

September 2022

In a League of Her Own: Why Female Student-Athletes Are Poised to Win Big in the NIL Era With a Properly Crafted Federal Law

Anna G. Williams
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Anna G. Williams, *In a League of Her Own: Why Female Student-Athletes Are Poised to Win Big in the NIL Era With a Properly Crafted Federal Law*, 125 W. Va. L. Rev. 371 (20220).

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact beau.smith@mail.wvu.edu.

IN A LEAGUE OF HER OWN: WHY FEMALE STUDENT-ATHLETES ARE POISED TO WIN BIG IN THE NIL ERA WITH A PROPERLY CRAFTED FEDERAL LAW

ABSTRACT

Today’s student-athletes have seen perhaps one of the biggest changes to the collegiate athletics landscape: individual states are now enacting legislation that allows student-athletes to profit off their name, image and likeness (“NIL”) in the lucrative age of social media. Gone are the days of the NCAA’s adamant refusal to permit student-athlete compensation under the rigid guise of “amateurism.” Although top athletes in highly followed sports like men’s basketball and football are poised to earn hefty endorsement deals, female student-athletes who have far fewer opportunities to become professional athletes are the real winners in the NIL era. In order to properly manage these benefits and protect student-athletes, a comprehensive federal NIL law that asserts, inter alia, that student-athletes have the same protections under antitrust law as any other member of society is necessary. Such legislation correctly maintains the proper notion of amateurism without exploiting the labor of collegiate athletes.

This Note examines the different proposed and enacted state and federal NIL laws and their effect on West Virginia and student-athletes everywhere. It then analyzes the history of amateurism in NCAA regulations and various antitrust challenges asserting the anticompetitive effects that stem from such policies. Finally, it provides recommendations for what a federal NIL law should look like, advocating for robust protections that place student-athletes at the center of the discussion. This Note emphasizes the positive effect that a proper federal NIL law will have upon female student-athletes who historically receive less recognition and compensation following graduation and in the professional world in comparison to their male counterparts.

TABLE OF CONTENTS

INTRODUCTION372

BACKGROUND.....374

I. THE CURRENT NIL LANDSCAPE - A SAMPLING OF VARIOUS NIL LAWS AND POLICIES377

 A. *Individual States*.....377

 B. *NCAA NIL By-Law*378

 C. *NIL Developments at the Federal Level*379

D. *How West Virginia University Student-Athletes are Faring Without a West Virginia NIL Law* 380

E. *Looking Ahead: NIL Rights for All*..... 382

II. THE PRE-NIL LANDSCAPE—THE HISTORY OF AMATEURISM IN COLLEGIATE ATHLETICS..... 382

A. *NCAA Policy and Amateurism*..... 382

B. *Legal Challenges to the NCAA Amateurism Policy via Antitrust Law* 385

1. Early Challenges and the Adherence to the “Unique” Nature of College Athletics 385

2. O’Bannon v. National College Athletic Association 388

3. National Collegiate Athletic Association v. Alston 391

III. DRAFTING A FEDERAL NIL LAW..... 394

A. *Student-Athletes Must have the Same Economic Freedom as Any Other Member of Society* 396

B. *Establishing a Requirement for Tax Education as Part of a Financial Literacy Workshop*..... 401

C. *Individual States Must Follow Federal NIL Rules, but are Free to Provide Broader Protections at the State Level* 403

IV. CONCLUSION..... 405

I. INTRODUCTION

Eighteen-year-old American gymnast Sunisa Lee stood pacing, staring at the scoreboard as the judges tallied the final scores, anxiously waiting to see if she would become the next all-around Olympic champion. Cameras flashed all around her and tears welled in her eyes as she saw her name in first position—Sunisa Lee is 2021’s greatest gymnast.¹ While earning a gold medal is a miraculous accomplishment for any athlete, it was particularly special for Lee, who was accustomed to competing with the world-famous Olympic champion Simone Biles.² Still in complete and utter shock, Lee expressed that “[t]his is such a surreal moment. I just feel like I could have never been here ever. It doesn’t even feel like real life.”³

¹ Holly Yan, *US Gymnast Suni Lee Wins Olympic All-around After Injuries, Tragedies and a Horrific Accident*, CNN SPORTS (July 29, 2021), <https://www.cnn.com/2021/07/29/sport/gymnast-suni-lee-profile/index.html>.

² Simone Biles, frequently referred to as the greatest gymnast of all time, currently holds 32 Olympic and World Championship medals. Caria Correa, *How Many Olympic Medals Does Biles Have?*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/sports/olympics/simone-biles-medal-count.html>.

³ Yan, *supra* note 1.

Lee verbally committed to continue her gymnastics career at Auburn University when she was just fourteen years old.⁴ Traditionally, many American gymnasts of Lee's caliber would forgo collegiate gymnastics so they could earn money in the "professional" gymnastics world, deciding that this would be a more lucrative option than a university athletic scholarship.⁵ By electing to accept sponsorship and endorsement money, an athlete is deemed to be a professional and is thus ineligible to compete in their sport in college.⁶ The dichotomy between professional and amateur status is particularly harsh in gymnastics, where female gymnasts' athletic abilities typically peak in their teenage years.⁷

Many began to wonder if Lee would have to make the difficult decision that so many Olympic gymnasts before her had made: Would she honor her commitment to Auburn, or would she instead choose to "cash in" on her fame?⁸ Fortunately for Lee and student-athletes everywhere, the dollar signs that divide an amateur athlete from a professional one are becoming less rigid thanks to new name, image and likeness ("NIL") legislation.

Part I of this Note examines the current NIL landscape, including existing and proposed NIL legislation by West Virginia and other states throughout the country. It also analyzes the interim NCAA NIL by-law and legislative developments at the federal level. Part II will answer the question of why it took so long to make NIL progress by illustrating the history of "amateurism" in NCAA policy and legal challenges brought by student-athletes under antitrust law. This part also dissects notable judicial decisions that paved the way towards the NIL-era. Finally, Part III suggests three components for a comprehensive, liberally constructed federal NIL law that will place student-

⁴ Jack West, *World Champion Gymnast Signs with the Tigers*, THE AUBURN PLAINSMAN (Mar. 1, 2021), <https://www.theplainsman.com/article/2021/03/world-champion-gymnast-signs-with-the-tigers>.

⁵ Ella Donald, *The Changing World of Simone Biles and US Women's Gymnastics Team*, CNN (July 27, 2021), <https://www.cnn.com/2021/07/22/opinions/usa-gymnastics-olympics-simone-biles-jordan-chiles-donald/index.html> (illustrating that 2016 Olympic all-around champion Simone Biles, after committing to compete collegiately at UCLA years earlier, decided to forgo her athletic scholarship and turn professional by signing with an agent instead).

⁶ Associated Press, *For Elite Gymnasts, Going Pro is a Complicated Choice*, USA TODAY (July 20, 2016), <https://www.usatoday.com/story/sports/olympics/2016/07/20/for-elite-gymnasts-going-pro-is-a-complicated-choice/87340808/>.

⁷ One Olympic gymnast, Jordyn Wieber, who opted to become a professional athlete in high school, struggled with her decision to forego competition in collegiate gymnastics. *Id.* Jordyn went on to coach NCAA gymnastics, and one of her colleagues shared Jordyn's expressed regret: "She kept asking, 'Is there a way to give the money back?'" *Id.*

⁸ Thomas Baker, *New NCAA NIL Rules May Result in More Olympians Staying in School*, FORBES (Aug. 7, 2021), <https://www.forbes.com/sites/thomasbaker/2021/08/07/new-ncaa-nil-rules-may-result-in-more-olympians-staying-in-school/?sh=c2f05744c682>.

athletes (especially female student-athletes) at the center of the discussion and afford them previously unheard-of financial, social, and educational benefits.

II. BACKGROUND

Graduation marks the end of a student-athlete's competitive athletic career for the majority of those that participate.⁹ National Collegiate Athletic Association ("NCAA") statistics reveal a sobering reality: "[f]ewer than 2% of all collegiate athletes will go on to play professional sports."¹⁰ This can be a hard pill to swallow for student-athletes who may have dedicated their entire lives to a sport—especially those who may have chosen their university for the school's athletic pedigree more so than its academic programs and fields of study.¹¹ The post-college landscape can be even more sparse for female athletes, as professional female athletic leagues are fewer in number and viewership.¹² Even for those hardworking female athletes that do eventually make the pros, the pay gap between men's and women's athletics is staggering:

In 2014, fifty-two National Basketball Association (NBA) players were each paid more individually than all of the Women's National Basketball Association (WNBA) players' salaries combined. That same year, the Professional Golf Association (PGA) awarded its winner more than five times the amount awarded to the winner of the Ladies Professional Golf Association (LPGA) tour. Tennis sensation Serena Williams earned a smaller prize for winning than her male peer competing in the same tournament. And the United States Women's National Soccer Team (USWNT) received thirty-three million

⁹ Erik Cliburn, *The Equity Debate in College Sports Goes Beyond Financial Compensation*, INSIGHT INTO DIVERSITY (May 17, 2021), <https://www.insightintodiversity.com/the-equity-debate-in-college-sports-goes-beyond-financial-compensation/>.

¹⁰ *Id.*

¹¹ One study observed that student-athletes tend to take easier classes than their non-student-athlete counterparts, a trend that is not unique to just "power conference" schools (meaning, the schools that routinely attract the country's top recruits) but also Division III and Ivy League universities that do not even offer athletic scholarships. The study went on to find that student-athletes do highly value their education but worry that "their teammates would judge them for it, so they study a little less, or take an easier major." The authors term this phenomenon "pluralistic ignorance." Daniel Oppenheimer, *Why Student Athletes Continue to Fail*, TIME (Apr. 20, 2015), <https://time.com/3827196/why-student-athletes-fail/>.

¹² Cliburn, *supra* note 9 (illustrating that just 0.8% of female basketball players become professionals, a statistic that is 0.4% lower than their male counterparts).

dollars less in prize money for winning the World Cup than their male peers on the German National Team.¹³

Although many student-athletes view their athletics as their job, the harsh truth is simply that athletes with stories and accomplishments like LeBron James and Serena Williams are the outliers, not the norm. Sports psychologists have examined this reality, even going so far as likening the transition from college athletics to “normal” life to a “loss of a loved one or other tragic event.”¹⁴ Jenny Wilson, a former swimmer at Northwestern University, expressed how much she missed her athletic career and voiced that there is now “a huge void in [her] life.”¹⁵ For athletes like Wilson, their athletics define and shape their lives.¹⁶

Fortunately, today’s young athletes are no longer forced to choose between continuing athletics at the university level or foregoing collegiate athletics altogether because of a powerful and long overdue push for fair student-athlete compensation: name, image and likeness (“NIL”) legislation.¹⁷ Put simply, NIL rules permit a student-athlete to be paid for a wide range of activities, such as autographs and sponsored advertisements on social media.¹⁸ While doubtless a decisive step forward, NIL legislation also strikes an equitable balance: student-athletes must not be paid directly for their athletic performance, nor are they to be paid directly by the university (exclusive of scholarship and financial aid).¹⁹ As the name suggests, NIL policy allows student-athletes to be compensated for their name, image and likeness without losing amateur status, an unprecedented feature in collegiate athletics.²⁰

The timing of recent NIL policies and legislation is great news for student-athletes who are already fluent in the world of social media.²¹ Jeremy Evans, an accomplished entertainment, media, and sports attorney, summarizes this perfectly: “Social media is indeed a referee that moves the sticks of

¹³ Nicole Zerunyan, *Time’s Up: Addressing Gender-Based Wage Discrimination in Professional Sports*, 38 LOY. L.A. ENT. L. REV. 229, 231–32 (2018).

¹⁴ Zak Cheney-Rice, *Here’s What Happens to the 98% of College Athletes Who Don’t Go Pro*, MIC (Mar. 19, 2014), <https://www.mic.com/articles/85789/here-s-what-happens-to-the-98-of-college-athletes-who-don-t-go-pro>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Baker, *supra* note 8.

¹⁸ *Questions and Answers on Name, Image and Likeness*, NCAA, <https://www.ncaa.org/questions-and-answers-name-image-and-likeness> (last visited Sept. 16, 2022).

¹⁹ *Id.* Individual states that have enacted their own NIL laws differ slightly, but most share the same core characteristics. See *infra* Part III.A.

²⁰ Timothy Winkler, *The End of an Error: Reforming the NCAA Through Legislation*, 90 UMKC L. REV. 219, 236 (2021).

²¹ See Jeremy M. Evans, *Student-Athlete Brands in the Age of Name, Image, and Likeness*, 13 LANDSLIDE 26, 26 (2020).

monetization.²² Social networking sites, such as Instagram, Twitter and TikTok, allow student-athletes to be more seen than ever—when a student-athlete appears on television, whether it be in a college football game, during the March Madness tournament, or a broadcast of a collegiate gymnastics meet, their popularity on social media is poised to increase.²³ With heightened social media presence comes increased earning potential.²⁴

For example, one estimate found that twin University of Miami basketball players Hanna and Haley Cavinder, who have approximately 5 million social media followers, have capitalized on their NILs by booking nearly \$1.7 million in sponsorship deals.²⁵ The Cavinder twins are not alone²⁶—there are countless female student-athletes all around the country that have remarkable social media presences and the possibility of earning serious money off of their NIL.²⁷ Given the prevalence of social media and the unlikelihood of becoming a professional athlete, it is an understatement to say that NIL reform is crucial for student-athletes everywhere.

²² *Id.*

²³ *Id.*

²⁴ More social media engagement via increased followers, “likes”, and “shares” raises the price of a brand partnerships promoted by the student-athlete on her social media accounts. *Id.*

²⁵ Brett Knight, *Cavinder Twins, Stars on TikTok and Basketball Court, are Nearing \$2 Million in NIL Deals, with More Ahead*, FORBES (July 1, 2022), <https://www.forbes.com/sites/brettknight/2022/07/01/haley-hanna-cavinder-twins-ncaa-nil/?sh=d6ad8ee5a41f>.

²⁶ Patrick Hruby, *Women’s Worth: How Female NCAA Athletes Will Profit in the New Era of NIL Rights*, GLOB. SPORT MATTERS (Mar. 12, 2021), <https://globalsportmatters.com/business/2021/03/12/womens-worth-how-female-ncaa-athletes-will-profit-in-the-new-era-of-nil-rights/> (noting the NIL power of Louisiana State University gymnast Olivia Dunne who, at the time of the article’s publication, has approximately five million social media followers).

²⁷ While NIL policies will clearly also benefit male student-athletes, female student-athletes particularly benefit from the ability to utilize social media for financial gain because, as previously mentioned, the prospects for female students to go professional and earn significant amounts of money are narrower than those of their male counterparts. Furthermore, even female student-athletes with smaller follower totals have real potential to earn NIL compensation. Kristi Dosh, *A Letter to Female Student Athletes About NIL*, BUS. OF COLL. SPORTS (Jul. 6, 2021), <https://businessofcollegesports.com/name-image-likeness/a-letter-to-female-student-athletes-about-nil/> (noting that the majority of social media deals in 2020 were with “micro-influencers,” or social media users with under 15,000 followers).

III. THE CURRENT NIL LANDSCAPE - A SAMPLING OF VARIOUS NIL LAWS AND POLICIES

A. Individual States

California led the NIL charge at the legislative level when it passed its Fair Pay to Play Act back in September 2019.²⁸ Despite its early passage, the law did not go into effect until 2021.²⁹ Florida then followed suit and, due to the delayed effective date of the California law, was the first active NIL law in the country.³⁰ Following California and Florida, 40 states currently have either enacted or proposed an NIL law.³¹ There are several common characteristics among existing laws, such as stipulations that state that universities and conferences may not interfere with student-athletes' ability to secure NIL deals,³² requirements that students-athletes must disclose their deals to their university,³³ and provisions that universities may not reduce scholarship or grant-in-aid based on a student-athlete's NIL compensation.³⁴

Today, a clear state-by-state NIL patchwork has formed. Individual states are rushing to enact some form of NIL legislation to keep up with recent trends and to prevent being disadvantaged with respect to athlete recruitment.³⁵ After all, why would a top athlete choose to play for a university in a state that would prevent him from earning money for his own name, image and likeness when a university in a neighboring state would allow him to do so?³⁶ West

²⁸ CAL. EDUC. CODE ANN. § 67456 (West 2022). It is noteworthy that the original effective date was changed from January 1, 2023, to September 1, 2021, likely to keep up with the tide of new NIL legislation.

²⁹ *Id.*

³⁰ FLA. STAT. ANN. § 1006.74 (West 2022).

³¹ This figure is current as of October 20, 2022. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS (Sept. 21, 2021), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/#:~:text=Tracker%3A%20Name%2C%20Image%20and%20Likeness%20Legislation%20by%20State,up%20from%201%2F1%2F2023%29%20%2031%20more%20rows%20>.

³² ARK. CODE ANN. § 4-75-1303(b) (West 2022).

³³ NEV. REV. STAT. ANN. § 398.310(2) (West 2022).

³⁴ TENN. CODE ANN. § 49-7-2802(e) (West 2022).

³⁵ *E.g.*, Andrew Quintana, *Cashing In: How the NCAA's NIL Rules Could Impact College Recruiting*, 10 TAMPA BAY (Aug. 24, 2021), <https://www.wtsp.com/article/sports/ncaa-nil-rule-college-recruiting/67-1bf6fbde-ba48-4df5-9999-9166c6fae91c>.

³⁶ *Id.* (illustrating the experience of McKenzie Milton, a former University of Central Florida quarterback who entered the transfer portal after Florida signed its NIL law and elected to stay in the state to attend Florida State University: “Knowing that [the law] would fall on my last year of possibly playing college football . . . it definitely played a role in me staying in Florida,” Milton said.”).

Virginia is an example of state that has not yet enacted an NIL law—the implications of this reality will be discussed below.

B. NCAA NIL By-Law

Recognizing the potential issues and unforeseen consequences that may arise as a result of each state signing its own NIL law (and some states not enacting one at all), the NCAA stepped in and promulgated its own NIL policy that applies to all states that have universities governed by the NCAA, namely serving colleges and universities in the states that have not enacted an NIL law at all.³⁷ The NCAA by-law is actually quite scant—the only major rules it establishes are that student-athletes may not enter a “pay-for-play” agreement (i.e., we will pay you X amount of dollars if you score a touchdown), and that student-athletes may obtain a professional services provider, such as an agent or marketing manager.³⁸

The NCAA asserts that its new by-law is to be applied in an interim capacity.³⁹ NCAA president Mark Emmert emphasized that federal legislation is needed to bring uniformity to college athletics:

This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities[.] 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 the 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.⁴⁰

Despite the long delay in NCAA action, the position that a federal law is needed to properly manage NIL rights is well-taken. This Note will address this issue further and provide substantive recommendations in Part III.

³⁷ *Interim NIL Policy*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf (last visited October 20, 2022); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

³⁸ Christopher Cody Wilcoxson, *Name, Image, and Likeness: Five Months into the NCAA's New Frontier*, JD SUPRA (Dec. 2, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-five-months-1219411/>.

³⁹ *Interim NIL Policy*, *supra* note 37.

⁴⁰ *Id.*

C. NIL Developments at the Federal Level

Congress gave ample attention to the new era that is student-athlete compensation, and several bills have been introduced by Republicans and Democrats alike—some even backed with bi-partisan sponsorship.⁴¹ Cory Booker (D-NJ), a former Stanford football tight end and co-sponsor of the College Athlete Bill of Rights, vehemently argues for enhanced NIL rights for student-athletes:

Modern college athletics is a de facto for-profit industry that is just too often exploiting men and women—taking advantage of their genius, of their talent, of their artistry, robbing many of them of earnings in their peak years, leaving them often injured with a lifetime worth of costs, sometimes looking back and their universities are still making profits off of their names.⁴²

In addition to sharing many of the common characteristics of NIL bills, Booker's bill is unique in many ways.⁴³ One of the most progressive components of the College Athlete Bill of Rights is that it would require profit sharing among high-revenue sports.⁴⁴ The bill proposes that if a sport's revenue is greater than the cost of scholarships, the profits are to be shared equally among the scholarship players.⁴⁵ In contrast, Senator Roger Wicker's (R-MS) proposed bill is on the more conservative side of the proposed federal legislation and explicitly

⁴¹ See, e.g., Student-Athlete Equity Act, H.R.1804, 116th Cong. (2019); College Athlete Bill of Rights, S. 5062, 116th Cong. (2020); College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021); Collegiate Athlete and Compensatory Rights Act, S. 5003, 116th Cong. (2020); Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020); Amateur Athletes Protection and Compensation Act of 2021, S. 414, 117th Cong. (2021); Student-Athlete Level Playing Field Act, H.R. 2841, 117th Cong. (2021).

⁴² Video: Booker: "Now is the Time for the NCAA to Evolve as an Organization to Truly Put the Students First and Their Concerns and Their Needs . . . If We Delay Justice for Those Athletes, Justice Delayed is Justice Denied," CORY BOOKER (June 9, 2021), https://www.booker.senate.gov/news/press/video_booker-now-is-the-time-for-the-ncaa-to-evolve-as-an-organization-to-truly-put-the-students-first-and-their-concerns-and-their-needs-if-we-delay-justice-for-those-athletes-justice-delayed-is-justice-denied.

⁴³ For example, the bill would require universities to establish a medical trust fund to cover out-of-pocket medical expenses related to student-athlete injuries. College Athlete Bill of Rights, S. 5062, 116th Cong. § 6 (2020).

⁴⁴ *Id.* § 5(b).

⁴⁵ *Id.* This ambitious proposal could mean men's football and basketball players would be entitled to earn \$173,000 and \$115,600 a year, respectively, and female basketball players could earn \$19,050. Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html>.

emphasizes that student-athletes are not employees and institutions may not, directly or indirectly, provide compensation to NIL-earning athletes.⁴⁶

Despite some division, many college coaches appear to be on board with the new NIL era and the push for federal intervention.⁴⁷ One anonymous survey found that only two out of 12 coaches shared that they had serious concerns about the new NIL policies and their effect on collegiate athletics.⁴⁸ Although the general sentiment is that compensation for hardworking student-athletes is a good thing, the more apprehensive coaches are concerned about loopholes and the potential for exploitation.⁴⁹ One coach weighed in: “Yes, I am for players being able to earn extra money, but [I] feel the process has been rushed and there will be many unintended consequences.”⁵⁰

There is no federal law on the books yet, and it remains unclear exactly what provisions a federal NIL law would contain. To be sure, college coaches and collegiate sports fans everywhere have a right to remain skeptical until a federal law exists. The best way to ensure student-athlete compensation rights and university and conference compliance is to enact a law that applies equally to institutions everywhere. The most sensible medium for achieving this goal is robust federal legislation.

D. How West Virginia University Student-Athletes are Faring Without a West Virginia NIL Law

West Virginia does not currently have an enforceable NIL law. The legislature, however, has introduced a bill that would allow the state’s student-athletes to enjoy all the privileges that states with NIL laws afford to their student-athletes.⁵¹ House Bill 2583 was first introduced in February of 2021 and has since been referred to the Committees on Education and, subsequently, the Judiciary.⁵² In the absence of a West Virginia NIL law, West Virginia University (“WVU”) has quickly asserted that WVU student-athletes may earn

⁴⁶ Collegiate Athlete and Compensatory Rights Act, S. 5003, 116th Cong. § 4(c) (2020).

⁴⁷ In an anonymous survey of college coaches by CBS Sports, one coach stated: “I believe [NIL legislation] will actually make things more transparent. I know a lot of schools are jockeying to figure out how to ‘legally’ pay recruits and their own players.” Matt Norlander, *Candid Coaches: Will Name, Image and Likeness Legislation Increase or Decrease Cheating in College Sports?*, CBS SPORTS (Oct. 4, 2021), <https://www.cbssports.com/college-basketball/news/candid-coaches-will-name-image-and-likeness-legislation-increase-or-decrease-cheating-in-college-sports/>.

⁴⁸ Bill Bender, *2021 Coaches Survey: FBS Coaches Anonymously Weigh in on NIL, Transfer Portal, Playoff Expansion and More*, SPORTING NEWS (Aug. 17, 2021), <https://www.sportingnews.com/us/ncaa-football/news/coaches-survey-fbs-coaches-anonymously-weigh-in-on-nil-transfer-portal-playoff-expansion-and-more/1eylk6zzw2wiczmglkskf309o>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See H.B. 2583, Reg. Sess. (W. Va. 2021).

⁵² *Id.*

compensation for their name, image and likeness in accordance with the NCAA's interim NIL policy and University character: "In an effort to prioritize student-athlete well-being, these name, image, and likeness opportunities may occur in a manner that is consistent with the core values, mission, and principles of West Virginia University[.]"⁵³

WVU, a Division I school, attracts and regularly recruits talented athletes to continue their education and athletic careers in Morgantown.⁵⁴ Although often recognized for its accomplished football team, WVU is also home to many remarkably successful women's sports: for example, the women's soccer program is currently ranked among the top 30% of NCAA Division I teams,⁵⁵ and a recent Associate Press poll ranked the women's basketball team 22nd among all Division I women's basketball teams.⁵⁶ Among these successful teams are individual student-athletes who boast sizable followings on social media.⁵⁷

Despite not having a state NIL law, these talented WVU student-athletes are not disadvantaged in the NIL era.⁵⁸ In fact, WVU actively encourages student-athlete compensation. WVU has partnered with VEEPIO, a company that will "create, facilitate and oversee NIL sponsorship opportunities."⁵⁹ This partnership will be full service, as it will help student-athletes by brokering sponsorship deals, monitoring analytics, and even "customiz[ing] a student-

⁵³ *Name, Image and Likeness Policy*, WVU SPORTS, <https://wvusports.com/sports/2021/7/1/nil-policy.aspx> (last visited Sept. 16, 2022).

⁵⁴ *See West Virginia Mountaineers*, ESPN, http://www.espn.com/college-sports/football/recruiting/school/_id/277/class/2022 (last visited Sept. 16, 2022) (providing that West Virginia University currently has 25 football players committed to joining the team next year, four of which are 4-star recruits).

⁵⁵ *Women's Soccer*, NCAA, <https://www.ncaa.com/rankings/soccer-women/d1/ncaa-womens-soccer-rpi> (last visited Sept. 16, 2022).

⁵⁶ Nick Farrell, *WVU Women's Basketball Ranks No. 22 in Latest AP Poll*, GOLD & BLUE NATION (Nov. 15, 2021), <https://www.wboy.com/goldandbluenation/wvuhoops/wvu-womens-basketball-ranks-no-22-in-latest-ap-poll/>.

⁵⁷ *See* Craig Meyer, *A New World: How Female College Athletes Have Capitalized on New Name, Image and Likeness Rules*, PITTSBURGH POST-GAZETTE (Oct. 16, 2021), <https://www.post-gazette.com/sports/Pitt/2021/10/16/pitt-panthers-penn-state-nittany-lions-west-virginia-mountaineers-ncaa-name-image-likeness-female-sports/stories/202110170076> (providing that Ana Zortea, a swimmer at WVU, has capitalized on her NIL by working with hair and skin care brands, and that Rachel Hornug, a WVU gymnast, plans to make NIL deals to engage with her 40,000+ followers).

⁵⁸ *Id.*

⁵⁹ Michael Fragale, *Athletics Partners with VEEPIO to Facilitate NIL*, WVU SPORTS (July 29, 2021), <https://wvusports.com/news/2021/7/29/baseball-athletics-partners-with-veepio-to-facilitate-nil.aspx>. Similarly, WVU alumni have created the Country Roads Trust, a fund designed to help WVU student-athletes arrange NIL details. *The Mission*, Country Roads Trust, <https://countryroadstrust.com/about/> (last visited Oct. 21, 2022). Despite serving only WVU student-athletes, the Country Roads Trust is a separate entity independent of the University. *Id.*

athlete's profile for distribution and secure payment for the student-athlete."⁶⁰ It is clear that even without a state law mandating compliance, WVU plans to fully capitalize on new NIL policies and provide its students not only with the opportunity to earn some money but also the ability to properly manage these new opportunities for success in the future.

E. Looking Ahead: NIL Rights for All

The paradox of the NIL era is that it is both progressive yet also merely reflective of a policy that should have been in place decades ago. NIL legislation promotes the common good in many ways and represents the not-so-unbelievable concept that student-athletes should be able to make money off of what has always been theirs: their own name, image and likeness. Although NIL legislation is a blessing for both female and male student-athletes, female athletes stand to benefit in an unprecedented way by capitalizing on their own name, image and likeness in a world where female professional sports leagues and opportunities are historically less appreciated than their male counterparts.⁶¹ In addition to financially assisting young athletes, NIL laws strike an equitable balance between amateurism and professional sports by preserving "the fact that college sports are not pay-for-play."⁶²

The items in the "pro" column for robust NIL policy seemingly outweigh those in the "con" column, which inevitably begs the question: what took so long? An answer to this question requires a look into the history of the rigid adherence to amateurism in college sports and previous NCAA policy.

IV. THE PRE-NIL LANDSCAPE—THE HISTORY OF AMATEURISM IN COLLEGIATE ATHLETICS

A. NCAA Policy and Amateurism

Because the NCAA considers collegiate athletes "amateurs," it has historically prevented them from receiving compensation as student-athletes.⁶³ The bare assertion that these athletes are amateurs, rather than professionals, has long been the NCAA's sole support for preventing student-athlete

⁶⁰ Fragale, *supra* note 59.

⁶¹ Zerunyan, *supra* note 13, at 239.

⁶² Hosick, *supra* note 37.

⁶³ See Brian L. Porto, *Neither Employees nor Indentured Servants: A New Amateurism for a New Millennium in College Sports*, 26 MARQ. SPORTS L. REV. 301, 301 (2016). Not only has this label prohibited even modest compensation, but Porto also argues that it has created an environment wherein participation in athletics is restricted to "athletes whose personal or family finances permitted them to train and compete without the need to profit from their athletic labors." *Id.* at 303.

compensation.⁶⁴ This stance was abundantly clear in an interview between Michael Rosenberg, a writer for Sports Illustrated, and Myles Brand, a former NCAA president:

Brand: “They can’t be paid.”
 Rosenberg: “Why?”
 Brand: “Because they’re amateurs.”
 Rosenberg: “What makes them amateurs?”
 Brand: “Well, they can’t be paid.”
 Rosenberg: “Why not?”
 Brand: “Because they’re amateurs.”
 Rosenberg: “Who decided they are amateurs?”
 Brand: “We did.”
 Rosenberg: “Why?”
 Brand: “Because we don’t pay them.”⁶⁵

This circular logic rested at the heart of the argument against direct compensation from the university to the student-athlete in the name of amateurism in collegiate athletics,⁶⁶ despite proponents of amateurism failing to articulate what exactly amateurism meant beyond the bare assertion that “pay-for-play” is prohibited.⁶⁷ The NCAA first defined the term amateur in 1916 as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”⁶⁸

⁶⁴ *Id.* at 301–02 (citing *Amateurism*, NCAA, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> (last visited Sept. 16, 2022)).

Amateurism, as the NCAA envisions it, prohibits college athletes from (1) signing a contract with a professional team in their collegiate sport; (2) receiving a salary for playing their collegiate sport; (3) receiving prize money in excess of actual and reasonable expenses; (4) playing in games with professional athletes; (5) trying out for, practicing with, or competing with a professional team; (6) receiving “[b]enefits from an agent or prospective agent”; (7) agreeing to representation by an agent; and (8) “[d]elay[ing] initial full-time colleg[e] enrollment to participate in organized sports competition.

Id.

⁶⁵ Erin Cronk, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes for the Use of their Names, Images, and Likenesses*, 34 U. LA VERNE L. REV. 135, 139–140 (2013) (citing Michael Rosenberg, *Change is Long Overdue: College Football Players Should be Paid*, SPORTS ILLUSTRATED.COM (Aug. 26, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_roseberg/08/26/pay.college/index.html).

⁶⁶ *Id.*

⁶⁷ See *In re Nat’l. Collegiate Athletic Ass’n. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1249 (9th Cir. 2020) (noting that the Southeastern Conference (SEC) commissioner himself “[did not] even know what [amateurism] means” and that the “purported pay-for-play prohibition is riddled with exceptions”).

⁶⁸ Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete’s Right of Publicity*, 58 WILLAMETTE L. REV. 101, 109 (2014).

The current NCAA Division I manual provides a nearly identical definition over 100 years later: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by educational and the physical, mental, and social benefits to be derived.”⁶⁹

The manual does, however, go a step forward from the 1916 guidelines by asserting that “student participation in intercollegiate athletics is a vocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁷⁰ Rather than solely focusing on the definition of amateurism and the alleged motivations for collegiate athletics, this amendment appears to posit the NCAA as a type of student-athlete guardian rather than an unforgiving barrier between student-athletes and monetary compensation beyond scholarship allotment.⁷¹ Furthermore, it is noteworthy that this provision against exploitation does not provide for protection from an athlete’s university, arguably the most important entity in a young student-athlete’s career.⁷² Given the crucial role that a university’s administration plays in facilitating not only a student-athlete’s athletic career but also her education, which will doubtless be a perennial component of her life unlike her competitive athletic endeavors, this seems like a notable error in NCAA policy.⁷³

Despite any inconsistencies among the exploitation provision, the NCAA manual makes it clear that universities are only allowed to compensate student-athletes directly in the form of financial aid that does not exceed the school’s cost of attendance.⁷⁴ If a student-athlete is paid for their performance, she violates the “line of demarcation between college athletics and professional sports”⁷⁵ and becomes ineligible to compete in varsity athletic sports.

The NCAA’s amateurism policies remained unaltered despite some universities raking in millions upon millions of dollars from their athletic programs.⁷⁶ For example, in the 2018-2019 fiscal year, the University of Texas’s

⁶⁹ NAT’L COLLEGIATE ATHLETIC ASS’N, 2020–2021 NCAA DIV. I MANUAL 3 (effective Aug. 1, 2020).

⁷⁰ *Id.*

⁷¹ See Elsa Kirchner Cole, *For the Win: A Story of Academic Fraud and Its Cover-Up to Keep “Student”-Athletes Eligible in Big-Time College Sports—A Review of Jay M. Smith and Mary Willingham’s Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports*, 42 J.C. & U.L. 227 (2016).

⁷² *Id.* at 228.

⁷³ *Id.* (Arguing that the university’s administration and faculty are the people who should be watching out for student-athletes and “ensuring that they get the education that is the quid pro quo for their athletics participation”).

⁷⁴ NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 69, at 3.

⁷⁵ *Id.* at 60.

⁷⁶ It should be noted that athletic department revenue varies from university to university, and not all universities bring in millions of dollars through their athletic programs. Nevertheless, 40 Division I schools had over \$100 million in gross revenue. Brad Crawford, *Ranking College Sport’s Highest Revenue Producers*, 247 SPORTS (July 17, 2020),

athletic department brought in approximately \$223 million.⁷⁷ Similarly, NCAA president Mark Emmert received a \$2.5 million salary in the 2019 calendar year.⁷⁸ Statistics like these reveal an undeniable truth: universities and NCAA directors have the potential to earn millions of dollars, whereas student-athletes who do not make it to a professional league are left with “little or nothing” after graduation.⁷⁹

B. Legal Challenges to the NCAA Amateurism Policy via Antitrust Law

The label of “amateurism” stood as a flimsy smokescreen that shielded the NCAA from successful challenges to the Association’s revenue scheme for decades.⁸⁰ But, like most weakly supported defenses, the amateurism argument was slowly but surely picked apart in the courts. Today, one thing has become abundantly clear: there is an “inherent contradiction between the NCAA’s amateurism principle and the billions of dollars profited off student athletes’ names, images, and likenesses.”⁸¹

1. Early Challenges and the Adherence to the “Unique” Nature of College Athletics

Although other athletic associations exist,⁸² the NCAA is by far the most dominant given that it has the largest membership and oversees Division I

https://247sports.com/LongFormArticle/College-football-revenue-producers-USA-Today-Texas-Longhorns-Ohio-State-Buckeyes-Alabama-Crimson-Tide-149248012/#149248012_2.

⁷⁷ *Id.*

⁷⁸ Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/>.

⁷⁹ Nat’l Collegiate Athletic Ass’n. v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

⁸⁰ See Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J.L. & PUB. POL’Y 137, 141 (1996).

⁸¹ Michael T. Jones, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O’Bannon v. NCAA*, 56 B.C. L. REV. 79, 90–91 (2015).

⁸² For example, the National Association of Intercollegiate Athletics (NAIA) has 250 member institutions. *2021–22 NAIA Member Institutions*, NAT’L ASS’N OF INTERCOLLEGIATE ATHLETICS, https://www.naia.org/schools/files/2021-22_NAIA_Institutions.pdf (last visited Aug. 20, 2022). Similarly, the National Junior College Athletic Association strives to “promote and foster two-year college athletics.” Some student-athletes opt to attend junior colleges before seeking recruitment to four-year NCAA university athletic programs. See *Mission*, NAT’L JUNIOR COLL. ATHLETIC ASS’N, https://www.njcaa.org/about/mission/Mission_statement (last visited Sept. 16, 2022).

sports,⁸³ the division in which many professional athletes participate while in college.⁸⁴ As an organization, the NCAA rulemaking encompasses a wide range of issues in college sports, including student-athlete eligibility standards, disciplinary standards, game schedules, and television advertising contracts.⁸⁵ Because the NCAA has nearly the sole authority to define amateurism and what it entails, challenges to its authority assert that it functions as an “economic cartel” over student-athletes and member schools.⁸⁶ The NCAA has the authority to police violations of its by-laws, and member schools are incentivized to comply with the NCAA’s regulations because of the schools’ economic need to remain a part of the largest and most recognized collegiate athletic association in the country.⁸⁷

Many plaintiffs have tested the reach of antitrust law to college athletics. Section 1 of the Sherman Act, the statute that governs federal antitrust law, provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”⁸⁸ The goal of antitrust law is to prevent anticompetitive practices, unreasonable restraints of trade, and interferences with the free market system.⁸⁹ The debate over whether or not to pay collegiate athletes is has historically been an antitrust issue and one that was only amplified by the dramatic shift towards profitability in a highly commercialized and lucrative college sports market.⁹⁰

Challenges to NCAA governance under antitrust law initially were met with little success, primarily under the assertion that NCAA rulemaking does not rise to the level of Sherman Act analysis because such activities do not

⁸³ The NCAA is made up of approximately 1,100 member institutions that award nearly \$3.5 billion in athletic scholarships. *Overview*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited Sept. 16, 2022).

⁸⁴ Hunter Sharf, *25 Top Colleges That Produce the Most Drafted Pro-Athletes*, FORBES (Aug. 2, 2017), <https://www.forbes.com/sites/huntersharp/2017/08/02/25-top-colleges-that-produce-the-most-pro-athletes/?sh=532794a074e9>.

⁸⁵ Herbert J. Hovenkamp, *The NCAA and the Rule of Reason*, 1796 PENN LAW: LEGAL SCHOLARSHIP REPOSITORY 1–2 (2017).

⁸⁶ Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2 (2000).

⁸⁷ *Id.* at 3.

⁸⁸ Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 2022).

⁸⁹ *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 971 (8th Cir. 1968) (“[T]he purpose of the Sherman Act is to preserve a system of free competition. This means no unreasonable or undue restraints are to be imposed on our competitive economic system so as to hinder . . . the free interplay of vital competition in the marketplace. The public is to be protected from the evils incident to monopolistic practices.”).

⁹⁰ *See Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136, 1146 (5th Cir. 1977).

sufficiently affect interstate commerce.⁹¹ If the NCAA rule being challenged could be found to be designed to promote amateurism or education, most courts found that the Sherman Act was inapplicable.⁹² In an early case, *Hennessey v. NCAA*,⁹³ the Fifth Circuit was met with such a challenge and, as an initial holding, found that although the plaintiff sued only the NCAA, they could proceed given that the NCAA bylaws could be seen as “the agreement and concert of action of the various members of the association.”⁹⁴ Nevertheless, despite recognizing that the NCAA engages in the business of regulating intercollegiate athletics, the court was reluctant to find an antitrust violation.⁹⁵

Just seven years later, the uphill battle against the NCAA became less steep. In *NCAA v. Board of Regents*,⁹⁶ the Supreme Court declined to confer to the NCAA a blanket exemption from antitrust scrutiny.⁹⁷ Analyzing the NCAA’s unique structure,⁹⁸ the Court conceded that while the NCAA may have legitimate objectives, it nevertheless is comprised of member organizations that “are in fact organized to maximize revenues.”⁹⁹ The Court’s opinion suggested that if the NCAA activity in question is truly concerned with amateurism or academic integrity, it does not violate antitrust law.¹⁰⁰

Despite the Supreme Court’s decision in *Board of Regents* declining to award blanket antitrust protections to the NCAA, subsequent antitrust challenges were met with mixed success: most NCAA activity was found to be characterized as noncommercial, to not have anticompetitive effects, or assumed to be procompetitive by being the least restrictive means of furthering the goals of amateurism.¹⁰¹ The NCAA’s long-enjoyed protection concerning amateurism was formulated due to the “nature” of college athletics, as succinctly summarized by the Supreme Court:

⁹¹ See *Jones v. Nat’l Collegiate Athletic Ass’n*, 392 F. Supp. 295, 303 (D. Mass. 1975).

⁹² Mitten, *supra* note 86.

⁹³ 564 F.2d at 1136.

⁹⁴ *Id.* at 1148.

⁹⁵ *Id.* at 1154.

⁹⁶ *Nat’l. Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

⁹⁷ *Id.* at 100–01.

⁹⁸ The court notes that advertisers will pay a premium price to reach college football audiences, and that there is no substitute for these unique broadcasting rights. *Id.* at 111, 115.

⁹⁹ *Id.* at 100 n.22.

¹⁰⁰ *Id.* at 101–02.

¹⁰¹ See, e.g., *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 187 (3d Cir. 1998) (holding that the Sherman Act’s restraint of trade provision did not apply to the NCAA’s promulgation of eligibility rules); *Bowers v. Nat’l Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460, 487 (D.N.J. 1998) (holding that the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements).

[The] NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. *In order to preserve the character and quality of the “product,” athletes must not be paid*, must be required to attend class, and the like. And the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally [restrictions on eligibility rules], its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.¹⁰²

As a result, challenges to NCAA rulemaking were still met with significant scrutiny. Nevertheless, resilient plaintiffs continued to bring antitrust actions against the NCAA. Over time, these challenges became more and more successful. One of the first major successful challenges came out of the Northern District of California.

2. *O’Bannon v. National College Athletic Ass’n*

In *O’Bannon v. NCAA*,¹⁰³ former collegiate athletes again challenged the interaction between amateurism rules and antitrust law.¹⁰⁴ Ed O’Bannon, a former UCLA basketball player, served as the lead plaintiff in a class action lawsuit against the NCAA for the use of the student-athletes’ likeness in, among other things, the video game *NCAA Basketball 09*.¹⁰⁵ Asserting violations of the Sherman Act, O’Bannon argued that, upon graduation, student-athletes should be compensated for the NCAA’s profitable use of their NIL.¹⁰⁶ At the district court level, student-athletes saw a major victory: the court found that the NCAA violated federal antitrust law by permitting member schools to earn money from

¹⁰² Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984) (emphasis added).

¹⁰³ 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

¹⁰⁴ *Id.* at 963.

¹⁰⁵ Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1098–99 (2010).

¹⁰⁶ *O’Bannon*, 7 F. Supp. 3d at 962–63.

the sale of licenses to use student-athletes' names, images and likenesses in products such as videogames and live telecasts without sharing profits with the interested student-athletes.¹⁰⁷

Because the Sherman Act is concerned with unreasonable restraints of trade, the *O'Bannon* court utilized the rule of reason analysis.¹⁰⁸ This analysis requires a burden-shifting framework wherein the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects.¹⁰⁹ If the plaintiff satisfies this burden, the defendant must then show that the restraint instead has procompetitive effects.¹¹⁰ As mentioned above, the NCAA has historically argued successfully that the nature of college sports and the NCAA's role in maintaining them make its actions procompetitive.¹¹¹ Finally, it is then on the plaintiff to show that "any legitimate objectives can be achieved in a substantially less restrictive manner."¹¹²

Using the above analysis, the Northern District of California enjoined the NCAA from enforcing any rules that would prohibit student-athletes like *O'Bannon* from having the opportunity to earn a limited share of the revenue generated from the use of their NILs.¹¹³ The court noted that "[b]ecause FBS Football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product."¹¹⁴ The court was not persuaded by the NCAA's argument that demand for the NCAA's product (college athletics) would decrease if student-athletes were permitted to be compensated a limited

¹⁰⁷ *Id.* at 1007 ("Specifically, the association's rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek.").

¹⁰⁸ *Id.* at 985 (first citing *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011); and then citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984) ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.").

¹¹² *O'Bannon*, 7 F. Supp. 3d at 985.

¹¹³ *Id.* at 1007–08.

¹¹⁴ *Id.* at 988.

amount¹¹⁵ for the use of their name, image and likeness.¹¹⁶ The *O'Bannon* court directly acknowledged a key issue in the student-athlete compensation debate that is of relatively recent vintage and has often been dismissed in other cases: collegiate sports, namely football and basketball, are billion-dollar industries.¹¹⁷

Despite being a historic decision, the victory was short-lived.¹¹⁸ Although the Ninth Circuit agreed with the district court that the NCAA's amateurism rules were not exempt from antitrust scrutiny, it vacated the lower court's holding concerning payment for student NILs by asserting that "the district court ignored that not paying student-athletes is precisely what makes them amateurs."¹¹⁹ Thus, the Ninth Circuit found that the district court erred in deciding that allowing NIL compensation is a viable alternative under the rule of reason analysis.¹²⁰ In so deciding, the court discussed the slippery slope that may result from the district court's ruling:

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to education expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.¹²¹

The Ninth Circuit's decision in *O'Bannon*, despite recognizing that the NCAA's activities are subject to scrutinized attention under antitrust law, ultimately adhered to the importance of amateurism in college sports.¹²²

¹¹⁵ The opinion did suggest that large amounts of compensation may be different: the NCAA provided testimony from a survey research expert who opined that "the public's attitudes toward student athlete compensation depend heavily on the level of compensation that student-athletes would receive." *Id.* at 1000–01.

¹¹⁶ *Id.* at 976.

¹¹⁷ Michael Steele, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 512–13 (2015).

¹¹⁸ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

¹¹⁹ *Id.* at 1076.

¹²⁰ *Id.*

¹²¹ *Id.* at 1078–79.

¹²² *Id.* (The court noted that the Supreme Court asserts that "we must afford the NCAA 'ample latitude' to superintend college athletics . . . we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.").

O'Bannon appealed the Ninth Circuit's decision to the Supreme Court, but certiorari was denied.¹²³

3. *National Collegiate Athletic Ass'n v. Alston*

Many legal commentators credit *NCAA v. Alston*¹²⁴ as a critical turning point in the student-athlete compensation debate.¹²⁵ The unanimous opinion, authored by Justice Gorsuch, will be long remembered (and likely litigated) for “cut[ting] against a century-old ‘no-pay for play’ college sports regime, but [] with a scalpel rather than a meat cleaver.”¹²⁶ This perspective is supported by the fact that although the Court ruled only on caps on academic benefits, its dicta and searing concurring opinion by Justice Kavanaugh cast serious doubt on NCAA governance and rulemaking as a whole.¹²⁷

i. *District and Circuit Court Findings*

Although some states had already begun introducing and passing NIL legislation, *NCAA v. Alston* rewrote the landscape of student-athlete compensation.¹²⁸ In *Alston*,¹²⁹ current and former student-athletes sued the NCAA, alleging violations of antitrust law as a result of the NCAA's policy of placing limits on the compensation that student-athletes could receive for their participation in collegiate sports.¹³⁰

The district court findings were twofold: (1) the court left undisturbed NCAA rules related to limits on athletic scholarships; and (2) the court struck down the NCAA rules that limit education-related benefits that schools may offer

¹²³ O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016).

¹²⁴ 141 S. Ct. 2141 (2021).

¹²⁵ Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, JD SUPRA (Aug. 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/>.

¹²⁶ *Id.*

¹²⁷ Kwanghyuk David Yoo, *SCOTUS Analysis: NCAA v. Alston*, EMORY L. NEWS CTR. (Aug. 2, 2021), <http://law.emory.edu/news-and-events/releases/2021/08/scotus-yoo-ncaa-v-alston.html>.

¹²⁸ Derrick L. Maultsby Jr., Stephanie Weber, & Anna Williams, *Supreme Court Sides with Student Athletes . . . But What Does That Mean?*, JACKSON KELLY: THE LEGAL BRIEF (June 23, 2021), <https://www.jacksonkelly.com/the-legal-brief-blog/supreme-court-sides-with-student-athletes-but-what-does-that-mean>.

¹²⁹ The lead plaintiff in *Alston* was Shawne Alston, a former WVU running back. Chris Bumbaca, *Who is Shawne Alston? Meet ex-West Virginia RB, Plaintiff in Landmark NCAA Supreme Court Decision*, USA Today (Jun. 21, 2021, 7:43 PM), <https://www.usatoday.com/story/sports/ncaaf/2021/06/21/shawne-alston-ncaa-supreme-court/7771854002/>.

¹³⁰ Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

student-athletes.¹³¹ Examples of education-related benefits include payments or scholarships for graduate or vocational school, academic tutoring, and post-NCAA eligibility internships.¹³² Finding that these education-related benefits could not be “confused with a professional athlete’s salary,” the district court accordingly entered an injunction preventing the NCAA from placing a cap on the value of education-related benefits provided by individual universities.¹³³ The court also asserted that the NCAA has a “near complete dominance of, and exercise[s] monopoly power in, the relevant market”¹³⁴ because there are no “viable substitutes” for elite athletes.¹³⁵ If a talented, young athlete wishes to continue their athletic career at the highest level, it is essentially NCAA or bust.¹³⁶ Upon the district court’s final ruling, both parties appealed¹³⁷ to the Ninth Circuit where the ruling was affirmed.¹³⁸

ii. *Supreme Court Opinion*

Certiorari was then granted by the Supreme Court to once again attempt to strike a balance between antitrust law and the NCAA’s amateurism policies. The Court put it bluntly: “In essence, [the NCAA] seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.”¹³⁹ Thus, the only issue raised on appeal was the injunction granted by the lower courts concerning the NCAA’s rules on education-related benefits, and the court analyzed the issue under a rule of reason analysis just as the Ninth Circuit did in *O’Bannon*.¹⁴⁰ Affirming the lower courts’ injunction, the Supreme Court echoed the district court’s sentiment that the

¹³¹ *Id.*

¹³² *Id.* at 2153.

¹³³ *Id.*

¹³⁴ *Id.* at 2151.

¹³⁵ *Id.* at 2152.

¹³⁶ Simply put, as the sole supervisor of collegiate athletics, the NCAA has 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.” *Id.*

¹³⁷ The plaintiffs did not renew their across-the-board challenge to NCAA rulemaking and thus the Supreme Court did not consider it on appeal. The only rules at issue, as discussed later in this Note, were those restricting education-related benefits, the subject of the district court’s injunction. *Id.* at 2144.

¹³⁸ In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1266 (9th Cir. 2020), *cert. granted sub nom.* Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff’d sub nom.* Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

¹³⁹ *Alston*, 141 S. Ct. at 2147 (2021).

¹⁴⁰ *Id.* at 2151.

NCAA uses its lucrative monopsony¹⁴¹ to artificially cap education-related benefits.¹⁴² The Supreme Court analogized it as such:

The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not contest here) that student-athletes have nowhere else to sell their labor.¹⁴³

The Court then went on to conclude that the district court's judgment was proper as it did not demand that the NCAA show that its rules were the "*least* restrictive means of preserving consumer demand."¹⁴⁴ Rather, its finding that the restraints in question were "patently and inexplicably stricter than is necessary" is enough to violate antitrust law.¹⁴⁵ The NCAA's procompetitive goals and adherence to amateurism were not sufficient reasons to justify the NCAA policies that restrict education-related benefits for student-athletes.¹⁴⁶

Perhaps one of the most striking parts of the decision was Justice Kavanaugh's concurring opinion, as it strongly suggested that *Alston* likely did not mark the end of litigation concerning the NCAA and its rulemaking.¹⁴⁷ While joining the majority's opinion in full, Kavanaugh urged that the NCAA's compensation rules that were not challenged in *Alston* (thus, those that are not about education-related benefits) "also raise serious questions under antitrust laws."¹⁴⁸ Kavanaugh chiefly asserted the paradox of the NCAA's circular logic: the NCAA fully recognizes that it dominates the college sports market through its rulemaking concerning compensation, thus unilaterally controlling it, but the

¹⁴¹ Monopsony is defined as "a market situation in which one buyer controls the market." *Monopsony*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Monopsony is often thought of as the flip side of monopoly . . . a monopsonist is a buyer with no rivals." *Id.* (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 137–38 (2000)).

¹⁴² *Alston*, 141 S. Ct. at 2152.

¹⁴³ *Id.* at 2156.

¹⁴⁴ *Id.* at 2161.

¹⁴⁵ *Id.* at 2162.

¹⁴⁶ The Court nevertheless emphasized that the injunction entered by the district court is not limitless, as it would still allow the NCAA to "forbid in-kind benefits unrelated to a student's actual education[.]" *Id.* at 2165. In response to concerns that universities would test the limits of the decree by, for example, purchasing luxury cars for student-athletes to use to get to class, the court stated that nothing stops the NCAA from "enforcing a 'no Lamborghini' rule." *Id.*

¹⁴⁷ *Id.* at 2166–67 (Kavanaugh, J., concurring) ("I add this concurring opinion to underscore that the NCAA's remaining compensation rules [i.e., those not about education-related benefits] also raise serious questions under the antitrust laws.").

¹⁴⁸ *Id.* at 2166–67.

NCAA also asserts that this is a sound practice because “the defining feature of college sports” is that the hardworking student-athletes play for free (exclusive of athletic scholarships).¹⁴⁹ Not only is this logic unpersuasive, it is also unheard of in any other industry. Kavanaugh draws a compelling parallel:

All of the restaurants in a region cannot come together to cut cooks’ wages on the theory that “customers prefer” to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers’ salaries in the name of providing legal services out of a “love of the law.” Hospitals cannot agree to cap nurses’ income in order to create a “purer” form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a “tradition” of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a “spirit of amateurism” in Hollywood.¹⁵⁰

Kavanaugh’s passionate concurring opinion explicitly states one truth that has been brewing through the decades of antitrust litigation concerning university athletics: “The NCAA is not above the law.”¹⁵¹

V. DRAFTING A FEDERAL NIL LAW

As is now abundantly clear, the inescapable reality of college sports prior to the NIL era was that despite some sports being multi-million dollar industries, seemingly everyone but the student-athletes got paid.¹⁵² Student-athletes were accustomed to saying no, whether it be to an offer to sponsor a product on Instagram or to accept something as meager as a free water bottle after winning a recreational athletic tournament.¹⁵³ What is even more shocking is that the NCAA has gone after student-athletes who have received trivial amounts of money accidentally. In one extreme case, a University of Massachusetts tennis player saw three seasons’ worth of her wins wiped out when she was mistakenly given a \$126 stipend intended for on-campus students after she had moved to

¹⁴⁹ *Id.* at 2167.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2169.

¹⁵² *Id.* at 2168 (“The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenue for colleges every year. Those enormous sums of money flow to seemingly everyone except the student-athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student-athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.”).

¹⁵³ Hruby, *supra* note 26 (illustrating the experience of Hayley Hodson, a former Stanford University volleyball player, who turned down sponsorship deals with clothing brands because of the NCAA’s rules on amateurism).

off-campus housing.¹⁵⁴ Stories like these are appalling, but thankfully change in the collegiate sports world has finally come. Now, it must be managed properly.

Despite its unreasonable adherence to amateurism in order to reap exemptions from the standard application of antitrust law, the NCAA now asserts that a federal NIL law is necessary:

A federal, nationwide solution for name, image and likeness is necessary and would provide student-athletes across the country a fair, uniform collegiate experience and help ensure that opportunities provided to hundreds of thousands of student-athletes participating in nonrevenue sports continue to be supported. The Association looks forward to working with Congress to enact legislation that ensures a federal solution to NIL legislation, provides narrow safe harbor protections against ongoing litigation and reaffirms the nonemployment status of student-athletes. This approach will provide for a uniform name, image and likeness approach that will result in fair, national competition for all student-athletes and protect and ensure opportunities for future student-athletes.¹⁵⁵

Although unquestionably a step forward, it must not be ignored that it took so long to finally get here. The NCAA defends its delayed timetable by asserting that pushing the NIL issue to the backburner allowed it to “improve academic support, provide the cost of attendance, guarantee scholarships and strengthen health and safety.”¹⁵⁶ This is not a justification that should be taken seriously; NIL has long been an important issue to student-athletes, and it should have been seasonably addressed.¹⁵⁷ Rather, the NCAA only began considering

¹⁵⁴ *Former UMass Tennis Player Brittany Collens Takes on NCAA Over Harsh Penalty*, CBS BOS. (Jan. 5, 2021, 5:55 PM), <https://boston.cbslocal.com/2021/01/05/ncaa-umass-womens-tennis-team-violatons-sanctions-petition-brittany-collens/>.

¹⁵⁵ *Questions and Answers on Name, Image and Likeness*, NCAA (Jan. 2021), <https://www.ncaa.org/questions-and-answers-name-image-and-likeness>.

¹⁵⁶ *Id.*

¹⁵⁷ Mark Few, the head coach of the men’s basketball team at Gonzaga University, succinctly described the need for a federal NIL law: “I’m embarrassed that we’re here having to deal with [NIL legislation] right now . . . These changes are long, long overdue. All athletes deserve to use their own name, image and likeness in commercial endorsements and on social media. And I’m very much in favor of them profiting as much as they possibly can from this . . . We can’t run competitive, fair championships if every state has a different rule.” Rebecca Shabad & Kyle Stewart, *Senators Agree on Need for a National Standard for College Athlete Compensation*, NBC NEWS (June 9, 2021, 2:32 PM), <https://www.nbcnews.com/politics/congress/senators-agree-need-national-standard-college-athlete-compensation-n1270208>.

making serious changes once individual states began rolling out progressive NIL laws.¹⁵⁸

Despite the delay, the NCAA's new NIL stance is certainly a good one. A federal NIL law will promote uniformity and take a significant amount of power out of the NCAA's hands. The history of NCAA litigation demonstrates that the NCAA should not be permitted to faithfully execute and oversee the NIL era; the power should be vested in student-athletes stemming from a federal source. Additionally, the federal government is more equipped to thoroughly legislate on the issue and address unforeseen problems that may arise. A state-by-state patchwork could negatively impact recruiting and complicate the already uncharted territory of endorsement deals for student-athletes, possibly paving the way for the exploitation of naïve, teenage athletes.¹⁵⁹

With all of this in mind, in order to promote the best interests of student-athletes, a federal NIL law must be enacted that (1) treats student-athletes as any other member of society under antitrust law; (2) mandates that universities create a financial literacy and tax workshop for student-athletes; and (3) allows states to create broader protections that are uniquely tailored to their state. A federal NIL law with these components will be especially beneficial for female athletes who are historically disadvantaged in the professional sports market.¹⁶⁰

A. Student-Athletes Must Have the Same Economic Freedom as Any Other Member of Society

First and foremost, a federal NIL law must address the antitrust concerns that have long been the subject of NCAA litigation. The NCAA's decades-long insistence upon amateurism in college athletics has shielded it from Sherman Act scrutiny, creating a rulemaking framework that is virtually unheard of in any other industry in the United States.¹⁶¹ The NCAA artificially fixes the price of student-athletes' labor by setting caps on education and other related benefits because without NCAA restrictions, an elite student-athlete could surely sell her

¹⁵⁸ See Joseph Salvador, *NCAA Approves Interim NIL Policy, Change Will Take Effect Thursday*, SPORTS ILLUSTRATED (June 30, 2021), <https://www.si.com/college/2021/06/30/nil-interim-policy-approved-starting-thursday> (showing the date that the NCAA policy went into effect). NCAA policies allowing all its member universities' student-athletes to earn NIL compensation went into effect on July 1, 2021, the same day Florida's NIL law went into effect and almost two years after California passed its NIL law.

¹⁵⁹ Matt Savare & Bryan Sterba, *What's in a Name (Image or Likeness)? Quite a Bit for Star College Athletes*, JD SUPRA (Sept. 13, 2021), <https://www.jdsupra.com/legalnews/what-s-in-a-name-image-or-likeness-3524746/> ("This complex, patchwork of disparate state laws and NCAA policy does not lend itself to efficient deal making between brands, agencies, and athletes. Athletes will understandably be reticent to jeopardize their eligibility by running afoul of this morass.").

¹⁶⁰ See Zerunyan, *supra* note 13.

¹⁶¹ Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

labor at a much higher price than the cost of her university tuition.¹⁶² Student-athletes got the message that they cannot be paid because society as a whole prefers to consume college athletics that showcase unpaid players.¹⁶³ Thankfully, *Alston* marked the end of some of these restrictions, but Kavanaugh's concurrence really gets to the core of the issue and sets the tone for the standard moving forward: student-athletes are human beings who deserve to have the same protections and guarantees as any other working person.

One of the many reasons the NCAA's amateurism argument fails with respect to NIL rights is that even if a student-athlete is compensated for their NIL, they are still amateur athletes in the sense that they are not being paid by their universities.¹⁶⁴ As the NCAA interim policy makes clear, student-athletes are prohibited from accepting money as an inducement to attend a particular university and from being paid for their athletic performance.¹⁶⁵ Critics of the NIL era must understand that permitting NIL compensation does not mean that the NCAA is parting with the notion of amateurism.¹⁶⁶ On the contrary, student-athletes will still be motivated by the "physical, mental, and social benefits to be derived,"¹⁶⁷ as the NCAA manual requires because the odds of becoming a professional athlete are incredibly slim—especially for female athletes.¹⁶⁸

Moreover, even if a student-athlete hopes to become a professional athlete, who is to say that the student is not also motivated by her love of the game and the structure that collegiate athletics brings? One can imagine a scenario in which a female student-athlete, who has played a sport ever since she was a young child, opts to forgo joining her university's team to instead get a job to help pay for college. Now with robust NIL rights, she can play the sport she loves while earning compensation by posting a couple of endorsement posts on Instagram on the side. Indeed, the Ninth Circuit envisioned such a result: "[I]f anything, loosening or abandoning the compensation rules might be the best way to 'widen' recruits' range of choices; athletes might well be more likely to attend

¹⁶² *Id.* at 2168.

¹⁶³ *Id.* at 2167–68 (illustrating that this logic is circular and bizarre: "Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.").

¹⁶⁴ 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 HARV. J. SPORTS & ENT. L. 247, 302–03 (2020) ("The only sensible definition of amateurism for a college athlete would require that athletes not be paid by member institutions a cash income for playing their sport.").

¹⁶⁵ Savare & Sterba, *supra* note 159 ("The NCAA's interim policy prohibits athletes from accepting compensation in connection with the commercialization of their persona.").

¹⁶⁶ Meyer & Zimbalist, *supra* note 164, at 257.

¹⁶⁷ 2020–21 NCAA Division I Manual, Art. 2.9, NAT'L COLLEGIATE ATHLETIC ASS'N (2020), <https://www.ncaapublications.com/productdownloads/D121.pdf>.

¹⁶⁸ Cliburn, *supra* note 9.

college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school.”¹⁶⁹

It cannot be said with confidence that allowing NIL compensation will harm the “nature” of college athletics: For the average student-athlete, the NIL era means that any extra money earned is just an added bonus: “From a licensing standpoint, the annual NIL value per student-athlete could range from \$1,000–\$10,000, whereas professional athletes garner between \$50,000–\$400,000.”¹⁷⁰ Just because student-athletes are poised to earn some money does not mean that they can immediately be likened to professional athletes.¹⁷¹

Beyond the most basic recognition that student-athletes should be seen as human beings rather than sources of cheap labor, a federal NIL law must prohibit undue restrictions on how an athlete may capitalize on her NIL. The United States’ free market system has for centuries allowed people to capitalize on their own NILs.¹⁷² One quick scroll through any social media site will reveal sponsored posts advertising a product, whether the person in the advertisement is a world-famous celebrity or perhaps an acquaintance with a significant niche following. The free market neither restricts these endorsements nor requires the endorsee to divulge the details of the deal.¹⁷³ The historical nature of the NCAA and how it previously governed its member schools and conferences with its amateurism principles should make no contribution to the analysis.¹⁷⁴

Currently, some states’ NIL laws restrict how student-athletes can cash in on their NIL. For example, Texas’s enacted law mandates that a student-athlete “shall, before entering into the contract, disclose to the institution . . . any

¹⁶⁹ O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1073 (9th Cir. 2015).

¹⁷⁰ AJ Maestas & Jason Belzer, *How Much is NIL Worth to Student Athletes?*, ATHLETIC DIR. U, <https://athleticdirector.uconn.edu/articles/how-much-is-nil-really-worth-to-student-athletes/> (last visited Oct. 26, 2022). Note that this is not to say that elite athletes in the nation’s most followed sports, such as men’s Division I football or basketball, will not earn unprecedented amounts of money; one estimate found that based on former LSU quarterback Joe Burrow’s number of Instagram followers, Burrow could have earned around \$700,000 by capitalizing on his NIL. *Id.*

¹⁷¹ For the sake of argument, even if this compensation would allow student-athletes to be likened to professional athletes, it likely would not be as detrimental as many opponents suggest. For example, multi-million-dollar professional athlete salaries do not deter viewership and consumption of those athletic leagues. Steele, *supra* note 117, at 538–39.

¹⁷² Ronald S. Katz, *NCAA’s Proposed NIL Regulations Are an Antitrust Violation Waiting to Happen*, INST. FOR INTELL. PROP. & SOC. JUST., <https://iipsj.org/blog-post-on-nil-and-antitrust/> (last visited Sept. 4, 2022).

¹⁷³ *Id.* (“How much someone is being paid for a name, image or likeness is clearly competitively sensitive information.”).

¹⁷⁴ At the risk of belaboring the point, Kavanaugh’s concurrence emphasizes that the importance of tradition within college athletics cannot alone be used as a means to justify adherence to amateurism principles at the expense of student-athlete compensation. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2166–69 (2021). Any bare adherence to traditional notions of college athletics as it relates to the policing of student-athlete endorsement deals would be counterproductive.

proposed contract the student athlete may sign for use of the student athlete's name, image, or likeness.¹⁷⁵ Not only does this create an overbearing standard for the average college athlete,¹⁷⁶ but it erases the privacy that is typically enjoyed by non-student-athletes who enter NIL deals.¹⁷⁷

Another benefit of the free market system is that a person seeking to capitalize on their NIL may contract with whomever they please.¹⁷⁸ Some state NIL laws would outright prohibit certain NIL deals: "Except with the prior written consent of the postsecondary education institution, a student athlete may not enter into a contract . . . if the institution determines that a term of the contract conflicts with a term of a contract held by the student athlete's postsecondary education institution."¹⁷⁹ Provisions like these pave the way for inevitable conflicts of interest. For example, a university that partners with Nike to furnish the school's athletic uniforms may take issue with a student-athlete who seeks to partner with Adidas.¹⁸⁰

Some states even take their NIL laws a step further by prohibiting certain endorsements that may be considered immoral, banning endorsements for things like sports betting, tobacco or alcohol, and adult entertainment.¹⁸¹ Mississippi's law contains a catch-all provision that forbids NIL deals with products that are "reasonably considered to be inconsistent with the [university's] values or mission," including deals that would "bring about public disrepute, embarrassment, scandal, ridicule or otherwise negatively impacting the reputation or the moral or ethical standards of" the university.¹⁸²

Requirements like these serve to place inordinate burdens on a student-athlete's freedom to enter NIL contracts.¹⁸³ They also have the potential to open the door to regulate the conduct of female student-athletes by the imposition of implicit biases upon what is a proper endorsement and what is not. Female

¹⁷⁵ S.B. 1385 § 251.9426(g)(1), 87th Leg. (Tex. 2021).

¹⁷⁶ Requiring that the student-athlete disclose *any* proposed contract that the student-athlete *may* sign is far too overreaching and simply unnecessarily broad, especially for a student-athlete who may have multiple potential endorsement opportunities.

¹⁷⁷ Paul A. Schwabe Jr., *The Modern Pay for Play Model: Laws That Protect Student-Athletes' Fundamental Right to Commercialize Their Names, Images, and Likenesses*, 15 BROOK. J. CORP. FIN. & COM. L. 289, 304–05. ("The freedom to contract is a fundamental right that requires additional legal protections, especially when limitations are sought to be imposed based on status (i.e., as a student-athlete) rather than capacity or subject matter of the contract.").

¹⁷⁸ Katz, *supra* note 172.

¹⁷⁹ H.B. 404 § 2(f), Reg. Sess. (Ala. 2021).

¹⁸⁰ Matt Suchecki, *Institutional Conflicts: What Are They and How Can Institutions Prepare for the Incoming NIL Changes?*, SPRY, <https://spry.so/insights/institutional-conflicts-what-are-they-and-how-can-institutions-prepare-for-the-incoming-nil-changes/> (last visited Sept. 4, 2022).

¹⁸¹ See S.B. 2313 § 4(14), 136th Sess. (Miss. 2021).

¹⁸² *Id.*

¹⁸³ Schwabe, *supra* note 177.

student-athletes have had to overcome numerous obstacles in the world of collegiate athletics—Title IX legislation in the past few decades perhaps illustrates the clearest example.¹⁸⁴ Female athletes may also be more vulnerable to stereotypes in the sponsorship market, making it even more difficult to secure endorsement deals in comparison to their male counterparts.¹⁸⁵ Andrea Paloian notes that well-known female athletes are expected to not only be successful, but also to maintain traditional notions of femininity.¹⁸⁶ One can imagine a situation wherein a female student-athlete partners with a brand or product that does not fit within the traditional mold of womanhood, conjuring controversy within her university. Knowing the obstacles that female athletes have historically had to face, vesting unchecked authority into the university to decide what is or is not consistent with university values could present unique challenges that male student-athletes may never have to face.

Restrictions like those mentioned above are also remarkably broad; who is to decide what is inconsistent with a university's values? What is the standard for deciding when an endorsement deal would bring "ridicule" to a university? The obvious answer to these questions is that the university would have the sole authority to determine which products or services are ripe for NIL compensation and which ones are not, again moving valid student-athlete concerns about dictating their own future to the back burner.

There are a couple of potential solutions to this problem that avoid vesting sole authority in the university. The first is a suggestion found in Senator Booker's proposed federal bill¹⁸⁷: a state may prohibit a student-athlete endorsement deal for a particular product, service, or industry if the state itself also prohibits institutions of higher education from entering into such agreements.¹⁸⁸ While this may not be the optimum solution, it prevents universities from creating their own arbitrary endorsement rules and creates uniformity among all institutions in a given state.

A second solution would be the creation of an open forum wherein university officials and student-athlete individuals, representatives, or teams may discuss their concerns or ideas for future endorsement deals. Such a solution

¹⁸⁴ See *Cohen v. Brown Univ.*, 101 F.3d 155, 179–81 (1st Cir. 1996) (holding that Brown University was not in compliance with the requirements of Title IX and asserting that even if there appears to be a lack of female interest in joining university athletic teams, it cannot be ignored that these differences may be a result of women historically being discouraged from athletic participation).

¹⁸⁵ Andrea Paloian, *The Female/Athlete Paradox: Managing Traditional Views of Masculinity and Femininity*, APPLIED PSYCH. OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/the-femaleathlete-paradox-managing-traditional-views-of-masculinity-and-femininity/ (last visited Sept. 4, 2022).

¹⁸⁶ *Id.*

¹⁸⁷ See College Athletes Bill of Rights, S. 5062, 116th Cong. § 3 (2020).

¹⁸⁸ *Id.* §3(a)(3)(A).

allows the student-athlete to have more control over their own endorsement deals while still allowing the university to have a say about what they believe is or is not consistent with their values. This may be the most equitable and democratic solution, and it helps abate arguments that the paternalistic power over student-athletes has merely shifted from the NCAA to the university.

In summation, a federal NIL law must prevent these arbitrary requirements and address and dismiss any lingering antitrust concerns by asserting that student-athletes are nonetheless people who deserve all economic freedom afforded to every other person in the country. Failing to do so is reverting to pre-NIL policies that shielded the NCAA and its member universities from antitrust scrutiny in the name of amateurism.

B. Establishing a Requirement for Tax Education as Part of a Financial Literacy Workshop

It is abundantly clear that recent NIL policy is a financial game-changer for student-athletes. Today's student-athletes will see money deposited into their bank account that they previously would never be allowed to accept. As a result, student-athletes may inadvertently overlook their tax obligations.¹⁸⁹

Senator Richard Burr (R-NC) has introduced¹⁹⁰ the NIL Scholarship Tax Act,¹⁹¹ which would give student-athletes two choices: Student-athletes can either receive a tax-free scholarship, or they can instead opt to receive outside compensation and pay income taxes on their scholarship award.¹⁹² The NIL Scholarship Tax Act has been met with criticism¹⁹³ and should be rejected because it again harkens back to an attempt to maintain the outdated "nature of college sports" model. Indeed, Senator Burr has said as much himself: "It's critical that we help protect the successful collegiate sports model that has provided students with educational and professional opportunities for more than

¹⁸⁹ Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 73 OKLA. L. REV. 457, 460 (2021) ("While [NIL legislation] does not transform student-athletes into employees of their institutions, income earned from the use of their NIL will be subject to significant federal and state tax obligations.").

¹⁹⁰ In support of his proposed bill, Senator Burr tweeted: "If college athletes are going to make money off their likenesses while in school, their scholarships should be treated like income. I'll be introducing legislation that subjects scholarships given to athletes who choose to "cash in" to income taxes." Richard Burr (@SenatorBurr), TWITTER (Oct. 29, 2019, 3:28 PM), <https://twitter.com/SenatorBurr/status/1189262863552208896>.

¹⁹¹ NIL Scholarship Tax Act, S. 2897, 117th Cong. (2021).

¹⁹² *Id.* § 2. Student-athletes who receive less than \$20,000 in NIL compensation would not be required to pay taxes on their scholarship. *Id.*

¹⁹³ Frank N. Darras, *How NIL Will Impact Insurance, Taxes, and Other Legal Issues for Collegiate Athletes*, THE RECORDER (Dec. 21, 2021, 5:00 AM), <https://www.law.com/therecorder/2021/12/21/how-nil-will-impact-insurance-taxes-and-other-legal-issues-for-collegiate-athletes/?sreturn=20220219222926>.

a century.”¹⁹⁴ Proposals like Senator Burr’s fail to recognize that NIL income does not affect amateurism or the college sports model—they provide ultimatums rather than guidance.

Currently, student-athletes who receive money from sponsors are considered independent contractors, meaning any applicable payroll taxes are not withheld—the student-athlete must therefore be more cognizant of her NIL income.¹⁹⁵ This, however, will likely prove to be a difficult task. While keeping track of cash income from NIL endorsements likely will not prove to be overly difficult, today’s student-athletes also must keep track of the value of non-cash items they receive, such as property, meals, and accommodations.¹⁹⁶ To illustrate this problem, “it would make no difference if a car dealership paid a student-athlete \$5,000 for the use of his NIL or if the dealership loaned him a car with a fair value of \$5,000 for the period of time used; either way, the student-athlete would have to report \$5,000 as gross income.”¹⁹⁷

Therefore, a better course of action than the NIL Scholarship Act is a federal requirement that individual institutions provide a mandatory financial literacy course to help student-athletes learn to be responsible with their earnings. Many state NIL laws have enacted such provisions strictly for the benefit of the student-athlete. For example, Georgia’s NIL law states that “A postsecondary educational institution shall conduct a financial literacy and life skills workshop for a minimum of five hours at the beginning of the student athlete’s first and third academic years.”¹⁹⁸ Georgia’s NIL law provides that the financial literacy workshop is to include topics like financial aid, debt management, budgeting, and time management skills.¹⁹⁹ The class is intended to serve strictly as a financial tool for student-athletes: Universities are expressly prohibited from including anything related to marketing or advertising in the course curriculum.²⁰⁰

The Georgia law’s requirements for an educational course on finances are commendable and should be included in the federal law, in addition to guidance on basic tax preparation.²⁰¹ It is important to remember that student-athletes are

¹⁹⁴ Brian Murphy, *Tax College Athletes’ Scholarships if They Make Too Much Money*, INDEP. TRIB. (Sep. 29, 2021), https://independenttribune.com/news/state-and-regional/article_30c68b47-af8a-58f9-951f-e40cbf71d2b1.html.

¹⁹⁵ Nicole DeRosa, *More NIL, More Taxes*, WISS (Aug. 2, 2021), <https://wiss.com/blog/more-nil-more-taxes/> (illustrating that tax implications for independent contractors are typically more complicated than tax implications for W-2 employees).

¹⁹⁶ Kisska-Schulze & Epstein, *supra* note 189, at 481–82.

¹⁹⁷ *Id.* at 482.

¹⁹⁸ H.B. 617, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Darras, *supra* note 193 (emphasizing that there is both a need and a desire for federal guidance on all things NIL-related).

young individuals, most of which are straight out of high school. Many student-athletes also cross state lines to attend the university of their choosing. Simply put, earning NIL compensation means complicated tax obligations that if improperly managed could have serious consequences.²⁰²

Essentially, a federal requirement that mandates universities to provide their student-athletes with even basic guidance on their tax obligations would help prevent innocent tax errors and potentially nefarious recruitment tactics.²⁰³ Furthermore, it would simply be irresponsible to make these dramatic NIL changes but force student-athletes to navigate the complicated world of tax law entirely on their own.

C. Individual States Must Follow Federal NIL Rules, but are Free to Provide Broader Protections at the State Level

Although a federal NIL law should be very robust, requiring expansive protections for student-athletes, it should also acknowledge that individual states may be better suited to craft broader NIL protections that are more suited for their student-athletes.²⁰⁴ Under such a framework, the federal and state governments can function in harmony and advance the policy goal of the NIL era: putting student-athletes first.²⁰⁵ Such institutional competence as balanced between the federal and state governments also fosters judicial deference,²⁰⁶ which is a welcome change from the decades of cumbersome litigation concerning NCAA governance and rulemaking.

For example, California's NIL law, the Fair Pay to Play Act, is unique in that it established a working group to consider extending NIL protections to community college athletes.²⁰⁷ This could represent an effort to protect a unique interest of California, such as a desire to encourage its students that community college is a viable option to obtain a quality education. In so doing, promising

²⁰² Kisska-Schulze & Epstein, *supra* note 189, at 457.

²⁰³ One commentator cautions against crooked recruiting and imagines a situation wherein college coaches coax student-athletes: "Come to our school because we'll help you build your brand and you won't have to pay any state income taxes on your earnings[.]" Andy Wittry, *Talking Taxes: How State Income Taxes, LLCs and Establishing Residency Could Affect NIL Income*, OUT OF BOUNDS WITH ANDY WITTRY (May 28, 2021), <https://andywittry.substack.com/p/talking-taxes-how-state-and-local>.

²⁰⁴ See Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L. J. 1, 8–9 (2006) (emphasizing that if either the federal or the state government fails in regulating an issue, the other "remains available to come to the aid of the citizens").

²⁰⁵ *Id.* at 8 (describing interactive federalism).

²⁰⁶ *Id.* ("The movement from dualist federalism to interactive federalism transfers the venue for federalism debates. The agents of interactive federalism are legislators or administrators, not judges. The role of the courts is to resist intervention.")

²⁰⁷ CAL. EDUC. CODE ANN. § 67457 (West 2022).

student-athletes can make the decision that is best for their unique situations without being tempted by the prospect of earning NIL compensation.

Similarly, Maryland's NIL law requires universities to adopt certain safety guidelines. Named after a football player who tragically died from heatstroke during a workout, the Jordan McNair Safe and Fair Play Act contains many of the standard NIL provisions but also prioritizes the health and safety of the state's hard-working student-athletes.²⁰⁸

In summation, a robust federal NIL law should be a top priority. The law should be carefully researched and crafted to afford student-athletes maximum protection and to protect their best interests. However, this is not to say that individual states should not have the ability to enact unique protections that may be specially tailored to their state. So long as individual state NIL policies do not run directly contrary to federal ones, the two should be permitted to coexist harmoniously.

²⁰⁸ H.B. 125, 2021 Gen. Assemb., 442d Sess. (Md. 2021).

VI. CONCLUSION

The effect that recent NIL legislation will have on the future of college athletics cannot be overstated. Student-athletes, who were accustomed to saying “no” to endorsement and sponsorship deals in the past, now have the potential to cash in on their name, image and likeness. The NCAA, which has long avoided antitrust law by clinging to the definition of amateurism and arguing that the nature of collegiate sports exempts them from scrutiny, is now powerless against the national NIL tide.

To be sure, NIL legislation is great news for student-athletes everywhere. However, it is particularly beneficial for female student-athletes who statistically have smaller chances of going professional or earning as much money as their male counterparts in the post-college athletic landscape. However, to properly ensure these benefits, a robust federal law is needed to resolve the current patchwork of state legislation and NCAA interim policy. To organize the chaos, a federal law that emphasizes that student-athletes deserve all economic freedoms available to any other member of society, mandates that universities hold financial literacy and tax workshops, and permits individual states to create broader NIL protections that are beneficial to the unique characteristics of their state is necessary. After decades of debate, litigation, and controversy, it is finally time to put student-athletes first.

*Anna G. Williams**

* J.D. Candidate, West Virginia University College of Law, 2023; B.A., Political Science, University of Pittsburgh, 2020. Lifelong sports lover and collegiate racquetball player. I would like to thank Shawn Hogbin for his thoughtful comments throughout the Note writing process, as well as the entirety of the West Virginia Law Review for their tireless efforts in publishing this Note. Any errors contained herein are mine alone.