Belmont Law Review

Volume 11 | Issue 1 | Article 5

11-2023

# Taming the Wild West: The Time is Near for Congress to Intervene in Name, Image, and Likeness Deals for Collegiate Athletes

Bradley Kilborn Kilborn
*Belmont University*

Follow this and additional works at: https://repository.belmont.edu/lawreview

Part of the Education Law Commons, Intellectual Property Law Commons, and the Legal Writing and Research Commons

Recommended Citation
Kilborn, Bradley Kilborn (2023) "Taming the Wild West: The Time is Near for Congress to Intervene in Name, Image, and Likeness Deals for Collegiate Athletes," *Belmont Law Review*: Vol. 11: Iss. 1, Article 5.
Available at: https://repository.belmont.edu/lawreview/vol11/iss1/5

This Student Notes is brought to you for free and open access by the College of Law at Belmont Digital Repository. It has been accepted for inclusion in Belmont Law Review by an authorized editor of Belmont Digital Repository. For more information, please contact repository@belmont.edu.

# TAMING THE WILD WEST: THE TIME IS NOW FOR CONGRESS TO INTERVENE IN NAME, IMAGE, AND LIKENESS DEALS FOR COLLEGIATE ATHLETES

BRADLEY KILBORN*


INTRODUCTION .......... 133

I. BACKGROUND: HOW WE ARRIVED HERE .......... 135

- A. A Brief History of the NCAA .......... 135
- B. Antitrust Challenges and Athlete Pushback .......... 137
  - 1. *NCAA v. Board of Regents* .......... 138
  - 2. *O'Bannon v. NCAA* .......... 141
- C. How *Alston* Changed Everything .......... 144
- D. NCAA Name, Image, and Likeness Guidelines .......... 148

II. CHALLENGES PRESENTED BY LACK OF GUARDRAILS .......... 150

- A. Piecemeal State Legislation .......... 151
- B. The Formation of "Collectives and Directives" .......... 153

III. WHY SHOULD CONGRESS CARE ABOUT COLLEGE ATHLETICS? .......... 157

- A. The Evolution of the Collegiate Athletics Industry .......... 157
- B. Congress's Power under the Commerce Clause .......... 159

IV. WHERE TO START: THE TIME IS NOW FOR CONGRESS TO STEP IN .......... 160

- A. Uniform Regulation of Collectives and Directives to End the "Race to the Bottom" .......... 161
  - 1. *Required Disclosures and Improved Transparency* .......... 163
  - 2. *Compensation Caps* .......... 164

CONCLUSION .......... 165


* J.D. Candidate 2024, Belmont University College of Law; B.B.A. Marketing & Real Estate, University of Georgia, 2016. I would like to thank my wife, Sarah, for her unwavering support throughout this endeavor. I would also like to thank Professor Martin Edwards for his helpful counsel and mentorship. Finally, I would like to thank the Belmont Law Review staff for their professional revision cycles.

## INTRODUCTION

On May 18, 2020, in *Alston v. NCAA*, the United States Supreme Court unanimously held that the National Collegiate Athletic Association (NCAA) violated section 1 of the Sherman Act by enforcing rules that restricted the education-related benefits that its member institutions could offer student-athletes.[1] This decision opened the door for collegiate athletes to begin profiting off their name, image, and likeness (NIL) without risking eligibility. Prior to *Alston*, NCAA rules always prohibited collegiate athletes from receiving traditional wage-like compensation, protecting the amateurism of college athletics.[2] Since *Alston* was decided, the NCAA has almost completely avoided drafting or enforcing any kind of regulation in this brand-new market for college athletes' services.[3] The only guidelines the NCAA enacted in response to the *Alston* decision were: (1) that athletes could not be paid for a "pay-for-play" scheme and (2) each deal had to have a quid pro quo.[4] Theoretically, these rules were designed to prevent schools, collectives,[5] brands, and boosters from inducing recruits to sign with certain schools in return for compensation.[6] All other regulation in this wide-open marketplace has been delegated to states to legislate, which lacks any semblance of uniformity.[7]

The assumption behind this new market was that the "shadow market" of college athletics would be cleaned up, allowing top collegiate athletes to finally profit off their skills in proportion to the value they

---

1. NCAA v. Alston, 141, S. Ct. 2141, 2166 (2021).
2. Robert Litan, *The NCAA's "Amateurism" Rules What's in a Name?*, MILIKEN INST. REV. (Oct. 13, 2022, 10:43 AM), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules [https://perma.cc/23V2-UE8F].
3. Josh Planos, *Stop Boosters From Playing The NIL Game*, FIVETHIRTYEIGHT (Oct. 13, 2022, 10:37 AM), https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/ [https://perma.cc/9FRN-QNC9].
4. Michelle B. Hosick, *DI Board of Directors issues name, image, and likeness guidance to schools*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 9, 2022, 5:21 PM), https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx [https://perma.cc/VP8N-MXAU].
5. NIL Collectives are independent entities that enter contracts with college athletes for the use of their name, image, and likeness. *See* Dennis Dodd, *Inside the World of "Collectives" Using Name, Image, and Likeness to Pay College Athletes, Influence Programs*, CBSSPORTS.COM (Jan. 26, 2022, 1:03 PM), https://www.cbssports.com/college-football/news/college-football-rankings-georgia-near-unanimous-no-1-as-sec-dominates-top-of-2023-preseason-cbs-sports-133/ [https://perma.cc/4CTJ-8U49].
6. Nicole Auerbach, *Schools question whether the NCAA can enforce pay-for-play rules in NIL: 'is there going to be accountability?'*, THE ATHLETIC (Mar. 10, 2022), https://theathletic.com/3173521/2022/03/10/schools-question-whether-the-ncaa-can-enforce-pay-for-play-rules-in-nil-is-there-going-to-be-accountability/ [https://perma.cc/YBQ2-6QKH].
7. Planos, *supra* note 3.

deliver to their academic institutions.[8] While some of this has occurred, the market has run wild without any substantive regulatory guidance.[9] Entities called "collectives" and "directives" have been formed by individual boosters,[10] or a collection of boosters, to create sources of funds to pay college athletes, or, in some circumstances, entire teams.[11] In the absence of a uniform framework, these entities only have to follow newly minted state legislation on NIL, which is constantly changing to make each state the most favorable market for NIL.[12] This lack of national uniformity has turned the entire industry into the "wild west."[13] States are enacting their own regulatory guidelines without any meaningful enforcement.[14] With the NCAA's unwillingness to regulate this space for fear of further antitrust litigation, Congress needs to promulgate legislation that provides a uniform set of rules and structural guidelines for the entire industry. Commissioners from the Southeastern Conference and the Pac-12 have recently lobbied in Washington, D.C., pleading with members of Congress to pass legislation that provides guidance for NIL.[15]

This note proposes a multifaceted approach for congressional intervention in the NIL market. While there are many areas needing NIL regulation in the collegiate athletic market, the most critical area of need for NIL regulation involves the collectives and directives. These entities have formed and operated without any meaningful guardrails since the NCAA permitted student-athletes to be compensated for their NIL. Additionally, they have been able to influence recruiting both at the high school recruit level and in the collegiate athlete transfer portal.

Without meaningful regulation, collectives and directives will continue to influence the flow of top collegiate athletic talent throughout the United States.[16] This note proposes that Congress enact guidelines for these entities to follow to remove corruption from this brand-new market.

---

8. Stephen Godfrey, *Meet the bag man: 10 rules for paying college football players*, BANNER SOC'Y (Apr. 10, 2014, 10:13 AM), https://www.bannersociety.com/2014/4/10/20703758/bag-man-paying-college-football-players [https://perma.cc/N4G2-CFS2].

9. Planos, *supra* note 3.

10. A "booster" is "any third-party entity that promotes an athletics program, assists with recruiting or assists with providing benefits to recruits, enrolled student-athletes, or their family members." *Id.* (citing the NCAA).

11. *Id.*

12. *Id.*

13. Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West'*, SPORTS ILLUSTRATED (DEC. 26, 2022, 12:37 AM), https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west [https://perma.cc/G9TU-AVHZ].

14. Planos, *supra* note 3.

15. Ross Dellenger, *SEC, Pac-12 to Pitch Senate on NIL Legislation, Athletes' Employment Status*, SPORTS ILLUSTRATED (Oct. 13, 2022, 11:34 AM), https://www.si.com/college/2022/05/05/sec-pac-12-commissioners-senate-nil-legislation-athlete-employment-pitch [https://perma.cc/GKU9-ZEZM].

16. Planos, *supra* note 3.

Congress can achieve this goal of creating a fair market through compensation caps and required disclosures from these collectives and directives.

Section I of this note provides context surrounding the NCAA and its historical role within collegiate athletics. It also illustrates *Alston v. NCAA* and how that decision completely shifted the direction of collegiate athlete compensation. Additionally, Section I describes the limited rules the NCAA has enacted in response to NIL compensation.

Section II describes some of the challenges presented by the lack of regulatory "guardrails" surrounding NIL for collegiate athletes, including piecemeal state legislation and the formations of "collectives" and "directives."

Section III details why Congress should preempt state regulation regarding NIL and how it has the power to legislate in this space under the Commerce Clause.

Lastly, Section IV advocates for Congress to intervene and address the challenge with "collectives" and "directives" by requiring disclosures to improve transparency and enacting contribution and expenditure caps.

## I. BACKGROUND: HOW WE ARRIVED HERE

This section will (1) provide contextual background on the history of the NCAA; (2) describe the history of NCAA antitrust litigation; (3) discuss *Alston v. NCAA* and its impact on NIL compensation for college athletes; and (4) describe the current rules the NCAA has created regarding NIL and how it is enforcing them.

### A. A Brief History of the NCAA

The National Collegiate Athletic Association (NCAA) is a private, non-profit, member-led organization.[17] This entity was initially formed in response to the urging of President Theodore Roosevelt.[18] The NCAA, originally named the "Intercollegiate Athletic Association of the United States," was formed to clean up and make uniform the rules of collegiate football.[19] At its inception, college football was played without pads and some teams even used players that were not enrolled at the corresponding university.[20] In its infancy, the NCAA focused primarily on rulemaking for the physical safety of student-athletes.[21] By 1905, college football was

17. *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/7UL2-GGAA].
18. *Id.*
19. *Id.*
20. Litan, *supra* note 2.
21. *Id.*

equally popular as it was violent.[22] Due to highly dangerous plays like the flying wedge,[23] and a lack of sufficient protective equipment, there were numerous fatalities year after year.[24]

College athletics and the public's interest in them began to grow and transition in the late 1930s and early 1940s.[25] There are several factors that led to this growth including the return of deployed soldiers, access to higher education, radios in the majority of homes, and the eventual advent of the television.[26] The first ever televised college football game occurred in 1939 between Waynesburg College and Fordham University.[27] Many commercial ramifications resulted from the growth of public interest in intercollegiate athletics.[28] Until this point, there was minimal recruitment of athletes to universities.[29] However, with the new commercial opportunities provided to winning programs, the competition for recruiting athletes intensified.[30]

In an effort to keep pace with the overall transition and growth of college athletics, the NCAA enacted the "Sanity Code" in 1948.[31] This was the first major development of regulation enacted by the NCAA since its creation.[32] The Sanity Code was designed to "alleviate the proliferation of exploitative practices in the recruitment of student-athletes."[33] This code expanded the NCAA's regulations to include regulation of financial aid, athlete recruitment, and academic standards to ensure amateurism in collegiate athletics.[34] The Sanity Code was a relatively ineffective regulation because the only penalty provided by the regulation was expulsion from the NCAA.[35] In the five years the Sanity Code governed NCAA athletics, this penalty was never imposed.[36]

During the first fifty years of its existence, the NCAA explicitly prohibited any kind of compensation for athletes.[37] "Compensation"

---

22. NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021).
23. *Flying Wedge Formation*, SPORTSLINGO, https://www.sportslingo.com/sports-glossary/f/flying-wedge-formation/ [https://perma.cc/M2P3-AB5L].
24. *Alston*, 141 S. Ct. at 2148.
25. Rodney K Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 13 (2000) (describing the history of college athletics).
26. *Id.*
27. Eric Vander Voort, *The first televised football game was played Sept. 30, 1939*, NCAA (Oct. 1, 2020), https://www.ncaa.com/news/football/article/2019-09-27/first-televised-football-game-was-played-sept-30-1939 [https://perma.cc/AZV3-XC6W].
28. Smith, *supra* note 25, at 14.
29. *Id.*
30. *Id.*
31. History, *supra* note 17.
32. *Id.*
33. Smith, *supra* note 25.
34. *History*, supra note 17.
35. Smith, *supra* note 25, at 14–15.
36. *Id.* at 15.
37. Litan, *supra* note 2.

included scholarships to the universities.[38] In 1956, the NCAA took its first step toward compensating athletes by allowing schools to offer conditional "grant-in-aid" to student-athletes.[39] These conditional grants limited schools to providing funds to student-athletes only for educational expenses (e.g., tuition, rent, and books) and a small amount for incidental expenses (e.g., laundry).[40] However, in 1976, the NCAA reversed direction and disallowed incidental expenses altogether.[41] Since its inception, the NCAA never allowed collegiate athletes to capitalize on their athletic success by accepting endorsement fees or licensing use of their NIL.[42]

### B. Antitrust Challenges and Athlete Pushback

As the commercialization and television broadcast value of collegiate athletics expanded in the 1970s and 1980s, the NCAA created more regulatory rules, expanding its governance power over collegiate athletics.[43] At this time, many universities were apprehensive about shifting viewership from in-person attendance to television broadcasts.[44] The NCAA held all the television broadcasting rights to these universities, so if fans decided to view games on television instead of in person, universities lost ticket revenue.[45] To alleviate this pain-point for their member institutions, the NCAA commissioned a study by the National Opinion Research Center (NORC) to determine the impact of televised games on in-person audiences.[46] Unsurprisingly, the study yielded a result that television coverage greatly reduced live audience attendance.[47]

To address these growing concerns, the NCAA developed a plan of controls.[48] This included regulation that would limit television exposure to only one college football game each week.[49] Additionally, no team would appear on television more than twice throughout the season.[50] Finally, the revenue from the games would be divided among certain schools and the

---

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. Smith, *supra* note 25.
44. Marie Kadlec, *Game Changing Legislation: NCAA Forced to Revise Name, Image, and Likeness Compensation Rules*, 45 NOVA L. REV. 227, 232–33 (2021) (describing NCAA television licensing).
45. *Id.* at 233.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

NCAA.[51] This plan was voted on and approved by all NCAA member institutions, including those that did not even have football programs.[52]

Many institutions were dissatisfied with the new broadcasting rules, especially since universities that lacked football programs had the same voting weight as those that did.[53] In the early 1970s, the NCAA would typically negotiate with two main television networks and enter into a two-year broadcasting deal with one of them.[54] This routine changed in 1977 when the NCAA entered a four-year exclusive broadcasting engagement with the American Broadcasting Company (ABC).[55]

As a result of their dissatisfaction with the new broadcasting deal, popular football universities banded together to form the Collegiate Football Association (CFA).[56] This group of universities decided to disregard the NCAA's four-year broadcasting deal with ABC and market their universities' broadcasting rights to other major networks.[57] Soon after testing the waters, the CFA was offered a lucrative broadcasting deal from the National Broadcasting Company (NBC).[58] Prior to entering the contract with NBC, then-president of the NCAA, James Frank, threatened that if NCAA/CFA members chose to be bound by the NBC contract, they would violate NCAA regulations and their football programs would face penal action.[59] These statements ultimately dissuaded the CFA teams from finalizing the broadcasting contract with NBC.[60] In reaction to the NCAA's threats, the University of Georgia and the University of Oklahoma filed a lawsuit against the NCAA.[61]

### *1. NCAA v. Board of Regents*

In *NCAA v. Board of Regents*, the University of Oklahoma and the University of Georgia filed a lawsuit against the NCAA alleging monopolistic control over televised college football violated the Sherman Antitrust Act.[62] "The Sherman Antitrust Act is a federal antitrust statute [that] prohibits [conduct] that restricts[s] interstate commerce and competition."[63] This act was promulgated to keep companies from

51. *Id.*
52. *Id.*
53. *Id.* at 233–34.
54. *Id.* at 233.
55. *Id.*
56. *Id.*
57. *Id.* at 234.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 234–35.
62. NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 95 (1984).
63. Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11

monopolizing an entire market[64] by preventing companies from entering "contracts, combinations, or conspiracies" that placed an unreasonable restraint on trade.[65]

The first step the court takes in a Sherman Antitrust Act analysis is to determine whether a particular activity is "commercial" in nature.[66] Second, the court considers whether a rule regarding an activity unreasonably restrains trade.[67] In the context of the NCAA, where the product is competitive sports that necessitate "joint activity among individual institutions," courts apply a "rule of reason" analysis to determine whether a rule or restraint is unreasonably anticompetitive.[68] This judicially-created framework involves three distinct burden-shifting steps.[69] The first step is for the plaintiff to show that the rule creates anticompetitive outcomes.[70] If successful, the defendant then bears the burden of proving the rule fosters procompetitive benefits.[71] Finally, the third step shifts the burden back to the plaintiff to show "that the challenged conduct is not reasonably necessary to achieve the legitimate benefits or that comparable procompetitive benefits could be achieved through a less restrictive alternative."[72] Courts are charged with comparing the legitimacy of the pro and anticompetitive outcomes of the rule and determining whether the virtue of the anticompetitive conduct justifies the adverse impact.[73]

In *Board of Regents*, the Supreme Court applied the rule of reason analysis and found that the NCAA's control over how many football games could be broadcasted and at what price the broadcasts could be set was an illegal restraint on trade and a clear illustration of the type of corporate conduct the Sherman Antitrust Act was designed to prevent.[74] The NCAA unsuccessfully argued that its television rule was procompetitive with an ostensibly anticompetitive effect.[75] The issue with the NCAA's television restriction was one of supply and demand.[76] It created an exclusive market for broadcasting rights with a limited amount of buyers.[77] Because the NCAA was the only organization that offered the product (college athletics), it could charge any price it saw fit for the rights to broadcast

---

HARV. J. OF SPORTS & ENT. L. 247, 268 (2020) (describing the Sherman Antitrust Act analysis).

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 268–69.
72. *Id.* at 269.
73. *Id.*
74. NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).
75. *Id.* at 114.
76. *Id.*
77. *Id.* at 114–15.

college football.[78] Without member organizations having the right to negotiate their own broadcasting rights, the NCAA was able to price-fix college football broadcasting rights without any valid justification for doing so.[79]

The central issue in the Court's analysis was whether the NCAA's price-fixing practices were unreasonable.[80] The NCAA argued that the rules were reasonable because its goal was to promote a "competitive balance" among its member institutions.[81] Both the schools with and without football programs were bound by the same broadcasting rules, essentially restricting a source of revenue that was more crucial to some institutions than others.[82] The Court found that the NCAA failed to present evidence that those broadcasting rules promoted any greater balance among the football and non-football member institutions and that there were more effective ways to promote a competitive balance and maintain amateurism within college athletics.[83]

In sum, the Court affirmed the lower court's decision that the NCAA violated the Sherman Antitrust Act by unreasonably restraining competition through its restrictions on television contracts.[84] While the Court's holding was forthright, Justice White's dissent included further dicta that the NCAA has relied upon to justify its denial to compensate college athletes, including restricting athletes from being compensated for their NIL:

> One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives."[85]

Additionally, in the majority opinion, Justice Stevens highlighted the NCAA's need to be afforded "ample latitude" to create a policy that maintains the integrity of the student-athlete.[86] In furtherance of this dicta,

---

78. *Id.*
79. *Id.*
80. *Id.* at 98.
81. *Id.* at 117.
82. *Id.* at 119.
83. *Id.*
84. *Id.* at 120.
85. *Id.* at 123 (White, J., dissenting) (quoting Kupec v. Atl. Coastal Conf., 399 F.Supp. 1377, 1380 (M.D.N.C. 1975)).
86. *Id.* at 120.

Justice Stevens stated, "[I]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[87] Ultimately, the Court left the decision of whether restriction of collegiate athlete compensation violated the Sherman Antitrust Act to be determined in the future, so the NCAA continued with its definition of amateurism that collegiate athletes could not be compensated.[88]

Following the Court's decision in *Board of Regents*, federal courts further endorsed the NCAA's definition of amateurism in a string of cases.[89] In *Jones v. NCAA*, a United States district court upheld the NCAA's declaration of ineligibility of a hockey player due to his violation of the NCAA's amateurism rules.[90] Fifteen years after that decision, in *Gaines v. NCAA*, another district court upheld the NCAA's declaration of ineligibility of a college football player that declared for the National Football League (NFL) draft but was not drafted.[91] In that opinion, the court supported its holding by stating, "most regulatory controls of the NCAA [which] are justifiable means of fostering competition among amateur teams and therefore procompetitive because they *enhance public interest* in intercollegiate athletics."[92] Finally, in the Fifth Circuit opinion of *McCormack v. NCAA*, the court affirmed the district court's dismissal of a claim that the NCAA violated antitrust laws by promulgating and enforcing rules restricting benefits awarded to student-athletes.[93] Here, the Fifth Circuit reasoned that the NCAA's amateurism requirements "reasonably furthered" its goals of integrating athletics with academics, thus distinguishing itself from professional sports and surviving in the face of commercial pressures.[94] These cases set the stage for *O'Bannon v. NCAA*.

### 2. *O'Bannon v. NCAA*

In 2008, former UCLA All-American basketball star Ed O'Bannon discovered that his image was being used in a college basketball video game produced by Electronic Arts (EA).[95] The avatar that O'Bannon claimed to look like visually resembled him, played for UCLA, and even wore his number, 31.[96] O'Bannon was shocked to realize his image was

87. *Id.*
88. *Id.*
89. Michael D. Fasciale, *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, 904 (2022) (describing the history of NCAA antitrust challenges).
90. *See* Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975).
91. *See* Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).
92. *Id.* at 747 (alteration in original) (emphasis added) (quoting NCAA v. Bd. of Regents of Univ. of Okla, 468 U.S. 85, 117 (1984)).
93. *See* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
94. *Id.* at 1345.
95. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
96. *Id.*

being used in this manner, as he never consented or was compensated for the use.[97] A year after this discovery, O'Bannon sued the NCAA and Collegiate Licensing Company (CLC) for licensing his image to EA while not compensating him due to the NCAA's amateurism rules.[98] Similar to other suits against the NCAA over the years, he claimed that the NCAA violated Section 1 of the Sherman Antitrust Act by restraining student-athletes from being compensated for the use of their NILs.[99]

Around this same time, Sam Keller brought a class-action lawsuit against the NCAA and EA games.[100] Keller, a former quarterback for Arizona State University, alleged that EA had "impermissibly used student-athletes' NILs in its video games and that the NCAA had wrongfully turned a blind eye to EA's misappropriation of these NILs."[101] Similar to O'Bannon's discovery, Keller found that in the 2005 edition of EA's college football video game, the starting quarterback for Arizona State University had the same hair tone and skin color as he did, wore the same jersey number as Keller, and was from the same hometown.[102]

These two cases were consolidated in pretrial proceedings and sought relief from the court to determine the issue under the Sherman Antitrust Act of "whether the agreement to prevent such payments to athletes for their NILs was an unreasonable restraint of trade."[103] At the time of these cases, the NCAA's bylaws prohibited the use of NIL of student-athletes for commercially exploitable purposes.[104] The NCAA defended its contract with EA by claiming that its agreement prohibited EA's use of any names or pictures of current student-athletes.[105] Additionally, it denied any similarity between the avatars in the games and any student-athletes.[106] Nevertheless, upon further research, the court concluded that the games undeniably used the student-athletes' images in developing the games.[107] Evidence was presented that EA even sent detailed questionnaires to collegiate athletic department equipment staffs to recreate players' unique appearances.[108] The only part missing in these games was the players' names, but EA also provided a way for users to import team rosters to the game so that the players' names could be

---

97. *Id.*
98. *Id.*
99. *Id.*
100. Keller v. Elec. Arts Inc., 724 F.3d 1268, 1272 (9th Cir. 2013).
101. *Id.* at 1271–72.
102. *Id.* at 1272.
103. *O'Bannon*, 724 F.3d at 1055.
104. *Id.*
105. *Keller Sues EA Over Images*, ESPN: NCAAF (May 8, 2009, 3:52 AM), https://www.espn.com/college-football/news/story?id=4151071 [https://perma.cc/E8ZX-PPCH].
106. *Id.*
107. *Keller*, 724 F.3d at 1271.
108. *Id.*

attached to their avatars.[109] At trial, Keller's attorney voiced his displeasure with the misappropriation of his client's NIL by pointing out, "[T]he NCAA says you can't profit from your likeness . . . [then] they do the wink and the nod when EA Sports presents them with the game, which has the likeness of the player."[110]

Although it is evident that the athletes' images were improperly used, the Ninth Circuit's ruling was limited to whether the NCAA's prohibition of athletes to be compensated for their NIL was a violation of the Sherman Antitrust Act.[111] Ultimately, the court found that while "the NCAA's rules had been more restrictive than necessary to maintain its tradition of amateurism," it held that preserving amateurism had procompetitive benefits to distinguish collegiate athletics.[112] Although the collegiate athletes did not win in *O'Bannon*, this case established that future student-athletes "will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL."[113]

It is worth noting that at the time of *O'Bannon*, EA was also producing popular games for the NBA and NFL.[114] The distinction between the use of the players' images in those games versus the NCAA games was that EA paid the players' unions for the NBA and NFL approximately $50 million to be the exclusive manufacturer of those video games.[115] Presumably, EA negotiated a similar deal with the NCAA to be the exclusive manufacturer for its games.[116] The NCAA ultimately settled the litigation with the *Keller* class for $20 million.[117] That money was distributed to the student-athletes who attended certain institutions during the years the game was sold.[118] The NCAA's restrictive floodgates preventing student-athletes from being compensated appeared to be fracturing.

109. *Id.*

110. *Keller Sues EA Over Images*, *supra* note 105.

111. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015).

112. *Id.* at 1079.

113. *Id.* at 1070.

114. John Gaudiosi, *Madden: The $4 billion video game franchise,* CNN: BUS. (Oct. 14, 2022, 12:30 PM), https://money.cnn.com/2013/09/05/technology/innovation/madden-25/index.html [https://perma.cc/7QQ7-M3JH].

115. *See id.*

116. *See* Andy Hutchins, *EA Sports May Lose Exclusive NCAA License: What Does It Mean?* SBNATION (June 24, 2012, 9:16 AM), https://www.sbnation.com/ncaa-football/2012/7/24/3180980/ea-sports-exclusive-ncaa-football-license-lawsuit [https://perma.cc/XRB2-5URC](referring to EA's deal with the NCAA as "exclusive").

117. *NCAA reaches settlement in EA video game lawsuit,* NCAA (June 9, 2014, 10:53 AM), https://www.ncaa.org/news/2014/6/9/ncaa-reaches-settlement-in-ea-video-game-lawsuit.aspx#:~:text=The%20settlement%20will%20award%20%2420,years%20the%20games%20were%20sold [https://perma.cc/ES3E-UCZB].

118. *Id.*

### C. How *Alston* Changed Everything

In the face of repeated challenges of anticompetitive practices regarding collegiate athlete compensation, the NCAA was unyielding in its stance that compensation violated the "amateurism" of college athletics. Until it was required, the NCAA was unwilling to even consider whether college athletes could be compensated, and if so, how to regulate that process. On March 30, 2021, in *NCAA v. Alston*, the United States Supreme Court held that the NCAA and its more than 1,200 member institutions violated the Sherman Act by limiting how much each school could compensate athletes for academic-related expenses.[119]

In *Alston*, a class of current and former student-athletes, made up from Division-I Football Bowl Subdivision (FBS) and men's and women's basketball, filed a class action against the NCAA.[120] The class challenged the NCAA's current set of rules that limited the compensation student-athletes could receive for their services, and alleged that these rules violated the Sherman Act.[121] This case made its way to the United States Supreme Court by way of the Northern District of California and the Court of Appeals for the Ninth Circuit.[122]

During a ten-day bench trial, the district court evaluated the uncontested evidence that the NCAA and its conferences agreed to compensation limits on student-athletes and enforced these limits by punishing violators.[123] Additionally, the district court noted that these limits "affect interstate commerce."[124] The NCAA's argument was not that it did not make and enforce these limits, which were effectively a horizontal restraint in the industry, but rather that it did so in order to preserve "amateurism."[125] Typically, horizontal price fixing, like in *Board of Regents,* is per se illegal.[126] However, in *Alston,* the Court decided to use a rule of reason analysis because some degree of horizontal restraint is essential in college athletics if the product is to exist.[127] In applying the rule of reason, the court found that the NCAA and its member institutions have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance."[128] Consequently, the court determined that NCAA's compensation limits created anticompetitive effects in the market.[129]

---

119. *See* NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).
120. *Id.* at 2151.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *See id.*
126. *Id.* at 2157.
127. *Id.*
128. *Id.* at 2152.
129. *Id.*

To overcome this anticompetitive effect, the NCAA had the burden to show its procompetitive justifications for its restraints.[130] To satisfy this burden, the NCAA argued that its restrictions "help[ed] increase output in college sports and maintain a competitive balance among teams" and that its rules "preserve[d] amateurism, which in turn widen[ed] consumer choice by providing a unique product – amateur college sports as distinct from professional sports."[131] The district court rejected both of these contentions, noting that nowhere in the NCAA's definition of amateurism does it claim that consumers insist upon it, and that the NCAA failed to establish that the effect of the compensation rules had any direct connection to consumer demand.[132] Ultimately, the district court found that the NCAA could exercise a less restrictive policy to achieve the same procompetitive effects.[133] It enjoined the NCAA from restricting educational forms of compensation alone, but did not go so far to say that collegiate athletes could be compensated for anything outside of education-related expenses.[134]

Both sides appealed the district court's decision.[135] The class of athletes argued that the court did not go far enough and that it should have enjoined the NCAA from restricting all forms of student-athlete compensation, regardless of its relation to education.[136] Meanwhile, the NCAA argued that the court went too far with its injunction by weakening the restraints the NCAA had over education-related benefits and compensation. The Court of Appeals for the Ninth Circuit ultimately affirmed in full, holding that "[T]he district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student Athletes and serves the procompetitive purpose of preserving the popularity of college sports."[137]

The NCAA was the only party that appealed the decision a second time.[138] After reviewing the record in full, the United States Supreme Court identified only one antitrust issue between the two parties: whether the NCAA's admitted horizontal price fixing, in a market where it exercises monopoly control, is a violation of the Sherman Antitrust Act.[139]

On final appeal, the NCAA's principal argument was that the lower courts erred in their decision to subject the NCAA's compensation restrictions to a rule of reason analysis.[140] The NCAA argued that the

130. *Id.* at 2160.
131. *Id.* at 2152.
132. *See id.*
133. *Id.* at 2153.
134. *Id.*
135. *Id.* at 2154.
136. *Id.*
137. *Id.*
138. *See id.*
139. *Id.*
140. *Id.* at 2155.

courts, at most, should have evaluated the restrictions under an "abbreviated deferential view."[141] The NCAA mainly justified this contention that, as a joint venture, it needed the ability to collaborate effectively with its members if it was to offer consumers the benefit of collegiate athletics.[142] Regardless of whether the NCAA was a joint venture, the Court noted that most restraints challenged under the Sherman Act, including joint venture restrictions, still required a rule of reason analysis.[143] A rule of reason analysis has been defined as "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition."[144] Under this analytical framework, the Court agreed with the lower courts that the compensation restrictions did not further extend benefits to the consumer of collegiate athletics that could not be obtained using less restrictive means.[145]

Next, the NCAA argued that even if the background antitrust principles favored the rule of reason analysis, the precedent from *Board of Regents* binds the Court to allow these restrictions. In upholding its anticompetitive practices, the NCAA has often relied on the passage from *Board of Regents,* stating:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[146]

Again, the Court did not find this argument persuasive, reasoning that the passage did not suggest that courts are required to reject all challenges to NCAA compensation restrictions.[147] The Court further highlighted that student-athlete compensation rules were not even at issue in *Board of Regents*.[148] Ultimately, the Court unanimously found none of the NCAA's arguments persuasive, and affirmed the lower courts' injunction on education-related compensation. However, the court noted that this decision did not prevent the NCAA from restricting compensation from "sneaker companies, auto dealerships, boosters, or anyone else."[149] Justice Kavanaugh's concurrence, however, indicated otherwise.

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 2164.
146. NCAA v. Bd. of Regents of U. of Oklahoma, 468 U.S. 85, 120 (1984).
147. *Alston*, 141 S. Ct. at 2157.
148. *Id.* at 2158.
149. *Id.* at 2164.

While the majority's opinion enjoined the NCAA from restricting education-related compensation of student-athletes, it is Justice Kavanaugh's strongly worded concurrence that has had the largest impact on NIL compensation for college athletes.[150] In his concurrence, Justice Kavanaugh made three main points.[151] First, he pointed out that the Court did not address the legality of the NCAA's other compensation restrictions solely because that issue was not raised on appeal by the student-athletes.[152] Second, regarding the Court's established "rule of reason" for challenges of the NCAA's compensation restrictions,[153] Justice Kavanaugh again dismissed the NCAA's contention that *Board of Regents* had precedence in the Court's analysis of compensation restriction challenges, labeling it dicta that had no bearing on whether the NCAA's compensation rules were lawful.[154] Finally, Justice Kavanaugh alluded to the fact that there were serious questions of whether the NCAA's remaining rules regulating athlete compensation could pass rule-of-reason muster.[155] He classified the NCAA's compensation rules as "circular and unpersuasive."[156] Justice Kavanaugh continued under this last point to state, "[N]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. . . . The NCAA is not above the law."[157]

In *Alston*, the Supreme Court did not have the chance to scrutinize the NCAA's other compensation restrictions unrelated to education, but its decision "laid the groundwork for the dismantling of those rules in future proceedings."[158] Less than six months after the *Alston* decision, the NCAA voted to allow student-athletes to receive compensation in exchange for their NIL.[159] It was not a coincidence that the NCAA removed its restriction for NIL shortly following the *Alston* decision.[160] Between the majority decision and Justice Kavanaugh's concurrence, the writing was on the wall that the NCAA's other compensation restrictions were ripe for further antitrust contest.[161]

---

150. *See id.* at 2167 (Kavanaugh, J., concurring).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2169.

158. Case Comment, *NCAA v. Alston*, 135 HARV. L. REV. 471, 475 (2021).

159. *See* Michelle B. Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (Jun. 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/FA58-2N74].

160. Case Comment, *supra* note 158, at 471.

161. *See generally Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

### D. NCAA Name, Image, and Likeness Guidelines

Monumental changes arrived quickly following the *Alston* decision. The first major change the NCAA implemented was actually unrelated to student-athlete compensation, but rather concerned transfer rules.[162] Historically, the NCAA required any student-athlete that transferred to another school to sit out for one full athletic season, with the only exception applying to graduate transfers.[163] However, on April 14, 2021, less than a month after the *Alston* decision, the NCAA amended its transfer rules to allow each student-athlete to transfer one time in college without having to sit out for an entire season.[164] Some commentators negatively perceived this amendment, comparing collegiate athletes to professional "free agents," but the general consensus supported this change.[165] If coaches have the ability to move freely throughout the collegiate landscape, why should athletes be stuck with a new coaching staff that did not recruit them?

Soon after the NCAA adopted a one-time transfer exemption, it took another step forward in revising its policies to reflect the new reality of collegiate athletics post-*Alston*.[166] On July 1, 2021, less than six months after the *Alston* decision, the NCAA adopted a uniform interim policy that suspended NCAA NIL rules for all incoming and current student-athletes.[167] Historically, NIL related to an individual's right of publicity, which could be further defined as "the right of individuals to control the deployment of their identity and association in commerce."[168] The NCAA's new policy enabled student-athletes to now profit off their NIL, a practice that was explicitly prohibited throughout the history of the NCAA.[169] This new policy was more of an annulment of previous regulations than a well-formed directive for NIL compensation of collegiate athletes.[170] The general framework of the interim policy allowed athletes to be compensated for

---

162. *See* David Cobb, *NCAA Board of Directors ratifies one-time transfer legislation allowing athletes immediate eligibility*, CBS SPORTS (Apr. 28, 2021, 5:31 PM), https://www.cbssports.com/college-football/news/ncaa-board-of-directors-ratifies-one-time-transfer-legislation-allowing-athletes-immediate-eligibility/ [https://perma.cc/4PRD-ZGAA].

163. *See* Alex Kirshner, *NCAA transfer rules, explained quickly and honestly*, SBNATION (May 9, 2018, 8:08 AM), https://www.sbnation.com/college-football/2018/5/9/17311748/ncaa-transfer-rules-change-guide-list-sit-out [https://perma.cc/TVM6-TQE8].

164. Cobb, *supra* note 162.

165. *See id.*; *see also* Emily Montano, *NCAA's new transfer rule is game-changing for college athletes*, THE POLY POST (Jan. 31, 2023), https://thepolypost.com/sports/2023/01/31/ncaas-new-transfer-rule-is-game-changing-for-college-athletes/ [https://perma.cc/ZF6M-84KS] (quoting Christie Joines, Assistant Athletic Director for Compliance & Internal Relations at California State Polytechnic University, Pomona, who described the transfer portal as helping "both the coach, the institution, and the student-athlete").

166. Hosick, *supra* note 159.

167. *Id.*

168. *Name, Image and Likeness (NIL)*, THE UNIVERSAL MKTG. DICTIONARY, https://marketing-dictionary.org/n/name-image-and-likeness-nil/ [https://perma.cc/7WB5-33A9].

169. *See* Hosick, *supra* note 159.

170. *See id.*

their NIL but gave little, if any, guidance on how athletes and institutions could move forward with this drastic change in direction.[171] Other than expressly permitting NIL compensation, the NCAA stated that it still preserved the previous regulations prohibiting this compensation to be tied to any pay-for-play or improper inducements for choosing to attend or remain at a certain school.[172] This essentially meant that the NCAA was allowing student-athletes to be compensated for their NIL, but this compensation could not relate in any manner to an athlete attending or remaining as a student-athlete at any particular school.[173] Other than these few stipulations, the NCAA delegated the rest of regulation of this industry to state governments,[174] likely due to the apprehension of further antitrust lawsuits against the NCAA related to student-athlete compensation.[175] Mark Emmert, President of the NCAA, alluded to this following the enactment of this interim policy:

> With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment — both legal and legislative — prevents us from providing a more permanent solution and the level of detail student-athletes deserve.[176]

Since the NCAA enacted its interim policy in the summer of 2021, twenty-nine states have passed legislation regulating how student-athletes can monetize their NIL.[177] The combination of the NCAA's interim policy and state legislation has governed the NIL space since its inception.[178] The only additional update the NCAA has provided since enacting the interim policy is revising its definition of "booster" to include NIL "collectives" and "directives."[179] The categorization of these "booster" entities resulted from the NCAA's newfound NIL compensation framework.[180] A booster's purpose is to "funnel name, image, and likeness deals to prospective student-athletes or enrolled student-athletes who might be considering

171. *See id.*
172. *Id.*
173. *See id.*
174. *See id.*
175. *See id.*
176. *Id.*
177. Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, SQUIRE PATTON BOGGS (Jul. 12, 2022), https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/#:~:text=State%20Law%20Addressing%20NIL,name%2C%20image%2C%20and%20likeness [https://perma.cc/5SDJ-M4JR].
178. *See generally* Hosick, *supra* note 4.
179. *See id.*
180. *See id.*

transferring."[181] The NCAA's rules explicitly preclude boosters from recruiting or providing benefits to prospective student-athletes; theoretically, collectives and directives are similarly barred from these inducements.[182] These collectives are ostensibly paying athletes for some sort of service, but any kind of recruitment that is included in these deals is technically a NCAA violation.[183] Enforcement of these policies depends on self-reporting, and thus far, no athlete, institution, or collective has been penalized for rule violations.[184]

The combination of the newly enacted leniency for transfers with the advent of collectives and directives pooling money together to recruit players has proven to be a significant issue throughout college athletics. Even though the NCAA *explicitly* prohibits collectives and directives from inducing athletes to sign with schools out of high school or transfer to another university, these entities are operating at all levels of athlete recruitment.[185] This has proven to be a substantial problem for coaches to both recruit athletes out of high school as well as retain continuity in their rosters year after year.[186] In 2022, twenty-five percent of all FBS Division I football players entered the transfer portal and many of them were lured there by collectives and directives promising future earnings if players transfer to their institutions.[187]

## II. CHALLENGES PRESENTED BY LACK OF GUARDRAILS

This section examines the various challenges presented by the NCAA's haphazard NIL guidance. First, it provides examples of current NIL state legislation and discusses the problems with this piecemeal legislation. Next, it describes the formation of "collectives" and "directives" and the unique challenge they present throughout the landscape of collegiate athletics.

---

181. *Id.*

182. *Id.*

183. *Id.*

184. Auerbach, *supra* note 6.

185. *See* Pete Nakos, *What are NIL Collectives and how do they operate?*, ON3 (Jul. 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/ [https://perma.cc/T6AE-XMEN].

186. *See id.*

187. *See id.; see also* ESPN Staff, *College football transfer portal tracker for 2023: Updates*, ESPN (Dec. 8 2022), https://www.espn.com/college-football/story/_/id/35010801/college-football-transfer-portal-tracker-2023-latest-updates-news-rumors-commits [https://perma.cc/T4FM-85GN].

### A. Piecemeal State Legislation

The NCAA has continued to operate under its interim policy regarding student-athlete compensation since *Alston* was decided in 2021.[188] Under this policy, the NCAA decided the best way to comply with the *Alston* decision and avoid further antitrust litigation regarding student-athlete compensation was to relinquish almost all regulatory authority to the states.[189] Other than the general guidelines that (1) athletes could not be paid for a "pay-for-play" scheme and (2) each deal had to have a quid pro quo, the NCAA's interim policy deferred to state legislation for further regulation.[190] Thus far, this policy has proven to be highly ineffective.[191] As one could likely predict, states now compete against each other to promulgate the most attractive legislation for student-athlete compensation, with some states deciding to do nothing further than adhering to the NCAA's interim guidelines.[192] Similar to state corporation law, this has led to states "racing to the bottom" to enact the most student-athlete-friendly legislation, thus attracting the top recruits to their state's institutions.[193] Navigating this piecemeal state regulation of student-athlete compensation has proven to be a challenge for student-athletes, coaches, athletic conferences, and universities.[194]

To date, twenty-nine states have passed legislation regulating how student-athletes can profit off their NIL.[195] Common restrictions in these laws focus on limiting the length of contracts to lengths that do not exceed the time a student-athlete can participate in college sports, and restricting NIL activity from ties to athletic performance (reaffirming the NCAA's prohibition on pay-for-play).[196] Loosely enforced, if at all, these laws provide some kind of general guidance and protection for student-athletes legally exercising their NIL rights.[197] However, many of these laws are as student-athlete-friendly as possible.[198] This is a major concern among NIL critics.[199] Some critics argue that a particular state's NIL law could be the determinative factor on whether a student-athlete chooses to attend a school

---

188. *See* Hosick, *supra* note 159.

189. *See id.*

190. *See id.*

191. Cody Orr, *NIL Hurts College Athletics. Here's How We Fix It*, SBNATION (May 23, 2022, 8:00 AM), https://www.ourdailybears.com/2022/5/23/23055991/nil-hurts-college-athletics-heres-how-we-fix-it [https://perma.cc/9ZR6-L5R6].

192. Nsouli & King, *supra* note 177.

193. *See id.; see generally* Daniel R. Fischel, *Race to the Bottom Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. UNIV. L. REV. 913 (1981) (discussing states competing for the most attractive corporation law).

194. Nsouli & King, *supra* note 177.

195. *Id.*

196. *Id.*

197. *See* Hosick, *supra* note 159.

198. Nsouli & King, *supra* note 177.

199. *Id.*

within that state as opposed to a school in another state that has a less restrictive NIL law.[200]

Alabama provides a wonderful example of this theory.[201] While *Alston* was being argued, Alabama passed its own NIL legislation.[202] It did so prior to the NCAA introducing its interim policy governing NIL.[203] Many states, including Alabama, predicted that this policy would be more restrictive than it was.[204] To Alabama's surprise, its NIL legislation was actually more restrictive than the NCAA's interim policy.[205] Ultimately, this led Alabama to repeal its NIL law and simply follow the NCAA's interim policy.[206] According to a state representative, Alabama repealed its NIL law because it thought its more restrictive policy would put its in-state institutions at a disadvantage in the recruiting process.[207]

Alabama is not the only state to revise its early NIL legislation. Louisiana, Mississippi, Missouri, Tennessee, and South Carolina, all states that house institutions that compete in the Southeastern Conference (which many believe to be the premier football conference in the country),[208] have all either amended or suspended their NIL laws.[209] Specifically, at the urging of Louisiana State University, Louisiana amended its NIL legislation to allow coaches and school personnel to facilitate NIL deals for student-athletes.[210] Governor Bill Lee of Tennessee recently signed legislation that allows universities to have direct, public relationships with "collectives."[211]

"Collectives" have been described as a school-specific fund "made up of deep-pocketed fans and alumni."[212] These funds operate by aggregating money from fans and alumni and distributing it to student-athletes for NIL activities.[213] Again, although the NCAA's interim policy

---

200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *See* Andy Staples and Nicole Auerbach, *After adding Oklahoma and Texas, what is the SEC's endgame? The rest of the NCAA fears a super league*, THE ATHLETIC (Jul. 29, 2021), https://theathletic.com/2737943/2021/07/29/after-adding-oklahoma-and-texas-what-is-the-secs-endgame-the-rest-of-the-ncaa-fears-a-super-league/ [https://perma.cc/V27J-5R5U].
209. *See* Jeremy Crabtree, *New York representatives say NIL bill would ban collectives*, ON3 (Jun. 7, 2022), https://www.on3.com/nil/news/new-york-representatives-say-nil-bill-would-ban-collectives/ [https://perma.cc/NAH5-4DCY].
210. *Id.*
211. Adam Sparks, *How new Tennessee law allows colleges to facilitate NIL payments to players*, KNOXVILLE NEWS SENTINEL (Apr. 25, 2022, 3:49 PM), https://www.knoxnews.com/story/sports/college/university-of-tennessee/2022/04/26/tennessee-nil-law-allows-colleges-facilitate-payments-vols-vanderbilt-memphis/7423300001/ [https://perma.cc/QJ2M-47X3].
212. Crabtree, *supra* note 209.
213. *Id.*

governing NIL and most states' NIL laws *explicitly* prohibit "pay-for-play" deals, coaches and NCAA leadership say these collectives are using money to induce recruits to attend their institutions.[214] Overall, this patchwork of state law and the NCAA's interim policy seem to be ambiguous and confusing as to who is actually responsible for the enforcement of these rules.[215]

### B. The Formation of "Collectives and Directives"

Thirty-five years ago, Southern Methodist University (SMU) was given the "death penalty" by the NCAA for repeated and blatant recruiting violations by compensating student-athletes on its football team.[216] SMU's punishment included significant scholarship bans as well as prohibiting SMU's football program from competing for multiple years.[217] "Thirty-five years later, many of the NCAA-described improper benefits given to SMU athletes—cars, housing, and cash—are now distributed to players and promised to prospects in exchange for appearances, a few tweets and some commercials."[218] Interestingly enough, this type of formerly-prohibited athlete compensation is now permitted by the same governing body.[219]

Traditional NIL brand endorsement was the type of use that the NCAA had in mind when it expressly permitted student-athletes to be compensated for their NIL.[220] The argument was strong for these student-athletes to have the ability to profit off their NIL: star collegiate athletes brought immense value to their institutions, thus they should participate in the share of monetary value.[221] Names like Tim Tebow and Johnny Manziel would constantly arise in this context. It is estimated that, in 2015, Johnny Manziel brought Texas A&M media exposure worth $37 million, none of which he was entitled to receive.[222] Few, if any, would still argue that

214. *Id.*; Hosick, *supra* note 159.

215. *See* Josh Moody, *Lack of Clear-Cut NCAA Rules Creates Confusion About NIL*, INSIDE HIGHER ED (Jan. 3, 2022), https://www.insidehighered.com/news/2022/01/04/lack-clear-ncaa-rules-creates-confusion-around-nil [https://perma.cc/Q4DP-QVUB].

216. *See* Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), https://time.com/3720498/ncaa-smu-death-penalty/ [https://perma.cc/9DLD-X4L9].

217. *Id.*

218. Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting [https://perma.cc/2V8S-5HEC].

219. *Id.*

220. *See* Hosick, *supra* note 159.

221. Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L. J. 226, 228 (2004) (discussing why student-athletes should be compensated).

222. Jon Terbush, *How much money has Texas A&M made off Johnny Manziel?*, THE WEEK (Jan. 8, 2015), https://theweek.com/articles/461371/how-much-money-texas-made-johnny-manziel [https://perma.cc/H6FG-DYAB].

Manziel should not be compensated for his NIL by endorsing brands, from local restaurants and car dealerships in College Station to national household brands. However, as one might have predicted, without any real guardrails for what constitutes NIL, and states defining what NIL means for their universities, the waters have muddied.[223]

It may come as no surprise that in this brand-new industry that lacks any meaningful regulation or enforcement, market participants have acted creatively under the umbrella of NIL.[224] Within one year of the NCAA enacting its interim policy allowing student-athletes to be compensated for their NIL, groups of boosters, alumni, and high net-worth individuals have formed entities called "collectives" and "directives."[225] These groups have been described as pools of money that have been aggregated to funnel compensation to student-athletes that operate under the guise of NIL.[226]

Collectives primarily fall into two categories: marketplace collectives and donor-driven collectives.[227] A marketplace collective is essentially a middleman between businesses and college athletes.[228] It is a platform that can help facilitate traditional NIL endorsement deals between student-athletes and companies seeking their endorsements.[229] Donor-driven collectives are funded by donations from individual boosters.[230] These donations can be one-time or subscription-based.[231] Once this type of collective is funded, it can distribute its funds to student-athletes as it sees fit.[232] In return for payment from donor-backed collectives, athletes typically perform small services such as participating in autograph signings or exclusive interviews.[233]

It is estimated that there are more than one hundred collectives operating across the country.[234] Some of these funds have already raised over $5 million to distribute to student-athletes at their respective schools.[235] As long as these entities follow the NCAA's interim policy and

223. Dellenger, *supra* note 218.

224. *Id.*

225. *Id.*

226. *Id.*

227. Jared Yaggie, *The New Wild West: An Update to the Existing NIL Environment in College Sports*, 91 CIN. L. REV. (Oct. 4, 2022), https://uclawreview.org/2022/10/04/an-update-to-the-existing-nil-environment/ [https://perma.cc/LDM3-Q7GK].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Abigail Gentrup, *Task Force Reportedly Aims To Crack Down on NIL Collectives*, FRONT OFFICE SPORTS (May 4, 2022 7:32 PM), https://frontofficesports.com/task-force-reportedly-aims-to-crack-down-on-nil-collectives/ [https://perma.cc/L3YF-BSVN].

235. Ross Dellenger, *Task Force to Big-Money Boosters: NIL Sanctions Could Be Coming,* SPORTS ILLUSTRATED (May 3, 2022), https://www.si.com/college/2022/05/03/task-

state law, their activities are permitted.[236] In most states, all this means is that they cannot induce student-athletes to come to individual schools, and a student-athlete must perform some kind of service in return for compensation.[237] States differ in what they permit collectives to do, but as previously noted, the popular trend is to allow them to work directly with athletic departments.[238] Again, compliance with many states' NIL legislation can be as simple as collectives paying student-athletes to post on their social media accounts or appear for an autograph signing.[239] In return for these minimal services, collectives are paying out tens of thousands to groups of athletes, or sometimes, entire teams.[240] For example, Texas's Clark Field Collective is paying every offensive lineman on scholarship $50 thousand annually, ostensibly in exchange for the collective's "charitable work."[241] This appears to be  more akin to a payroll than NIL endorsement.

Darren Heitner is a Florida attorney who helped craft the state's NIL legislation as well as founded a collective for the University of Florida.[242] He has worked on hundreds of NIL deals with student-athletes to date.[243] Heitner described the contracts between student-athletes and collectives to be more standardized than contracts between brands and student-athletes, which can be an additional point that equates student-athletes more as employees of the collectives than endorsers of their product or service.[244]

These collectives and directives have proven particularly challenging for the NCAA and state legislatures to regulate.[245] Val Ackerman, a member of the NCAA's NIL subcommittee and Big East Commissioner, has been quoted saying, "[W]e didn't envision packs of donors banding together to create pools of money they would spend, in some cases, indiscriminately."[246] Additionally, in May 2022, a survey among athletic directors was conducted in which 90% said they were concerned about collectives using NIL payments as improper recruiting inducements.[247]

---

force-to-big-money-boosters-nil-sanctions-could-be-coming [https://perma.cc/MFE2-EACV].

236. Auerbach, *supra* note 6.

237. *Id.*

238. Crabtree, *supra* note 209.

239. Auerbach, *supra* note 6.

240. *Id.*

241. Gentrup, *supra* note 234.

242. Planos, *supra* note 3.

243. *See* Pete Nakos, *From collectives to athletes: How Darren Heitner has pushed forward NIL landscape*, ON3 (June 13, 2022), https://www.on3.com/nil/news/darren-heitner-nil-name-image-likeness-lawyer-florida-legislation-gators-football-collective-cavinder-twins/ [https://perma.cc/9R72-R4Q5].

244. Planos, *supra* note 3.

245. *Id.*

246. *Id.*

247. *Id.*

One directive that has garnered significant attention thus far is run by Florida billionaire John Ruiz.[248] His directive works almost exclusively with University of Miami student-athletes whom he compensates for endorsing his two companies: LifeWallet and Cigarette Racing.[249] Thus far, Ruiz has been very public about the $10 million he expects to spend in 2023, working with more than one hundred University of Miami student-athletes.[250] One of Ruiz's deals involved the highest profile transfer in college basketball coming to the University of Miami.[251] Once the student-athlete signed with Miami, Ruiz signed him to a contract that provided him a car and $400 thousand annually.[252] Technically, Florida state law does not permit schools to be involved with NIL deals or with collectives and directives.[253]

Another NIL arrangement that has received considerable attention is Built Bar's deal with walk-on football players at Brigham Young University (BYU).[254] Currently, the state of Utah does not restrict any NIL endorsement deals for student-athletes.[255] In its arrangement with a group of thirty-six walk-ons, Built Bar provides full tuition in return for the athletes wearing a Built Bar sticker on their helmets in practice.[256]

Both Ruiz and Built Bar's deals received national attention and raised questions about whether these were "pay-to-play" arrangements as are explicitly prohibited by the NCAA.[257] The NCAA reached out to both groups to "provide additional information," but made clear that it was not an investigation.[258]

It appears that some of these NIL deals with collectives and directives could violate the NCAA's interim policy, although there has not been any enforcement or penalties to this point.[259] Earlier this year, the Vice President of Enforcement for the NCAA, Jon Duncan, even told the Associated Press, "We're not enforcing NIL deals, and we're not enforcing

---

248. Jonathan Givony & Jeff Borzello, *NIL agent says Miami hoops star Isaiah Wong will enter transfer portal if NIL compensation isn't increased*, ESPN (Apr. 28, 2022), https://www.espn.com/mens-college-basketball/story/_/id/33823826/nil-agent-says-miami-hoops-star-isaiah-wong-enter-transfer-portal-nil-compensation-increased [https://perma.cc/AQS9-WM7T].

249. *Id.*

250. Dellenger, *supra* note 235.

251. Givony & Borzello, *supra* note 248.

252. *Id.*

253. *Id.*

254. Lorenzo Reyes, *BYU helped broker NIL deal with Built Bar company that will pay tuition for football walk-ons*, USA TODAY (Aug. 13, 2021, 1:55 PM), https://www.usatoday.com/story/sports/ncaaf/independents/2021/08/13/nil-deal-pay-tuition-byu-football-players/8120059002/ [https://perma.cc/3ZHH-93F5].

255. *Id.*

256. *Id.*

257. Dellenger, *supra* note 235.

258. *Id.*

259. *Id.*

the interim policy, which is largely permissive."[260] If states are "racing for the bottom" with their own NIL legislation, and the NCAA is not enforcing its interim policy, is there any *actual* oversight of this industry?

## III. WHY SHOULD CONGRESS CARE ABOUT COLLEGE ATHLETICS?

This section discusses the importance of congressional intervention in the NIL market in college athletics. The NCAA has lost its appetite to regulate this space due to apprehension of further antitrust litigation and states are "racing for the bottom" to make their regulations most attractive to recruit top-level collegiate talent. The first subsection demonstrates that the market size for college athletics has grown to be significant and worthy of congressional regulation due to the current void of any meaningful structure. The second subsection shows how Congress has the power to regulate this space under the Commerce Clause of the United States Constitution because this void in regulatory structure results in substantial effects on interstate commerce.

### A. The Evolution of the Collegiate Athletics Industry

As previously stated, at its inception, the NCAA was formed primarily to enact rules and regulations to keep collegiate athletes physically safe in their fields of competition.[261] In the early 1900s, there was minimal commercial interest in collegiate athletics.[262] That began to change in the late 1920s as higher education institutions realized that intercollegiate athletics were an integral part of higher education in the United States.[263] In the late 1900s, and through recent years, the market for college athletics has exponentially grown alongside the advancement and inception of new technologies and mediums to consume live sports.[264]

Television revenue from the NCAA Division I men's basketball tournament over the years further illustrates this expansion in consumer interest.[265] In 1980, television revenue from the NCAA Division I men's basketball tournament totaled just under $9 million.[266] By 2013, the television revenue from this tournament totaled $684 million, with no sign

---

260. Ralph D. Russo, *Lack of detailed NIL rules challenges NCAA enforcement*, ASSOCIATED PRESS (Jan. 29, 2022), https://apnews.com/article/college-football-sports-business-15e776b5d115dac0a37a1563d5bfce00 [https://perma.cc/PZK4-6NQN].

261. Smith, *supra* note 25, at 12–13.

262. *But see id.*

263. *Id.* at 13.

264. *See Television revenue NCAA college basketball tournament from 1980 to 2013*, STATISTA, https://www.statista.com/statistics/287522/ncaa-basketball-tournament-television-revenue/ [https://perma.cc/A4KF-7YC5].

265. *Id.*

266. *Id.*

of slowing down.[267] Revenues for this tournament have increased by an average of 230% over this thirty-three year period.[268] The top five collegiate men's basketball programs gross between $27-48 million annually.[269] It is not surprising that the top-grossing teams happen to be some of the most successful programs in college basketball history. Duke, the University of North Carolina, and the University of Kentucky are all included in this list.[270] Collectively, these three programs have won nineteen men's basketball national championships.[271]

Division I college football reflects a similar trend. In 2019, the top five football programs generated between $25-31 million in total profits.[272] The back-to-back reigning college football national champions, the University of Georgia Bulldogs, reported a total athletic department revenue of nearly $170 million in 2022.[273] A key takeaway from these examples: winning drives revenue.

One of the largest components of revenue for these college athletic departments is licensing media rights.[274] These rights are bid upon by major broadcasting networks to have the exclusive rights to broadcast certain collegiate athletic competitions.[275] These rights are the same rights that were disputed in the *Board of Regents* case described earlier. In 2019, media rights for college athletics alone were estimated at $3.4 billion.[276] This value is set to drastically increase: the Big Ten recently signed a new media rights deal with multiple networks estimated to amount to over $8 billion over seven years.[277]

---

267. *Id.*

268. *Id.*

269. George Malone, *The Richest College Basketball Programs in America*, YAHOO! FIN. (Mar. 20, 2021), https://finance.yahoo.com/news/richest-college-basketball-programs-america-210045624.html?guccounter=1 [https://perma.cc/5DC4-Q78X].

270. *Id.*

271. *Id.*

272. *See* Katharina Buchholz, *The Richest College Football Programs*, STATISTA, https://www.statista.com/chart/20152/college-football-programs-earning-most-profits/ [https ://perma.cc/466U-5U94].

273. Lee Shearer, *UGA Football Is Making Money Paw Over Fist*, FLAGPOLE (Jun. 22, 2022), https://flagpole.com/news/news-features/2022/06/22/uga-football-is-making-money-paw-over-fist/ [https://perma.cc/Z8FP-K5PC].

274. Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (Jul. 2, 2021), https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/ [https:// perma.cc/V69L-9KQC].

275. *Broadcasting Rights: what are them and how do they work*, WEPLAY HOLDING: ESPORTS (Nov. 9, 2021), https://weplayholding.com/blog/broadcasting-rights-what-are-them-and-how-do-they-work/ [https://perma.cc/A5KN-ARTW].

276. Richter, *supra* note 274.

277. Andy Staples, *SEC vs. Big Ten enters a new chapter as TV deals collide with more than theme songs at stake*, THE ATHLETIC (Aug. 18, 2022), https://theathletic.com/3520 031/2022/08/18/sec-big-ten-conference-media-deals/ [https://perma.cc/2CDZ-APCF].

In its first year of operation, the NIL industry in college athletics has proven to be a significant market.[278] Estimates suggest that college athletes could earn up to $1.5 billion dollars this year in the NIL market.[279] Texas A&M University is reported to have the highest-grossing NIL athletes, collectively grossing over $4 million in NIL deals.[280] Football student-athletes earned $3.3 million of that total.[281] Interestingly enough, Texas A&M also signed the "best [football] recruiting class ever" in 2022.[282]

The intercollegiate athletic market is estimated to be nearly a $60 billion industry.[283] There is an observable correlation between the most financially successful programs also being the winningest programs.[284] The winningest programs also tend to have the most talented athletes. The emergence of NIL, with a lack of uniform regulation, has the potential to substantially burden interstate commerce by funneling top athletic talent to states that have the most attractive NIL regulations, or lack of any altogether.

### B. Congress's Power under the Commerce Clause

The Commerce Clause of the United States Constitution provides Congress with broad authority to regulate interstate commerce.[285] *United States v. Lopez* provides three areas that Congress has the power to regulate under the Commerce Clause.[286] First, Congress can regulate the channels of interstate commerce such as routes through which commerce travels.[287] Second, Congress can regulate the instrumentalities of interstate commerce, such as people and things moving in interstate commerce.[288] Third and finally, Congress has the authority under the Commerce Clause to regulate activities that have a substantial relationship to interstate commerce.[289]

---

278. Jeremy Crabtree, *Report: Texas A&M athletes topped $4 million in NIL deals*, ON3 (Sep. 7, 2022), https://www.on3.com/nil/news/report-texas-am-aggie-athletes-topped-4-million-in-nil-deals/ [https://perma.cc/S78A-RLHN].

279. Justin Byers, *College Athletes Could Earn $1.5B This Year*, FRONT OFF. SPORTS (Oct. 6, 2022), https://frontofficesports.com/college-athletes-could-earn-1b-this-year/ [https://perma.cc/84K9-SG32].

280. Crabtree, *supra* note 278.

281. *Id.*

282. *Id.*

283. Kadlec, *supra* note 44, at 230.

284. *See* Malone, *supra* note 269; *see also* Buchholz, *supra* note 272; *see also* Shearer, *supra* note 273.

285. U.S. CONST. art. I, § 8, cl. 3; *Overview of Commerce Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/#:~:text=The%20Commerce%20Clause%20gives%20Congress,a%20source%20of%20federal%20power [https://perma.cc/K894-AG9M].

286. *See* United States v. Lopez, 514 U.S. 549 (1995).

287. *Id.* at 558–59.

288. *Id.*

289. *Id.*

Within this third category, an activity must substantially affect interstate commerce and the regulated activity must be an economic activity.[290] The standard to determine whether an activity substantially affects interstate commerce is the rational basis test.[291] Under this standard, the legislation must be rationally related to a legitimate governmental interest.[292]

Under the third prong of the *Lopez* Commerce Clause analysis, Congress has the power to regulate the NIL industry in college athletics. As the previous section described, collegiate athletics have grown to be a significant market throughout the United States.[293] Even in its infancy, NIL has had a substantial effect on the entire college athletics market.[294] The NCAA refuses to regulate this industry, and states are competing with each other to be the most attractive NIL state for collegiate athlete compensation.[295] This lack of regulation is creating a substantial imbalance among the states as to where top athletes are choosing to compete in intercollegiate athletics.[296] This void in regulation has the potential to significantly affect interstate commerce as athletes are likely to attend schools in the states with the most favorable NIL rules, and ultimately generate large amounts of revenue for institutions in those states.

## IV. WHERE TO START: THE TIME IS NOW FOR CONGRESS TO STEP IN

This section discusses the areas of NIL that are most in need of regulation: the collectives and directives. With a void in regulation and independent oversight, these groups have formed throughout the country to funnel money from boosters to athletes in order to attract top talent. NIL collectives are stretching the concept of NIL, co-opting the expansion of student-athlete freedom to create rule-bending recruiting bidding wars and de facto student-athlete payrolls. There are two major problems with the emerging collective-driven NIL system: (1) the lack of uniformity and clarity of the rules and (2) the lack of substantive limits on collectives' activities.

The lack of uniformity has resulted in uncertainty and a legal race to the bottom.[297] This lack of uniformity harms student-athletes and their parents because they are unable to obtain quality information about the availability and value of legitimate collective-made NIL deals from school

290. *Id.* at 560.
291. *Id.* at 557.
292. *Id.* at 555.
293. Richter, *supra* note 274.
294. Byers, *supra* note 279.
295. Russo, *supra* note 260.
296. Crabtree, *supra* note 278.
297. Dellenger, *supra* note 15.

to school.[298] Additionally, the lack of uniformity encourages race to the bottom tactics in state legislatures and among boosters.[299] This is untenable in the long run. A set of uniform required disclosures about NIL deals made through collectives can provide needed transparency in the marketplace.

The absence of substantive limits on NIL collectives has led to improper "payrolling" of student-athletes, tempted collectives to get improperly involved in recruiting, and invited abuses of the process by larger donors.[300] Caps on contributions to collectives and limits on the size of deals created through them can curb the worst abuses these vast collections of money have created.

Section A proposes a solution to the issue: uniform federal legislation. The two subsections present solutions to regulate these funds through increased transparency through required disclosures and donor compensation caps.

### A. Uniform Regulation of Collectives and Directives to End the "Race to the Bottom"

Uniformity, it is what everyone in the collegiate athletics NIL landscape is clamoring for.[301] Power Five conference commissioners, athletic directors, coaches, and even high school recruits and parents of recruits all desire a uniform set of rules for NIL.[302] Currently, the discussion is not whether college athletes should have the ability to be compensated for their NIL, but rather how the market should function.[303] The argument for college athletes to have the ability to be compensated for their NIL has been made for years, but rather than strategically moving in that direction, the NCAA essentially flipped a switch after *Alston*.[304] For decades, an act that previously would have instantly voided a student-athlete's amateur status and made him or her ineligible to compete in NCAA events has suddenly become expressly permitted by the same governing

---

298. Zach Goodall, *Finebaum Show Discusses 'Utterly Bizarre' Florida Gators-Jaden Rashada Saga*, SPORTS ILLUSTRATED (Jan. 19, 2023), https://www.si.com/college/florida/football/florida-gators-jaden-rashada-paul-finebaum-utterly-bizarre-billy-napier [https://perma.cc/K2ZG-ERWK]; Crabtree, *supra* note 209.

299. Goodall, *supra* note 298; Crabtree, *supra* note 209.

300. Dellenger, *supra* note 218.

301. Dellenger, *supra* note 15.

302. Ross Dellenger, *Power 5 Commissioners Urge Congress to Take Action on NIL Regulations*, SPORTS ILLUSTRATED (Aug. 31, 2022), https://www.si.com/college/2022/08/31/nil-regulations-power-five-commissioners-urge-congress [https://perma.cc/RB2U-6P2L].

303. Jeff Borzello, *Mark Emmert says NCAA, Congress must work together to move toward nationwide NIL uniformity*, ESPN (Mar. 31, 2022), https://www.espn.com/college-sports/story/_/id/33641798/mark-emmert-says-ncaa-congress-work-together-move-nation wide-nil-uniformity [https://perma.cc/P9DF-GP8L].

304. Zach Braziller, *NCAA changes college sports forever: 'an entirely new landscape'*, N.Y. POST (June 30, 2021), https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/ [https://perma.cc/HLQ7-4EGS].

organization.[305] Unfortunately, this decision was made retroactively in response to the *Alston* decision, and thus, it lacked any kind of meaningful regulation or guardrails.[306] This void produced a space for creative boosters to form donor-backed collectives and directives to influence the flow of talent in collegiate athletics.[307]

It is likely that the NCAA did not anticipate that these funds would form and operate under the NIL umbrella, and at this point, there is little the organization can do.[308] The NCAA created minimal guidelines for NIL and has relinquished any semblance of regulation to the states to legislate additional guidance in the space.[309] This has led to a patchwork of state laws governing this industry.[310] Since the NCAA enacted its "interim policy," state legislatures have been promulgating, amending, and even repealing NIL legislation.[311] States that tend to be the most competitive in collegiate athletics have been "racing to the bottom" to pass the least restrictive NIL legislation as it relates to student-athlete compensation.[312] States lack incentive to actively regulate the industry because the more restrictive the regulation becomes, the less attractive the in-state institution is for top athletic talent.[313] This lack of regulation and enforcement has created a substantial space in the market for donor-backed collectives to influence student-athlete recruitment at the highest level of college athletics.[314] Additionally, now that over twenty-nine states have enacted NIL legislation, NCAA rules that conflict with them could be seen as violating state law and warranting injunctive relief for the states.[315]

Historically, Congress has not had a significant interest or need to regulate college athletics, but with the weakened state of the NCAA as a regulatory body, and the patchwork of state law governing NIL regulation, the need for federal intervention is clear. Collegiate athletics has grown to be a $60 billion industry.[316] The NIL market for collegiate athletics is estimated to already have reached the $750 million to $1 billion range, with further projections of it growing to $3-5 billion in the next five years.[317]

---

305. Dellenger, *supra* note 218.

306. Auerbach, *supra* note 6.

307. Dellenger, *supra* note 218.

308. Planos, *supra* note 3.

309. Hosick, *supra* note 4.

310. Fasciale, *supra* note 89.

311. Crabtree, *supra* note 209.

312. *Id.*

313. Sparks, *supra* note 211.

314. Dellenger, *supra* note 218.

315. Laura C. Murray, *The New Frontier of NIL Legislation*, 60 HOUS. L. REV. 757, 766 (2023) (discussing the number of states with NIL legislation in place).

316. Kadlec, *supra* note 44, at 230.

317. Shannon Terry, *About On3 NIL Valuation, Brand Value, Roster Value*, ON3 (Jul. 29, 2022), https://www.on3.com/nil/news/about-on3-nil-valuation-per-post-value/ [https://perma.cc/JY59-L7ML].

Lobbying for federal uniform legislation in this industry has already begun, and the place to start is the collectives and directives.[318]

### 1. *Required Disclosures and Improved Transparency*

A significant challenge in the NIL landscape of college athletics is the fair market value of these deals. A solution to this issue would be to increase transparency of these deals with required disclosures for collectives and directives. Currently, all the NCAA requires for NIL deals is that the athlete must perform in some capacity in return for compensation.[319] While this cannot be related to on-field performance, it can be as simple as an autograph signing or social media post.[320] At this point, there is no entity with any oversight over the substance and details of the NIL deals.

Increased transparency through required disclosures would help set a fair market value for NIL deals with collectives and directives. Many believe the Federal Trade Commission (FTC) should be the governmental entity to enforce these required disclosures of NIL contracts.[321] Under Section 5 of the Federal Trade Commission Act, the FTC has authority to regulate "unfair or deceptive acts or practices in or affecting commerce."[322] As described above, these donor-backed collectives are unfairly impacting the flow of collegiate athletic talent by using funds to steer recruits to certain institutions.[323] Allowing these collectives to continue to operate without restraint has a significant financial impact throughout the consumption of intercollegiate athletics.

Requiring transparency and disclosure would help in multiple areas. First, it would create a fair market by allowing other collectives throughout the country to understand the value of a deal for a certain caliber of athlete. This increased transparency would allow whatever regulatory entity (likely the FTC) to identify outliers and further investigate circumstances surrounding a certain deal. Finally, increased transparency would assist student-athletes and their parents in making the most informed decision possible when selecting an institution. This would prevent any kind of fraudulent promises or attempted inducements because these incoming student-athletes would be provided with legitimate information

318. Dellenger, *supra* note 15.

319. Dellenger, *supra* note 218.

320. *Id.*

321. Ross Dellenger, *As July 1 Nears, Congress Making Critical Progress on NIL and College Athletes' Rights*, SPORTS ILLUSTRATED (May 18, 2021), https://www.si.com/college/2021/05/18/ncaa-athletes-rights-profit-congress-nil-bill [https://perma.cc/GM7J-55BZ].

322. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1914).

323. Dellenger, *supra* note 218.

about what their fair market value is across the collegiate athletic landscape.[324]

*2. Compensation Caps*

Another solution for Congress to regulate the negative impact of donor-backed collectives and directives is to create a compensation cap for individual donors as well as a cap on how much collectives and directives can pay individual athletes. These kinds of compensation caps could be similarly structured to contribution caps on political action committees (PACs) and enacted under the same motivation: to prevent corruption. With the number of these collectives and directives eclipsing one hundred nationally, it is readily apparent that these entities are having a substantial impact on the collegiate sports landscape. The NCAA expressly prohibits them from inducing athletes to come to certain educational institutions, but the NCAA has also articulated that it does not plan to enforce these rules.[325]

Such a compensation cap might include three limitations. First, only individual donors could contribute to collectives. Nothing prohibits any business from approaching an athlete directly for an NIL deal, so there should not be a need for corporate capital to flow into collective funds. Second, like PACs, there would be a maximum annual compensation for individual donors. PACs are capped at $10 thousand annually for donor contributions.[326] This figure would be suitable for annual individual contributions for boosters to donor-backed collectives. Such a contribution cap would still allow boosters to donate to their alma mater's donor-backed collective, but it would also level the playing field across the country for collectives, regardless of how wealthy their individual donors are. Finally, there would be a cap on how much a collective could disburse to an individual athlete annually. This would not be a "salary cap" per se for college athletes, but rather a cap on the percent of total funds that a collective can compensate an individual athlete annually. Of course, individual donors or businesses are still free to contract with athletes directly.

With donor-backed collectives raising an average of $3-5 million,[327] a conservative percentage cap for individual donor-backed

324. Zach Goodall, *Finebaum Show Discusses 'Utterly Bizarre' Florida Gators-Jaden Rashada Saga*, SPORTS ILLUSTRATED (Jan. 19, 2023), https://www.si.com/college/florida/football/florida-gators-jaden-rashada-paul-finebaum-utterly-bizarre-billy-napier [https://perma.cc/K2ZG-ERWK].

325. Planos, *supra* note 3.

326. *Limits on contributions made by nonconnected PACs*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/contribution-limits-nonconnected-pacs/ [https://perma.cc/6JUS-VWSC].

327. *Donors, NIL collectives grapple with recruiting success in college football*, ON3 (Dec. 20, 2022), https://www.on3.com/nil/news/college-football-high-school-recruiting-nil-collective-inducement-hit-rate-donor/ [https://perma.cc/JVW6-S6PW].

collectives would be 5% of its total fund. This percentage would still provide top-level collegiate talent with high earnings opportunities (more than twice the average household income in the United States)[328] while preventing any single donor-backed collectives from influencing the flow of athletic talent by the amount it is willing to pay to an individual athlete. Additionally, this does not prohibit the athlete from being compensated for his or her NIL from other traditional endorsement opportunities.

Enforcing compensation caps and required disclosures throughout all collectives participating in the collegiate athletic NIL market might involve a substantial burden for the FTC to regulate. However, collegiate athletics is a $60 billion industry, with NIL expected to grow to a $3-5 billion market in the next five years.[329] Collectives are unfairly manipulating a multi-billion-dollar commercial market operating throughout the country. The FTC has the authority, and the NIL market has a need for regulation of collectives through compensation caps and required disclosures.

## CONCLUSION

In summary, there is a substantial void in regulating the NIL market for college athletics, and a recognizable need for meaningful uniform guidelines to provide athletes and institutions with a framework to productively operate in this new market. NIL is a long overdue opportunity for college athletics. The current system simply lacks meaningful guardrails and regulations. The NCAA's interim policy, in combination with piecemeal state legislation, has proven to be an ineffective way for this industry to operate. This void in regulatory guidelines has allowed the formation of collectives and directives and enabled them to manipulate the national recruiting landscape. Congress has the power, and the market undoubtedly has the need for uniform federal regulation. Federal regulation can serve the interest of uniformity by requiring transparency in a newly established market, and it can also serve the interest of systematic fairness by placing substantive limits on NIL collectives, including contribution and expenditure caps. The time for congressional intervention to tame this wild west is now.

---

328. Jessica Semega & Melissa Kollar, *Income in the United States: 2021*, U.S. CENSUS BUREAU (Sep. 12, 2022), https://www.census.gov/library/publications/2022/demo/p60-276.html#:~:text=Highlights,and%20Table%20A%2D1 [https://perma.cc/Q2KM-HEJF].

329. Kadlec, *supra* note 44, at 230; Terry, *supra* note 317.