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IS THE END JUST THE BEGINNING? NIL CHANGES AND THE NEW WORLD OF INTERCOLLEGIATE ATHLETICS

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I. INTRODUCTION

Since the beginning of the NCAA's creation in the early 1900s, it has completely dominated the intercollegiate athletics market. The NCAA based its business model on amateurism, believing that student-athletes should not be compensated for their athletic services, nor the use of their name, image, or likeness.

Student-athletes and universities fought with the National Collegiate Athletic Association ("NCAA") for decades trying to obtain freedom in the world of college sports.[1] After several years of lawsuits, the Supreme Court very narrowly sided with student-athletes, holding that the NCAA violated the law by limiting the education-related benefits that schools could offer to student-athletes.[2] The most notable aspect of this opinion is Justice Brett Kavanaugh's concurrence which

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[1] *See,* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015); NCAA v. Alston, 141 S. Ct. 2141 (2021).

[2] NCAA v. Alston, 141 S. Ct. 2141 (2021).

further expands on the Court's holding. Justice Kavanaugh stated that the NCAA's tradition of amateurism was not enough to justify the NCAA's decision to not fairly compensate student-athletes.[3] The NCAA's business model would be illegal in any other market in America, and there is no reason why college sports should be any different, as the NCAA is not above the law.[4]

Amid the *Alston* lawsuit, several states passed legislation allowing student-athletes to be compensated for their name, image, and likeness ("NIL").[5] The legislation would take effect in 2023, regardless of what the Court in *Alston* held. After the Court released the *Alston* holding in 2021, the NCAA knew it had to step in and act, as several states already allowed student-athletes to monetize their NIL. The NCAA then released an interim NIL policy that allowed all student-athletes to profit from their likeness.

NIL compensation stands in a grey area, as no federal laws have been enacted to regulate this market. Many states have enacted their own laws; however, they vary from state to state. This disparity has created an unlevel playing field among universities in different states. The unlevel playing field has not produced a major problem yet; however, an unexpected issue has arisen which goes by the name of collective.

This paper proceeds in four sections. First, I outline the history of the NCAA. I discuss the NCAA's creation and how the college sports market has transformed into what it is today. Then I explain the NCAA's laws regarding student-athlete compensation. I discuss state laws, the differences among states, and the push for a federal framework regarding student-athlete compensation. Third, I discuss collectives. I explain what collectives are and the unanticipated issues that have arisen through collectives. Lastly, I propose a solution to the problems surrounding collectives by proposing the ideal federal legislation.

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[3] *Id.* at 2169.

[4] *Id.*

[5] *See, e.g.*, Colin Dwyer, *California Governor Signs Bill Allowing College Athletes To Profit From Endorsements,* NPR (Sept. 30, 2019, 11:13 AM), https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-athletes-to-profit-from-endorsem.

II. HISTORY OF THE NCAA AND ITS FIGHT FOR "AMATEURISM"

A. THE CREATION OF THE NCAA

The relationship between American Colleges, Universities, and sports, has been in existence for over 150 years.[6] The beginning of intercollegiate athletics dates back to as early as the 1860s.[7] On November 6, 1869, students from Rutgers and Princeton met in New Brunswick, New Jersey for what is now known as the first college football game in American history.[8] This game was more akin to soccer than it was to modern football.[9] By the end of the 1870s, many teams began to adopt a rugby-like approach similar to the game American football has evolved into today.[10]

Football gained a reputation for brutality.[11] Serious injuries were common because of the mass formations and gang tackling, and in the 1904 season alone, there were 18 fatalities and over 150 injuries on the field.[12] The public began to cry for help, wanting the sport to be reformed or abolished.[13] Theodore Roosevelt responded to the public outcry by calling a meeting between Harvard, Princeton, and Yale, in which he urged leaders to review the rules in place and clean up the game.[14] Unfortunately, injuries and fatalities continued to rise, and during the 1905 season, Chancellor Henry M. MacCracken of New York University held a meeting with 13 different schools to reform the playing rules of football.[15] Soon after this meeting, 62 colleges and

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[6] *See* JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY (2006), https://www.ncaapublications.com/productdownloads/AB06.pdf.
[7] *Id.* at 2.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *History,* NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Nov. 23, 2022).
[12] *Id.*
[13] *Id.*
[14] NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021).
[15] *History, supra* note 11.

universities became the founding members of the Intercollegiate Athletic Association of the United States ("IAAUS").[16]

On March 31, 1906, the IAAUS was officially constituted as a rule-making body.[17] The association primarily set standards, but it also expressed views regarding the compensation of college athletes, standing behind the idea that college athletes should not receive money or any other financial compensation.[18] By 1910, the IAAUS was renamed the National Collegiate Athletic Association.[19]

B. THE COMPLICATED RELATIONSHIP BETWEEN COLLEGE SPORTS AND MONEY

Colleges and universities have had a complex relationship with sports and money from the beginning. As early as the late 1880s, the rivalry game between Princeton and Yale generated over $25,000 in ticket sales,[20] which has risen to over $600,000 today.[21] Colleges and universities quickly realized that sports were more than a game. They were also a business. College sports, specifically football, went from being a "student's game," to a "highly organized commercial enterprise."[22]

"Th[is] commercialism extended to the market for student-athletes."[23] Colleges found that the better their athletes were, the more revenue the college would generate. As a result, colleges began to actively offer talented athletes compensation and other inducements to play at their schools.[24] There were no academic residency requirements, meaning athletes could travel from college to college and appear in games wherever they wanted, generally dependent on who

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[16] *Id.*
[17] *Id.*
[18] *Alston,* 141 S. Ct. at 2148.
[19] *History, supra* note 11.
[20] *Alston,* 141 S. Ct. at 2148.
[21] *Value of $24,000 from 1880 to 2023*, CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/1880?amount=24000 (last visited Feb. 18, 2023).
[22] HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS 8 (1929), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/American_College_Athletics.pdf.
[23] *Alston,* 141 S. Ct. at 2149.
[24] *Id.* at 2148.

would pay them the most.[25] The NCAA admonished student-athlete compensation in 1906, but a 1929 study found that several schools still paid many of their athletes "under the table."[26]

a. The Adoption of the Sanity Code and the End of Athlete Compensation

Things began to spiral out of control in college sports by the mid-twentieth century. So-called "students" were transferring from school to school to play in football games, while others were enrolling into one class, then dropping out immediately after their moment of fame. It became a competition among colleges and universities to see who could acquire the best players in the nation, no matter what that entailed. The NCAA recognized that change was needed, but they could not enforce rules that were not in existence.

The NCAA adopted the "sanity code" in 1948. The sanity code was the first set of rules restricting the compensation paid to student-athletes.[27] The sanity code prohibited schools from awarding scholarships based on a student's athletic ability[28] , and it reiterated the idea that the NCAA opposed any form of promised pay.[29] However, the sanity code did permit schools to award scholarships to athletes, but recipients had to demonstrate their financial needs and meet the school's academic standard.[30] The sanity code laid down rules against recruitment, stating that neither coaches nor athletic staff could solicit an athlete's attendance by offering financial aid or other inducements.[31]

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[25] *Id*.
[26] CROWLEY, *supra* note 6.
[27] *History, supra* note 11.
[28] O'Bannon v. NCAA, 802 F.3d 1049, 1054 (9th Cir. 2015).
[29] NCAA v. Alston, 141 S. Ct. 2141, 2149 (2021).
[30] Jake Grant, *Rearview Mirror: The Sanity Code,* SBNATION (Oct. 31, 2019, 9:00 AM),
https://www.fromtherumbleseat.com/2019/10/31/20941243/rearview-mirror-the-sanity-code-georgia-tech-ncaa-image-and-likeness-players-scholarship-athletics.
[31] *Colleges Adopt the "Sanity Code" to Govern Sports*, N.Y. TIMES, at 3 (Jan. 11, 1948), https://www.nytimes.com/1948/01/11/archives/colleges-adopt-the-sanity-code-to-govern-sports-ncaa-bans.html.

The sanity code was also known for its embedded "compliance mechanism"[32] that would force schools to comply with NCAA rules and regulations. The new mechanism consisted of a compliance committee that could "terminate an institution's NCAA membership" if they didn't follow NCAA rules.[33] The code "provid[ed] for the 'suspension or expulsion' of 'proven offenders.'"[34]

Rules concerning athlete compensation have continued to evolve since the adoption of the sanity code.[35] Several years after adopting the initial code, a scandal occurred in which several colleges admitted to disobeying the rules and lacking respect for them.[36] Soon after, the code was rescinded.[37] The NCAA broadened its rules for the first time in 1956 by permitting schools to offer scholarships to student-athletes based on their athletic ability without regard to the athlete's financial need.[38] The new rules allowed schools to pay for "room, board, books, fees, and 'cash for incidental expenses such as laundry.'"[39] However, there was a cap. Schools could not give additional compensation past the amount of "grant-in-aid," defined as the total amount needed for "tuition and fees, room and board, and required course-related books."[40] If athletes were found obtaining financial aid in excess of the full "grant-in-aid," they would lose their eligibility to play college sports.[41] For example, in 2010, Reggie Bush, a football player at the University of Southern California, lost his player eligibility when the NCAA found out that he and his family had accepted benefits such as cash, travel expenses, and a rent-free home in

[32] Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329, 333 (2007).
[33] *Id.*
[34] *Alston* 141 S. Ct. at 2149, (*quoting Colleges Adopt the "Sanity Code" to Govern Sports*, N.Y. TIMES, at 3 (Jan. 11, 1948), https://www.nytimes.com/1948/01/11/archives/colleges-adopt-the-sanity-code-to-govern-sports-ncaa-bans.html.
[35] *Alston* 141 S. Ct. at 2149.
[36] Grant, *supra* note 30.
[37] *Id.*
[38] O'Bannon v. NCAA, 802 F.3d 1049, 1054 (9th Cir. 2015).
[39] *Alston* 141 S. Ct. at 2149, (quoting In Re Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019).
[40] *O'Bannon*, 802 F.3d at 1054.
[41] *Id.*

San Diego.[42] The NCAA forced Reggie Bush to return the Heisman trophy he won in 2005, and it forced the University of Southern California to vacate its 2004 national title as well as several other regular season wins.[43]

In later years, the NCAA created the Student Assistance Fund ("SAF") and the Academic Enhancement Fund ("AEF") to provide athletes at Division I schools with additional financial resources.[44] These funds aimed to assist student-athletes with special financial needs by providing tutorial services, supplies, and equipment.[45] The majority of the money is used for educational purposes, but some of it goes to players for their needs, "such as clothing."[46] In 2014, the NCAA began allowing its member schools to give scholarships based on a school's full cost of attendance rather than just the cost of "grant-in-aid."[47] The eighty NCAA member schools that make up the five largest athletic conferences in the country quickly voted to raise their athletic scholarships to the full cost of attendance.[48]

The NCAA attempted to assist student-athletes with their financial needs but continued to restrict the amount they could make, leaving millions of dollars on the table.[49] The NCAA limited how much a college or university could pay a student-athlete, and it also "barred [student-athletes] from being paid to advertise, recommend or directly promote the sale or use of a commercial product or service of any

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[42] Ryan Kartje, *NCAA says Reggie Bush wont' get his Heisman Trophy back despite new NIL rules,* L.A. TIMES (July 28, 2021, 12:41 PM), https://www.latimes.com/sports/usc/story/2021-07-28/ncaa-says-reggie-bush-wont-get-his-heisman-trophy-back-despite-new-nil-rules#.

[43] *Id.*

[44] Daniel Libit, *Alston Case Turns Spotlight onto NCAA's Student Assistance Fund,* SPORTICO (July 20, 2021, 10:00 AM), https://www.sportico.com/leagues/college-sports/2021/ncaa-student-assistance-fund-1234634735/.

[45] *Division I Finances,* NCAA, https://www.ncaa.org/sports/2021/5/11/division-i-finances.aspx (last visited Mar. 13, 2023).

[46] *Id.*

[47] O'Bannon v. NCAA, 802 F.3d 1049, 1054-55 (9th Cir. 2015).

[48] *Id.*

[49] Paul Rudder, *How much money can college athletes make with NIL marketing endorsement deals?* AS (Feb. 8, 2023, 12:31), https://en.as.com/ncaa/how-much-money-can-college-athletes-make-with-nil-marketing-endorsement-deals-n/.

kind."[50] In other words, student-athletes were not able to monetize their name, image, and likeness, otherwise known as their right to publicity. A person's right to publicity "is the inherent right of every human being to control the commercial use of his or her identity."[51] This is a right that every person in the United States was allowed to monetize,[52] except for student-athletes. Athletes were strictly "prohibited—with few exceptions—from receiving any 'pay' based on his athletic ability, whether from boosters, companies seeking endorsements, or would-be licensors of the athlete's name, image, and likeness."[53]

C. THE NCAA'S FIGHT FOR AMATEURISM

For well over half a century, the NCAA controlled the type and amount of funds that student-athletes could receive while reaping enormous profits generated by those same student-athletes. The NCAA has also transformed itself from an association merely meant to govern intercollegiate athletics to a massive business.[54] In 2019, the NCAA's revenue was $1.12 billion,[55] and NCAA president Mark Emmert made over $2.9 million.[56] Furthermore, two NCAA executives

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[50] Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules,* N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html.

[51] Mark Roesler & Garrett Hutchinson, *What's in a Name, likeness, and Image? The Case for a Federal Right of Publicity Law,* ABA (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

[52] Jay Bilas, *Why NIL has been good for college sports . . . and the hurdles that remain,* ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311.

[53] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

[54] NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021).

[55] Associated Press, *NCAA earns $1.15 billion in 2021 as revenue returns to normal,* ESPN (Feb. 2, 2022), https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal.

[56] Steve Berkowitz, *NCAA president Mark Emmert credited with $2.9 million in total pay for 2019 calendar year,* USA TODAY (Jul. 19, 2021, 8:04 PM), https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/.

made over $1.0 million, while seven others received at least $550,000 in compensation.[57] The association took a massive hit in 2020 due to the cancellation of the March Madness tournament, but in 2021 its revenue rose to $1.15 billion,[58] and the NCAA President made over $2.99 million in total compensation.[59] On top of that, several Division I football coaches have a salary exceeding $1.0 million, while some make as much as $11.0 million in a year's time.[60] It is clear that the people running the operation profited extensively; meanwhile, the student-athletes were still restricted. The question is: why did the NCAA regulate student-athlete compensation and their ability to make a profit? Why were players not allowed to make money without the risk of losing their eligibility? It all boils down to one word: amateurism.

Since the beginning of the NCAA's creation, it has adopted rules that implement standards of amateurism.[61] But what exactly does the term "amateurism" mean? The dictionary defines amateurism as "the belief that people should take part in sports and other activities as a hobby, for pleasure, rather than as a job, for money."[62] As explained by the NCAA, an amateur is "someone who does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses, or gained a competitive advantage in his/her sport."[63] Electing amateur status as a student-athlete is not an option that the NCAA gives to players; rather, it forces student-athletes to conform to the NCAA's amateurism rules.[64] In fact, athletes can lose

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[57] *Id.*

[58] Associated Press, *supra* note 55.

[59] Steve Berkowitz, *NCAA president Mark Emmert pockets more in 2020 despite pay cut during pandemic,* USA TODAY (May 16, 2022, 7:00 PM) https://www.usatoday.com/story/sports/college/2022/05/16/mark-emmert-2020-compensation-pandemic-cuts/9800720002/.

[60] Julia Elbaba, *Looking at the top college football head coach salaries in 2022,* NBC SPORTS (Sept, 8, 2022), https://www.nbcsports.com/chicago/college-football-head-coach-salaries-kirby-smart-2022-new-contract.

[61] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

[62] *Amateurism,* COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/amateurism.

[63] *What is Amateurism?,* NCAA, https://ncaa.egain.cloud/kb/EligibilityHelp/content/KB-2219/What-is-amateurism (last visited Mar. 1, 2023).

[64] *What Is Amateurism? And Why Does The NCAA Care About It,,* BREAKOUT SPORTS (Jan. 29, 2019), https://breakoutsports.net/2019/01/29/what-is-amateurism-and-why-does-the-ncaa-care-about-it/.

their eligibility to play or be penalized by fines if they violate their amateur status.[65]

Rule 12.01.1 of the NCAA bylaws states that only amateur student-athletes are eligible for participation in intercollegiate athletics.[66] Not only are student-athletes required to be "amateurs," the rules regarding amateur status are exceptionally strict. Under rule 12.1.2, an individual loses amateur status and is not eligible for intercollegiate competition in a particular sport if the individual:

> (a) Uses athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to pay professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) Receives, directly or indirectly, a salary, reimbursement of expenses, or any other form of financial assistance from a professional sports organization based on athletics skills or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) After initial full-time collegiate enrollment, enters into a professional draft; or (g) Enters into an agreement with an agent. [67]

The NCAA contends that student-athletes "shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits derived."[68] Furthermore, the association claims that "student participation in intercollegiate athletics is an avocation, and student-athletes should [be] protected from exploitation by professional and

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[65] *Id.*

[66] NCAA, DIVISION I MANUAL 42 (2022), https://web3.ncaa.org/lsdbi/reports/getReport/90008.

[67] *Id.* at 45.

[68] Kelly Charles Crabb, *The Amateurism Myth: a Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 191 (2017).

commercial enterprises."[69] The belief is that athletes are better protected if principles of amateurism are enforced.

The principle of amateurism became an embedded tradition in college sports, for which some people have deep admiration.[70] This tradition, however, led the NCAA to believe that they had created a "unique product—amateur college sports as distinct from professional sports."[71] They claimed that this unique product benefited consumers who insisted upon the amateur nature of college sports.[72] The NCAA contended that if amateurism were stricken from the intercollegiate athletic model, their product would be "impermissibly redefin[ed]." [73]

Although the NCAA was able to dominate the market, restrict student-athlete compensation, and prohibit student-athletes from profiting from their likeness for over seventy-three years, the Supreme Court of the United States changed the game forever in 2021.

D. THE DECISION THAT CHANGED IT ALL: *NCAA V. ALSTON*

The NCAA faced legal challenges for years as it attempted to uphold its tradition of amateurism and dominate the market surrounding intercollegiate athletics.[74] The association spent over $67.7 million in legal fees in the 2019-2020 fiscal year alone trying to defend its model.[75] Student-athletes and universities have sued the NCAA, striving to obtain freedom in the world of college sports.

One of the first lawsuits that attempted to and succeeded in undermining the NCAA's dominance in the intercollegiate market was the case of *National Collegiate Athletic Association v. Board of Regents*.[76] In 1981 the University of Oklahoma and the University of Georgia contracted with networks to televise their respective college football games.[77] The NCAA placed limits on the number of games that a university was allowed to televise[78] and also restricted the number of

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[69] *Id.*
[70] *See* NCAA v. Alston, 141 S. Ct. 2141, 2152 (2021).
[71] *Id.*
[72] *Id.*
[73] *Id.* at 2162.
[74] Berkowitz, s*upra* note 56.
[75] *Id.*
[76] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).
[77] *Id.* at 88.
[78] *Id.*

games available to the public in an attempt to force consumers to attend games physically.[79] The NCAA also barred negotiations between broadcasters and universities.[80] The University of Oklahoma and the University of Georgia joined forces and brought suit challenging the NCAA's control over the number of football games each university could televise, arguing that its actions were an unreasonable restraint on trade and in violation of the law.[81] Under the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is … illegal."[82] In short, businesses are banned from colluding or merging to form a monopoly and from controlling and manipulating prices in certain markets.

The District Court sided with the universities, holding that the NCAA's control over the intercollegiate television market violated the Sherman Act, making their actions illegal.[83] The Court of Appeals later affirmed the judgment of the District Court, holding that the NCAA's "actions were a horizontal restraint on trade and unreasonable as a matter of law." [84] The Court found that the NCAA was raising prices and reducing output, as well as controlling a market in which it had a monopoly, both of which are anticompetitive actions that the NCAA never justified.[85] The Supreme Court of the United States later affirmed the holding of the Court of Appeals[86]. This 1984 decision opened the doors to years of lawsuits against the NCAA alleging violations of the Sherman Act.

In 2008, Ed O'Bannon, a former basketball player at the University of California, Los Angeles, was informed by a friend that he had been depicted in a college basketball video game.[87] The game had been produced by Electronic Arts ("EA"), a production company that made video games based on college football and basketball teams.[88] O'Bannon turned on the game, where he saw an avatar that looked

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[79] *Id.*
[80] *Id*.
[81] *Id.*
[82] 15 U.S.C § 1.
[83] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 88.
[84] *Id*.
[85] *Id.* at 116-17.
[86] *Id.* at 120.
[87] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
[88] *Id.*

identical to him and wore his jersey number.[89] O'Bannon was unaware of the use of his avatar, had not consented to it, nor had he received any money or compensation for the use of it.[90] Roughly a year later, O'Bannon commenced suit against the NCAA in federal court, arguing that the NCAA's amateurism rules "insofar as they prevented student-athletes from being compensated for the use of their NILs, were an illegal restraint of trade under Section 1 of the Sherman Act."[91] Within the same time frame, a former quarterback from Arizona State University, Sam Keller, also brought suit against the NCAA.[92] Keller purported that EA impermissibly used his likeness in their video games, and the NCAA "wrongfully turned a blind eye to EA's misappropriation of these NILs."[93] Shortly thereafter, both cases were consolidated as one.[94]

EA and the NCAA contended that the avatars used in the video games were not based on actual players.[95] However, E-mail correspondence between EA and Collegiate Licensing Company ("CLC") suggested otherwise.[96] In 2007, an executive for CLC stated that EA was using players' real names to develop video games before they stripped the names.[97] Earlier e-mails suggested that the NCAA was finally going to embrace the use of actual players' names in the video games.[98] In the midst of this, schools profited extensively from the revenue of these video games. In the 2012-2013 year, Louisville had a revenue of $85,845, while UCLA's revenue was $57,230 for the NCAA football games produced by EA sports.[99]

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Jon Solomon, *EA Sports and Collegiate Licensing Co. used real NCAA players in video games, e-mail suggest,* AL.COM (Sept. 19, 2012, 12:40 AM), https://www.al.com/sports/2012/09/ea_sports_and_collegiate_licen.html.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Kristi Dosh, *Why Electronic Arts Will Finally Pay Current and Former NCAA Football Players,* THE MONTLEY FOOL (June 4, 2014, 11:47 AM), https://www.fool.com/investing/general/2014/06/04/why-electronic-arts-will-finally-pay-current-and-f.aspx.

This case did not turn out in the athletes' favor. The United States Court of Appeals for the Ninth Circuit held that the NCAA was not above antitrust laws, and its rules restricting student-athlete compensation were not exempt from antitrust scrutiny.[100] The NCAA rules barring compensation for the use of student-athletes' NIL had a significant anticompetitive effect on the college education market.[101] However, the compensation rules had pro-competitive effects in integrating academics with athletics and promoting amateurism.[102] Allowing student-athletes to be compensated up to the full amount of college attendance was considered a less restrictive way of accomplishing this pro-competitive purpose.[103] Because of this, the Court held that the NCAA was only required to "permit its schools to provide up to the cost of attendance to their student-athletes."[104] Nothing more. Subsequently, the Supreme Court denied certiorari, and student-athletes were defeated again. In 2021, this all changed when the United States Supreme Court released its opinion in *NCAA v. Alston.*[105]

The theory behind *Alston* was similar to that of *O'Bannon.* The plaintiffs, in this case, were a class of former student-athletes that once again challenged the NCAA's rules restricting the compensation they may receive in exchange for their athletic services.[106] Similarly, the plaintiffs argued that by controlling student-athlete compensation, the NCAA violated the Sherman Act's prohibition against "contracts, combinations, or conspiracies in restraint of trade or commerce."[107] However, the court in *Alston* had a very narrow holding. It found that the NCAA did violate the Sherman Act by restricting the amount of education-related benefits that schools could give to student-athletes, but the Court solely limited its holding to education-related benefits and nothing more.[108]

The most notable aspect of this opinion appears in Justice Brett Kavanaugh's concurrence. In Justice Kavanaugh's concurrence, he

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[100] O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir.2015).
[101] *Id.* at 1057-58.
[102] *Id.* at 1083.
[103] *Id.*
[104] *Id.* at 1079.
[105] *See* NCAA v. Alston, 141 S. Ct. 2141 (2021).
[106] *Id.* at 2151.
[107] *Id.*
[108] *Id.*

states that the point of his concurring opinion is "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[109] Moreover, he states that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[110] For example, law firms cannot collude together and cap lawyers' salaries for the sake of "providing legal services out of a 'love of the law.'"[111] Hospitals cannot collude together to cabin nurses' salaries as a means to make caring for the sick purer.[112] No matter the market, if people are fixing the prices of salaries, then it is price-fixing labor, which is an antitrust violation because it eliminates a free market in which people can obtain fair compensation for their work.[113] Just because the NCAA built its "product" on price-fixing labor does not mean it is exempt from paying for the consequences of its actions.[114]

Justice Kavanagh reiterated that NCAA executives, college coaches, and seemingly everyone else involved in this business, are pocketing *billions* of dollars off student-athletes' labor, except for the athletes themselves.[115] The NCAA is taking advantage of student-athletes by producing billions of dollars from their work while not compensating them, which raises serious questions under the antitrust laws.[116] Justice Kavanaugh concluded his concurrence by saying that the NCAA's tradition of amateurism and its decision to build its business on the idea that they were not going to compensate student-athletes is not enough to justify its actions and exclude them from being subject to the law.[117] "The NCAA is not above the law."[118]

Justice Kavanaugh's concurrence opened the floodgates to years of forthcoming lawsuits against the NCAA if they did not make a change. In a sense, Kavanaugh hinted that the NCAA's entire business model was based on a violation of the law. The NCAA knew it had to do something because it could no longer withstand the fight against upholding its business model and tradition of amateurism. So,

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[109] *Id.* at 2166-67.
[110] *Id.* at 2167.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 2168.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 2169.
[118] *Id.*

during the Summer of 2021, the NCAA, at last, released an interim name, image, and likeness policy that allowed student-athletes to profit from their likeness.[119]

III. THE NEW RULES

A. THE NCAA'S INTERIM NAME, IMAGE, AND LIKENESS POLICY

Effective July 1, 2021, the NCAA began to allow student-athletes to be compensated for the use of their name, image, and likeness.[120] The NCAA released an Interim NIL policy that provided guidance to student-athletes and universities.[121] The guidance was intended to be short-term as the NCAA asserted that they would continue to work with Congress to adopt federal legislation to support student-athletes' use of NIL.[122] The policy provided that:

> (1) NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following: a) For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, the individual's eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12; b) For institutions in states with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law; c) Use of a

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[119] NCAA, INTERIM NIL POLICY (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.
[120] *Id.*
[121] *Id.*
[122] *Id.*

> professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.
> (2) The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.
> (3) Individuals should report NIL activities consistent with state law and/or institutional requirements. [123]

Amidst the chaos of *Alston,* many states enacted NIL legislation that would take effect in later years, regardless of what the outcome of *Alston* was determined to be. One of the first states that enacted this legislation was California.[124] In 2019, California Governor Gavin Newsom signed a bill allowing college athletes to profit from their likeness despite the NCAA policy that disallowed compensation.[125] This measure created a ripple effect, which many other states followed,[126] knowing that they would be "left behind" in the world of college sports if they did not do so. Most legislation was supposed to take effect in 2023, but it immediately became effective when the NCAA released its interim policy in the Summer of 2021. So how do state laws coincide with the NCAA's interim policy?

B. STATE LAW

Currently, twenty-nine (29) states have passed NIL laws, while many others have proposed legislation.[127] Student-athletes in states without NIL laws adhere to the NCAA's interim policy with little to no guidance unless their university has released further instruction. The laws among the states that have passed legislation are very similar to

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[123] *Id.*
[124] Dwyer, *supra* note 5.
[125] Collegiate athletics: student athlete compensation and representation, CA S.B. 206, § 1-3 (2019).
[126] Pete Nakos, *How NIL legislation varies on a state-by-state basis,* ON3 (July 8, 2022), https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis/.
[127] *Id*; *see also NIL Legislation Tracker,* SAUL EWING, https://www.saul.com/nil-legislation-tracker (last visited Mar. 1, 2023).

one another and tend to elaborate on the NCAA's NIL policy giving further guidance to student-athletes and universities.

One common characteristic among the states is the restriction of compensation based on an athlete's performance, i.e., pay-for-play. Tennessee law states, "…such compensation must not be provided in exchange for athletic performance or attendance at an institution."[128] Arkansas law provides that student-athletes shall not enter into any contract for compensation based on student-athletes' publicity rights if the contract "[i]nvolves the student-athlete's performance or lack of performance in athletic competition."[129] A majority of states also allow universities to restrict the use of their logo in an athlete's NIL use, such as Mississippi, stating "[a] student-athlete may not receive or enter into a contract for compensation for the use of his or her publicity rights in a way that also uses registered or licensed marks, logos, verbiage or designs of a postsecondary institution unless the institution has provided the student-athlete with written permission to do so before entering into the agreement or receipt of compensation."[130] Another common characteristic found among the states involves disclosure. For example, Connecticut law "[r]equir[es] a student-athlete to disclose and submit a copy to his or her institution of higher education of each endorsement contract, written agreement for employment and representation agreement executed by the student-athlete."[131]

Although many state laws are similar, there are also notable differences. For example, Missouri allows university employees, such as coaches, to aid in NIL opportunities for student-athletes.[132] However, Missouri does not allow university employees to serve as an agent for student-athletes.[133] Montana law *will* allow a college or university to serve as an agent and manage NIL contracts for student-athletes.[134] New Mexico law provides that "[a] post-secondary educational institution shall not: …prohibit or discourage a student-athlete from wearing footwear of the student-athlete's choice during official, mandatory team activities so long as the footwear does not have reflective fabric or lights or pose a health risk to a student-

[128] TENN. CODE ANN. § 47-7-2802(a).
[129] A.C.A § 4-75-1304.
[130] MISS. CODE ANN. § 37-97-107(3).
[131] CONN. GEN. STAT § 10a-56(c).
[132] MO. REV. STAT. § 173.280(4)(2)(b).
[133] *Id.*
[134] MONT. CODE ANN. § 20-1-232(5).

athlete…"[135] This statute means that athletic apparel companies can sponsor student-athletes, even if a different company sponsors their team. These are just a few ways that states are approaching NIL issues.

The states' various approaches create the potential for an unlevel playing field among different states, but not one that has had a blatant effect yet.

C. THE PUSH FOR FEDERAL REGULATION

Despite the NCAA's effort, Congress has not yet passed any law regarding student-athlete compensation. In 2021, NCAA President Mark Emmert stood in front of Congress and asked for a "federal framework" for student-athlete compensation but did not have a proposal for the framework.[136]

It is a great irony that the NCAA wanted to govern itself without the help of Congress.[137] Yet, now, it is asking Congress to step in and provide uniform laws to level the collegiate playing field.[138] Congress has been reluctant to intervene. The interim NIL policy states that the NCAA will continue to work with Congress in an attempt to adopt federal rules that support student-athletes' use of NIL.[139]

IV. WHAT IS A COLLECTIVE?

Student-athletes have been able to profit from their likeness for well over a year now, and it is going well. Although we have seen that a tilted playing field has been created due to differing state laws, we have not yet noticed any major problems. The changes have not yet negatively impacted college sports. However, an unexpected problem has arisen. It goes by the name of "collective," and if your university does not have one, then it is already behind.

NIL collectives did not exist in 2021. Thus, the challenges arising from them could not have been anticipated. A collective is a

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[135] N.M. STAT. ANN. §21-31-3(A)(2).

[136] Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand,* INSIDE HIGHER ED (Oct. 1, 2021), https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law.

[137] *Id.*

[138] *Id.*

[139] NCAA, *supra* note 119.

cooperative enterprise that obtains funds from donors, boosters, and businesses that are then used to "facilitate NIL deals for athletes."[140] The NCAA defines boosters as "any third-party entity that promotes an athletic program, assists with recruiting or assists with providing benefits to recruits, enrolled student-athletes or their family members"[141] The NCAA further states that the definition of booster could include collectives that channel money from NIL deals to prospective and enrolled student-athletes.[142] Right now, there are over 120 collectives nationwide that have been created or are in the process of being created. [143] The majority of the Power Five schools are associated with a collective. All fourteen Southeastern Conference schools have at least one collective. [144]

Collectives operate independently of colleges and universities and generally must remain a third-party entity relative to the university.[145] They are often established by well-known alumni and school supporters[146] and funded by boosters, whether through one-time payments or continuing contributions.[147] Three different types of collectives have been established thus far: (1) Marketplace collectives; (2) Donor-driven collectives; and (3) Dual collectives.[148]

Marketplace collectives generally construct settings where student-athletes can market themselves to connect with businesses for NIL opportunities.[149] Donor-driven collectives pull together funds directly from boosters and other supporters, and the collective creates

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[140] Pete Nakos, *What are NIL collectives and how do they operate?,* ON3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/.

[141] Michelle Hosick, *DI Board of Directors issues name, image, and likeness guidance to schools,* NCAA (May 9, 2022, 5:21 PM), https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Dennis Dodd, *Inside the world of 'collectives' using name, image and likeness to pay college athletes, influence programs,* CBS SPORTS (Jan. 26, 2022, 1:03 PM), https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/.

[146] Nakos, *supra* note 126.

[147] *Id.*

[148] *Id.*

[149] *Id.*

NIL opportunities for student-athletes.[150] In this scenario, the collective gives the money they have raised from donors directly back to the student-athletes with whom they have contracted,[151] typically in exchange for an autograph signing, an appearance, or a social media post. One might say that these collectives "wash" donor money and pay it forward to student-athletes. Dual collectives are a combination of marketplace collectives and donor-driven collectives.[152] This new "business" has resulted in a major concern in intercollegiate athletics.

A. THE PROBLEMS ARISING FROM COLLECTIVES

In the short period of time student-athletes have been able to profit from their likeness, collectives have reshaped the NIL landscape. There are no guidelines or laws surrounding collectives. They are entirely ungoverned and unregulated.[153] Some actions taken by collectives are questionable and have raised concerns in college sports. These concerns include actions pertaining to improper recruiting inducements, pay-for-play, and the free market of collectives. In a sense, collectives are unregulated booster groups that have created LLCs aimed toward giving benefits directly to student-athletes.[154]

a. The Concern over Improper Recruiting Inducements and Pay-for-Play

Collectives are a disguised way for boosters, alumni, donors, companies, and other influential people to recruit and induce athletes to play for their school. Per the NCAA, boosters are not allowed to recruit prospective student-athletes, encourage a prospect's participation in university athletics, or provide benefits to prospects not previously offered.[155] The definition of boosters could comprise a

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Rick Burton, *NCAA's Impending Pay-For-Play Panic May Be A Cry For Federal Help,* SPORTICO (Feb. 15, 2022, 11:00 PM), https://www.sportico.com/leagues/college-sports/2022/ncaa-pay-for-play-panic-1234661545/.
[154] *Id.*
[155] *Role of Boosters,* NCAA, https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx (last visited Mar. 1, 2023).

collective,[156] as the NCAA defines boosters as "third-party entit[ies] that promote athletic program[s], assist[] with recruiting or assist[] with providing benefits to recruits, enrolled student-athletes or their family members,"[157] and the majority of collectives are essentially a company that funnels money they have received from boosters, directly to players.

The NCAA bylaws state that student-athletes cannot use their athletic skills for pay or accept a promise of pay for participating in intercollegiate athletics.[158] An athlete is not eligible to play in a sport if they have ever taken pay, or the promise of pay, for competing in that sport.[159] It has been a longstanding rule of the NCAA that boosters cannot be involved with the recruiting process of prospective student-athletes[160] and cannot promise any form of payment to an athlete for attendance at a certain university. "If a [collective's] sole or primary purpose is to engage in NIL activities with student-athletes from a specific institution, such [entity] would be considered a booster."[161] Further, if a collective is involved with recruiting activities for purposes of NIL, the collective would trigger booster status.[162] NCAA guidance states that any booster or NIL entity, such as a collective, that has contact with a prospective student-athlete, in which they promise to secure a NIL deal for the prospective student-athlete would violate NCAA rules,[163] as the entity is promising pay, albeit for their likeness, student-athletes in the form of a NIL deal.

In March of 2022, a five-star recruit who graduates in 2023, signed an agreement with a donor-driven collective that could pay him

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156 Hosick, *supra* note 141.
157 *Id.*
158 NCAA, *supra* note 66.
159 *Id.*
160 Dennis Dodd, *NCAA aims to crack down on boosters disguising 'pay for play' as name, image, and likeness payments,* CBS SPORTS (May 3, 2022, 10:14 PM), https://www.cbssports.com/college-football/news/ncaa-aims-to-crack-down-on-boosters-disguising-pay-for-play-as-name-image-and-likeness-payments/.
161 NCAA, NAME, IMAGE AND LIKENESS POLICY QUESTION AND ANSWER, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/July2022NIL_DIInterimPolicy.pdf.
162 NCAA, *supra* note 119.
163 *Id.*

more than $8 million by the end of his junior year of college.[164] The athlete will receive $350,000 almost immediately, followed by monthly payments.[165] In exchange for this contract, the athlete will make public appearances, promote products or businesses on social media, and hand over the rights to use his NIL exclusively.[166] The agreement specifically states that "nothing in this Agreement constitutes any form of inducement to enroll at any school and/or join any athletic team."[167] The contract does not state that the athlete must attend a specific university, but it does say that the athlete must be "enrolled at an NCAA member institution and [be] a member of the football team at such institution," which is an attempt to avoid violating the pay-for-play rules.[168]

Many concerning issues arise from a transaction such as this one. The contract does not require enrollment at a specific university but does require the athlete to be a member of the football team at an NCAA member institution. The content of the contract seems to comply with the letter of the NCAA bylaws, but is the contract in keeping with the spirit? The collective is promising pay, in the form of a NIL deal, to an athlete as long as the athlete plays football for an NCAA member institution team. The contract stated that this transaction was not meant to induce the athlete to attend a specific university; nevertheless, the athlete receives a deep financial inducement to attend and stay at the university with which the collective primarily works. While the athlete may have already considered this specific university, no one can say that offering this NIL deal did not make attending the university more attractive. This agreement was a booster "disguised" as a collective, promising pay to a prospective student-athlete in NIL deals, which likely induced the player to attend the specific university.

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[164] Stewart Mandel, *Five-star recruit in Class of 2023 signs agreement with collective that could pay him more than $8 million,* THE ATHLETIC (Mar. 11, 2022), https://theathletic.com/3178558/2022/03/11/. (The contract is not publicly available. "Lawyer Mike Caspino, who drafted the contract, allowed *The Athletic* to review and verify the contract in exchange for keeping the player and collectives identities anonymous.")

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

The collective was not named, but most collectives aim to benefit student-athletes at a specific college or university, and we can assume this one is no different. Per the NCAA's guidance, the collective would be considered a booster in such a scenario. This means that the collective should not have had any contact with the prospective student-athlete, even if they were not trying to get the athlete to play at a certain institution.

This leads to the next issue. If the athlete chooses to attend a different university after granting their exclusive NIL rights to a collective in a different state, will that collective be obligated to provide NIL opportunities in the area where the student-athlete is located? Will the athlete no longer be able to profit from their likeness since the collective has exclusive rights and is located elsewhere? We may not have an answer to this question until the situation arises, or it keeps an athlete from transferring or attending another school. However, if the athlete is not guaranteed a certain amount of compensation, and has granted exclusive rights to a specific collective, then the athlete may not be able to make a profit from their likeness if they do transfer or choose to attend different schools.

In the *laissez-faire* world of NIL, student-athletes can now sell themselves to collectives for any amount they want, and if the school wants them bad enough, the collective will make it happen. "Said another way, the collectives can give any amount to any favored athlete in the name of helping the home team win more games."[169] For example, a University of Miami booster gave every Hurricane football player who was on scholarship $500 a month for promoting a chain of gyms that he owned.[170] A protein bar company based out of Utah offered money to every BYU football player on scholarship and then paid the tuition for every walk-on.[171] No one knows if these offers are within the rules or if they fall into the definition of pay-for-play, a direct violation of NCAA bylaws.[172] Student-athletes may not admit it, but the guaranteed money offered by the collectives may be the very inducement that leads athletes to certain colleges. Indeed, student-

[169] Burton, *supra* note 153.
[170] Nicole Auerbach, *Schools question whether the NCAA can enforce pay-for-play rules in NIL: 'Is there going to be accountability?'*, THE ATHLETIC (Mar. 10, 2022), https://theathletic.com/3173521/2022/03/10/.
[171] *Id.*
[172] *Id.*

athletes may select a school based solely on the size of the collective and the amount of money that other players on the team are making.

The NCAA released guidance in the spring of 2023 explicitly defining a booster, which includes the term collective, and emphasizes the fact that boosters are not allowed to recruit or provide benefits to prospective student-athletes.[173] The NCAA expressed concern that activity in the name of NIL, particularly activity involving boosters, was violating the rules.[174] The NCAA said that it would review cases that are clearly contrary to NCAA rules,[175] but it has yet to take any action. This inaction may be because the NCAA does not want to intervene and open the floodgates for additional lawsuits.

b. The Free Market

As noted above, no government control or regulation exists over collectives. The lack of governmental oversight over NIL renders student-athletes vulnerable.

Collectives receive funds from boosters, businesses, and donors, and there is no limit as to how much money they may obtain. There are no laws that require collectives to disclose how much money they receive or where the money goes. As collectives set up ways for student-athletes to profit from their likeness, it is only expected that the collectives want to make a profit themselves. So, where do their profits come from?

Generally, collectives will take a percentage of each deal they create for an athlete. For example, if the student-athlete and the collective have a contract stating that the collective will take 10% of each deal, and the collective creates a deal between the athlete and a third party in which the athlete is paid $100, the collective will receive $10 for each $100 deal. If an athlete is desperate enough, a collective could negotiate a contract with the student-athlete in which they receive 90%, and the athlete receives 10%. In this scenario, the pockets

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[173] *Id.*

[174] Michelle Hosick, *DI Board of Directors directs DI Council to review impact of NIL on student-athletes,* NCAA (Feb. 18, 2022, 5:12 PM), https://www.ncaa.org/news/2022/2/18/media-center-di-board-of-directors-directs-di-council-to-review-impact-of-nil-on-student-athletes.aspx.

[175] Hosick, *supra* note 141.

of the collective owners are lined with money from boosters and donors intended to go into student-athletes' pockets.

Even in the NFL, there is a cap on how much a contract advisor can charge or receive. The cap stands at a maximum of 3% of the compensation received by the player, but the default compensation in the standard agreement is 1.5%. [176] The fee depends on the contract type that the advisor negotiates, but it is never higher than 3%.[177] Because student-athletes are typically young and in a vulnerable stage of life, the NCAA should cap the amount a collective can retain from a student-athlete's NIL deals.

V. WHAT THE RULES REGARDING COLLECTIVES *SHOULD* LOOK LIKE

Collectives need to have a legal framework laid out by Congress because, as noted by Justice Kavanaugh, the NCAA does not possess the authority under the law to regulate the market. Collectives must be regulated because, right now, student-athletes are at extreme risk of exploitation.

Collectives should be required to keep a detailed accounting of all money received, all money that is paid to athletes, and all money that the collective is profiting. This accounting statement (but not the records of the individual transactions) should be made available on a confidential basis to any student-athlete represented by the collective. Full disclosure of all collective money would hold the collective accountable for their actions and ensure that student-athletes were maximizing their profits.

In addition, student-athletes should be permitted and strongly advised to have legal counsel in connection with NIL transactions. The attorney should be considered a "professional service provider" in compliance with the NIL interim policy.

Contracts between student-athletes and collectives should have a maximum contract length of one academic year. This temporal restriction means that athletes would have the ability to renegotiate his or her deal yearly. There are several reasons this would be beneficial to student-athletes. First off, an athlete granting a collective exclusive

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[176] NFLPA, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS 12 (2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf.
[177] *Id.*

rights in his or her NIL would be able to take back control of those rights after one year. An athlete would also retain the ability to transfer to another school, renegotiate their contract with the existing or new collective, or even work directly with third parties outside of any collective. A multi-year contract may induce a player to stay at a specific school when they would be better suited elsewhere. Annual contracts would allow student-athletes to retain more control of his or her rights without the albatross of any continuing obligation to a collective. If contract lengths are not to be restricted, then collectives should not be able to require exclusive rights over an athlete's NIL. Allowing student-athletes to grant a collective exclusive rights to their NIL is dangerous because the athletes may miss out on opportunities with third parties that do not want to work with an intermediary, or worse, they may not be able to profit from their likeness at all if they transfer.

Congress should limit how much a collective can make from a student-athlete NIL transaction. The NFL's collective bargaining agreement with the NFL Players' association limits a contract advisor's compensation to 3%, and collectives should be similarly limited. Because NFL players make significantly more than what the majority of college athletes will profit, there should be a cap, but it should be somewhere around 15% of each deal rather than 3%. A cap would ensure that most of the money received by donor-driven collectives is returned to the student-athletes. Furthermore, a cap ensures fairness to athletes and makes sure that vulnerable athletes do not enter unfair contracts with collectives because they are in desperate need of money.

One of the final major problems surrounding collectives is the issue of inducements and promised pay. Collectives are offering prospective student-athletes large amounts of money in the form of NIL deals, and while the agreement does not require the athlete to play at a certain university, we may reasonably assume that this is a silent, understood term of the agreement. This directly induces the athlete to play for the university affiliated with the collective. These deals are a disguised way for donors and boosters to recruit athletes, which is likely a direct violation of NCAA bylaws.

To avoid this, prospective student-athletes should be required to sign a binding letter of intent to the university in which they plan to attend before they can have any communication with a collective. A letter of intent is a legally binding contract stating that an athlete will attend a college for a minimum of one academic year in exchange for

an athletic scholarship to that university.[178] Letters of intent ensure that an athlete will play for the university they contracted with and not go elsewhere, even if they get a better offer.[179] If an athlete does not honor a letter of intent, they lose one year of eligibility for all sports at their next institution.[180] Athletes should be required to sign a binding letter of intent with a university before communicating with a collective, as it would make sure that athletes were not negotiating with several different collectives in an attempt to see who could give them the best-guaranteed NIL deals. If an athlete is found to be in violation of this rule, their eligibility should be stripped or at least severely limited. The letter of intent would not solve all the problems surrounding improper inducements and promised pay, but it would be a start.

VI. CONCLUSION

With new laws and regulations come new problems, as we have seen here with the unanticipated issue of collectives. Collectives are unregulated entities engaged in some very questionable activities. As a result, student-athletes are at extreme risk of exploitation due to the state of the law surrounding NIL. Changes need to be made, and a legal framework needs to be put in place to ensure a level playing field and the protection of student-athletes. Athletes have every right to maximize their NIL profits, however, they should not be induced to attend a university based on promised pay in the form of guaranteed NIL deals.

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[178] *What is the Letter of Intent? Read this Before Signing a Sports Scholarship Offer*, UNITED SPORTS USA (Mar. 23, 2016), https://www.unitedsportsusa.com/blog/what-is-the-letter-of-intent/.
[179] *Id.*
[180] NCSA College Recruiting, *Everything You Need to Know About the National Letter of Intent,* NCSA COLLEGE RECRUITING, https://www.ncsasports.org/blog/everything-you-need-to-know-about-the-national-letter-of-intent (last visited Mar. 13, 2023).