.<sup>55</sup> The trial court granted the permanent injunction on the grounds that the program violated the student athlete's right to privacy and that the NCAA failed to establish a compelling need for the program and that there were no alternative ways to accomplish the NCAA's objectives.<sup>56</sup> The Court of Appeals affirmed.<sup>57</sup>

The California Supreme Court reversed and upheld the NCAA's drug testing policy.<sup>58</sup> The *Hill* court found that the athletes had a diminished expectation of privacy by participating in athletic activities that require physical examinations.<sup>59</sup> Although the NCAA intruded on the athlete's privacy by collecting and testing the students' urine, the students did not have a legal right to participate in sports allowing the diminished expectation.<sup>60</sup> The *Hill* court essentially created a new level of scrutiny for private testing entities as it applies to actions by private

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<sup>51</sup> See *Hill v. Nat'l Collegiate Athletic Ass'n.*, 7 Cal. 4th 1 (Cal. 1994).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 637.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Hill*, 865 P.2d at 633.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

nongovernmental entities but did not address the level of scrutiny for state and government actors. Therefore, the nature of the actor administering a drug testing policy on student athletes is a threshold issue for the court when it is tasked to determine whether the program can survive constitutional scrutiny.<sup>61</sup> If a private nongovernmental entity imposes a drug testing policy for student-athletes, a court will apply some type of rational basis review where a state and government actor is evaluated on a stricter standard.<sup>62</sup>

Another significant aspect of the *Hill* holding is the court's statement that the NCAA's drug testing policy implicated a student-athletes autonomy privacy and informational privacy interests.<sup>63</sup> The student-athletes autonomy privacy interest is in their freedom from public observation in an activity where the individual would normally perform in private and have a reasonable expectation of privacy in.<sup>64</sup> The student-athletes informational privacy interest is in their right to limiting publication of confidential information about their drug test results.<sup>65</sup> The *Hill* court recognized that the NCAA's drug testing policy must withstand constitutional scrutiny on each aspect of the student-athletes right to privacy.<sup>66</sup>

Although the court recognized that the Stanford students had a reasonable expectation of privacy in their urine samples, the NCAA was able to show a legitimate and compelling interest in its reasoning for testing student-athletes for drug use. By applying its own version of rational basis review, the *Hill* court found the NCAA's interest in safeguarding the integrity of college athletics and protecting the health and safety of student-athletes to be a sufficient reasoning to administer the drug tests.<sup>67</sup> Although the court was extremely vague in describing the review that

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<sup>61</sup> *Id.* at 641.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 657

<sup>64</sup> *Id.*

<sup>65</sup> *See Hill*, 865 P.2d at 641.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

allowed it to arrive to this decision, its primary reason for its decision was that “the NCAA has a significant interest in conducting a testing program.”<sup>68</sup>

The *Hill* court also reasoned that since the student-athletes already have a diminished expectation of privacy by virtue of their participation in an NCAA intercollegiate sport, the NCAA’s drug testing policy is rationally related to its interest in ensuring accurate drug test results to ensure its ban on harmful substances to maintain fair competition.<sup>69</sup> Therefore, the court upheld it despite the invasion of privacy it has on student-athletes, the testing procedures can continue under the modified scrutiny standard that the court created when evaluating this issue.<sup>70</sup> This case demonstrates that the NCAA is protected from Fourth Amendment attacks by student-athletes since it is not considered a state actor. Therefore, the NCAA is allowed to administer invasive drug testing procedures due to its inherent nature as a private entity.

#### **iv. What are the Current Policies of Drug Testing Student Athletes?**

After looking at how the court views drug testing college athletes, it is important to understand how these tests are administered and what institutions are seeking to detect. The NCAA’s drug testing policy is universal for all member institutions. However, certain schools can create their own drug testing policies that are more lenient, follow, or are stricter than the NCAA’s. This section will discuss in detail the NCAA’s drug testing policy for the 2023-2024 academic year and the policy of three universities.<sup>71</sup>

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<sup>68</sup> *Id.* at 662.

<sup>69</sup> *Id.* at 666.

<sup>70</sup> *Id.*

<sup>71</sup> The NCAA only drug tests students when they are participating in championship games. Schools have adopted year-round testing policies to avoid potential ineligibility of student athletes who will be participating in those championship games.

### a. The NCAA's Current Policy

Currently, the NCAA's drug testing policy covers a broad variety of drugs and involves a significant intrusion on a participating student's privacy.<sup>72</sup> According to the NCAA, this policy is put in place to "deter student-athletes from using performance-enhancing drugs."<sup>73</sup> The NCAA tests for steroids, peptide hormones and masking agents year-round and also tests for stimulants and recreational drugs during championships.<sup>74</sup> The list includes stimulants, anabolic agents, alcohol and beta blockers, diuretics/masking agents, narcotics, cannabinoids, peptide hormones, growth factors, hormone and metabolic modulators, and beta-2 agonists.<sup>75</sup> The NCAA also encourages member schools to test for these substances as part of their athletic department drug-deterrence programs.<sup>76</sup> Although this is not a requirement for a membership institution to participate in an NCAA competition, most schools have followed suit.

The NCAA drug testing program permits the use of the classes of banned substances if the student-athlete can prove that they are used for a legitimate medical purpose, except cannabinoids.<sup>77</sup> Requests for exceptions are reviewed by the medical panel of the NCAA

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<sup>72</sup> Although the NCAA does not disclose how many student-athletes fail the drug test annually, the NCAA stated that in 2019 the NCAA's drug-testing partner, Drug Free Sport International, tested 675 student-athletes, with 78 yielding a positive test. See NCAA Media Center, *NCAA increases THC testing threshold*, NCAA.ORG (Jun. 20, 2019), <https://www.ncaa.org/news/2019/6/20/ncaa-increases-thc-testing-threshold.aspx#:~:text=Since%20the%20shift%2C%20the%20NCAA's,78%20yielding%20a%20positive%20test.>

<sup>73</sup> See NCAA, *NCAA Drug Testing Program*, NCAA.ORG, <https://www.ncaa.org/sports/2016/7/20/ncaa-drug-testing-program.aspx>.

<sup>74</sup> *Id.*

<sup>75</sup> See NCAA, *NCAA Drug Testing Program 2023-24 Manual*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/ssi/substance/2023-24/2023-24SSI\\_DrugTestingProgram.pdf](https://ncaaorg.s3.amazonaws.com/ssi/substance/2023-24/2023-24SSI_DrugTestingProgram.pdf).

<sup>76</sup> Some schools have suspended or reduced its drug testing programs in light of Covid in efforts to save costs. This may lead to perceptions that the NCAA no longer tests in a way that it once hand since running a testing program can be seen as a serious additional burden on the member institutions. See ESPN Associated Press, *NCAA Has Not Tested For Drugs at Championships Since Onset of Pandemic*, ESPN.COM (Apr. 2, 2021), [https://www.espn.com/mens-college-basketball/story/\\_/id/31183948/ncaa-not-tested-drugs-championships-onset-pandemic](https://www.espn.com/mens-college-basketball/story/_/id/31183948/ncaa-not-tested-drugs-championships-onset-pandemic).

<sup>77</sup> See NCAA, *NCAA Drug Testing Program 2023-24 Manual*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/ssi/substance/2023-24/2023-24SSI\\_DrugTestingProgram.pdf](https://ncaaorg.s3.amazonaws.com/ssi/substance/2023-24/2023-24SSI_DrugTestingProgram.pdf).

Committee on Competitive Safeguards and Medical Aspects of Sports (CSMAS).<sup>78</sup> The NCAA will then inform the athletics director on the outcome of the exception request.<sup>79</sup>

The NCAA also sets forth its elaborate testing procedures in Section 6 of the NCAA Drug-Testing Program Manual.<sup>80</sup> At a designated collection station, the student-athlete is fully observed during their specimen collection procedure.<sup>81</sup> After it has been determined that the specimen meets the specific NCAA criteria for testing, the student selects a collection kit and splits their specimen into two vials “A” and “B” with unique barcodes on them for testing.<sup>82</sup> The specimen is only identifiable by its barcode number, and not by the student’s name or school.<sup>83</sup>

In order to be eligible to participate in the NCAA, every student-athlete must sign a Drug Testing Consent Form.<sup>84</sup> Failure to sign this form renders the student-athlete ineligible to participate in intercollegiate athletics.<sup>85</sup> Every player must consent to NCAA drug testing on a year-round basis including, but not limited to, during their participation in any NCAA championship or post season football game.<sup>86</sup> This form gives a student-athlete no choice but to allow the NCAA to collect their urine sample upon notification of selection.<sup>87</sup>

If the test comes back positive for an NCAA-banned drug, a student is declared ineligible for participation in postseason and regular season competition.<sup>88</sup> If the positive result is for a drug besides cannabinoids or narcotics, they are ineligible to compete until they have been withheld

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See NCAA, *Division I Drug-Testing Consent Form 23-1b*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp\\_Form23-1b-DrugTestingConsentBannedListForm.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp_Form23-1b-DrugTestingConsentBannedListForm.pdf).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> If a student-athlete can show that they have a medical exception for the drug they tested positive for, then they are not rendered ineligible. *Id.*

for one reason of regular competition.<sup>89</sup> An athlete who tests positive twice will receive sanctions which can vary from required participation in an education and management plan for substance misuse, to losing all remaining eligibility for regular and postseason competitions, or require withholding from participation up to 50 percent of a season.<sup>90</sup> If a student-athlete misses a scheduled drug test, they are penalized as if they tested positive for a banned drug (besides a cannabinoid or narcotic).<sup>91</sup>

It is clear that the sanctions set forth by the NCAA are no slap on the wrist and it includes some serious penalties. Because student-athletes have no option but to submit to this invasive procedure in order to participate, they are left without options. The NCAA does give each student-athlete an opportunity to appeal any sanction that results from a positive drug test, but it does not allow any player to refuse one.<sup>92</sup> In the consent form, each student-athlete consents to the policy and its consequences, the sample to be used for research to improve drug testing detection and permits disclosure of the results purposes relating to eligibility for participation in NCAA competition.<sup>93</sup> Even if the student-athlete appealed their drug test result, it is not guaranteed that they will be granted eligibility status. Of the 25-30 annual drug test appeals, only about 1-3 are granted dependent on the year.<sup>94</sup>

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<sup>89</sup> Even if the positive drug result was during a year that they did not use a season of competition, they are still charged with a loss of a season. *Id.*

<sup>90</sup> These outcomes are dependent on the type of drug the student-athlete tests positive for during the first and second test. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See Ross Dellenger, *The Curious Case of Kristian Fulton: A Two-Year Ban, a Last-Ditch Appeal and a Spotlight on the NCAA*, SI.COM (Jun. 13, 2018), <https://www.si.com/college/2018/06/13/lsu-kristian-fulton-ncaa-suspension-appeal-drug-test>.



## **b. Student-Athlete Drug Testing Policies of Three Universities in the U.S.: A Spectrum**

Although member institutions must abide by the NCAA drug testing policy when it wishes to participate in conferences and championship games, schools have administered its own student-athlete drug testing policies in effort to prevent student-athlete disqualification for NCAA events.<sup>95</sup> The NCAA encourages its membership institutions to establish and administer its own drug testing policies.<sup>96</sup> Although the NCAA is consistent with its drug testing procedures and sanctions, policies and penalties vary across institutions as it reflects the athletic departments consideration for its student's well-being.<sup>97</sup> Many schools have similar policies to the NCAA, but some schools have some different views on the types of testing and sanctions are permitted.<sup>98</sup> The schools that will be analyzed in this section are both public and private universities, which are located on different coasts, and have quite different student-athlete drug testing policies. These schools were chosen because they represent a spectrum of intrusiveness and demonstrate the various options and protocols that schools may choose when exercising its ability to construct its own drug testing policy.

The first school that was chosen is the University of Oregon ("UO") which is located in Eugene, Oregon and is a NCAA Division I school.<sup>99</sup> UO has its own drug testing policy<sup>100</sup> that the athletic department follows aside from the NCAA, which permits UO to test its student-

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<sup>95</sup> A 2009 survey of institutions across all three divisions found that 92 to 96 percent of programs do random testing of all sports. Some schools will test randomly, while others will test on a reasonable suspicion standard. See Allie Grasgreen, *High-Stakes Test You Can't Prep For*, INSIDEHIGHERED.COM (Sept. 26, 2012), <https://www.insidehighered.com/news/2012/09/27/more-colleges-using-random-drug-testing-athletes>.

<sup>96</sup> See Elliot Kelly, *NCAA Drug Testing Policies and Penalties: The Role of Team Performance*, GEORGIA STATE JOURNAL OF INTERCOLLEGIATE SPORT, 2018, 11, 24-39, <https://journals.ku.edu/jis/article/view/10107/9537>.

<sup>97</sup> *Id.*

<sup>98</sup> It is unclear whether the NCAA's lack of an association-wide policy mandating each member institution to conduct its own drug testing policy has led to this large variance in procedures across schools. *Id.*

<sup>99</sup> University of Oregon, *Main Page*, UOREGON.EDU <https://www.uoregon.edu>.

<sup>100</sup> University of Oregon, *Athletic Department Substance Use and Drug Testing*, UOREGON.EDU <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-7-intercollegiate-athletics/athletic-department-substance>.

athletes on the basis of individualized suspicion<sup>101</sup> or for previously failing a lab-generated specimen-integrity test. UO bans the same classes of drugs as the NCAA does, from illicit substances and performance enhancing drugs.<sup>102</sup> UO's athletic department is allowed to test student-athletes by urinalysis or saliva sample.<sup>103</sup> Furthermore, all student-athletes are subject to additional unannounced random drug testing throughout the entire calendar year with little or no notice given.<sup>104</sup> For random tests, each student-athlete is selected for testing using a random number system.<sup>105</sup>

UO follows protocols required by the testing laboratory and the NCAA for testing student-athletes that “respect the student-athlete’s reasonable expectation of privacy, minimize the chances of accidental error or cheating, and preserve the appropriate chain of custody and integrity of urine and saliva samples.”<sup>106</sup> If there is a positive result, UO’s athletic department shall review it and determine the appropriate sanction or program necessary.<sup>107</sup> A program can include abstention from further use and periodic retesting, counseling, reduced playing time, and withdrawals from drills, scrimmages, or competitions and shall include any potential

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<sup>101</sup> Individualized or “reasonable suspicion” must be based on a specific event or occurrence which leads to the belief that a student-athlete has used any drugs that can have an effect on practice, conditioning, or competition. A coach or administrator should communicate to the director of athletic medicine circumstances that give rise to an individualized reasonable suspicion. The director of athletic medicine is the only individual to authorize and initiate the drug test, and the circumstances that give rise to the suspicion shall be recorded and kept confidential. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> When reviewing the positive result, the athletic department shall consider the type of drugs identified, the recency of use, the medical, safety, and performance-enhancing effects of the use when formulating an appropriate program for the student athlete. See University of Oregon, *Athletic Department Substance Use and Drug Testing Policy*, UOREGON.EDU, <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-7-intercollegiate-athletics/athletic-department-substance>.

sanctions.<sup>108</sup> A sanction can be as harsh as dismissal from the team and loss of all athletic financial aid upon a single positive test result.<sup>109</sup>

The second school chosen is Pennsylvania State University (“Penn State”) which is primarily located in State College, Pennsylvania,<sup>110</sup> and is a Division I school with a straightforward policy on drug and alcohol use by student-athletes. The objective of Penn State’s program is to advocate for the development of a healthy and responsible lifestyle for its student-athletes.<sup>111</sup> The policy regulates three major classes of substances: Alcohol,<sup>112</sup> Illicit Substances, and Performance Enhancing Drugs. Penn State has different types of testing including team testing,<sup>113</sup> random testing,<sup>114</sup> reasonable suspicion testing,<sup>115</sup> and NCAA and Big Ten Conference Testing.<sup>116</sup> Team testing, random testing, and reasonable suspicion testing is conducted by the Penn State athletic department and acts an extra testing initiative beyond what the NCAA requires.<sup>117</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Penn State University, *Campuses*, PSU.EDU, <https://www.psu.edu/academics/campuses/>.

<sup>111</sup> See Penn State University Intercollegiate Athletics, *Drugs and Alcohol Testing and Education Program Policies & Procedures Manual*, GOPSPORTS.COM (2019), [https://gopsports.com/documents/2019/7/17/PSU\\_Athletics\\_Drug\\_and\\_Alcohol\\_Testing\\_and\\_Education\\_Program\\_Policies\\_and\\_Procedures\\_Manual\\_Updated\\_7\\_3\\_2019.pdf](https://gopsports.com/documents/2019/7/17/PSU_Athletics_Drug_and_Alcohol_Testing_and_Education_Program_Policies_and_Procedures_Manual_Updated_7_3_2019.pdf).

<sup>112</sup> Penn State’s policy on alcohol prohibits anyone who is under 21 to consume it. It also allows for each Head Coach to impose their own rules regarding student-athlete alcohol consumption which can affect the student-athlete’s eligibility for practices and competitions. There are mandated sanctions for certain alcohol related offenses including a DUI, public intoxication, or assault while under the influence of alcohol. *Id.*

<sup>113</sup> Team testing is where all student-athletes on a team are required to test and are notified by an institutional representative before the test is to be conducted. *Id.*

<sup>114</sup> All student-athletes are subject to unannounced random drug testing throughout the entire year, including post-season competition and summer sessions. Students are selected by a random number system run by a computer program and are given little to no notice about their test. *Id.*

<sup>115</sup> A student-athlete is subject to testing when an athletic department employee reasonably suspects that the student-athlete is using a substance in violation of this policy. The suspicion can be based on information from any reliable source. *Id.*

<sup>116</sup> Any student-athlete is subject to the NCAA and Big Ten Conference testing. Penn State will not protect a student from the possibility of being tested by these entities and a positive result will cause the student-athlete to be subject to sanctions and treatment. *Id.*

<sup>117</sup> *Id.* This is likely because Penn State wants to ensure that its student-athletes will remain eligible for important competitions since it is a notable athletic university.

When a student-athlete is required to test, their head coach or his/her designee will be notified up to 24 hours in advance.<sup>118</sup> Any student-athlete who fails to report at the given testing site and time is placed under immediate suspension and is unable to participate in practice or competition until testing is done.<sup>119</sup> When the athlete shows up for testing, they are first identified<sup>120</sup> and then they are required to sign in and personally select an individually sealed and coded specimen bottle.<sup>121</sup> A collector must visually observe the student-athlete as they provide at least a 60mL sample of urine.<sup>122</sup> If a student-athlete tests positive, they are subject to mental and physical evaluations by the team physician and are recommended a treatment and education plan.<sup>123</sup> The student-athlete can be suspended from traditional season or post-season championship competitions,<sup>124</sup> or even dismissed from the program entirely. Student-athletes have the right to appeal a positive result.<sup>125</sup>

The third school that was chosen is Harvard University (“Harvard”), which is located in Cambridge, Massachusetts, and is a Division I school with a very lenient drug testing policy.<sup>126</sup> Harvard’s Student-Athlete Handbook<sup>127</sup> outlines student-athlete eligibility and states that

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<sup>118</sup> See Penn State University Intercollegiate Athletics, *Drugs and Alcohol Testing and Education Program Policies & Procedures Manual*, GOPSUSPORTS.COM (2019), [https://gopsusports.com/documents/2019/7/17/PSU\\_Athletics\\_Drug\\_and\\_Alcohol\\_Testing\\_and\\_Education\\_Program\\_Policies\\_and\\_Procedures\\_Manual\\_Updated\\_7\\_3\\_2019.pdf](https://gopsusports.com/documents/2019/7/17/PSU_Athletics_Drug_and_Alcohol_Testing_and_Education_Program_Policies_and_Procedures_Manual_Updated_7_3_2019.pdf).

<sup>119</sup> Unless the student-athlete has a valid reason for their absence, they will be treated as if they tested positive with a cheating violation. *Id.*

<sup>120</sup> Student-athletes are identified either by photo ID or if their coach is present, the coach identifies them. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> The student-athlete is also subject to a community service requirement and is further subject to reasonable suspicion and follow-up testing. *Id.*

<sup>124</sup> The percentage can range from 10% of the season to up to 50% of the season depending on what they tested positive for. *Id.*

<sup>125</sup> As part of the appeals process, the student must request an appeal in writing with supporting evidence within 7 days of the positive result. The student may request a meeting with the Committee to state their basis for the appeal. A final decision is made by the Committee and is made available in writing. *Id.*

<sup>126</sup> See Harvard University, *Main Page*, HARVARD.EDU, <https://www.harvard.edu>.

<sup>127</sup> See Harvard University, *Harvard University Athletics Student-Athlete Handbook 2021-2022*, HARVARD.EDU (2021), [https://s3.us-east-2.amazonaws.com/sidearm.nextgen.sites/gocrimson.com/documents/2021/10/28/Harvard\\_Student\\_Athlete\\_Handbook\\_2021\\_22.pdf](https://s3.us-east-2.amazonaws.com/sidearm.nextgen.sites/gocrimson.com/documents/2021/10/28/Harvard_Student_Athlete_Handbook_2021_22.pdf).

Harvard does not participate in any institutional sanctioned drug testing. Student-athletes who participate in any NCAA-sponsored event are eligible for random mandatory urinalysis testing by the NCAA, but Harvard does not conduct any tests separate from this.<sup>128</sup> For Harvard, the school strictly complies with the NCAA rules and regulations, but does not take any additional preventative measures, like the University of Oregon or Penn State, to prevent a positive drug result for an NCAA event. Harvard's approach is not very common as many schools have similar deterrence and safety values as the NCAA does. However, Harvard's student-athletes are not subject to additional, and potentially more invasive drug testing besides what is required to compete in the NCAA.<sup>129</sup>

The lack of consistent testing policies across schools is a paramount issue as it allows each institution to act more or less punitive than the NCAA. Varying policies have the ability to create unfair outcomes for some student-athletes at certain schools "as a banned substance violation at one institution may require the offending student-athlete to sit out from competition, while the same type of violation committed at a rival school may result in a less restrictive penalty."<sup>130</sup> This also allows for institutions to create more rigid guidelines that can arguably be a further intrusion on a student-athletes Fourth Amendment right to privacy.<sup>131</sup> It is not common practice for student's to choose which school they will play at based off of its drug policy.<sup>132</sup> However, if student-athletes were aware of these discrepancies, then they could have the

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<sup>128</sup> *Id.*

<sup>129</sup> Harvard's approach is the least intrusive out of all of the school policies analyzed and may not be subject to Fourth Amendment challenge.

<sup>130</sup> See Elliot Kelly, X, *NCAA Drug Testing Policies and Penalties: The Role of Team Performance*, GEORGIA JOURNAL OF INTERCOLLEGIATE SPORT, 2018, 11, 24-39, <https://journals.ku.edu/jis/article/view/10107/9537>.

<sup>131</sup> This inevitably follows the issue of whether the school is a state or private actor to determine whether it is subject to Fourth Amendment requirements, which requires further analysis. Possibly uniform testing procedures among member institutions adopted by the NCAA, assuming it survives antitrust scrutiny, is the answer to avoid this major discrepancy.

<sup>132</sup> This may be because student-athletes are unsure that different schools have such a discrepancy in its policies, or they are aware they are subject to one anyway and have yet to articulate how intrusive they may be.

opportunity to advocate for uniformity. The significant disparity for drug testing student-athletes boils down to the purpose behind the university's testing scheme. Some schools may be concerned about a student-athletes eligibility status for an NCAA competition and test for preventative security where other schools promote a student-athletes right to privacy by not enforcing additional testing.

### **III. Other Areas of Privacy Concern for Collegiate Student-Athletes**

A student-athletes right to privacy is affected in many scenarios. Besides being forced to provide a urine sample for drug testing, student-athletes have to disclose intrusive and personal information about themselves in order to participate in NCAA events. Two distinct federal laws in the United States that govern privacy and confidentiality are the Family Educational Rights and Privacy Act<sup>133</sup> ("FERPA") and the Health Insurance Portability and Accountability Act<sup>134</sup> ("HIPAA"). These Acts are applicable in different contexts of collegiate sports and protect different types of information.

In order to be eligible to compete in the NCAA, every student-athlete is required to sign a Student-Athlete Statement before their first competition within the academic year "to assist in certifying eligibility."<sup>135</sup> According to NCAA Bylaw 12.7.2.1, failure to sign such form results in "the student-athlete's ineligibility for participation in all intercollegiate competition."<sup>136</sup> One section of the Student-Athlete Statement contains FERPA and HIPAA waivers, which the student-athlete has no choice but to consent to.<sup>137</sup>

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<sup>133</sup> See 20 U.S.C. § 1232g.

<sup>134</sup> See 42 U.S.C. § 1320.

<sup>135</sup> See NCAA, *NCAA Division I Student-Athlete Statement Form 23-1a*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp\\_Form23-1a-StudentAthleteStatementForm.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp_Form23-1a-StudentAthleteStatementForm.pdf).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at Part II.

According to the FERPA consent waiver, each student-athlete must agree to the potential disclosure of: their drug test results administered by the NCAA or a similar sport's governing body, high school transcripts, pre-college test scores, graduation status, social security number, race and gender identification, diagnosis of education-impacting disabilities, accommodations provided for education-impacting disabilities, financial aid records, and "any other materials of information disclosed by you or otherwise received pertaining to your NCAA eligibility."<sup>138</sup> Essentially, all personal information about a student-athlete can be disclosed and the student is not afforded any privacy protection during their time at a member institution. It seems that the NCAA included this blanket clause which covers anything else the member institution may discover and allows disclosure of such information.

According to the HIPPA consent waiver, the student-athlete must agree to the potential disclosure of any information regarding any: injury, illness or diagnosis, or any treatment or management of any injury or illness, related to or affecting the student's training for and participation in the sport.<sup>139</sup>

Furthermore, there is a Subsequent NCAA Disclosure section in the Student-Athlete Statement where each student must consent to the disclosure of information regarding any NCAA reinstatement, infractions, or waiver matter where the student is involved in during their time as an athlete to the media, its committee members, or any other third party.<sup>140</sup> This form restricts release of this information only for the purpose of determining the student-athlete's eligibility for NCAA participation or financial aid, or to confirm or correct inaccuracy in

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<sup>138</sup> *Id.* Part II. 1. (a-k).

<sup>139</sup> *Id.* HIPPA section

<sup>140</sup> *Id.* Subsequent NCAA Disclosure

publicly recorded statements, without identifying the student-athlete by name to the extent required by NCAA regulations, policies and procedures or required by law.<sup>141</sup>

This section will look closer into the required FERPA and HIPPA releases from student-athletes and how the breadth of these clauses has been used by member institutions. It will also scrutinize how the broadness of these releases significantly infringe on an NCAA participating student-athletes right to privacy. Finally, it will discuss how these acts have the possibility of publicly revealing a student-athletes drug test results, which may further infringe on their Fourth Amendment right to privacy.

**i. FERPA (The Buckley Amendment) Implications in the NCAA**

The Buckley Amendment, also known as the Family Educational Rights and Privacy Act of 1974,<sup>142</sup> or “FERPA” prohibits the release of a student’s educational records by any educational agency or institution receiving federal funds. All students attending a collegiate institution that receives federal funding must be notified of their rights under the Act.<sup>143</sup> Under FERPA, schools must get written permission from a parent or eligible student in order for the institution to release any information about a student’s record.<sup>144</sup> FERPA has been used in various ways to release sensitive and private information pertaining to student-athletes.<sup>145</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> 20 U.S.C. § 1232g; *see also* Family Educational Rights and Privacy, 34 C.F.R. § 99.

<sup>143</sup> 20 U.S.C. § 1232g (e).

<sup>144</sup> 34 C.F.R. § 99.

<sup>145</sup> The NCAA recently demanded that schools release prior disciplinary history for sexual assault. Each school is allowed to create its own policies and procedures for implementation. This information can be released by way of a FERPA authorization. *See* NCAA, *NCAA Board of Governors Policy on Campus Sexual Violence Administrator FAQ*, NCAA.ORG (May 22, 2023), <https://www.ncaa.org/sports/2021/7/21/ncaa-board-of-governors-policy-on-campus-sexual-violence-administrator-faq.aspx>.



Every student-athlete is required to consent to the potential disclosure of information that would otherwise be protected by FERPA when filling out their Student Athlete Statement.<sup>146</sup> It has been argued that collegiate athletic departments use the Buckley Amendment as authority to withhold information about a student athlete if it has potential to damage the school's reputation or release the information if it will make the school look good.<sup>147</sup> One author provided an example of this dichotomy when the Iowa State University's athletic department released a list to the local newspaper containing the names and GPAs of 124 student-athletes who received a GPA of 3.0 or higher in 2003.<sup>148</sup> When the editor inquired into the other student-athletes GPAs who were not on the list, the Iowa State Athletic Director denied the request on the grounds that "[t]he Athletic Department and Iowa State University are prohibited from releasing this information without the permission of the student-athletes" as it is protected by FERPA.<sup>149</sup>

The editor then requested for the document signed by the student-athletes whose information was included in the release.<sup>150</sup> The Director provided each student's NCAA Student Athlete Statement, where a signature is required by all student-athletes to participate in college athletics.<sup>151</sup> Upon a closer review, the editor realized that even those students who were not included on the original list had signed the document, meaning that they also authorized the release of their GPAs.<sup>152</sup> After seeing this situation, it is apparent that a university athletic department has the authority to pick and choose when a student-athletes information gets to be

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<sup>146</sup> See NCAA, *NCAA Division I Student-Athlete Statement Form 23-1a*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp\\_Form23-1a-StudentAthleteStatementForm.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp_Form23-1a-StudentAthleteStatementForm.pdf).

<sup>147</sup> Herb Strentz, *Law Compounds Drake basketball/GPA woes*, IOWA NEWSPAPER ASSOCIATION BULLETIN, (February 7, 2001), <http://www.bloomington.in.us/~nafcar/buckley.html>.

<sup>148</sup> Paul J. Batista, *Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include the Right to Sue*, 14 MARQ. SPORTS L. REV. 319 (2004), <http://scholarship.law.marquette.edu/sportslaw/vol14/iss2/4>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

disclosed, thus violating the individual's right to privacy only when it is beneficial to the university.

Another issue FERPA creates for student-athletes is that upon a violation, FERPA does not create a private enforcement right.<sup>153</sup> This issue arose in *Gonzaga v. Doe*,<sup>154</sup> where a former undergraduate student sued Gonzaga University for telling his future employer that he engaged in acts of sexual misconduct against another female undergraduate student. This started a formal investigation into Doe and jeopardized his future employment.<sup>155</sup> Doe sued Gonzaga for a myriad of claims, including violations of FERPA for unauthorized release of personal information.<sup>156</sup> Ultimately, the U.S. Supreme Court found that Doe was unable to sue Gonzaga because there is no personal right to enforce a violation under 42 U.S.C. § 1983.<sup>157</sup> This holding was two-fold: first, the Act is about receiving federal funds and spending Legislation does not confer personal enforceable rights,<sup>158</sup> and second, Congress did not have the unambiguous intent to confer such rights when passing FERPA.<sup>159</sup> Therefore, this case makes it clear that student-athletes are left without individual rights to file a private civil suit if the NCAA or the institution discloses personal information about them in violation of FERPA. The only recourse available to them is through the office of the Secretary of Education.<sup>160</sup>

A pressing issue with the mandated FERPA release is the fact that a student-athlete's drug test have the ability to be exposed since it falls under the NCAA's broad-encompassing

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<sup>153</sup> Paul J. Batista, *Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include the Right to Sue*, 14 MARQ. SPORTS L. REV. 319 (2004), <http://scholarship.law.marquette.edu/sportslaw/vol14/iss2/4>.

<sup>154</sup> See *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 395-96.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

disclosure clause in the Student Athlete Statement.<sup>161</sup> Release of this intrinsically sensitive information has detrimental impacts on a student-athlete. A single positive result can destruct the athlete's reputation amongst the public, other universities, and even professional leagues who may have previously been interested in the student-athlete. What is also so harmful about this is the fact that a supplement, which is not a banned drug, can cause a student to test positive for a drug. This means that a student could not have actually ingested drugs, but tested positive anyway, and the media can still unfairly run with the fact that the student took drugs. A drug test disclosure can also seriously impact a student's mental health, which in turn can affect their physical health. Even though in practice, drug-results are typically not information that is revealed to the public, the fact that it could be for a student-athlete is both extremely detrimental on one's career and health.

## **ii. HIPAA Implications in the NCAA**

HIPAA, also known as the Health Insurance Portability and Accountability Act of 1996,<sup>162</sup> was enacted to govern the privacy of protected health information. HIPAA's privacy rule is applicable to "covered entities" which include: (1) health plans; (2) health care clearinghouses; and (3) healthcare providers that electronically transmit health information in connection with certain electronic transactions.<sup>163</sup> Most universities assume that they are a HIPAA-covered entity because the university health center provides medical treatment to the students.<sup>164</sup> In the collegiate context, HIPAA only applies to outside team physicians, athletic

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<sup>161</sup> See NCAA, *NCAA Division I Student-Athlete Statement Form 23-1a*, NCAA.ORG (2023), [https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp\\_Form23-1a-StudentAthleteStatementForm.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2023-24/2023-24D1Comp_Form23-1a-StudentAthleteStatementForm.pdf).

<sup>162</sup> See 45 C.F.R. § 160-64.

<sup>163</sup> Rob Danzman, *College Student Privacy: FERPA, HIPAA, and Parents*, MOTIVATECOUNSELING.COM (July 27, 2023), <https://motivatecounseling.com/college-student-privacy-ferpa-hipaa-and-parents/>.

<sup>164</sup> *Id.*

trainers, and healthcare providers that treat university and NCAA athletes.<sup>165</sup> However, HIPAA does not apply to any health records maintained by an educational institution if it is considered an education record or treatment record under FERPA.<sup>166</sup> When a university uses its own athletic trainers and doctors to treat student athletes, it becomes FERPA record, which student-athletes are required to waive when competing in the NCAA.<sup>167</sup>

Treating student-athletes and disclosing their health-related information becomes an interesting dichotomy between FERPA and HIPAA. To break it down in a single sentence, HIPAA guidelines must be followed when student-athletes are being treated in an outside clinic, and FERPA guidelines must be followed when student-athletes are being treated by trainers and doctors who are formally employed by the school.<sup>168</sup>

In most situations, student-athletes are required to consent to a HIPAA waiver when being treated, so their private health information can be known to the school's athletic department, or anyone else the department believes is on a need-to-know basis. Although it is standard practice for information about players' injuries to be communicated among a wide range of individuals, a widespread HIPAA waiver has potential danger to expose a student-athletes more personal health concern.<sup>169</sup> Because HIPAA has a potential to reveal a student-athletes lifelong medical history, where FERPA only has the potential to expose medical documents during the student's time as an athlete, it has significantly higher privacy concerns.

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See Kenny Berkowitz, *A Private Matter: HIPAA and your athletic program*, TRAINING-CONDITIONING.COM (Jan. 29, 2015), <https://training-conditioning.com/article/a-private-matter/>.

<sup>169</sup> See Richard Bell, *The Impact of the HIPAA Privacy Rule on Collegiate Sport Professionals*, THESPORTJOURNAL.ORG (Apr. 2, 2008), <https://thesportjournal.org/article/the-impact-of-the-hipaa-privacy-rule-on-collegiate-sport-professionals/>.

Requiring a widespread HIPAA release to compete in the NCAA, as per the NCAA Student-Athlete Statement, is a significant privacy intrusion. Once the release is signed, the NCAA has the ability to disclose a player's information to the media.<sup>170</sup> This blanket release can become problematic because most student-athletes, even though they are informed that they are signing the release, do not realize that they signed away the right to keep their personal information private. Some schools have not implemented such a policy and suggest getting permission from each student-athlete when reporting to the media.<sup>171</sup> However, the NCAA Student-Athlete Statement makes clear that this is not a policy that continuously asks for consent before each release.<sup>172</sup> Although it seems to be common practice for certain sensitive information to be kept private, confidentiality is not promised and there is room for exposure.

What falls under a HIPAA disclosure is a student-athlete's drug test results. Whether a student tests positive or negative, it is nobody's business and should not be information that is allowed to be disclosed through an NCAA mandated HIPAA release. This can become even more problematic if a student tests positive for any of the banned drugs as it can have destructive effects on their reputation and mental health. Although this release is primarily for the student's doctors to obtain information so they can treat the student, there are still some loopholes that allow this information to be shared on a widespread level. As if the mandatory drug test itself was not a privacy intrusion itself, the required and extraordinarily broad release further intrudes beyond Fourth Amendment expectations.

Student-athletes face other potential disclosures when they sign the required release forms such as the release of their current injuries or illnesses, and their biometric tracking data.

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Although widespread injury releases are currently not commonplace for the NCAA, it may become routine due to the increased access to legal sports betting.<sup>173</sup> One author has written on this phenomenon and found that “HIPAA and is not a meaningful obstacle to releasing reliable medical information useful to books and bettors.”<sup>174</sup> Because athletes waive their HIPAA rights when competing for the NCAA, this information is likely to be released regularly to enhance the sports betting world.<sup>175</sup> As for the release of biometric data, there remains potential for weighty privacy concerns for student-athletes since their intimate information about their athletic performance is tracked and monitored. There has not been much legal discussion as to whether WHOOP<sup>176</sup> devices need to comply with HIPAA.<sup>177</sup> Requiring student-athletes to wear these devices creates the ability for coaches and staff to violate the privacy of their athletes since their data is being tracked and stored *all day every day*.<sup>178</sup> Without some type of protections instilled for this information, student-athletes are still being subject to unreasonable invasions of privacy.

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<sup>173</sup> The Supreme Court decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), prompted calls from Big 10 athletic directors to pursue a weekly national injury reporting mandate. This suggestion did not pass through the NCAA’s Oversight Committee, leaving the program with a policy that guards injury information. See John Holden, *Why Are There No NCAA Injury Reports In The Age Of Legal Sports Betting?*, LEGALSPORTSREPORT.COM (March 27, 2024), <https://www.legalsportsreport.com/31209/ncaa-injury-reports-legal-sports-betting/#:~:text=So%20is%20HIPAA%20really%20an,release%20of%20certain%20medical%20information>.

<sup>174</sup> Releasing sensitive health information is standard procedure in many professional leagues and collegiate athletes waive some privacy rights associated with their medical history to train and participate in competitions. *Id.*

<sup>175</sup> New Jersey saw the concern with releasing such information and prompted a law that excludes a person’s ability to wager on in-state collegiate teams. *Id.*

<sup>176</sup> A WHOOP device is a fitness-tracking wearable that uses physiological data to improve an athlete’s training and fitness. It stores an athlete’s data and is usually worn by athletes 24/7. See Zach Nehr, *What is a Whoop? A Complete Guide*, VELO.OUTSIDEONLINE.COM (Jun 1, 2023), <https://velo.outsideonline.com/road/road-racing/what-is-whoop-a-complete-guide/#>.

<sup>177</sup> The main argument why WHOOP does not need to comply with HIPAA is because wearable technology is not necessarily considered a covered entity. See Casey Yang, *Biometric Data In Sports Could Be Subject To Biometric Privacy Laws*, CALLAWYERS.ORG (2022), <https://calawyers.org/business-law/biometric-data-in-sports-could-be-subject-to-biometric-privacy-laws/>.

<sup>178</sup> See Kate Donovan, *Wearable Technology in College Athletics Creates Potential Privacy Violations with the Distribution of Student-Athlete Biometric Data*, SUFFOLK.EDU (Oct. 25, 2023), <https://sites.suffolk.edu/jhtl/2023/10/25/wearable-technology-in-college-athletics-creates-potential-privacy-violations-with-the-distribution-of-student-athlete-biometric-data/>.

#### IV. Antitrust Scrutiny: Kavanaugh’s Rule of Reason or Gorsuch’s Trust in the NCAA to Regulate

A rule of reason analysis is integral in determining whether the NCAA’s student-athlete drug testing policy is an effective means of regulating the association. Essentially, the question to look at here is: does the current drug testing policy set forth an anticompetitive effect? The NCAA’s current drug testing policy requires an antitrust analysis because the potential restraints it may create in a student-athlete’s ability to compete have the ability to be anticompetitive.<sup>179</sup> Courts evaluate most antitrust claims under a rule of reason analysis that requires a plaintiff to show that defendants with market power have participated in anticompetitive conduct.<sup>180</sup> When a court determines that a practice is reasonable, it survives antitrust scrutiny.<sup>181</sup> This is different than antitrust law’s “per se”<sup>182</sup> rule, where market power does not require proof and anticompetitive effects are inferred from the conduct itself.<sup>183</sup> In the NCAA context, the court follows the rule of reason analysis to determine whether a rule promulgated by the NCAA has procompetitive effects.<sup>184</sup>

In evaluating conduct in accordance with antitrust restraints to determine if it is compliant under the rule of reason, courts typically apply a three-step burden shifting framework.<sup>185</sup> First, the plaintiff must show that the conduct has substantial anticompetitive effects in a well-defined

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<sup>179</sup> This is more prevalent now in light of a student-athletes rights to NIL. If an athlete is forced to miss out on a game or competition because of a positive drug test result, their economic rights are now at stake.

<sup>180</sup> See Hovenkamp, Herbert J., “The Rule of Reason” (2018). *All Faculty Scholarship*. 1778, [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2780&context=faculty_scholarship).

<sup>181</sup> See 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust principles and Their Application* ¶ 1501 (4th ed. 2017).

<sup>182</sup> The few exceptions that continue to follow the “per se” rule is naked price fixing, naked market division, boycotts, and narrow criticized rules for tying arrangements. See 9 Phillip E. Areeds & Herbert Hovenkamp, *Antitrust Law* ¶ 1720 (3d ed. 2011).

<sup>183</sup> See e.g., *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987) (finding that the per se rule relieves the plaintiff of the burden to prove anticompetitive effect as it is assumed).

<sup>184</sup> See *National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).

<sup>185</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021). However, the Court found that these three steps do not represent a strict checklist, and what is required to assess whether a challenges restraint harms competition can vary on the circumstances. *Id.*

market.<sup>186</sup> Next, the defendant must show that the allegedly unlawful conduct has procompetitive benefits.<sup>187</sup> Finally, the plaintiff can overcome the defendant's showing by offering a least restrictive alternative to the conduct that is equally effective.<sup>188</sup> If no alternative is available, a court will weigh the anticompetitive effects against the procompetitive benefits to determine if the conduct is an unreasonable restraint of trade according to the Sherman Act.<sup>189</sup> This section will complete a rule of reason analysis and go through each step to determine whether the NCAA's current drug testing policy has procompetitive effects.

The leading case in determining what antitrust scrutiny the NCAA rules are subject to is *NCAA v. Alston*.<sup>190</sup> This case analyzed whether the NCAA's rules on limited education related compensation were reasonable in light of the Sherman Act.<sup>191</sup> It is important to highlight that the Supreme Court in *Alston* differed on whether every rule promulgated by the NCAA needs to be analyzed under the rule of reason.<sup>192</sup> Justice Gorsuch, writing for the majority, found that it is unnecessary for every rule or policy set forth by the NCAA to be scrutinized under an antitrust analysis.<sup>193</sup> Gorsuch believes that when a rule is reasonable, it is up to the NCAA to regulate it as it is the proper authority to do so.<sup>194</sup> Justice Kavanaugh in his concurring opinion stated that the NCAA's rules are subject to a full rule of reason analysis.<sup>195</sup> With a radically changing view of

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> The court found that the NCAA is subject to the rule of reason when its rules are being evaluated for antitrust violations. *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See Alston*, 141 S. Ct. at 2141.

<sup>193</sup> *Id.*

<sup>194</sup> However, when a rule is entirely unreasonable, the court is then allowed to step in and conduct a rule of reason analysis. *Id.*

<sup>195</sup> *Id.*



the NCAA's ability to regulate college sports, should drug testing be included, or are there elements in the current policy that are valuable and necessary to keep it intact?

Any case that would challenge the current drug testing policy would likely argue somewhere in-between Gorsuch and Kavanaugh. Under Gorsuch's more narrow approach, the first issue would be whether the policy is so clearly unreasonable that a rule of reason analysis needs to be conducted. Because of the impact the test has on the student, there is good argument that the rule itself is unreasonable and requires a court to determine if it is compliant with antitrust laws. Under Kavanaugh's more broad approach, the current drug testing policy must be scrutinized under the rule of reason. Kavanaugh's concurrence is likely preferred by courts and plaintiff's since it calls for a court to check an agency's action. Under this view, an antitrust analysis is required for the current drug testing policy administered by the NCAA since its outcome determines a student-athlete's eligibility which not only affects their status as a student, but even their potential future careers.

This section will complete a rule of reason analysis for the NCAA's current drug testing policy. First, a student-athlete who is subject to the NCAA's drug testing policy would be required to bring forth this claim. A student-athlete can likely survive the first prong, showing that the policy has substantial anticompetitive effects in the industry. The district court in *Alston* found that the NCAA enjoys complete dominance over the relevant market for collegiate sports and there are no viable substitutes for them to compete in.<sup>196</sup> For drug testing, the NCAA and its member institutions have the power to facilitate these invasive tests without any meaningful risk of diminishing its market dominance. Because there is no other league or competition as

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<sup>196</sup> See *NCAA v. Alston* (D. Ct. Op., at 1097).

prominent as the NCAA, student-athletes are left with no choice but to submit to such test since there is no competition alternatives available.

The most critical point to this first step is the fact that there is no opportunity for a student-athlete to waive this test. College athletes have no choice but to submit to the mandated drug test. If they refuse, they are denied the opportunity to compete in the NCAA which is the peak of college athletics. It has been stated that competition at this level “comes with immeasurable opportunities for personal, professional, and economic growth.”<sup>197</sup> The NCAA provides the proper platform to showcase a student’s athletic performance in front of national audiences and professional scouts.<sup>198</sup> Requiring all students to submit to such a broad encompassing and invasive drug test denies these benefits to affected student-athletes who wish to compete in the only relevant market, the NCAA.<sup>199</sup> Each competition that they are required to sit out for, either from a refused or failed drug test, is not replaceable and the student-athlete will never receive that opportunity ever again.

Second, the NCAA to survive antitrust scrutiny must demonstrate that the drug testing policy has some type of procompetitive effect. The NCAA may be able to show this through various arguments. For starters, fans do not want to watch their favorite team’s athletes play while they’re on drugs. This also plays into the notion as to why the NCAA tests, which is to maintain the integrity of college athletics. Fans are incredibly passionate about the sport. When drugs are involved that can either enhance a player’s ability or can set a player back, it is likely that viewership will dramatically drop. Further, without opening a can of worms, many people take

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<sup>197</sup> See *Ohio v. NCAA* (Compl. at ¶ 40.)

<sup>198</sup> *Id.* at ¶ 40.

<sup>199</sup> Although there are other competitions that student-athletes can participate in, none of them have the same opportunities as the NCAA does. Additionally, a student-athletes school may not be a member of the other conferences or leagues which would obviously impact their eligibility to participate.

sports-betting seriously, and NCAA competitions can be wagered on. If student-athletes are not regulated, they can take performance enhancing drugs which can potentially throw off games. The most important argument that the NCAA would set forth is that drug testing ensures the integrity of intercollegiate athletics. Testing does notify the NCAA whether a player is using a drug that enhances their natural abilities and without such test, the integrity of the game is jeopardized.

On the other hand, there is arguably no procompetitive effect behind the NCAA's current drug testing policy. There is good argument that other drugs besides performance enhancing drugs or stimulants do not need to be tested for. The drug panel is incredibly broad and includes drugs that are not relevant to the competition, such a supplement. Most importantly, the drug testing procedure itself is quite invasive on the student-athlete's privacy interest and the results impede on the individual's eligibility to participate in an NCAA competition. Requiring the student to submit to a urine sample when there is an NCAA competition, where the results may be disclosed by way of a required FERPA and HIPAA consent, completely repeals any right of privacy that the student should be entitled to. Further, student-athletes can show that the policy in its current structure is anticompetitive because it does not limit testing to a reasonable suspicion standard.<sup>200</sup> Because the test itself is overly broad and does not involve a standard of suspicion,

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<sup>200</sup> If the NCAA limited its program to reasonable suspicion testing of student-athletes who exude characteristic signs of steroid use, it will be properly modified to survive anticompetitive scrutiny. See Thomas P. Simon, *Reforming the NCAA Drug-Testing Program to Withstand State Constitutional Scrutiny: An Analysis and Proposal*, 24 U. MICH. J. L. REFORM 289 (1990), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1751&context=mjlr>. Notre Dame football coach Lou Holtz has stated: "if you're observant, you often can recognize an individual using steroids. You may see a sudden gain, when you see someone come out of nowhere to bench press 550 pounds, you have to wonder." L. Holtz, *The Fighting Spirit: A Championship Season at Notre Dame*, 161 (1989). Holtz's argument is that a reasonable suspicion standard will not leave athlete's abusing steroids undetected since there it is likely clear to observe. However, it may be harder for NCAA officials to regulate this change and should not solely rely on schools' coaches and trainers to relay this type of sensitive information.

the student-athletes can likely demonstrate that the current NCAA's drug testing policy is anticompetitive and requires modification to survive antitrust scrutiny.

Third, a student-athlete may be able to overcome the NCAA's proposed procompetitive benefits by offering least restrictive alternatives that are equally effective. The students have a strong argument in showing that the NCAA should only test based on individualized reasonable suspicion.<sup>201</sup> This policy has been adopted by several universities and does not force every athlete to submit to a test that invades their privacy. This is an equally effective policy that supports the NCAA's main initiative of maintaining the integrity of college athletics.

Furthermore, students may be able to demonstrate that testing for performance enhancing drugs and stimulants only is a less invasive way to maintain the NCAA's goal. Although other drugs may interfere with an athlete's ability to perform, performance enhancing drugs have the potential danger of throwing the integrity of the sport. Again, the breadth of the current drug panel is too extreme and intrudes on the student-athlete's privacy. Unless the NCAA is able to pinpoint why each drug on the current banned substances list needs to be tested for, it is likely unreasonable.

Overall, it seems as though the NCAA's drug testing policy may survive antitrust scrutiny through a rule of reason analysis. However, there may need to be less intrusive modifications to the current policy in order for it to be found reasonable. Competing in the NCAA is so valuable to a student-athlete for many reasons; it gives them exposure to future deals or opportunities and allows them to travel for competitions and experience different types of competition.<sup>202</sup> If preserving the integrity of intercollegiate athletics is the tried-and-true reason for the NCAA to

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<sup>201</sup> Adopting this standard would require the NCAA to create a policy defining reasonable suspicion, which would give it grounds to drug test a student athlete before a championship.

<sup>202</sup> See e.g., NCAA, *The Value of College Sports*, NCAA.ORG, <https://www.ncaa.org/sports/2014/1/3/the-value-of-college-sports.aspx>.

test this way, then the drug panel must be limited to the drugs that would actually affect that. Otherwise, the tests seem to act more as a self-serving reason than the legitimate interest the NCAA claims to test for. Although an NCAA athlete arguably enjoys more protection than they would be if subject to the policies of WADA<sup>203</sup> and USADA,<sup>204</sup> there is still ample arguments for student-athletes to make that the NCAA's policy is overbroad and anticompetitive.<sup>205</sup>

## V. Why Does This Matter?

Although this debate has carried on since the NCAA first implemented the student-athlete drug testing policy in 1986, this policy needs to be revisited. *Hill*<sup>206</sup> has desensitized the idea of drug testing student-athletes and it has now become the norm. However, student-athletes now have Name, Image, and Likeness (“NIL”) rights which extends beyond privilege to participate in the sport. The court's previous reasonings, which allowed the NCAA to drug test without abiding by the Fourth Amendment, may longer stand since participating in collegiate athletics has now become an economic right.

The ability to earn NIL is an economic right; missing a single game could be a loss of opportunity for a student-athlete. In *Ohio v. NCAA*,<sup>207</sup> the Attorney General filed a complaint

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<sup>203</sup> WADA, also known as the World Anti-Doping Agency, is an international independent agency that coordinates anti-doping rules and policies for all sports across all countries. WADA is responsible for creating the list of substances that are illegal to use in order to be eligible for Olympic competition. There are 14 classes of drugs that WADA bans from competition that set the international standard. The testing process is quite complex and authorizes the testing of athletes by blood and urine. See WADA, *International Standards*, WADA-AMA.ORG, <https://www.wada-ama.org/en/what-we-do/international-standards>.

<sup>204</sup> USADA, also known as the U.S. Anti-Doping Agency, is the national anti-doping organization for the United States Olympics and is charged with managing the anti-doping program for in-competition and out-of-competition testing. USADA follows WADA's list of substances and can administer its own tests to ensure that all U.S. citizens are eligible to compete for Team USA when selected to participate in an Olympic-sanctioned sport. See USADA, *About USADA*, USADA.ORG, <https://www.usada.org/about/>.

<sup>205</sup> There is more at stake for USADA and WADA athletes since they are representing the country in one of the most significant and privileged competitions in the world. Although USADA and WADA's drug testing policies are stricter and more invasive than the NCAA's, USADA and WADA are likely to pass antitrust scrutiny under a rule of reason analysis. The procompetitive effect of USADA and WADA's policies of ensuring the integrity of the game and deterring use of drugs is much more significant than the NCAA's since the Olympic sports are at a world-wide level and the competition's result hinges on one of the most significant athletic accolades in history.

<sup>206</sup> See *Hill v. Nat'l Collegiate Athletic Ass'n.*, 7 Cal. 4th 1 (Cal. 1994).

<sup>207</sup> See *Ohio et al. v. Nat'l Collegiate Athletic Ass'n (NCAA)*, No. 1:23-cv-00100 (N.D. W.V. Dec 7, 2023).

suggesting that the Transfer Eligibility Rule unreasonably interfered with the student’s right to earn NIL royalties and asked the court for a Temporary Restraining Order (“TRO”).<sup>208</sup> The Complaint highlights that “forced ineligibility and missing even a single game can negatively impact a college athlete’s future earning potential.”<sup>209</sup> If a student is found ineligible to participate in a competition because of a failed or denied drug test, the athlete is deprived of their exposure which can lead to potential NIL opportunities. These new rights require the Court to re-visit the current drug testing policies in light of what *Ohio v. NCAA* suggests.

NIL agreements can vary for each student athlete depending on their current circumstance. Factors to consider include: what school the student-athlete plays for, what NIL resources that school is capable of providing, “the degree of exposure that the athlete might expect from playing sports at that school, the relationships a given school might have with third parties interested in entering NIL agreements (through collectives or otherwise), and ties to established media markets in which NIL agreements may be more prevalent, among other factors.”<sup>210</sup> Because these drug tests limit eligibility for the student-athlete, it essentially prevents them from obtaining maximum NIL valuations which has the capability of depriving them millions of dollars.

Testing programs may be able to survive this new structure in college athletics, but it will be a close call and requires modification. Ensuring the integrity of the sport is the NCAA’s primary reasoning to enforce its drug testing policy. This is wholly intrinsic to its procompetitive effects that the mandated drug tests have for the NCAA and is essential to a rule of reason analysis.

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<sup>208</sup> See *Ohio v. NCAA* (Compl. at ¶ 1.), <https://www.naag.org/wp-content/uploads/2023/12/Ohio-et-al-v-NCAA-complaint.pdf>. The Complaint’s main force of action was to obtain a Temporary Restraining Order lifting the Transfer Eligibility Rule for transferring student-athletes who competed in the NCAA. Although the Complaint does not seek to obtain an injunction for student-athlete drug testing, it makes similar and comparable points which can support this idea.

<sup>209</sup> *Id.* (Compl. At ¶ 43.)

<sup>210</sup> *Id.* (Compl. At ¶ 44.)

However, as previously mentioned, it is likely only able to survive under a modified structure that is not as broad encompassing as it is currently. A proper program that maintains integrity but does not place an athlete at-risk to pursue their right to NIL, requires an alteration on the drugs prohibited, the situations that an athlete can be tested in, the purpose of the drug test, and the sanctions upon a positive test result. Altering these requirements will not completely deprive the student of both their privacy and economic right to earn.

## **VI. Conclusion**

The price student-athletes pay who wish to compete in an NCAA competition is the release of their right to privacy. Student-athletes are required to reveal information about themselves that is normally protected under the Fourth Amendment. The NCAA leaves student-athletes without a choice but to submit to these intrusive rules since it was labeled a private actor. Submitting to broad and invasive drug test and consenting to the potentially damaging FERPA and HIPAA releases leave these NCAA competitors with minimal protection, causing them to be subject to damaging publications.

Now that NIL has become an economic right that student-athletes are now entitled to, this broad testing scheme and overly inclusive releases may not survive under the rule of reason. The court has a changing view of what the NCAA has the right to control, completely stripping a student-athlete of their privacy may come under the court's purview as something the NCAA cannot unreasonably control. The NCAA's current drug-testing program is vulnerable to antitrust challenge because of its breadth and potential for anti-competitiveness. Without modification of the banned substances, or development of a reasonable suspicion standard to test, student-athletes may be successful in overcoming this challenge. Finally, without ensuring that there are

extra privacy protections for a student-athlete's sensitive health information, the NCAA's requirements are bound to challenge since each student's information is bound to exposure.