

NOTE

FROM MARCH MADNESS TO POSTGAME

SADNESS:

LEVELING THE PLAYING FIELD IN COLLEGIATE ATHLETICS
BY ESTABLISHING A NATIONAL NAME, IMAGE, AND
LIKENESS POLICY

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I. INTRODUCTION

Picture this: it's the championship game of the 2016 National Collegiate Athletic Association ("NCAA") Men's Basketball March Madness Tournament, and with 4.7 seconds left in the game, Marcus Paige of the 1-seeded University of North Carolina has just made a three-point shot for the tie. After a brief timeout, Ryan Arcidiacono, star point guard of 2-seed Villanova University, dribbles the ball down the court, eventually passing it to his teammate, forward Kris Jenkins. With 0.6 seconds left in the game, Jenkins jumps up to shoot a three-point shot, sinking it as time expires and handing Villanova its second national championship victory with a 77–74 upset win.¹ This iconic moment—which colloquially became known as "The Shot"—has spawned merchandise of all sorts, from tapestries to phone cases, depicting Jenkins mid-jump as the ball leaves his hands right before time expires.² Yet Jenkins, the man responsible for it all, was prohibited from profiting off the buzz of his buzzer beater.³

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- ¹ March Madness, *Villanova vs. North Carolina: Kris Jenkins Shot Wins National Title*, YOUTUBE (Apr. 4, 2016), <https://www.youtube.com/watch?v=L7FFJUz0tdo> [<https://perma.cc/9FTG-VQNH>].
 - ² See Margaret, *Kris Jenkins Villanova Buzzer National Championship Beater – Blue Art Print*, SOCIETY6, https://society6.com/product/kris-jenkins-villanova-buzzer-national-championship-beater-blue_print [<https://perma.cc/XLC9-Q42E>]; see also *Kris Jenkins "The Shot" Sweatshirt*, FAN ARCH, <https://fanarch.com/products/kris-jenkins-the-shot-sweatshirt?variant=42525540057309> [<https://perma.cc/8YRL-RU29>].
 - ³ See, e.g. Dana O'Neil, *One Shining Payment? With NIL, March Heroes Like Kris Jenkins Could Cash in*, THE ATHLETIC (July 1, 2021), <https://theathletic.com/2682410/2021/07/01/one-shining-payment-with-nil-march-heroes-like-kris-jenkins-could-cash-in/> [<https://perma.cc/8E89-9ASD>] (listing various memorabilia depicting the shot, including an autographed Jenkins jersey, for sale on websites such as eBay and Etsy, noting "Jenkins didn't get and won't get any of [the] money" from the sale of these items). Jenkins himself has lamented his inability to profit off of his name, image, and likeness in the wake of his championship shot. See Kris Jenkins (@Smooove2you_), X (July 1, 2021, 3:58 PM), https://twitter.com/Smooove2you_/status/1410689221803839489 [<https://perma.cc/D2P3-MT79>] [hereinafter Jenkins NIL Tweet].

The NCAA, the body tasked with regulating collegiate athletic activities, is a billion-dollar industry,⁴ yet the people primarily responsible for it all—the student-athletes themselves—have historically been prevented from recouping a single cent.⁵ Nor were they—until recently—allowed to profit off their name, image, and likeness (“NIL”).⁶ While some states were early to pass legislation giving NIL rights to college athletes, such as California through its Fair Pay to Play

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- ⁴ Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016–17 School Year*, ESPN (Mar. 7, 2018, 1:58 PM), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [<https://perma.cc/PUS4-ZTMU>] (highlighting that the NCAA made \$1.06 billion in revenue from September 2016 through August 2017).
- ⁵ See *infra* Section II.2 (NCAA Profitability); see also Caleb Naysmith, *NIL Is Changing the Face of College Athletics Recruiting – Insights From University of Michigan’s Top NIL Agency*, YAHOO: FINANCE (Dec. 28, 2022), <https://finance.yahoo.com/news/nil-changing-face-college-athletics-174820341.html> [<https://perma.cc/X9TD-G2ME>] (highlighting that while student-athletes generated an estimated \$1.16 billion for the NCAA in 2021, only the NCAA and its member institutions received a share of the revenue).
- ⁶ See generally *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 76 (2021). Though the 9–0 Supreme Court decision striking down NCAA restrictions on “education-related payments” did not expressly address NIL, in the succeeding weeks the NCAA changed its policy to allow students to sign NIL deals. Matt Ford, *The One Thing the Supreme Court Got Right: Blowing Up College Sports*, NEW REPUBLIC (Aug. 25, 2023), <https://newrepublic.com/article/175193/supreme-court-alston-college-sports> [<https://perma.cc/M28G-MNS9>]. This is likely at least partially due to Justice Kavanaugh’s concurrence, *Alston*, 594 U.S. at 107–112 (Kavanaugh, J., concurring), which has been widely understood as indicating that the Court would strike down any NCAA policy expressly barring college athletes from profiting off their NIL. See, e.g. DyTiesha Dunson, *NIL Deals and Taxes: An Analysis of Potential Tax Implications for Joint Ventures Involving Universities and Student Athletes*, 34 TAX’N EXEMPTS 20, 23 (2022) (noting that Justice Kavanaugh’s concurrence suggests that remaining NCAA compensation rules unrelated to educational benefits would likely be found to violate antitrust laws); Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh’s Concurrence*, TIME (June 21, 2021 6:24 PM EDT), <https://time.com/6074583/ncaa-supreme-court-ruling/> [<https://perma.cc/7LSH-G239>] (interpreting Kavanaugh’s concurrence as a rallying cry for student-athletes to challenge *all* NCAA compensation regulation, not just those tied to education-related benefits).

Act in 2019,⁷ others have yet to even acknowledge the right upon which NIL is built.⁸

In 2021, the Supreme Court decided *NCAA v. Alston*, an antitrust case in which a group of student athletes challenged NCAA rules that limited athlete compensation to education- and performance-related activities.⁹ Applying the rule of reason, the Supreme Court ultimately affirmed the district court's finding that the NCAA rules limiting academic-related expenses were anticompetitive and thus violated the Sherman Act.¹⁰ In his concurrence, Justice Kavanaugh indicated that although the *Alston* ruling focused narrowly on education-related benefits, the NCAA's remaining compensation rules—including those barring student-athletes from profiting off of their NIL—were likely also unconstitutional.¹¹

Since the release of the Court's *Alston* opinion, the NCAA has amended its rules to allow student-athletes to profit off their NIL, but the guidelines are general and vague, and ultimately defer to the regulations of each institution or state, where applicable.¹² There is no uniformity among state NIL laws: some states have passed legislation, some have left it to the common law, some have done a combination of both, and some have neglected to address NIL rights at all.¹³

Even in the states that have adopted (via statute) or acknowledged (via common law) some form of NIL rights, no two states are identical in their approaches to said policy. Seemingly minor variances in how different states treat NIL rights can lead to big problems. For example, institutions in states with weak or no NIL laws may have a harder time recruiting than their counterparts in states

⁷ See CAL. EDUC. CODE § 67456 (West 2022).

⁸ See *infra* Section II.A. (The Right of Publicity & Name, Image, and Likeness).

⁹ *Alston*, 594 U.S. at 69.

¹⁰ *Id.* at 107.

¹¹ *Id.*; see also Dunson, *supra* note 6, at 23.

¹² See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/VG93-AHMZ>].

¹³ See Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (May 25, 2023), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> [<https://perma.cc/8WQR-3BVK>]; see also *NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level*, NIL NETWORK, <https://www.nilnetwork.com/nil-laws-by-state/> [<https://perma.cc/XAD3-M2G9>] [hereinafter NIL NETWORK].

with stronger NIL protections,¹⁴ and student-athletes in areas with broader NIL rights may have more opportunities than student-athletes with stricter NIL regulations.¹⁵ Additionally, the NCAA protocols regarding transferring student-athletes have recently become more liberalized, affording more freedom to transfer than ever before.¹⁶ This combination of broad variances in NIL legislation

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- ¹⁴ See Bill Carter, *The Impact of NIL on College Recruiting and Why Alabama's New Advantage Center is a Case Study*, SPORTS BUS. J. (Feb. 21, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/02/21-Carter.aspx> [<https://perma.cc/A6M6-2GEX>] (highlighting that 67% of athletes who considered transferring said potential NIL deals would play a role in their decision); see also Jeremy Crabtree, *On3 Exclusive: Top Recruits Open Up About NIL's Influence*, ON3 (July 26, 2022), <https://www.on3.com/nil/news/on3-exclusive-survey-top-recruits-open-up-about-nils-influence/> [<https://perma.cc/2TYK-XC6R>] (noting that of 85 high school football recruits surveyed, 30% said they would choose a school that was not a "perfect fit" if it came with a lucrative NIL deal).
- ¹⁵ See Charlie Baker (@CharlieBakerMA), X (Mar. 29, 2023, 1:16 PM), <https://twitter.com/charliebakerma/status/1641127313801723906?s=42&t=CZQbX5PgVVRJc-kELIg1PA> [<https://perma.cc/WG8N-NDNY>] (NCAA president Charlie Barker arguing that the lack of uniformity in NIL laws creates an "uneven playing field" for student-athletes).
- ¹⁶ Meghan Durham Wright, *Division I Council Approves Changes to Transfer Rules*, NCAA (Apr. 17, 2024, 6:35 PM), <https://www.ncaa.org/news/2024/4/17/media-center-division-i-council-approves-changes-to-transfer-rules.aspx> [<https://perma.cc/64SX-N8R8>] (announcing the NCAA's new policy of not restricting the number of times a student-athlete may transfer so long as certain academic benchmarks are met). This change from the previous policy — which granted immediate eligibility to first-time transfers but upon any subsequent transfers required one year of "redshirting" (*i.e.*, sitting out) prior to becoming eligible — was likely due at least in part to allegations by multiple states that the policy violated antitrust law. See John Raby, *College Athletes Who Transfer Twice Can Play, For Now, After a Judge Sets Aside NCAA Transfer Rule*, ASSOCIATED PRESS (Dec. 13, 2023, 5:27 PM), <https://apnews.com/article/ncaa-transfer-portal-22ef447ad67826138724cec3cd6ab581> [<https://perma.cc/NP2V-SK3F>] (highlighting a federal district court's temporary restraining order against the NCAA's rules for two-time transfers); Noah Henderson, *U.S. DOJ Joins Action Against NCAA Transfer Rules*, SPORTS ILLUSTRATED: FANNATION (Jan. 20, 2024, 12:00 PM), <https://www.si.com/fannation/name-image-likeness/news/u-s-doj-joins-action-against-ncaa-transfer-rules-noah9> [<https://perma.cc/8HYT-Q47R>] (describing an ongoing suit against the

across states and relaxed transfer rules creates a potential problem: it opens the door for “shopping,” wherein a student-athlete transfers schools based solely on where they can strike up the most profitable NIL deals, rather than what school or athletic program may be the best fit for them academically, athletically, socially, or otherwise.

Congress is best situated to establish a universal NIL policy while still leaving room for individual institutions to exercise some degree of flexibility. Although pre-*Alston* attempts at federal regulation failed,¹⁷ the discussion is riper now than ever before, and the issues that are merely potential “what-ifs” now will only become more serious if a uniform regulation is not soon created. As such, to address potential issues with state NIL laws and liberal transfer policies, Congress should pass a federal statute giving college athletes broad authority to control their NIL rights. In addition to outlining a nationwide NIL policy, this new federal statute should create the Collegiate Student-Athlete Committee (“CSAC”) under the Office of Postsecondary Education in the U.S. Department of Education as the body responsible for promulgating, administering, and enforcing regulations pursuant to the statute.

II. BACKGROUND

This Part provides an overview of the current state of identity appropriation laws and the role the federal government can play in creating and enforcing them. Section A describes the right of publicity and name, image, and likeness (NIL), focusing on the treatment of each under state law and discussing Congress’s power to regulate at the federal level.¹⁸ Section B provides a comprehensive profile of the NCAA, with a particular focus on its policies regarding NIL and transfer students.¹⁹ Lastly, Section C briefly describes the

NCAA alleging its prohibition on multiple transfers violates the Sherman Act).

¹⁷ See, e.g., College Athletes Bill of Rights (“CABOR”), S. 4724, 117th Cong. (2022); Student Athlete Level Playing Field Act (“SALPFA”), H.R. 2841, 117th Cong. (2021); Fairness in Collegiate Athletics Act (“FCAA”), S. 4004, 116th Cong. (2020); Collegiate Athlete Compensation Rights Act (“CACRA”), S. 5003, 116th Cong. (2020).

¹⁸ *Infra* Section A.

¹⁹ *Infra* Section B.

history and organizational structure of the U.S. Department of Education as it pertains to postsecondary schools.²⁰

A. THE RIGHT OF PUBLICITY & NAME, IMAGE, & LIKENESS

The right of publicity is recognized as the right of each individual to commercially exploit their identity.²¹ Originally emerging from the privacy torts identified by Samuel Warren and Louis Brandeis,²² the right is now generally regarded as distinct from these torts, as it uniquely addresses the commercial impact of the appropriation of an individual's name, image, and likeness (NIL).²³ Currently, both the right of publicity and NIL are governed at the state level, creating a hodgepodge of regulations that are often contradictory.²⁴ Many scholars have argued that this disjointedness may be remedied with the passing of a federal statute under the Commerce Clause of the U.S. Constitution.²⁵

1. *The Right of Publicity*

The right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.”²⁶ Though originally born as part of the right to privacy,²⁷ the right of publicity is now regarded as its own entity.²⁸ While the right to privacy is generally considered a safeguard against unwanted intrusion, the right of publicity focuses on the individual's property-like interest

²⁰ *Infra* Section C.

²¹ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (5th ed. 2024).

²² *Id.* § 28:3; *infra* note 30.

²³ *Id.* § 28:6 (describing infringements on the right of publicity as injuring the pocketbook whereas intrusions on the right to privacy injure the psyche); *see also* Taylor P. Thompson, Note, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1371 (2022).

²⁴ *See infra* Section III.1.

²⁵ *See infra* Part III.A.

²⁶ J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2023).

²⁷ MCCARTHY, *supra* note 21, § 28:5.

²⁸ *Id.* § 28:6 (distinguishing the right to privacy, which guards against “intrusion upon an individual's private self-esteem and dignity” from the right of publicity, which prevents potential loss suffered from commercial exploitation).

in their public image.²⁹ Origins of the privacy right can be traced to Samuel Warren and Louis Brandeis, who in 1890 proposed a new “Right to Privacy” that emphasized the right of each person “to be let alone.”³⁰ As a result, for most of the early twentieth century, privacy law was treated as a personal right designed to prevent emotional and reputational harm caused by infringements on an individual’s *private* life; anything done “in a public or quasi-public capacity” was not generally subject to protection.³¹ While some policies hinted at a right of publicity, such as the New York statute prohibiting unauthorized use of the “name, portrait or picture of any living persons” “for advertising purposes, or for the purpose of trade,”³² most interpretations of these laws concerned appropriations and falsehoods in advertising.³³

The right of publicity was described as a right separate from the right of privacy in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which involved a licensing dispute between a baseball player and a chewing-gum company regarding the latter’s use of the former’s image in advertising.³⁴ The Second

²⁹ MCCARTHY & SCHECHTER, *supra* note 26, § 1:6 (defining “privacy” as the right “to control dissemination of information about oneself” or protection from governmental intrusion) with MCCARTHY & SCHECHTER, *supra* note 26, § 1:7 (the right of publicity is about an individual’s control over the “commercial use” of their identity).

³⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

³¹ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1168–71 (2006); *see also* Warren & Brandeis, *supra* note 30, at 216 (matters to be protected by privacy rights are those “concern[ing] the private life, habits, acts, and relations of an individual” unrelated to any public position or act held or conducted by the individual).

³² N.Y. CIV. RIGHTS LAW § 50 (McKinney 2022) (initially passed in 1903, *see* Laws of the State of New York Passed at the Sessions of the Legislature 126th Sess.:V. 1 (1903)), HATHITRUST, <https://babel.hathitrust.org/cgi/pt?id=nyp.33433090742549&view=1up&seq=320&q1=portrait> [<https://perma.cc/DA66-8EEX>].

³³ *See* Dogan & Lemley, *supra* note 31, at 1169–70 (stating most “commercial appropriation” cases concern unauthorized use in association with advertising).

³⁴ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867–68 (2d Cir. 1953).

Circuit declared that “independent of that right of privacy,” there exists a distinct right of publicity that should be protected.³⁵

The right of publicity has only been the subject of Supreme Court litigation once: in *Zacchini v. Scripps-Howard Broadcasting Co.*, wherein a “human cannonball” performer brought suit for the filming and broadcasting of his act on local television.³⁶ Echoing the Second Circuit’s line-drawing between the right of publicity and traditional notions of privacy, the Court ultimately held that the First and Fourteenth Amendments do not shield defendants from liability under state right of publicity laws in such instances.³⁷ The Court primarily took issue with the fact that that the broadcast centered on something “at the heart” of Zacchini’s career as an entertainer—i.e., that it was an “appropriation of the very activity by which [Zacchini] acquired his reputation in the first place”—suggesting that such instances may be the “strongest case” for a state-recognized right of publicity.³⁸

There has historically been disagreement regarding whether the right of publicity should be treated as a privacy right or as an intellectual property right.³⁹ Today, however, the dominant approach treats the right of publicity as an intellectual property right⁴⁰ and infringement upon the right as a tort.⁴¹ This shift

³⁵ See *id.* at 868 (stating independent of New York, “a man has a right in the publicity value of his photograph” distinct from New York’s statutory right to privacy).

³⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977); *Concise History of the Right of Publicity*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/brief-history-of-rop> [[https://perma.cc/S8B\]-6UAD](https://perma.cc/S8B]-6UAD)].

³⁷ See *Zacchini*, 433 U.S. at 574–75 (stating that “the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent”).

³⁸ *Id.* at 576.

³⁹ John T. Holden et al., *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports’ New Economic Frontier*, 57 GA. L. REV. 1, 7–9 (2022).

⁴⁰ See MCCARTHY & SCHECHTER, *supra* note 26, § 1.7 (stating that “The Right of Publicity is an Intellectual Property Right”); see also Dogan & Lemley, *supra* note 31, at 1163 (stating that one rationale “turns the right of publicity into a new form of IP right, one based explicitly on analogies to and justifications for real property”).

⁴¹ See MCCARTHY & SCHECHTER, *supra* note 26, § 3.2 (stating that one can establish a “prima facie case for liability of infringement of the right of publicity” sounding in tort).

seems to have begun in the mid-twentieth century, as television, film, and radio personalities began seeking compensation for reproduction of their likenesses rather than a right to retreat from the public eye.⁴² Over time, views of the right of publicity shifted from notions of personal dignity to the economic value of an individual's name, image, or likeness.⁴³ Economic justifications for establishing a right of publicity include furthering economic goals such as "stimulating athletic and artistic achievement, promoting the efficient allocation of resources, and protecting consumers."⁴⁴ Additionally, a right of publicity is thought to secure "the fruits of celebrity labor," prevent unjust enrichment and emotional harm, and protect individual rights.⁴⁵ Supporters also argue that the right protects each individual's "natural rights of property," in that the human identity is itself self-evident and thus worthy of protection.⁴⁶ Critics of the right of publicity argue that it is incompatible with free speech and that it functions as a form of private censorship.⁴⁷

⁴² See Holden et al., *supra* note 39, at 8 (stating that "by the mid-twentieth century, many—particularly those in television, film, and radio—were seeking the opposite of privacy; they were seeking to see their likenesses reproduced and to be compensated for it."); see also Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203–04 (1954) (stating that "Well known personalities . . . do not seek the "solitude and privacy" . . . Their concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy") (internal citations omitted).

⁴³ See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM'N LAW., Aug. 2011, at 14, 14 (stating that "the right [of publicity] began to be viewed more as economic, based on the commercial value of one's name or likeness, instead of a personal right based on dignity and bruised feelings").

⁴⁴ *Id.* (quoting *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996)).

⁴⁵ Vick & Jassy, *supra* note 43, at 14; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575–76 (1977) (noting that petitioner put significant "time, effort, and expense" into his act and that the prevention of unjust enrichment is the primary rationale for protecting the right of publicity).

⁴⁶ See *MCCARTHY & SCHECHTER*, *supra* note 26, §§ 2.1–2.2 (stating that "it is a self-evident natural right that plaintiff should be able to control such a use of his or her identity").

⁴⁷ Vick & Jassy, *supra* note 43, at 15.

The right of publicity is generally regarded as a state issue.⁴⁸ States may recognize a right of publicity via common law, statute, or both.⁴⁹ As of May 2024, thirty-four states explicitly recognize a right of publicity.⁵⁰ Of these, twenty-one expressly recognize the right via common law,⁵¹ and do so via statute.⁵² Currently, twelve states recognize *both* a common law and statutory right of

⁴⁸ MCCARTHY & SCHECHTER, *supra* note 26, § 1:3; *see also* Thompson, *supra* note 23, at 1373.

⁴⁹ MCCARTHY & SCHECHTER, *supra* note 26, § 6:2.

⁵⁰ *Id.* This number includes Louisiana, which recognizes a right of publicity only for deceased soldiers. Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity – State-by-State*, <https://rightofpublicityroadmap.com/> [<https://perma.cc/274K-YH8Y>] [hereinafter *Rothman's Roadmap – State-by-State*]; LA. STAT. ANN. § 14:102.21 (2022).

⁵¹ MCCARTHY & SCHECHTER, *supra* note 26, § 6:2. States that have recognized a common law right of publicity are Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Ohio,, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin. *Id.* However, Illinois's right of publicity statute expressly preempts its common law counterpart. *Id.*; *Rothman's Roadmap – State-by-State*, *supra* note 50.

⁵² MCCARTHY & SCHECHTER, *supra* note 26, § 6:2; *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> [<https://perma.cc/DG2C-MD4X>] [hereinafter RIGHT OF PUBLICITY]. The states with right of publicity statutes are Alabama, Arizona, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. MCCARTHY & SCHECHTER, *supra* note 26, § 6:8–143. Some states recognize the right of publicity both statutorily *and* in common law, which accounts for the seemingly suspect mathematics. RIGHT OF PUBLICITY, *supra*.

publicity for living persons.⁵³ In three states—Louisiana,⁵⁴ Nebraska,⁵⁵ and New York⁵⁶—courts have expressly stated that a common law right to publicity does not exist; yet in all three, legislation has been passed establishing a right of publicity.⁵⁷

No general right of publicity statute has been considered by Congress in recent years, though many proposed NIL bills rely upon it.⁵⁸ However, § 43(a) of the Lanham Act may provide a cause of action for civil liability on grounds similar to the right of publicity.⁵⁹ The absence of a federal publicity statute has resulted in a mixed bag of state regulation, with some states explicitly acknowledging the

⁵³ RIGHT OF PUBLICITY, *supra* note 52; MCCARTHY & SCHECHTER, *supra* note 26, §§ 6:2, 6:8–143. The states are Alabama, Arizona, California, Florida, Hawaii, Kentucky, Ohio, Oklahoma, Pennsylvania, Texas, Utah, and Wisconsin. *Id.*

⁵⁴ See *Frigon v. Universal Pictures, Inc.*, 255 So.3d 591, 598 (La. App. 2018) (finding a common law right of publicity would constitute an “unwarranted intrusion” into domain reserved for the legislature).

⁵⁵ *Carson v. Nat’l Bank of Com. Tr. & Sav.*, 501 F.2d 1082, 1084 (8th Cir. 1974) (“there is no precedent in this state establishing [a common law right to privacy]”).

⁵⁶ *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (“the ‘right of publicity’ . . . is exclusively statutory in this State”).

⁵⁷ MCCARTHY & SCHECHTER, *supra* note 26, § 6:2. A Louisiana intermediate appellate court declined to adopt a right of publicity for living persons via common law, holding that establishing such a right is the job of the state legislature. *Id.*; *Frigon*, 255 So.3d at 598. Furthermore, Louisiana only recently established a right to publicity, with the statute going into effect August 1, 2022. See James R. Chastain, Jr., *Right of Publicity Laws: Louisiana*, PRAC. L. INTELL. PROP. & TECH. 1.

⁵⁸ See, e.g., Collegiate Athlete Compensation Rights Act, S. 4855, 117th Congress § 2 (2022) (defining “publicity right” as a law “that permits an individual to control and profit from the commercial use of [their own] name, image, or likeness,” including any right licensed under an NIL agreement).

⁵⁹ See BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 777 (digital ed. 2022); 15 U.S.C. § 1125(a)(1)(a) (a person may be civilly liable if they “use in commerce any word, term, *name*, symbol, or device” that is “likely” to “deceive as to the affiliation, connection, or association of such person . . . or approval of his or her goods, services, or commercial activities by another person”) (emphasis added).

right as its own entity,⁶⁰ some regarding it as a privacy right,⁶¹ and some not recognizing it at all.⁶² Additionally, the NCAA has pointed to the lack of a federal publicity statute as justification for denying group licensing rights for certain videos and pictures.⁶³ Some scholars have similarly cited the lack of such a federal statute as at least partially contributing to the NCAA's ability to create and uphold strict guidelines prohibiting student-athletes from profiting on their celebrity for so long.⁶⁴

2. *Name, Image, and Likeness ("NIL")*

The right of publicity is based on the notion that individuals should be able to exercise some degree of control over the use of their name, image, and likeness.⁶⁵ Under tort law, William Prosser described the right of publicity as an umbrella above four distinct privacy interests:

- (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- (2) public disclosure of embarrassing private facts about the plaintiff;
- (3) publicity which places the plaintiff in a false light in the public eye; and

⁶⁰ See, e.g., CAL. CIV. CODE § 3344 (Deering 2024); N.Y. CIV. RIGHTS L. § 50-f (LexisNexis 2024).

⁶¹ See *Moore v. Sun Pub. Corp.*, 881 P.2d 735, 743 (1994) (identifying the right of publicity as one category of the invasion of privacy tort).

⁶² See, e.g., *Nelson v. Times*, 373 A.2d 1221, 1223 (Me. 1977) (recognizing a privacy tort of "appropriation . . . of name or likeness," but no right of publicity).

⁶³ Thompson, *supra* note 48, at 1376.

⁶⁴ See *id.*; see also Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 100 (2012) (noting student athletes have almost no legal recourse to respond to violations of their NIL rights).

⁶⁵ See MCCARTHY & SCHECHTER, *supra* note 26, § 1:3.

(4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁶⁶

NIL rights fall under the fourth category.⁶⁷ The Restatement (Third) of Unfair Competition similarly describes grounds for a cause of action against "one who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indica of identity for purposes of trade."⁶⁸ The common theme of appropriation separates NIL from other privacy-related rights, creating a right distinct from traditional privacy interests that falls under the right of publicity.⁶⁹

NIL rights "provide a route to player compensation that remains untethered to pay for play."⁷⁰ Instead of being paid for their athletic performance, NIL allows players to profit off their name, image, and likeness by way of endorsements and advertising deals.

Like the right of publicity, Congress has not enacted a federal statute governing the NIL rights of college athletes, even though both the NCAA⁷¹ and

⁶⁶ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); see also Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 30 (2010) (discussing the impact of Prosser's comments on right of publicity law).

⁶⁷ Thompson, *supra* note 23, at 1371.

⁶⁸ *Id.*; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

⁶⁹ See Thompson, *supra* note 23, at 1371 ("[w]hat distinguishes NIL rights from the traditional rights of privacy is the element of appropriation by another, thus creating a separate category of property right as the right of publicity") (internal quotes omitted); see also Panel 1: *The Future of Name, Image, & Likeness Policies for College Athletes*, 18 N.Y.U. J.L. & BUS. 903, 909 (Daniel G. Kelly, Moderator) (2022) ("all Americans have an inherent right to their ability to commercialize their identity . . . through the right of publicity").

⁷⁰ Thompson, *supra* note 23, at 1376.

⁷¹ Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASH. POST (July 23, 2020, 5:39 PM), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/> [<https://perma.cc/T58R-JYD2>].

the Supreme Court⁷² have called on it to do so. Despite bipartisan efforts, multiple attempts at passing a federal NIL statute have failed.⁷³

3. *Jurisdiction for a Federal Right of Publicity Standard Under the Commerce Clause*

The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”⁷⁴ As such, Congress may regulate any activity that substantially affects interstate commerce.⁷⁵ Scholars have suggested that Congress’s ability to regulate interstate commerce gives it the authority to pass a federal right of publicity statute.⁷⁶ The

⁷² See *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring) (describing legislation as a method for solving ambiguities regarding college athlete compensation).

⁷³ See, e.g., Collegiate Athlete Compensation Rights Act (“CACRA”), S. 5003, 116th Cong. (2020); S. 5062, 116th Cong. (2020); H.R. 850, 117th Cong. (2021); see also Ross Dellenger, *Republican Senator Reintroduces Bill That Takes Aim at NIL’s Recruiting Influence*, SPORTS ILLUSTRATED (Sept. 14, 2022), <https://www.si.com/college/2022/09/14/ncaa-nil-federal-bill-congress-roger-wicker> [<https://perma.cc/5YRC-QHSV>] (reporting plans to introduce a new NIL proposal to Congress); *Tracker: Name, Image, and Likeness Legislation by State*, BUS. OF COLL. SPORTS (last updated July 28, 2023), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/ZVG5-LCAD>] [hereinafter BUS. COLL. State Tracker] (tracking state and federal NIL legislation attempts); Amy L. Piccola, et al., *NIL Legislation Tracker: Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING, LLP, <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/7CJM-7WSZ>] (tracking federal and state legislation attempts).

⁷⁴ U.S. CONST. art. 1, § 8, cl. 3.

⁷⁵ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

⁷⁶ See Sean D. Whaley, *I’m a Highway Star: An Outline for a Federal Right of Publicity*, 31 HASTINGS COMM. & ENT. L. J. 257, 266 (2009) (“Congress’s ability to regulate publicity rights stems from the use of persona in activities that substantially affect interstate commerce.”); Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana’s Law as the Model, State-Based Right of Publicity is Ready to Move to the Federal Level*, RES GESTAE Nov. 2001, at 31, 37 (“[t]he Commerce Clause gives Congress the power to regulate interstate commerce, which would allow for a federal Right of Publicity to be implemented in the first place”); Vick and Jassy, *supra* note 43, at 17 (noting that the right of publicity affects interstate

potential effect of the right of publicity on interstate commerce is particularly relevant in this modern “Internet Age:” whereas previously, advertisements and endorsements may have been limited to a small town or locality, today many of these involve posting on social media, which puts the content on a multistate stage.⁷⁷

Additionally, a statute enacted under the Commerce Clause must include means that are “reasonable and appropriate” in relation to the statute’s goals.⁷⁸ Scholars have indicated that a federal right of publicity statute governing student-athletes would meet this requirement as the nature of intercollegiate sports requires interstate travel.⁷⁹ Furthermore, scholars have gone so far as to suggest that regulating NIL rights at the state level may violate the dormant Commerce Clause, which is implied in the Commerce Clause and prohibits the states from regulating interstate commerce.⁸⁰ A national right of publicity statute passed under the Commerce Clause would resolve this problem by eliminating conflicting state regulations surrounding the right of publicity.⁸¹

commerce, particularly by way of “multistate advertising campaigns and the distribution and sale of products and works that are the subject of right of publicity law and disputes”).

⁷⁷ See Edward Kuester, *The Conflict Between an Athlete’s Right of Publicity and the First Amendment*, 15 JOHN MARSHALL REV. INTELL. PROP. L. 117, 134 (2015) (arguing that the “Internet Age” renders states incapable of effectively governing the right of publicity); Vick & Jassy, *supra* note 43, at 17 (asserting that the right of publicity likely interferes with channels of interstate commerce “such as the Internet, television, and radio”).

⁷⁸ Jeremy A. Wale, Comment, *Adequate Protection of Professional Athletes’ Publicity Rights: A Federal Statute is the Only Answer*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 245, 266 (2009) (quoting *Hewlett Packard Co. v. Barnes*, 425 F. Supp. 1294, 1300 (N.D. Cal. 1977), *aff’d*, 571 F.2d 502 (9th Cir. 1978)).

⁷⁹ *Cf. id.* (making an analogous claim about professional athletes).

⁸⁰ Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes’ Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 900–01 (2022); Holden et al., *supra* note 39, at 33 (recounting the NCAA’s allegations that California’s Fair Pay to Play Act, which allows college athletes to profit off their athletic reputation, violates the dormant Commerce Clause).

⁸¹ See Kuester, *supra* note 77, at 132; Jeremy T. Marr, Note, *Constitutional Restraints on State Right of Publicity Laws*, 44 B.C. L. REV. 863, 898 (2003) (“the Commerce Clause . . . expressly authorizes Congress to regulate interstate commerce while severely restricting states from doing so”).

B. A PROFILE OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

From its inception in 1905 to today, the NCAA has served as the preeminent organization for collegiate athletics.⁸² While touting amateurism as one of its central pillars, the NCAA consistently rakes in over a billion dollars each year.⁸³ Historically, the NCAA has prohibited student-athletes from capitalizing off their NIL, but in 2021 reversed this position in the wake of *NCAA v. Alston*, allowing its member students to profit off of their NIL and adopting a supplemental policy for use in jurisdictions that did not have their own NIL laws.⁸⁴ Additionally, in April 2024, the NCAA announced it would abandon its policy of restricting eligibility based on the number of a time a student-athlete transferred institutions.⁸⁵ Such major changes to the NCAA in such a short time have sparked uncertainty as to what the future of the organization will look like.

1. *History and General Policies*

The NCAA began on December 28, 1905 as the Intercollegiate Athletic Association of the United States (“IAAUS”), an organization of 62 colleges and universities formed at the request of President Theodore Roosevelt with the goal of “clean[ing] up” the violent—and sometimes deadly—game of collegiate football.⁸⁶ Designated as a rule-making council in 1906, the IAAUS changed its name to the NCAA in 1910 and began expanding into hosting championships for various sports in the early twentieth century.⁸⁷ After World War II, the NCAA

⁸² *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/DRK8-BHWW>] [hereinafter *NCAA History*] (describing events leading to NCAA inception); see *infra* Sections II.1–II.4 (highlighting role of NCAA as most significant collegiate athletic organization).

⁸³ NCAA, Quick Guide to New NCAA Interim Policy (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QuickGuideToNewPolicy.pdf [<https://perma.cc/Q85R-ELS5>] [hereinafter *NCAA Quick Guide*]; see *infra* notes 89–121.

⁸⁴ Hosick, *supra* note 12, at 1.

⁸⁵ Wright, *supra* note 16.

⁸⁶ *NCAA History*, *supra* note 82 (noting the “brutal” reputation of college football at the start of the twentieth century, evidenced by the 159 serious injuries and 18 deaths in the 1904 season alone).

⁸⁷ *Id.* The first of these was the National Collegiate Track and Field Championship, first held in 1921. *Id.* The first basketball national championship took place in March 1939, which saw Oregon beat Ohio State 46-33. Patrick M. Quinn, *NCAA Basketball Tournament Celebrates 50th*

established policies governing financial aid, recruitment, and academic standards, and in 1973 the membership was divided into Divisions I, II, and III.⁸⁸ Mark Emmert served as President of the NCAA from 2010 until 2023; during his tenure, the organization primarily focused on preventing fraudulent recruiting, adapting to COVID-19, and strategizing NIL policy, all while continuing to manage the responsibilities it has outlined for itself over the last century.⁸⁹

A pillar of the NCAA is its commitment to the “amateurism” of student-athletes.⁹⁰ Under Article 12 of the NCAA Division I Bylaws, only amateur athletes are eligible for intercollegiate competition.⁹¹ The NCAA has defined an amateur as “someone who does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses or gained a competitive

Birthday: First Tournament Held at Northwestern University, March, 1939, NW. UNIV. (1989), https://www.library.northwestern.edu/documents/libraries-collections/university-archives/first_ncaa.pdf [<https://perma.cc/AK6A-UTTZ>].

⁸⁸ NCAA History, *supra* note 82.

⁸⁹ *Id.* Emmert was replaced as NCAA President by former Massachusetts Governor Charlie Baker beginning in March 2023. See NCAA Announces Governor Charlie Baker to Be Next President, NCAA (Dec. 15, 2022), <https://www.ncaa.com/news/ncaa/article/2022-12-15/ncaa-announces-governor-charlie-baker-be-next-president> [<https://perma.cc/SG2X-4229>].

⁹⁰ See 2022–23 NCAA Division I Manual at xiii (2022), <https://www.ncaapublications.com/productdownloads/D123.pdf> [<https://perma.cc/7CNA-UR23>] [hereinafter 2022–23 NCAA Manual]; see also Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 120 (1984) (describing the NCAA as “play[ing] a critical role in the maintenance of a revered tradition of amateurism in college sports.”). The *Board of Regents* court further stated that methods to preserve amateurism in college sports are procompetitive, and thus justifiable, because they “enhance public interest in intercollegiate athletics.” *Id.* at 117.

⁹¹ See 2022–23 NCAA Manual, *supra* note 90, art. 12.01.1. Additionally, the 2020–21 NCAA Manual defined amateurism as “participation ... motivated primarily by education and by the physical, mental, and social benefits to be derived,” but this description is not included in the 2022–23 Manual. See *id.* art. 2.9 (“Principles for Conduct of Intercollegiate Athletics”), <https://www.ncaapublications.com/productdownloads/D121.pdf> [<https://perma.cc/6FPK-9RCR>] [hereinafter 2020–21 NCAA Manual].

advantage in his/her sport.”⁹² The defining line between an “amateur” student-athlete and a professional is that student-athletes are considered “an integral part of the student body.”⁹³ Traditionally, student-athletes lose amateur status by hiring an agent, signing with a professional team, or entering the draft of a professional league.⁹⁴ Additionally, amateur student-athletes are generally prohibited from receiving any sort of payment for their skill other than “actual and necessary expenses.”⁹⁵ These include meals, lodging, athletic equipment, health-related expenses, and costs related to athletic practice and competition, among other reasonable expenses; the cost of each must be comparable in price to the fair market value for the location in which the good or service is provided.⁹⁶ Compensation (i.e., “pay-for-play”) also strips student-athletes of their amateurism, rendering them ineligible to participate in NCAA sports.⁹⁷ Grant-in-aid, such as athletic scholarships, does not constitute payment for play, and is thus permitted so long as the amount does not exceed NCAA guidelines.⁹⁸ While individual member schools may set their own grant-in-aid caps, the NCAA is prohibited from setting the grant-in-aid cap below the cost of attendance at the respective institution; in other words, the NCAA cannot prohibit full-ride

⁹² See DyTiesha Dunson, *NIL Deals and Taxes: An Analysis of Potential Tax Implications for Joint Ventures Involving Universities and Student Athletes*, 34 TAX’N EXEMPTS 20, 20 (2022) (internal citations omitted).

⁹³ See 2022–23 NCAA Manual, *supra* note 90, art. 12.01.2 (there exists a “clear line of demarcation” separating professionals from collegiate athletes).

⁹⁴ See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1055 (9th Cir. 2015) (noting some rules unrelated to financial restraints that shape the amateurism standard).

⁹⁵ See 2022–23 NCAA Manual, *supra* note 90, art. 12.1.2. Specific prohibitions in recruiting are outlined in art. 13.2.1.1.

⁹⁶ See *id.* art. 12.02.2.

⁹⁷ See *id.* art. 12.1.2; NCAA Quick Guide, *supra* note 83 (emphasizing that pay-for-play is prohibited practice under NCAA policy).

⁹⁸ 2022–23 NCAA Manual, *supra* note 90, art. 12.01.4 (distinguishing grant-in-aid from pay-for-play).

scholarships.⁹⁹ As such, schools may provide scholarships covering up to the full cost of attendance to student-athletes if they so choose.¹⁰⁰

2. NCAA Profitability

In 2016, the net revenue of college athletics exceeded that of three of the four major professional sports organizations in the United States.¹⁰¹ The NCAA made \$1.16 billion in 2021, 85% of which came from the Division I Men's Basketball March Madness Tournament.¹⁰² Despite the cancellation of the 2020 Tournament due to the COVID-19 pandemic, resulting in a 50% decrease in revenue, NCAA President Mark A. Emmert earned \$2.9 million for the 2019-2020 fiscal year.¹⁰³ In 2019, Division I schools earned a total of \$15.8 billion in athletic revenue,¹⁰⁴ with

⁹⁹ See *O'Bannon*, 802 F.3d at 1075 (applying the rule of reason and affirming in part the district court's decision on the grounds that the NCAA's prohibition on full-ride scholarships was "patently and inexplicably stricter" than what was necessary to accomplish its goal of maintaining amateurism in college sports).

¹⁰⁰ *Id.*; 2022-23 NCAA Manual, *supra* note 90, art. 15.1 (barring student-athletes from receiving financial aid "that exceeds the value of the cost of attendance").

¹⁰¹ See Tyler J. Murry, Note, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 790 (2022) (noting that college athletics saw more profits than the NHL, NBA, and MLB).

¹⁰² See Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, SPORTICO (Mar. 26, 2022, 9:00 AM), <https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/> [<https://perma.cc/VQ6J-XM33>]. The NCAA does not sponsor the College Football Playoffs or college football bowl games. B. David Ridpath, *The College Football Playoff and Other NCAA Revenues Are An Exposé of Selfish Interest*, FORBES (Jan. 17, 2017, 1:13 PM), <https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/?sh=6315fcd04e1a> [<https://perma.cc/7D43-RSCA>].

¹⁰³ Michael Shapiro, *Report: NCAA Paid Mark Emmert \$2.9 Million in 2019-20 Despite COVID-19 Revenue Drop*, SPORTS ILLUSTRATED (July 19, 2021), <https://www.si.com/college/2021/07/19/mark-emmert-ncaa-salary-covid-19-revenue-drop> [<https://perma.cc/W6EY-3MD3>].

¹⁰⁴ *15-Year Trends in Division I Athletics Finances*, NCAA RSCH. 5, <https://ncaaorg.s3.amazonaws.com/committees/d1/presforum/sustain/2020D>

the Power Five conferences¹⁰⁵ alone making more than \$2.9 billion.¹⁰⁶ In the year prior, more than half of the Power Five's member schools exceeded \$100 million in revenue.¹⁰⁷ In 2022, the Power Five member conferences collectively generated \$3.3 billion, with the Big Ten alone amassing \$845.6 million.¹⁰⁸ Also in 2022, college football head coaches Nick Saban of Alabama and Kirby Smart of Georgia were

IRES_15YrTrendsD1AthFinances.pdf [<https://perma.cc/Y7EV-A67Q>] [hereinafter *15-Year Trends*].

- ¹⁰⁵ The Power Five consists of the Atlantic Coast (ACC), Southeastern (SEC), Big Ten, Big 12, and Pac-12 Conferences; the moniker references the fact that the 65 schools that fall within one of these five conferences are among the most athletically dominant and financially successful schools in NCAA Division I. Chris Murphy, *Madness, Inc.: How Everyone is Getting Rich Off College Sports – Except the Players*, CHRIS MURPHY 1, 5 (Mar. 28, 2019), https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf [<https://perma.cc/YF4W-MZRG>].
- ¹⁰⁶ Steve Berkowitz, *Power Five Conferences Had Over \$2.9 Billion in Revenue in Fiscal 2019*, *New Tax Records Show*, USA TODAY (July 10, 2020, 2:00 PM), <https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002/> [<https://perma.cc/7GUE-URN6>] [hereinafter *Power Five Fiscal 2019*]. The number does not include revenue from endorsements or other ventures. *Id.*
- ¹⁰⁷ See Murphy, *supra* note 105, at 5 (further noting that in the same period, 11 Power Five schools made over \$150 million and two exceeded \$200 million).
- ¹⁰⁸ Steve Berkowitz, *NCAA's Power Five Conferences are Cash Cows. Here's How Much Schools Made in Fiscal 2022*, USA TODAY (updated May 19, 2023, 4:23 PM) <https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/> [<https://perma.cc/DN5A-7AXT>] [hereinafter *Power Five Fiscal 2022*] (further noting that the lowest-earning Power Five conference was the Big 12, with a total revenue of \$480.6 million). Comparatively, 2022 revenues for non-Power Five conferences included \$87.6 million for the Big East, \$79.4 million for the Mountain West, and \$35.4 million for the Sun Belt. *Big East Conference Inc.*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/900955035> [<https://perma.cc/AH6J-NCHV>] (last updated Mar. 4, 2024); *Mountain West Conference*, PROPUBLICA (last updated Mar. 4, 2024), <https://projects.propublica.org/nonprofits/organizations/841472434> [<https://perma.cc/G7XR-ZAQC>]; *Sun Belt Conference*, PROPUBLICA (last updated Mar. 4, 2024), <https://projects.propublica.org/nonprofits/organizations/582085078> [<https://perma.cc/5BBR-M9PC>].

each paid over \$11 million by their respective institutions,¹⁰⁹ while the top five highest-paid coaches in Division I men's basketball were salaried at anywhere from \$6-10 million.¹¹⁰ Additionally, some institutions that excel at certain sports may see a surge in admissions applications—a phenomenon known as the “Flutie Effect,” named for former Boston College quarterback Doug Flutie, whose game-winning Hail Mary pass in 1984 preceded a surge in applications for the following year.¹¹¹ As Justice Kavanaugh noted in his *Alston* concurrence, NCAA compensation policy has historically resulted in the organization and its member institutions “suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year.”¹¹²

¹⁰⁹ Julia Elbaba, *Looking at the Top College Football Head Coach Salaries in 2022*, NBC SPORTS CHICAGO (Sept. 8, 2022), <https://www.nbcsportschicago.com/ncaa/looking-at-the-top-college-football-head-coach-salaries-in-2022/328860/> [<https://perma.cc/9PEB-YKK3>].

¹¹⁰ *NCAA Men's Basketball Highest-Paid Coaches for 2021-22 Season*, USA TODAY, <https://www.usatoday.com/picture-gallery/sports/ncaab/2022/03/11/ncaa-mens-basketball-highest-paid-coaches-2021-22-season/9424310002/> [<https://perma.cc/4MV9-NYLR>] (last updated Mar. 12, 2022, 7:51 PM) [hereinafter *NCAA Men's Basketball Highest-Paid Coaches*]. * The author of this Note, and avid Villanova fan, would like to point out that while three of the coaches in the top five made it to the Final Four round of the 2022 March Madness tournament, of them only Jay Wright has led his team to multiple National Championship victories in the last ten years.

¹¹¹ Brittany Renee Mayes & Emily Giambalvo, *Does Sports Glory Create a Spike in College Applications? It's Not a Slam Dunk.*, WASH. POST (Dec. 6, 2018), <https://www.washingtonpost.com/graphics/2018/sports/ncaa-applicants/> [<https://perma.cc/LAX8-RYDW>] (observing that schools such as Alabama and Kentucky saw spikes in applications in the year following a football and men's basketball championship, respectively). The phenomenon is not exclusive to large, public schools. See, e.g. Drew Sterwald, *The Dunk City Effect Continues to Grow*, FLA. GULF COAST U. 360 (Mar. 15, 2017), <https://fgcu360.com/2017/03/15/dunkcityeffectcontinues2017/> [<https://perma.cc/QQ5Z-AGYB>] (noting an 88% spike in out-of-state admission applications to Florida Gulf Coast University in the year following the men's basketball team's appearance in the Sweet Sixteen of March Madness).

¹¹² *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring). Justice Kavanaugh additionally noted that such a model raises “serious questions” of antitrust issues. *Id.* at 108.

Among NCAA Division I Football Subdivision (“FBS”) schools,¹¹³ approximately 58% of athletic department revenue comes directly from just two sports: football and men’s basketball. As a result, they are often regarded as “revenue sports.”¹¹⁴ However, only about 7% of the football and men’s basketball revenue is estimated to go back to the athletes, and even then, only via scholarships and stipends, as per the NCAA policy banning “pay-for-play” and its restrictive definitions of what constitutes such behavior.¹¹⁵ 50% of players in these two sports are Black (versus only 11% in other sports), and many come from poor neighborhoods.¹¹⁶ Much of the profit generated by the two revenue sports are “rent-shared,” in that they are at least partly distributed to teams in other, non-revenue sports.¹¹⁷ As such, rent-sharing with other sports as opposed to distributing revenue sport profit to the revenue-generating players themselves is more likely to adversely impact Black athletes than their white counterparts, as the

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- ¹¹³ There are about 130 FBS schools, which are defined by their competitive intercollegiate football programs. Most FBS schools have, on average, 20 different sports teams. Craig Garthwaite et. al., *Who Profits From Amateurism? Rent-Sharing in Modern College Sports 1* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27734, 2020).
- ¹¹⁴ *Id.* Of the remaining athletic department revenue, 27% comes from media rights and 15% comes from the remaining sports. *Id.*
- ¹¹⁵ *See id.* at 1, 9 (estimating the percent of revenue that is returned to athletes of revenue sports); *id.* at 1, 10 (noting that athlete profit from participation sports is limited to stipends and scholarships); *see also* 2022–23 NCAA Manual, *supra* note 90, at 39–40 (limiting compensation athletes may receive in exchange for their participation to only those expenses that are “actual and necessary”).
- ¹¹⁶ 2022–23 NCAA Manual, *supra* note 90, at 5–6; *see also* Terry Nguyen, *Most College Athletes Can’t Accept Brand Sponsorship or Deals. That Could Soon Change.*, Vox (June 22, 2021, 10:57 AM), <https://www.vox.com/the-goods/22242503/ncaa-college-athletes-endorsement-rule> [<https://perma.cc/AQP4-BGUF>] (discussing the inequity in the fact that Black revenue sports players and their communities “never witness the return on [the athletes’] success”).
- ¹¹⁷ *See* Garthwaite et al., *supra* note 113, at 3 (calculating that for every dollar of revenue generated by football and men’s basketball, eleven cents are spent on all other sports).

former account for the vast majority of athletes in the two sports that fund expenses for all other, whiter sports.¹¹⁸

Though the NCAA officially sets a twenty-hour-per-week cap on the amount of time athletes may spend on athletic activities,¹¹⁹ in practice, college athletes report spending closer to fifty hours engaged in athletics—and the NCAA itself even recognizes that actual amount is well beyond its set limit.¹²⁰ Additionally, among all NCAA student-athletes, only 1.2% of men’s basketball players and 1.6% of football players go on to play in their sport’s respective professional league.¹²¹ Even those who are skilled enough to “make it” professionally may never have the opportunity to reap financial reward for their skill if faced with significant injury during their collegiate career.¹²² The result is that even the most renowned college athlete may never receive financial recognition for their notoriety.

3. NCAA NIL Policy Before and After *NCAA v. Alston*

Under the NCAA’s previous NIL rules, Division I athletes were not allowed to use their NIL in any promotional capacity, regardless of whether or not they received compensation.¹²³ More specifically, Article 12 of the NCAA Bylaws

¹¹⁸ *Id.* at 5–6; *see also* Kelly, *supra* note 69, at 910 (noting African American men are disproportionately affected by the NCAA’s constraints on athletes’ ability to profit).

¹¹⁹ 2022–23 NCAA Manual, *supra* note 90, art. 17.1.7.1.

¹²⁰ *See Student-Athlete Time Demands: April 2015*, PENN, SCHOEN & BERLAND 2 (Apr. 2015), <https://sports.cbsimg.net/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf> [<https://perma.cc/Z9GH-EDWK>]; *Time Management: What Student-Athletes Should Expect*, NCAA ELIGIBILITY CENTER 1, 1 (Aug. 2023), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/Time_Management_DI_DII_DIII.pdf [<https://perma.cc/C595-5CTL>].

¹²¹ *NCAA Recruiting Facts*, NCAA 1, 2 (Dec. 2023), https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf [<https://perma.cc/WAN8-44KB>] [hereinafter *Recruiting Facts*].

¹²² Holden et al., *supra* note 39, at 33 (discussing former college football player Jake Butt, whose professional prospects were foiled by a torn ACL, resulting in an estimated \$25 million loss).

¹²³ 2020–21 NCAA Manual, *supra* note 91, art. 12.5.2.1; *see also Name, Image and Likeness: What Student-Athletes Should Know*, NCAA 1, 1, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/2020_NILresource_SA.pdf [<https://perma.cc/T5B8-RLMX>] [hereinafter *Should Know*].

stated that a Division I athlete would lose their eligibility if they allowed, or accepted payment in exchange for, the use of their NIL in an advertisement,¹²⁴ or if they received repayment for endorsing a commercial service or product.¹²⁵

The former policy permitted Division II and III athletes to use their NIL, even allowed remuneration in some instances, so long as the payment was unrelated to the individual's involvement in athletics.¹²⁶ On the other hand, the NCAA Bylaws allowed all conferences and academic institutions to commercialize the NIL of member student-athletes.¹²⁷ Additionally, for years, student-athletes were required to sign over their NIL rights to the NCAA for the organization's use in "promoting its own activities."¹²⁸ College athletes essentially served as "human billboards" with little control over—or reward for—what they were promoting.¹²⁹

¹²⁴ 2020–21 NCAA Manual, *supra* note 91, art. 12.5.2.1(a) (revoking eligibility for any Division I who "accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind").

¹²⁵ *Id.* art. 12.5.2.1(b) (revoking eligibility for any Division I athlete who "receives remuneration for endorsing a commercial product or service through the individual's use of such product or service").

¹²⁶ *Should Know*, *supra* note 123, at 1.

¹²⁷ *See* 2020–21 NCAA Manual, *supra* note 91, arts. 3.3.4.7.1, 3.2.4.24.

¹²⁸ *NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations*, NCAA 1, 10 (Apr. 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [<https://perma.cc/V3NV-3NQ5>] [hereinafter *Final Report*]. The Board states that it "has never attempted to make commercial use of student-athlete NIL, and has no intention of doing so in the future." *Id.*

¹²⁹ Murphy, *supra* note 105, at 2. Kris Jenkins, the subject of this Note's Introduction, recently lamented the NCAA's repeated use of his NIL in advertisements since 2016, for which Jenkins has received no compensation from the organization. *See* Kris Jenkins (@Smooove2you_), X (Mar. 27, 2023, 4:46 PM), https://twitter.com/Smooove2you_/status/1640455334211866624 [<https://perma.cc/UK3Q-FRHA>] [hereinafter *Jenkins NCAA Tweet*].

While this model forced many collegiate athletes to miss out on what might have been huge NIL deals,¹³⁰ in reality, most would not have recouped a significant profit.¹³¹ However, many scholars argue that NIL rights are about dignity more than anything else—the notion that one has autonomy over their public image.¹³²

Despite restrictions on student-athletes' ability to capitalize on their NIL, multiple states passed legislation allowing them to do so, with many laws set to go into effect on July 1, 2021.¹³³ The first of these, upon which many subsequent laws were modeled, was California's Fair Pay to Play Act, which was enacted in 2019 and allows college athletes to profit off their "athletic reputation."¹³⁴ Though set to go into effect in 2023, in the wake of *NCAA v. Alston* the law was amended to move the implementation date up to September 1, 2021.¹³⁵ The law prohibits postsecondary educational institutions and the NCAA from preventing a student-athlete from profiting off their NIL or "athletic reputation."¹³⁶ Other states soon

¹³⁰ Mark Emmert, *If College Athletes Could Profit Off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 10, 2019, 9:16 AM), <https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/> [<https://perma.cc/5KRL-NLWU>] (speculating that Clemson University's then-quarterback Trevor Lawrence likely could have made "millions" off NIL deals following Clemson's national championship win).

¹³¹ Spenser Davis, *July Data Shows Value of Average NIL Deal*, SATURDAY DOWN SOUTH (2021), <https://www.saturdaydownsouth.com/sec-football/july-data-shows-value-of-average-nil-deal/> [<https://perma.cc/Y3XD-BPQ9>] (reporting that the average Division I NIL transaction is \$471, with a median of only \$35).

¹³² Kelly, *supra* note 69, at 910; *see also* MCCARTHY & SCHECHTER, *supra* note 26, § 2:2 (describing "human identity" as a "self-evident property right" worthy of protecting under the right of publicity).

¹³³ *See* NIL NETWORK, *supra* note 13, at 1–12.

¹³⁴ CAL. EDUC. CODE § 67456 (West 2022); *see also* Skinner and Bradford Move Up Effective Date of Fair Pay to Play Act to Sept. 1, 2021, NANCY SKINNER (June 21, 2021), <https://sd09.senate.ca.gov/news/20210621-skinner-and-bradford-move-effective-date-fair-pay-play-act-sept-1-2021> [<https://perma.cc/5GSK-ANFF>] (summarizing the law and announcing the intention to move up its effective date).

¹³⁵ NANCY SKINNER, *supra* note 134.

¹³⁶ CAL. EDUC. CODE § 67456(a)(1)–(2).

followed suit: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Maryland, Michigan, Mississippi, Montana, Nebraska, New Jersey, New Mexico, Oklahoma, South Carolina, and Tennessee all passed NIL legislation prior to the *Alston* decision, most with effective dates of July 1, 2021.¹³⁷

On June 21, 2021, the Supreme Court issued its opinion in *NCAA v. Alston*, an antitrust case in which the Supreme Court affirmed the determination of the district court that rules governing education-related benefits are subject to rule of reason analysis.¹³⁸ Applying the rule of reason to the benefits in question, the Supreme Court found that the existence of “substantially less restrictive alternative[s]” rendered the policy—which restricted schools’ abilities to provide “non-cash education-related benefits” to student-athletes—a violation of the Sherman Act.¹³⁹ While the Court kept its ruling narrow, declining to rule on the NCAA’s freedom (or lack thereof) to forbid benefits *unrelated* to education, Justice Kavanaugh suggested in his concurrence that the NCAA’s remaining compensation rules may not be legally justifiable.¹⁴⁰ Justice Kavanaugh also called on Congress to resolve lingering questions regarding compensation for college athletes.¹⁴¹

When the *Alston* decision was announced on June 21, 2021, nineteen states had already passed laws allowing collegiate athletes to profit off of their NIL in some capacity, though most of these laws were not set to go into effect until 2022 or later..¹⁴² In response—both to *Alston* and to the state laws slated to go into effect

¹³⁷ Dan Murphy, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021, 10:59 AM), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [<https://perma.cc/N2HP-DG37>] (outlining a timeline of NIL-related activity among the NCAA, Congress, and state governments).

¹³⁸ Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69, 87–91 (2021).

¹³⁹ *Id.* at 100–01.

¹⁴⁰ *Id.* at 109 (Kavanaugh, J., concurring) (“[u]nder the rule of reason, the NCAA must supply a legally valid precompetitive justification for its remaining compensation rules. As [Justice Kavanaugh] see[s] it, the NCAA may lack such a justification”).

¹⁴¹ *See id.* at 111 (Kavanaugh, J., concurring) (remarking that “legislation would be one option” to solve ambiguities in college athletics compensation policies).

¹⁴² *State-by-State NILs Executive Summary*, THE DRAKE GROUP, <https://www.thedrakegroup.org/wp-content/uploads/2020/03/July-1-Update-State-NIL-Legislation-Xsummary-and-Database.pdf> [<https://perma.cc/NUV8-MEZ2>] (July 1, 2021) (detailing states with

imminently—the NCAA announced on June 30, 2021, its adoption of an interim NIL policy, set to go into effect the following day.¹⁴³ The new policy permits student-athletes of all divisions to engage in NIL activity without impacting their playing eligibility.¹⁴⁴ Under the new policy, students may be compensated for their NIL (so long as the compensation is not in exchange for athletic performance or participation), and may hire an agent to negotiate NIL deals on their behalf.¹⁴⁵ While state law preempts the NCAA’s interim policy,¹⁴⁶ the policy extends to all NCAA athletes, thus providing NIL opportunities for student-athletes attending institutions in states that have not yet crafted their own NIL laws.¹⁴⁷ So long as they are in compliance with NCAA rules unrelated to NIL¹⁴⁸—as well as the NIL regulations of their respective school, conference, and state, where relevant—student-athletes may exercise the use of their NIL in any way they see fit, without

approved or proposed NIL legislation as of July 1, 2021); *see also* *NIL State Laws*, NIL NETWORK, <https://www.nilnetwork.com/nil-laws-by-state/> [<https://perma.cc/SS9S-M68P>] (last updated Aug. 27, 2022). In the wake of *Alston*, some states moved up the effective date of their NIL laws, such as California, which changed the effective date of its Fair Pay to Play Act from January 1, 2023 to September 1, 2021. *Skinner And Bradford Move Up Effective Date Of Fair Pay To Play Act To Sept. 1, 2021*, NANCY SKINNER (June 21, 2021), <https://sd09.senate.ca.gov/news/20210621-skinner-and-bradford-move-effective-date-fair-pay-play-act-sept-1-2021> [<https://perma.cc/9ZTA-J6VY>].

¹⁴³ Hosick, *supra* note 12.

¹⁴⁴ *Interim NIL Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [<https://perma.cc/4G6Y-KBZF>] [hereinafter *NIL Policy*].

¹⁴⁵ *Name, Image and Likeness Policy: Question and Answer*, NCAA (Feb. 2023), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [<https://perma.cc/EEY7-Q5WW>] [hereinafter *Question and Answer*].

¹⁴⁶ *NIL Policy*, *supra* note 144. The policy similarly does not overrule the NIL policies of NCAA member schools or conferences. *Id.*

¹⁴⁷ Hosick, *supra* note 12.

¹⁴⁸ All athletes remain subject to the pay-for-play and inducement prohibitions. NCAA Quick Guide, *supra* note 97.

losing eligibility.¹⁴⁹ In short, the interim policy effectively waives Article 12 of the NCAA Bylaws.¹⁵⁰

As of May 25, 2023, twenty-nine states allow collegiate athletes to profit from their NIL.¹⁵¹ While there are some consistent general themes throughout most state legislation, such as permission to use an agent or advisor for negotiations and prohibitions on academic institutions directly compensating athletes,¹⁵² each law is different, resulting in a lack of uniform NIL policy across the states.¹⁵³ For example, Montana allows the college or university to act as an agent on behalf of the athlete for NIL deals, while Arkansas and Florida require the agency to be barred in the respective state.¹⁵⁴ Additionally, some states allow athletes to license school marks in NIL deals, while others expressly prohibit it.¹⁵⁵ Another major difference is that some states prohibit athletes from using their NIL to promote “vice industries,” such as alcohol, tobacco, or adult entertainment, while others

¹⁴⁹ *Id.* (summarizing the new policy); *Name Image Likeness: New Interim Policy Key Takeaways*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf [<https://perma.cc/AS55-3HM8>] [hereinafter *Key Takeaways*] (distinguishing activities permitted under the new policy from those prohibited); *NIL Policy*, *supra* note 144.

¹⁵⁰ Gregory Marino, *The NCAA Declares Independence from NIL Restrictions*, JD SUPRA (Aug. 23, 2021), <https://www.jdsupra.com/legalnews/the-ncaa-declares-independence-from-nil-4713672/> [<https://perma.cc/7X3J-BT57>].

¹⁵¹ Keller, *supra* note 13 (tracking NIL legislation in each of the fifty states). The number does not include Alabama or South Carolina, both of which passed NIL legislation in 2021 but subsequently repealed it in 2022. *Id.*

¹⁵² Holden et. al., *supra* note 39, at 34–35.

¹⁵³ *See generally* NIL NETWORK, *supra* note 13 (identifying key provisions of each state’s NIL policy, if applicable); THE DRAKE GROUP, *supra* note 142, at 8–35 (noting and outlining state legislation related to the NIL rights of college athletes).

¹⁵⁴ Mont. Leg. S.B. 248, 67th Leg., Reg. Sess. (Mont. 2021); see also *Montana Senate Bill 248*, LEGISCAN, <https://legiscan.com/MT/bill/SB248/2021> [<https://perma.cc/U52J-MSUL>] (noting its passage); NIL NETWORK, *supra* note 13 (summarizing Arkansas’ and Florida’s student athlete NIL laws).

¹⁵⁵ Holden et. al., *supra* note 39, at 37. For example, Nebraska prohibits student-athletes from using the school’s intellectual property in NIL endorsements, while Connecticut permits it. *Compare* Neb. Leg. Legis. B. 1137, 107th Leg., 2nd Reg. Sess. (Neb. 2022), *with* Conn. Gen. Assemb. Pub. Act No. 22-11, 2022 Gen. Assemb. (Conn. 2022).

defer to the conferences or schools themselves with regards to this determination.¹⁵⁶ Furthermore, because conferences and the individual schools are both permitted to craft their own NIL policy—even in states that have NIL laws—regulations may vary not just from state to state, but from school to school even among those within the same state.¹⁵⁷

Of the thirty-two states with NIL legislation, ten do not recognize a right of publicity at all.¹⁵⁸ Conversely, there are ten states that recognize a right to publicity (either in common law or through legislation) but do not have any NIL laws.¹⁵⁹

¹⁵⁶ NIL NETWORK, *supra* note 13. For example, while states such as Texas and Virginia explicitly prohibit student-athletes from endorsing certain industries or products, states like Kentucky allow schools to require that the product or service endorsed not conflict with the school's reputation or image. *Compare* Tex. S. S.B. No. 1385, 87th Tex. Leg., Reg. Sess. (Tex. 2021) (barring a student-athlete from being compensated for an endorsement using his or her NIL to promote alcohol, tobacco, gambling, or “sexually oriented business”); Va. Gen. Assemb. S.B. 223, 2022 Reg. Sess. (Va. 2022) (prohibiting a student-athlete from using his or her NIL to endorse alcohol, adult entertainment, drugs and drug paraphernalia, or firearms), *with* Andy Beshear, *Relating to Responsibilities of Postsecondary Educational Institutions as to Name, Image and Likeness Compensation of Student-Athletes*, KENTUCKY GOVERNOR ANDY BESHEAR (June 4, 2021), https://governor.ky.gov/attachments/20210624_Executive-Order_2021-418_Student-Athletes.pdf [<https://perma.cc/66T6-BC37>] (deferring to each academic institution to determine for itself what industries (if any) its student-athletes may not use their NIL to promote).

¹⁵⁷ *Tracker: NIL Policies by Institution*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-nil-policies-by-institution/> [<https://perma.cc/KG86-HREZ>] (last updated Apr. 1, 2022) [hereinafter *Bus. Coll. Institution Tracker*] (identifying and tracking policies of conferences and universities that have developed their own NIL regulations).

¹⁵⁸ *Compare* MCCARTHY & SCHECHTER, *supra* note 26, § 6:2 (listing states that recognize a right of publicity), *with* *State and Federal Legislation Tracker*, TROUTMAN PEPPER <https://www.troutman.com/state-and-federal-nil-legislation-tracker.html> [<https://perma.cc/9HUV-GQDD>] [hereinafter *Troutman NIL Tracker*] (listing states that have NIL laws). These states are Colorado, Louisiana, Maine, Maryland, Mississippi, Montana, New Mexico, North Carolina, and Oregon. *Id.*

¹⁵⁹ *Compare* MCCARTHY & SCHECHTER, *supra* note 26 § 6:2 (listing states that recognize a right of publicity), *with* *Troutman NIL Tracker*, *supra* note 158 (listing states that have NIL laws). These states are Alabama, Hawaii,

4. NCAA Policy Regarding Transferring Student-Athletes

The Transfer Portal emerged as part of the “notification-of-transfer” model that Division I athletics first began using in the 2018-19 season.¹⁶⁰ Previously, student-athletes interested in transferring were required to obtain permission from their coach to contact other institutions; under the new model, student-athletes express to a compliance administrator at their current institution their desire to enter into the Portal, upon which the school has two days to submit the athlete’s information.¹⁶¹ Following this policy change, Division I athletics did not see a substantial spike in athletes entering the transfer portal.¹⁶²

In April 2021, the NCAA released a new policy governing the transfer of Division I athletes, to go into effect starting in the 2021-22 season.¹⁶³ Dubbed the

Indiana, Massachusetts, New Hampshire, Rhode Island, South Carolina, South Dakota, West Virginia, and Wisconsin. Both Alabama and South Carolina previously enacted NIL legislation but have since repealed it. *See* Ala. HB 76 (2022) <https://arc-sos.state.al.us/ucp/L0866985.AI1.pdf> [<https://perma.cc/F6PX-7796>] (repealing previously-enacted NIL legislation); Henry McMaster, *Executive Budget State of South Carolina: Fiscal Year 2023-24*, June 6, 2023, https://www.scstatehouse.gov/sess125_2023-2024/appropriations2023/gbud2023.pdf [<https://perma.cc/DYZ7-D77D>] (repealing previously-enacted NIL legislation in the fiscal budget).

¹⁶⁰ Greg Johnson, *What the NCAA Transfer Portal Is...and What It Isn't*, NCAA CHAMPION MAG. (Fall 2019), <http://s3.amazonaws.com/static.ncaa.org/static/champion/what-the-ncaa-transfer-portal-is/index.html> [<https://perma.cc/8L4D-ULK2>].

¹⁶¹ *Id.*

¹⁶² *Destination of 2019 NCAA Division I Men’s Basketball Transfers*, NCAA RSCH. (Jan. 2020), https://ncaaorg.s3.amazonaws.com/research/transfers/Jan2020RES_DestD1MBBTransfers.pdf [<https://perma.cc/CMG9-BEZN>] (indicating that there was no statistically significant increase in Division I men’s basketball players seeking to transfer between 2018 and 2019).

¹⁶³ *NCAA Transfer Rules*, NCSA COLL. RECRUITING (2023), <https://www.ncsasports.org/recruiting/ncaa-transfer-rules> [<https://perma.cc/XY25-ZNNG>] (outlining the NCAA transfer policy as of August 2022); *One-Time Transfer Rule Clears Last NCAA Step, Starts in 2021*, ASSOCIATED PRESS (Apr. 28, 2021, 6:47 PM), <https://apnews.com/article/sports-hockey-09e16b6f1740da246012b7a84fa0dd55> [<https://perma.cc/M2KW-DL4F>] (summarizing the policy change).

“one-time transfer exception,” the policy eliminated the sitting-out requirement for first-time transfers, instead allowing student-athletes transferring for the first time to compete immediately, with no additional requirements other than properly following the proscribed process.¹⁶⁴ The one-time transfer exception had historically been available to players of certain Division I sports, but the new policy extended its reach to football, men’s and women’s basketball, baseball, and men’s ice hockey, all of which were previously excluded.¹⁶⁵ Student-athletes still retained four years of eligibility under this new policy.¹⁶⁶ While the one-time transfer exception only extended to first-time transfers, there was technically no limit on the number of times a student-athlete may transfer; however, an athlete would generally be required to sit out for a season upon any subsequent transfers after their first, unless they obtained a waiver from the NCAA granting immediate eligibility.¹⁶⁷ A student-athlete might have been granted immediate eligibility upon a secondary transfer if the school from which they are transferring discontinues or does not sponsor their sport, among other reasons.¹⁶⁸

From 2020 to 2021, the number of Division I student-athletes who entered the Transfer Portal increased by nearly 50%.¹⁶⁹ In particular, when looking only at

¹⁶⁴ See NCAA ELIGIBILITY CENTER, *supra* note 120, at 2 (outlining requirements for student-athletes seeking to transfer). Eligibility for the one-time transfer exception requires that the student-athlete: (1) be transferring from one four-year Division I school to another, (2) have academic eligibility at the institution which they intend to leave, (3) have never transferred from a four-year institution, and (4) certify in writing, along with their new head coach, that there was no improper communication with the new school, *i.e.*, contact with the new school’s athletic team prior to entering the transfer portal. *Id.* Undergraduate students must write to their current school requesting to enter the NCAA Transfer portal and must do so within the proper transfer window of their specific sport. Disciplinary action and academics are also considered. *Id.*

¹⁶⁵ See *One-Time Transfer Rule Clears Last NCAA Step*, *supra* note 163.

¹⁶⁶ See NCSA COLL. RECRUITING, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ See NCAA ELIGIBILITY CENTER, *supra* note 120, at 3.

¹⁶⁹ See *Transfer Portal Data: Division I Student-Athlete Transfer Trends*, NCAA, <https://www.ncaa.org/sports/2022/4/25/transfer-portal-data-division-i-student-athlete-transfer-trends.aspx> [<https://perma.cc/X5AC-PWLZ>] [hereinafter *Transfer Portal Data*] (indicating 6,703 Division I athletes transferred in 2020, as opposed to 9,567 in 2021). Data for 2020 reflects students who entered the transfer portal in between August 1, 2019–July 31, 2020, while data for 2021 reflects the period from August 1, 2020–July 31,

transfer statistics for football, men's and women's basketball, baseball, and men's ice hockey, the number rose to 5,425 in 2021, an increase from the previous year that is likely due at least in part to the "one-time transfer exception" being extended to players of these sports.¹⁷⁰ Furthermore, almost half of the 2021 Transfer Portal was comprised of students on these teams that were not eligible for the one-time transfer exception in previous years. In 2022,¹⁷¹ 20,911 Division I student-athletes—roughly 13% of the Division I student-athlete population—entered the Transfer Portal, an increase from 17,781 in 2021.¹⁷² Though a full data profile for 2023 has yet to be released, 13,025 Division I student-athletes successfully transferred to another NCAA institution, up from 12,168 the year prior.¹⁷³ Additionally, 20.5% of FBS rosters were made up of transfers in 2023 (compared to 6.4% in 2019),¹⁷⁴ while 20% of Division I scholarship men's basketball players had entered the Portal within one week of the 2023 March Madness

2021. Greg Johnson, *New Dashboard Shows DI Student-Athlete Transfer Trends*, NCAA (Apr. 25, 2022, 10:00 AM), <https://www.ncaa.org/news/2022/4/25/media-center-new-dashboard-shows-di-student-athlete-transfer-trends.aspx> [<https://perma.cc/S5QL-2NLL>] [hereinafter *Johnson Transfer Trends I*].

¹⁷⁰ See *Transfer Portal Data*, *supra* note 169; *Johnson Transfer Trends I*, *supra* note 169. For example, the number of men's basketball transfers increased from 648 in 2020 to 1,208 in 2021. Compare *Transfer Portal Data*, *supra* note 169, with *Destination of 2020 NCAA Division I Men's Basketball Transfers*, NCAA RESEARCH, https://ncaaorg.s3.amazonaws.com/research/transfers/2020-21RES_DestD1MBBTTransfers.pdf [<https://perma.cc/FC6N-L44K>]. Of the 9,806 total transfers in 2021, 5,425 (or about 55%) of them came from football, baseball, men's and women's basketball, and men's ice hockey. *Transfer Portal Data*, *supra* note 169.

¹⁷¹ Greg Johnson, *2022 Transfer Trends Released for Divisions I and II*, NCAA (Feb. 21, 2023, 2:00 PM), <https://www.ncaa.org/news/2023/2/21/media-center-2022-transfer-trends-released-for-divisions-i-and-ii.aspx> [<https://perma.cc/W7A3-4RXU>] [hereinafter *Johnson Transfer Trends II*] (the period is measured from August 1, 2021, to July 21, 2022).

¹⁷² *Id.* (included in the 2022 total are the 1,649 Division I men's basketball players and 2,918 Division I football players who entered the Portal).

¹⁷³ *Id.*

¹⁷⁴ Tom VanHaaren, *FBS Rosters Grow to 20.5% Transfer Players in 2023*, ESPN (Nov. 29, 2023, 12:34 PM), https://www.espn.com/college-football/story/_/id/39005847/fbs-rosters-grow-205-transfer-players-2023 [<https://perma.cc/3V8Y-FSDZ>].

championship game.¹⁷⁵ While some of these shifts, particularly among graduate students, may be explained by the extra year of eligibility that the NCAA granted in the wake of the COVID-19 pandemic,¹⁷⁶ the adoption of the more flexible transfer policy likely also contributed to the more recent spike in transfers.

Between the general increase in transfers since the Portal opened in 2018 and these more recent spikes, the NCAA announced in 2023 its decision to amend its guidelines for second-time transfers seeking waivers, adding specific requirements that students seeking to transfer must meet in order to be immediately eligible.¹⁷⁷ The new legislation, which was approved by the NCAA Division I Council in early January of 2023 and went into effect starting with the 2023–24 season, only allowed second-time undergraduate transfers to qualify for immediate eligibility if the reason for their transfer was due to either physical injury, a mental health condition, or an “exigent circumstance” such as sexual assault.¹⁷⁸ Athletic and academic reasons, such as lack of playing time or change in major, would not warrant receipt of a waiver.¹⁷⁹ Additionally, the requirement only applied to undergraduate transfers; graduate student-athletes were still deemed immediately eligible even in their second or third transfer.¹⁸⁰ The regulation did not put a cap on the number of times a student-athlete may transfer, but rather required that players sit out for a season upon any transfers subsequent

¹⁷⁵ Tyler Nettuno, *1 Wild Stat Shows Just How Active the College Basketball Transfer Portal Has Been This Offseason*, USA TODAY: FOR THE WIN (Apr. 10, 2023, 5:52 PM), <https://ftw.usatoday.com/2023/04/ncaa-mens-basketball-transfer-portal-20-percent-scholarship-players> [https://perma.cc/EJE4-JHK8].

¹⁷⁶ *Johnson Transfer Trends I*, *supra* note 169.

¹⁷⁷ Shehan Jeyarajah, *NCAA Council Votes to Limit Eligibility For Second-Time Transfers to Curb Ballooning Portal Usage*, CBS SPORTS (Jan. 11, 2023, 7:06 PM), <https://www.cbssports.com/college-football/news/ncaa-council-votes-to-limit-eligibility-for-second-time-transfers-to-curb-ballooning-portal-usage/> [https://perma.cc/D4M4-NLLX].

¹⁷⁸ *Id.*; see also Meghan Durham, *Division I Council Modernizes Rules for Coaching Limits*, NCAA (Jan. 11, 2023, 5:42 PM), <https://www.ncaa.org/news/2023/1/11/media-center-division-i-council-modernizes-rules-for-coaching-limits.aspx> [https://perma.cc/B6CY-WEH6].

¹⁷⁹ See Durham, *supra* note 178 (distinguishing circumstances for which waiver of sit-out requirements would be approved from those that would not).

¹⁸⁰ See Jeyarajah, *supra* note 177 (noting that the changes in waiver policy will not apply to graduate student-athletes).

to their first before becoming eligible to play.¹⁸¹ However, the “one-time” transfer rule is currently being challenged as a violation of federal antitrust law, with the U.S. Department of Justice recently joining the suit on the side of the plaintiffs.¹⁸²

As a result, in April 2024 the NCAA Council announced that beginning in the 2024–25 season, student-athletes would no longer be required to “redshirt” to attain eligibility upon their second, third, or fourth transfer; instead, a student-athlete is immediately eligible to compete (provided academic and procedural requirements are met) regardless of the number of times he or she has transferred previously.¹⁸³

Coupled with NIL policies that vary among states, schools, and conferences, preeminent college coaches have expressed their concern with the current NCAA transfer system, even considering the newly proposed changes.¹⁸⁴ As such, many have argued that an independent body separate from the NCAA step in and ameliorate the confusion.¹⁸⁵

¹⁸¹ NCAA *Guide for Four-Year Transfers* 12, NCAA, http://fs.ncaa.org/Docs/eligibility_center/Transfer/FourYearGuide.pdf [<https://perma.cc/S9WT-KXM4>] [hereinafter Four Year Guide].

¹⁸² Noah Henderson, *U.S. DOJ Joins Action Against NCAA Transfer Rules*, SPORTS ILLUSTRATED: FANNATION (Jan. 20, 2024, 12:00 PM), <https://www.si.com/fannation/name-image-likeness/news/u-s-doj-joins-action-against-ncaa-transfer-rules-noah9> [<https://perma.cc/XW4Q-HAEY>].

¹⁸³ Wright, *supra* note 16. The change in policy also implicitly removed prior waiver requirements. *Id.*

¹⁸⁴ Joseph Zucker, *Alabama’s Nick Saban: CFB is Not ‘Sustainable’ with Transfer Portal, NIL Contracts*, BLEACHER REP. (Apr. 13, 2022), <https://bleacherreport.com/articles/10032591-alabamas-nick-saban-cfb-is-not-sustainable-with-transfer-portal-nil-contracts> [<https://perma.cc/U9XT-ZAQA>] (quoting Alabama football coach Nick Saban, who lamented “[NIL] creates a situation where you can basically buy players . . . [a]nd you can also get players to get in the transfer portal to see if they can get more someplace else than they can get at your place”). While Alabama has not seen a notable influx of transfers out-of-state in the wake of the state legislature repealing its NIL law, it’s possible that such trends should be expected in the future. *See Transfer Portal Data, supra* note 169.

¹⁸⁵ *See, e.g.*, Ralph D. Russo, *NCAA President Shifts Focus To Employment Status of College Athletes During Senate Hearing*, ASSOCIATED PRESS (Oct. 17, 2023, 6:20 PM), <https://apnews.com/article/ncaa-nil-charlie-baker-hearing-senate-83ed8f9e1fb267db1ce5e24d6b79617a> [<https://perma.cc/4YYM-6ZWC>] (highlighting that both current NCAA President Charlie Baker and his

C. A BRIEF BACKGROUND ON THE DEPARTMENT OF EDUCATION

The U.S. Department of Education as it is known today was created in October 1979, when Congress passed the Department of Education Organization Act.¹⁸⁶ The U.S. Department of Education seeks to promote achievement in students from pre-Kindergarten through postsecondary school by fostering equality and excellence in education.¹⁸⁷ One of the offices that operates within the U.S. Department of Education is the Office of Postsecondary Education (OPE), which is overseen by the Office of the Under Secretary¹⁸⁸ and focuses on “increasing access to quality postsecondary education.”¹⁸⁹ While most of the programs overseen by OPE focus on funding programs that seek to provide equitable opportunities for historically marginalized communities,¹⁹⁰ the responsibilities set forth by the Act are much broader: “The Assistant Secretary shall administer such functions affecting postsecondary education, both public and private . . . and shall serve as the principal advisor to the Secretary on matters affecting postsecondary education.”¹⁹¹

predecessor Mark Emmert have lobbied for Congress to establish a federal NIL bill).

¹⁸⁶ See *An Overview of the U.S. Department of Education*, U.S. DEP’T OF EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html> [<https://perma.cc/8AGT-DBN5>] [hereinafter *DoEd Overview*]; see also Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified as amended at 20 U.S.C. §§ 3401–3501).

¹⁸⁷ *DoEd Overview*, *supra* note 186.

¹⁸⁸ See *Operating Structure*, U.S. DEP’T. OF EDUC., <https://www2.ed.gov/about/offices/or/index.html> [<https://perma.cc/C29M-3K4P>] (last modified June 23, 2023).

¹⁸⁹ See *Office of Postsecondary Education – Programs*, U.S. DEP’T. OF EDUC., <https://www2.ed.gov/about/offices/list/ope/programs.html> [<https://perma.cc/LZ6K-VXSW>] (last modified Mar. 22, 2024) [hereinafter *OPE Programs*].

¹⁹⁰ *Id.* For examples, among the programs administered by OPE are the “Strengthening Historically Black Colleges and Universities” initiative and the “Hispanic-Serving Institutions Science, Technology, Engineering, or Mathematics and Articulation Program.” *Id.*

¹⁹¹ 20 U.S.C. § 3415(a) (2022).

III. ANALYSIS

Now that student-athletes may profit off their NIL, it is time to establish uniform regulations regarding how they may go about doing so. The inconsistency among the states regarding NIL legislation coupled with a more liberal collegiate transfer policy poses a significant problem for Division I sports: How can student-athletes ensure they are sufficiently informed in order to maximize their NIL potential?¹⁹² Rather than attempting to track the numerous and ever-changing choice-of-law rules, many of which contain complicated legal jargon, the best course of action is for Congress to pass a comprehensive federal statute that standardizes NIL rights for college athletes and gives them broad authority over the exercise of their NIL rights.

A. CONGRESS AS THE PROPER STARTING POINT

Congress's authority under the Commerce Clause allows it to pass federal NIL legislation that would preempt state law and NCAA, conference, and school policies.¹⁹³ In addition to addressing dormant Commerce Clause concerns, a federal statute is the best method for redressing the current complications with NIL regulation, as it creates a uniform standard that prevents confusion when a student-athlete transfers to a school in a state with a different NIL policy than that of their first institution.

1. *Why States Should Not Determine NIL Policy*

Leaving NIL policy formation to each individual state has already proven to be a jumbled mess.¹⁹⁴ Not only is there disagreement amongst states regarding whether NIL policy should be adopted at all, but of the states that do have NIL legislation, no two policies are identical. While the lack of uniformity is frustrating enough, coupled with the NCAA's liberal transfer policy, it could yield practical

¹⁹² Josh Planos, *College Athletes Suffered When Schools Weren't Ready for NIL*, FIVETHIRTYEIGHT (June 30, 2022, 6:00 AM), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [https://perma.cc/7TNL-22P6] (quoting a graduate track-and-field athlete at the University of Nevada: "in terms of the legal stuff, we don't have a lot of help at all . . . I don't know what deals to not do . . . there's really not a lot of guidance"). Even in states with liberal NIL policies, student-athletes have trouble understanding the rules. *Id.*

¹⁹³ Vick & Jassy, *supra* note 43, at 17.

¹⁹⁴ See NIL NETWORK, *supra* note 13.

issues such as college athletes “shopping”—*i.e.*, transferring to schools based solely on the ability to profit of their NIL in that school’s state, without concern for other, potentially more pertinent factors.¹⁹⁵ It could also leave these young athletes somewhat vulnerable to legal problems should they transfer from a school in a state with a permissive NIL policy to one in a state with more stringent requirements.

2. *Why Courts Should Not Determine NIL Policy*

To put it simply, treating NIL policy as a common law issue would present an issue almost identical to that which exists currently: policy would vary depending on jurisdiction, yielding inconsistent regulations across the country. While the Supreme Court in *Alston* implied that they would support a uniform NIL policy,¹⁹⁶ a case would first need to make its way up to the Court, which would likely take years; furthermore, allowing the Supreme Court to outline the specific guidelines of a nationwide NIL policy would threaten separation of powers because shaping these policies would amount to legislating, a task specifically reserved for Congress.¹⁹⁷

Unlike Congress, where membership is determined by electorates of each state or district, the courts are not answerable to “the people,” and thus are less likely to be tuned in to what those affected by NIL policies—most notably the athletes themselves, but schools and conferences as well—desire from said policies. The variances among state NIL legislation indicates that different states

¹⁹⁵ Mitch Light, *How Are NIL, Transfer Portal Affecting College Baseball? The Athletic’s Coaches Forum*, THE ATHLETIC (Feb. 14, 2024), <https://theathletic.com/5264153/2024/02/14/nil-transfer-portal-college-baseball/> [https://perma.cc/NX9Z-WRMP] (highlighting comments made by UC baseball coach Andy Stankiewicz that current NIL policy coupled with the NCAA transfer portal have shifted the focus of collegiate athletes to how they can maximize individual profit); Josh Goldberg, *The Transfer Portal Has Changed the Dynamic of College Sports*, GREENSPOON MARDER LLP (Jan. 18, 2024), <https://www.gmlaw.com/news/the-transfer-portal-has-changed-the-dynamic-of-college-sports/> [https://perma.cc/X5NZ-BD55] (indicating that student-athletes displeased with their NIL opportunities may use the transfer portal as “leverage” to seek out a better NIL deal).

¹⁹⁶ Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69, 108 (2021) (Kavanaugh, J., concurring) (suggesting NCAA rules that have “historically restricted student athletes from receiving money from endorsement deals and the like...raise serious questions under antitrust law”).

¹⁹⁷ U.S. CONST. art. I, § 8, cl. 18.

may prioritize different things when formulating NIL policy;¹⁹⁸ as such, these considerations will be more directly addressed in a federal statute, as Congress's membership is made of people representing their specific state, and in theory these members are supposed to keep their constituents' desires in mind when crafting legislation.

3. *Why the NCAA Should Not Determine NIL Policy*

The NCAA has historically demonstrated a lack of enthusiasm with regards to collegiate athletes being able to profit off their NIL rights, not only by outright banning the practice until *Alston*, but also by enforcing rules that similarly restrict the "appropriate" circumstances under which student-athletes may receive any sort of compensation related to their status as a student-athlete.¹⁹⁹ Even without its history of exploitation, the NCAA is not designed to run as a legislative entity; rather, it is a collection of businesses.²⁰⁰ Additionally, the NCAA has had trouble imposing its existing NIL policy in light of court decisions and legislative actions;²⁰¹ empowering the organization to formulate standard NIL regulations would not remedy this problem, because NCAA policy could still be disregarded by state laws. Such sweeping changes of policy should instead be entrusted to those by whom such decisions were intended to be made. However, allowing the NCAA to enforce regulations set forth by a more objective body would allow the organization to get back to its roots: ensuring the safety and wellbeing of collegiate athletes.

¹⁹⁸ See generally NEB. REV. STAT. § 48-3603(8) (2024); see also Conn. Gen. Assemb. Pub. Act No. 22-11; Tex. S. S.B. No. 1385.

¹⁹⁹ See generally *Alston*, 594 U.S. 69; see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015). The regulations challenged in these cases, as well as the NCAA's history of restricting players' NIL rights (and instead capitalizing on them for itself), indicate that the NCAA does not have college athletes' best interests at heart.

²⁰⁰ Kelly, *supra* note 69, at 907 ("the NCAA isn't some kind of quasi-governmental entity that we should all bow down and give deference to").

²⁰¹ Ross Dellenger, *Alabama Coach Nick Saban Weighs In Our NIL, Player Safety and NCAA Rules Change*, SPORTS ILLUSTRATED (Mar. 7, 2023), <https://www.si.com/college/2023/03/07/nick-saban-exclusive-interview-nil-rule-changes> [<https://perma.cc/UVT9-MQQ6>] (quoting Nick Saban as saying "[the NCAA] can't enforce their own rules" because of variances in NIL policy across states).

4. *Enforcement and Continuation: Why the Department of Education is the Proper Overseer*

The Department of Education already has an office dedicated to postsecondary schools but does not place much—if any—emphasis on the collegiate experience besides providing funding to members of certain communities towards their cost of attendance.²⁰²

The Collegiate Student-Athlete Committee (“CSAC”) should not replace the NCAA, but rather work alongside and above it. While CSAC would ultimately be in charge of establishing regulations regarding collegiate athletics, the NCAA would be tasked with ensuring these policies are followed on the ground level, as its scope is much narrower than that of the federal government and thus it would be able to look at schools and conferences more closely and on a more consistent basis.²⁰³ CSAC would act as an appeal board for minor infractions, but would ultimately oversee the NCAA’s actions and step in when it finds the NCAA has acted outside the scope of its authority—an authority to be determined by CSAC upon its creation.

B. PROPOSED TERMS OF FEDERAL LEGISLATION

To compensate for the historical unfairness of NIL restrictions, and to leave room for the experts of CSAC to create more detailed regulations, the federal statute’s NIL policies should be fairly broad and liberal. Congress should give student-athletes broad authority over the method and manner by which they license their NIL rights. The foundation of the statute should allow relatively free reign of the student-athlete in the engagement of their NIL deals, with restrictions emerging only once triggered rather than as a rule to start. The following are among some of the provisions that should be included, along with explanations and justifications:

1. *Collegiate athletes shall not be limited to the industries with which they enter NIL deals.* The student’s school or conference may prohibit an athlete from entering into an NIL deal only if (a) some element of the brand deal would violate state or federal laws, or (b) the values of the company with whom the athlete seeks to partner are at odds with

²⁰² See *OPE Programs*, *supra* note 189.

²⁰³ Furthermore, acting pursuant to the broad powers Congress delegated to OPE, CSAC would also have the authority to regulate matters relating to collegiate athletics that are unrelated to NIL and the right of publicity.

those of the student's institution.²⁰⁴ Generally, the school's value upon which its objection is based should be well-known—*e.g.*, the athletic department of Bob Jones University objecting to a student-athlete's endorsement of an alcoholic beverage—as this puts student-athletes on notice about what types of NIL deals they be involved in, decreasing the likelihood of a transfer. Institutions should not be required to prove the devoutness of their values, unless it appears they are using the “value” argument to prevent the athlete from profiting off their NIL. The “values”—and thus, the industries that the student-athlete is prohibited from endorsing—must be made clear to the student-athlete at the time they agree to attend the institution. The athlete is beholden to the terms of the *initial* agreement, even if the school changes its “values”—and thus, prohibited industries—throughout the course of the student-athlete's tenure, though institutions shall generally be discouraged from making such changes at all. An athlete's failure to comply shall not result in financial repayment of any kind to the school or conference, nor shall it effect the athlete's status. However, schools may, for example, place restrictions on the amount of playing time a student receives.

2. *Schools and conferences may not exert undue influence on a collegiate athlete to participate or not participate in a particular NIL deal.* A school or conference may express to an athlete its preferences regarding a student-athlete's NIL agreements but may not imply or actually provide incentives—monetary or otherwise—to sway the athlete one way or the other. Additionally, schools and conferences shall not express disfavor towards a particular industry to a student-athlete seeking an NIL deal with such an industry, unless the industry has been identified in the initial contract as one antithetical to the values of the institution.
3. *Collegiate athletes may generally both (a) wear attire bearing the mark of their college or university and (b) say the name of the institution in NIL deals.* This permission is also subject to protest from the athlete's school on grounds like those mentioned in the immediately preceding paragraph, but the bar for egregiousness is much lower, as use of the institution's name may have broader (legal)

²⁰⁴ For example, a Catholic university may prohibit student-athletes from endorsing the Church of Satan.

implications for the school.²⁰⁵ However, the athlete may not indicate that the school itself endorses the good or service that the athlete sponsors in their NIL deal.

4. *Collegiate athletes may hire an agent to handle their NIL deals.* The school may serve as the athlete's agent, but the athlete is not required to appoint the school—or any of its employees—as such. If the athlete selects a non-school entity to represent them, any fees may not be paid by the student's school or conference or another school seeking to recruit the student. Such restrictions seek to give athletes the freedom to choose their representation, while still working to avoid the problem of further concentrating wealth in the "Big" conferences that can offer significantly more money for such deals.²⁰⁶ Additionally, schools and/or conferences shall be encouraged, but not required, to provide guidance to students with regards to choosing representation.
5. *Collegiate athletes must inform their academic institution of their plans to participate in a specific NIL deal.* The general interest in capitalizing on their NIL does not need to be made known, but if the athlete intends to advertise or endorse a brand, they must give notice to their academic institution. This prevents conflicts of interest such as those mentioned above and adds a layer of protection for the players.
6. *Schools and conferences may still use collegiate athletes in promotional materials for collegiate athletics.* The athlete is not required to be compensated for this participation, but the promotional material *must* advertise at least one of the following: (a) the conference that the student-athlete is a part of; (b) the academic institution that the student-athlete attends, and/or that school's athletic department;

²⁰⁵ As an example, the uniforms for Villanova University's men's basketball team are provided by Nike. As such, if a basketball player seeks to have an NIL deal with Adidas, Villanova may require that the student not identify themselves as "[X] from Villanova" and/or wear a sweatshirt with the school's logo on it in the advertisement. The student may, however, use their name in promotion.

²⁰⁶ See Murphy, *supra* note 105; Power Five Fiscal 2019, *supra* note 106; Power Five Fiscal 2022, *supra* note 108; Big East Conference Inc, *supra* note 108; Mountain West Conference, *supra* note 108; Sun Belt Conference, *supra* note 108; Light, *supra* note 195.

(c) the specific athletic program that the student-athlete is a part of at their school; (d) an upcoming²⁰⁷ game, match, or tournament that the student-athlete's team is to be a part of.²⁰⁸ These are considered materials promoting the *program*—of which the student-athlete is a part—as a whole rather than something related to NIL, and thus are treated differently.

7. *Conferences shall designate NIL Resource Officers (NILROs) to inform conference members, including collegiate athletes, of current federal NIL policy and ensure all NIL regulations are being followed accordingly.* While conferences may designate one NILRO per school, at *minimum*, there must be one officer for every four schools in the conference. Each NILRO will be certified by the appropriate federal organization after successfully completing an informational course on federal NIL policy, upon which certification as an NILRO is issued. The Resource Officer may be hired from outside the conference or may be a current employee of the conference (e.g., an administrative assistant currently employed at one of the conference's member-schools). Active coaches may not serve as NILRO, even to institutions outside of their own conference; inactive and/or former coaches may serve, so long as their service as a Resource Officer does not coincide with their service as coach for any period of time. Each conference shall determine whether the NILRO position qualifies as a full-time, specific job, or if it is merely a certification an existing employee may have. Congress shall award a \$2,500 stipend per certified NILRO and

²⁰⁷ "Upcoming" describes any future game, match, or tournament in the current season, or, if the season has ended, in the immediately succeeding season.

²⁰⁸ While the distinction between (2), (3), and (4) is not crucial since they are subject to the same rule, it is worth being discussed. (2) refers to advertisements of the school itself, e.g., ads that play during sporting events encouraging prospective students—not just athletes—to consider applying to the school. It also includes similar ads touting the school's athletic department *in its entirety*, not just the sport the athlete plays. (3) Covers the athlete's particular sport, e.g., recruiting materials, advertisements for the upcoming season, or "hype videos" that may be shown at games or between commercial breaks during such games. (4) Includes materials such as advertisements for the sport's conference tournament or significant upcoming games.

will provide financial incentives for conferences to establish NILRO as a full-time position.

8. *The NILRO gives a presentation to student-athletes and collegiate athletic employees on current NIL policy not less than once per academic year.* Prior to the seminar, and no later than July 1 of each year, the Department of Education will issue an online training module that the NILRO must complete to maintain certification. Additionally, the Department will provide to the NILRO: (a) a copy of the most up-to-date NIL statute, (b) a list of key provisions from the statute that the Department deems necessary for the NILRO to share with student-athletes and others involved in collegiate athletic programs, and (c) comprehensive guidelines on what to include in the seminar, including a list of FAQs with answers. The NILRO leading the seminar must be certified by the Department of Education. The seminar must occur prior to the start of the upcoming sports season.²⁰⁹ Conferences may choose whether to have a conference-wide NILRO or separate it by sport or respective institution. While *having* the seminar is required, conferences need not mandate attendance, but regardless shall make their best effort to ensure maximum attendance. However, the seminar places student-athletes and employees alike on constructive notice; as such, violations of federal NIL policy may be subject to a fine defined in the statute.
9. *Academic institutions may provide additional financial literacy programs for student-athletes wishing to take advantage of NIL opportunities.* This provision would not be required, as it might place an undue burden on the institutions. Individual institutions may shape these programs however they see fit, including outsourcing the responsibility to local financial firms or other institutions.

Constructing broad NIL policies protects athletes' right of publicity by allowing them to exercise autonomy over how they are perceived by the public. It also allows them to profit off their athleticism (in that the value of their NIL is obviously derived from their athletic skill). Furthermore, a national NIL policy

²⁰⁹ However, for example if one sport starts much earlier in the school year than the rest of the sports, the conference/school may arrange it so that the early-starting sport's team has a separate NILRO seminar prior to their season starting, then have a separate one with all the remaining sports teams prior to their seasons starting.

eliminates the motivation to transfer for this reason alone, eliminating the potential “shopping” problem as well as any issues resulting from differing NIL regulations across States.

IV. CONCLUSION

Congress should invoke the Commerce Clause to pass a federal statute establishing uniform NIL regulations for college athletes, as it is the only way to allow students to profit off their abilities without also encouraging gross misuse of the transfer policy. In addition to outlining certain policies that should regulate NIL rights for college athletes, the statute should establish a commission under OPE of the Department of Education that ultimately oversees college athletics and ensures that Congress’s policies are being followed, in addition to passing regulations of its own as it sees fit. Nationalizing NIL law under the right to publicity will ensure that college athletes can have their cake and eat it too—that is, have the college experience and control the exploitation of their personhood.