NAME, IMAGE, AND LIKENESS DEALS AND IMMIGRATION CONSEQUENCES FOR INTERNATIONAL STUDENT-ATHLETES

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Abstract

International student-athletes are being sidelined from deals that would allow them to reap financial benefits from licensing their name, image, and likeness ("NIL"). The calls to sideline these students are not coming from the NCAA or even the federal agencies in charge of immigration. The calls are coming from overly cautious universities, attorneys, and academics who incorrectly see NIL licensing as work or employment that is incompatible with the visa obligations of international student-athletes. This Article argues that international athletes can license their NIL without violating their visa terms.

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Introduction

Since July 1, 2021, student-athletes competing in National Collegiate Athletic Association ("NCAA") programs have been authorized to "engage

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in . . . NIL activity" without jeopardizing their eligibility for collegiate play.[1] The NCAA has been clear from the beginning that international student-athletes[2]—those who attend U.S. institutions of higher learning pursuant to a student visa—are covered by its NIL policy.[3] That is, the NCAA itself does not have different NIL rules for U.S.-citizen student-athletes and student-athletes from abroad. But student visas come with various restrictions on what students may do while in the United States other than attend class. Aware of this, the NCAA has recommended that international student-athletes, who comprise an estimated twelve percent of Division I NCAA athletes,[4] seek "guidance" from their school and/or U.S. immigration

1. *Interim NIL Policy*, NCAA (July 2021) [hereinafter NCAA Interim Policy], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf. As Professor Marc Edelman discusses in his contribution to this Symposium, multiple state legislatures have passed laws codifying the ability of athletes within their jurisdiction to "legally and safely endorse products." Marc Edelman, *Name, Image, and Likeness Rights In College Sports: Evaluating Year One of Much Overdue Reforms*, 76 OKLA. L. REV. 1, 3 (2023) (noting more than twenty such state laws passed before the NCAA issued its own authorization of NIL activity).

2. In line with prevailing usage in the literature and press, this Article uses the term "international student" as shorthand to refer to a student who is not a U.S. citizen and who attends a U.S. institution of higher learning pursuant to a student visa. Some caveats about this terminology are in order, as the term "international student" in this context is at best a simplification and at worst a misnomer. In immigration law, the existence or absence of U.S. citizenship is the threshold and cardinal-most distinction for all legal analysis. *See generally, e.g.*, *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works. But citizenship status may or may not coincide with a quality of internationality in one's relationship with their school or school's culture. A U.S. citizen who was born and raised abroad, first arriving in the United States only for college, would be fairly termed an "international student" if one navigates by dictionary definitions, and such a person would undoubtedly have an international perspective in their cultural engagement in college. By the same token, a person without U.S. citizenship who has spent essentially their entire life in the United States might experience college in a way that is not palpably "international" as most would use the term. A distinct caveat is in order regarding visa status. Some persons who are not U.S. citizens might have authorization to be lawfully present in the United States and attend college without having a student visa. For instance, a lawful permanent resident—often called a "green card" holder—is authorized to attend college and seek a degree, as well as engage in full-time employment. The restrictions of a student visa are inapplicable to lawful permanent residents.

3. *Name, Image and Likeness Policy: Question and Answer*, NCAA (Feb. 2023) [hereinafter *NIL Policy Question and Answer*], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf ("International individuals are covered by the interim NIL policy . . . .").

4. John T. Holden, Marc Edelman, and Michael A. McCann, in their article *A Short*

authorities about "maintaining their immigration status" while engaging in "name, image and likeness activities."[5]

U.S. immigration authorities have not issued any statements that could be construed as guidance about international student-athletes monetizing their NIL. What little immigration authorities have said is devoid of useful advice. In late June 2021, before the NCAA policy became effective, a "Broadcast Message" was issued by the Student and Exchange Visitor Program ("SEVP"), a division of U.S. Immigration and Customs Enforcement ("ICE") that deals with and monitors international students and the institutions where they study.[6] The message stated that SEVP was "aware of and actively monitoring" legislation regarding NIL including for international students.[7] ICE has told reporters that it "continues to assess" NIL options for international athletes.[8]

In the absence of more detailed statements from the government regarding international athletes' NIL opportunities, universities, agents, attorneys, and academics have endeavored to fill the void. And, with few exceptions, the message they have delivered is one of extreme caution. They have

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Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier, note that "[a]pproximately twelve percent of college athletes are from a foreign country." 57 GA. L. REV. 1, 70 (2022). Holden, Edelman, and McCann's article finds support for this statement in a newspaper article that, in turn, links to NCAA research from 2019. *See id.* (citing *Trends in the Participation of International Student-Athletes in NCAA Divisions I and II,* NCAA (Oct. 2019), https://ncaaorg.s3.amazonaws.com/research/demographics/2019RES_ISATrendsDivSprt.pdf (reporting 12.1% of first-year Division I athletes as having an international home address)). Updated NCAA data indicates that, in 2021, 12.4% of first-year Division I athletes reported a non-U.S. home address, the basis by which the NCAA categorized students as "international." *Trends in the Participation of International Student-Athletes in NCAA Divisions I and II*, NCAA (Dec. 2022), https://ncaaorg.s3.amazonaws.com/research/demographics/2022RES_ISATrendsDivSprt.pdf. As we have already discussed, *supra* note 2, "from a foreign country" or "a non-U.S. home address" does not neatly equate with "international student present in the United States on a student visa." Nevertheless, the 12% figure stands as the best available proxy for the scope of the international student-athlete NIL problems discussed in this Article.

5. *NIL Policy Question and Answer*, *supra* note 3.

6. *Broadcast Message: SEVP Monitoring Student Athlete Legislation*, U.S. IMMIGR. & CUSTOMS ENF'T: STUDENT & EXCH. VISITOR PROGRAM (June 21, 2021), https://www.ice.gov/doclib/sevis/pdf/bcm2106-03.pdf.

7. *Id.*

8. Bruce Pascoe, *With Little Governmental Guidance, UA's Bennedict Mathurin, International Athletes Live in Gray Area*, TUSCON.COM (Apr. 12, 2022), https://tucson.com/sports/arizonawildcats/with-little-governmental-guidance-uas-bennedict-mathurin-international-athletes-live-in-gray-area/article_cb4ee2c8-b834-11ec-8a67-1f4bf4fbff98.html.

discouraged international students from monetizing their NIL on the theory that such efforts are impermissible "work" or "employment" that is not authorized by their student visa status.[9] Indeed, one immigration attorney went so far as to tell the Associated Press that any university that "finds out that one of their international student-athletes has been doing side jobs, making money off their name, image or likeness . . . is legally obligated to terminate their visa."[10]

The idea that international student-athletes should be totally banned from NIL deals stems from misconceptions and unwarranted assumptions about name, image, and likeness rights. This Article seeks to correct those misunderstandings.[11] In Part I, we discuss the nature of "NIL" and "NIL activity." In Part II, we establish that the legal doctrine known as the right of publicity enables athletes to receive NIL income without working or providing services. In Part III, we explain that international student-athletes are not prohibited from earning right-of-publicity-enabled NIL income that is unconnected to work. In Part IV, we explore how international student-athletes can receive NIL income from deals that require work or services without engaging in the "employment" prohibited by the terms of their visa. Lastly, in Part V, we explore a caveat to our analysis.

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9. *Id.* ("Some schools play it conservatively, advising their international athletes to do nothing for fear of violating immigration law."); Pat Eaton-Robb, *Foreign College Athletes Left Out of Rush for NIL Windfall*, AP NEWS (Dec. 24, 2021), https://apnews.com/article/entertainment-sports-business-celebrity-endorsements-education-4abf78b5012911f02ebee4ee6d776d7d ("[M]ost schools tell international students to avoid all NIL opportunities to prevent any possible violation."); Victoria J. Haneman & David P. Weber, *The Abandonment of International College Athletes by NIL Policy*, 101 N.C. L. REV. 1599, 1602 (2023) (describing international athletes as "barred from participating in NIL deals"); Alicia Jessop, *International Intercollegiate Athletes: A Legal Pathway to Benefit from Their Name, Image, and Likeness in the United States*, 52 CAL. W. INT'L L.J. 309 (2022) (describing international student-athletes as "left out of securing NIL deals").

10. Eaton-Robb, *supra* note 9 (statement of Attorney Leigh Cole); *see also* Anayat Durrani, *3 Things International Student-Athletes Should Know*, U.S. NEWS & WORLD REP. (Feb. 15, 2022), https://www.usnews.com/education/best-global-universities/articles/things-international-student-athletes-should-know (statement of immigration attorney Raymond G. Lahoud) ("[International students] should just play the sport in the United States and nothing more."). We believe this legal opinion is not correct.

11. The thesis of this Article was presented and argued at the Oklahoma Law Review symposium titled *Name, Image, Likeness in College Athletics* held on October 14, 2022. *See* UofOklahomaLaw, *2022 Oklahoma Law Review Symposium Name, Image, Likeness in College Athletics*, YOUTUBE (Oct. 26, 2022), https://www.youtube.com/watch?v=FZXeXjqgjPM.

I. What Are "NIL" and "NIL Activity," and What Can They Include?

It is important to start with an understanding of what the phrase "name, image, and likeness"—now ubiquitously shortened to "NIL"—actually means. In all the buzz about NIL among lawyers, journalists, agents, commentators, and others, there has been seemingly universal acquiescence to the idea that NIL is an actual *thing*. But is NIL an actual thing? And if it is a thing: what kind of thing is it? And where does it come from? Answering those questions would seem to be an essential step before moving on to consider what is implicated when the NCAA now says it is allowing—"NIL activity"—an even more troublesome phrase than NIL.

Before diving in, here's the conclusion up front: NIL, in a legal sense, is only *sort of* a thing. Lawyers and other commentators, in talking about NIL as if it is a "real" legal thing, end up creating confusion.

What the NCAA calls "NIL" gets its legal wherewithal principally from what the law calls the "right of publicity." Unfortunately, however, it is not possible to simply substitute "right of publicity" for "NIL" in order to map the term "NIL" on to actual law.

The genesis of the NCAA's original interest in NIL has ostensibly been its eagerness for preserving "amateurism"—the practice of having student-athletes not compensated by money for their athletic participation.[12] Why is amateurism important to the NCAA? There are many threads of explanation. The concept's historical roots—going back more than a century[13]—come from class elitism and a desire of the college-going leisure class to distinguish themselves from the money-needing working class.[14]

In more recent years, the NCAA has pointed to amateurism as an essential ingredient that differentiates its product of collegiate sports from professional sports. The explanation is convenient to erecting a defense to lawsuits alleging that NCAA restrictions violated federal antitrust law.[15] Realistically,

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12. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.").

13. *See id.* ("Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.").

14. *See* Kristen R. Muenzen, Comment, *Weakening It's* [sic] *Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259–60 (2003).

15. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 101–02 ("[T]he NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an

it is hard to ignore that by maintaining amateurism, the NCAA and its member institutions, as a purely pecuniary matter, come out way ahead. If neither the NCAA nor colleges need to pay players, and if they face no competition from other parties in exploiting student-athletes' NIL, then all revenues generated by college athletes stay within the NCAA-member system.[16]

Those motivations to preserve amateurism, among others, help explain how the NCAA came around to prohibiting players from NIL compensation in the first place. Bowing to the reality that some students needed to work to earn money during college—or perhaps simply seeing such a pursuit as not constituting a threat to amateurism—the NCAA has long allowed student-athletes to make money from regular employment.[17] So, for instance, the NCAA would never object to a student-athlete taking a job at a local hardware store.[18] The NCAA has, however, long been concerned that student-athletes' jobs should not become conduits for compensating athletic performance; thus, student-athletes can receive only compensation based on the value of their non-athletic-related services.[19]

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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 . . . . And the integrity of the 'product' cannot be preserved except by mutual agreement . . . ."); *id.* at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."); O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) ("[W]e agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive . . . .").

16. *Cf.* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 966 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015) ("In exchange for these unique bundles of goods and services, football and basketball recruits must provide their schools with their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes.").

17. *See id.* at 972.

18. *Cf.* Jon Solomon, *10 Ways College Athletes Can Get Paid and Remain Eligible for Their Sport*, CBS SPORTS (June 21, 2016, 5:20 PM ET) ("The NCAA allows players to have paying jobs. They may rarely have the time to do so, but it is permitted if the work is performed at an amount comparable to the going rate in that area for similar services.").

19. *O'Bannon*, 7 F. Supp. 3d at 972 ("The NCAA . . . prohibits any student-athlete from receiving compensation from outside sources based on his athletic skills or ability. . . . [W]hile a student-athlete may generally earn money from any 'on- or off-campus employment' unrelated to his athletic ability, he may not receive 'any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or

Imagine three things a local hardware store proprietor—hoping in his heart to boost the efforts of the college to recruit and retain star players—might do if limited to compensating the student-athlete for the value of his services. First, the hardware store proprietor might pay the student-athlete five times the going hourly wage, not because the student-athlete is five times faster at stocking shelves and removing alarm fobs from paid-for power tools, but because he is worth five times as much as other workers as his star power brings customers into the store, increasing sales. Second, the hardware store proprietor might pay the student-athlete a sizable amount of money for autographing footballs—and we could even assume that to be fair-value compensation because signed footballs successfully induce the purchase of new riding lawn mowers. This option is particularly helpful to the team because the student-athlete, not needing to clock in at the store, would have more time for training. Third, the hardware store proprietor might pay fair-value for using the player's name and photo in advertisements. And if the proprietor used an existing photo—one the player would not have to spend time posing for—then the player would not have to do so much as a single minute of work.

In the NCAA's pre-2021 view, all of these fair-value transactions would subvert the organization's amateurism values. In each case, it is the student's athletic renown that supports the extra compensation over what a regular, non-athlete employee could earn. And each of the three deals succeeds in meeting the hardware store proprietor's aim of getting money to the student-athlete in a way that corresponds with the student-athlete's on-the-field value to the team. All three of these tacks were blocked, however, by the NCAA's pre-2021 ban on compensating players for their "name, image, or likeness."

II. The Right of Publicity Enables Athletes to Receive NIL Income Without Working or Providing Services

Now, with our hypothetical hardware store proprietor, we have assumed that, in addition to wanting to help the team, he is also getting fair value out of each of these three alternatives. Forget, for a moment, about the NCAA. If the value to his business is all the hardware store proprietor cares about, what would there be to stop him from pursuing the three courses of action if the student-athlete did not cooperate? The first tack would not work because, short of kidnapping, he cannot force the student-athlete to be present in the store. The second tack would fail because, short of threats or violence, he

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personal following that he or she has obtained because of athletics ability.'" (footnote omitted) (quoting NCAA, 2013-14 NCAA DIVISION I MANUAL art. 15.2.7, at 197 (2013)).

cannot make the student-athlete autograph footballs. But the third tack—using the student-athlete's name and photo in an advertisement—just might work because it requires no active involvement by the student-athlete. There is nothing to stop the hardware store proprietor from using the student-athlete's, or anyone else's, name and likeness in advertisements—except the law of the right of publicity.

The right of publicity claims doctrinal homes in both tort law and, more recently, intellectual property. Historically, the right of publicity is recognized as having evolved from the right of privacy.[20] According to blackletter formulations, the right of publicity provides a cause of action against anyone who makes a commercial use of a person's name, image, likeness, or other indicia of identity.[21] In reality, the right of publicity is not so broad as this characterization.

Successful right of publicity cases generally arise only in three specific contexts—endorsement, merchandizing, or virtual impressment.[22] An endorsement-type violation occurs where the defendant has represented the plaintiff as making a commercial endorsement or has caused the plaintiff to appear in an advertisement in a way that implies endorsement.[23] A merchandizing-type violation arises where the plaintiff's name, image, likeness, or other indicia of identity, is used on a product such that the product is essentially a vehicle for the plaintiff's name, image, or likeness.[24] A virtual-impressment-type violation has less support in the caselaw, but has been sporadically found when there is some kind of virtual enlistment of the plaintiff to render a simulated performance, such as with image-rendering technology or via the efforts of a skilled impersonator.[25]

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20. *See, e.g.*, Montgomery v. Montgomery, 60 S.W.3d 524, 528 (Ky. 2001); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (AM. L. INST. 1995) ("The principal historical antecedent of the right of publicity is the right of privacy."); JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 11 (2018) ("[A]t the origin of the right to privacy, privacy was primarily about the right to control 'publicity'—when and how one's image and name could be used by others in public.").

21. *See, e.g.*, Dwyer v. Am. Express Co., 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1995) ("Considering plaintiffs' appropriation claim, the elements of the tort are: an appropriation, without consent, of one's name or likeness for another's use or benefit. This branch of the privacy doctrine is designed to protect a person from having his name or image used for commercial purposes without consent." (citations omitted)).

22. Eric E. Johnson, *Disentangling the Right of Publicity,* 111 NW. U. L. REV. 891, 928 (2017).

23. *Id.* at 928–32.

24. *Id.* at 932–34.

25. *Id.* at 934–38.

The existence of a cause of action for the violation of one's right of publicity enables persons to make money from the use of their name, image, or likeness. More exactly, a person's ability to sue someone for failing to obtain permission before engaging in an endorsement-type, merchandizing-type, or virtual-impressment-type use of the person's name, image, or likeness enables that person to negotiate a fee in exchange for permission.

The law calls that permission a "license." A license is not a contract, a service, or a piece of property. Rather, a license, in terms of its legal meaning, is an affirmative defense.[26] For example, the tort of trespass to land lays the foundation so that a college can sometimes get people to pay money for a ticket to a basketball game. In the same way, the availability of a cause of action for violation of the right of publicity allows a person to sometimes get others to pay for a license for the commercial use of that person's name, image, or likeness.

Note that all three branches of the right of publicity—endorsement, merchandizing, and virtual impressment—allow for licensing without any employment, labor, services, or any other form of work being undertaken by the licensor, whether the licensor is a student-athlete or not. Engaging in licensing, far from being work, is really closer to the opposite of work. At its core, it is rest. It is a type of legally binding forbearance.

The NCAA's use of the term "NIL activity"[27] is likely at the root of most of the misapprehension that NIL-licensing income is necessarily paired with work. The fact is that licensing of NIL has a long history—intimately tied to sports—that demonstrates the non-work nature of NIL licensing. As far back as the 1880s, tobacco companies included cards featuring photos of athletes in cigarette packs.[28] In the 1930s, Goudey Gum Company first included baseball cards with packs of gum.[29] Gum-based baseball cards were further popularized in 1952 when Topps Chewing Gum added baseball cards to their taffy and gum packs in an effort to boost sales of their confections.[30] Topps'

26. I.A.E., Inc. v. Shaver, 74 F.3d 768, 775 (7th Cir. 1996) ("[T]he existence of a license, exclusive or nonexclusive, creates an affirmative defense to a claim of copyright infringement.").

27. *NIL Policy Question and Answer*, *supra* note 3 ("International individuals are covered by the interim NIL policy . . . .").

28. Joe Pinsker, *A Cultural History of the Baseball Card*, ATLANTIC (Dec. 17, 2014), https://www.theatlantic.com/business/archive/2014/12/a-cultural-history-of-the-baseball-card/383784/.

29. *Id.*

30. Jamal Greene, *Card Game Selling Gum Was the Goal for Topps 50 Years Ago. Then It Put Baseball Cards in Its Packs and Created an Industry*, SPORTS ILLUSTRATED (Dec. 25,

revamp of the card style soon made it the industry leader.[31] At this time, gum companies entered into contracts with individual baseball players that gave them the "exclusive right to use the ball-player's photograph in connection with sales of plaintiff's gum."[32] That is, gum companies licensed players' NIL for purposes of merchandizing—selling baseball cards with players' names and likenesses.

The merchandizing right is a straightforward one for licensing in the college-athlete context. Imagine a sporting goods company, Weston, that makes and sells softball bats. Weston's latest bat, the Thwacker 3000, is sold in a shrink-wrap package that includes a picture of Jocelyn Alo (NCAA record holder for softball home runs)[33] as well as the phrase "endorsed by Jocelyn Alo." Alo could sue Weston for misappropriation of her right of publicity. But, if Weston had a license from Alo, an agreement that the company could use her NIL in connection with the Thwacker 3000, that license would serve as an affirmative defense to Alo's suit.

The virtual-impressment-type right of publicity violation also has application in the college-athlete context. Indeed, much of the impetus for NCAA's reversal with regard to its NIL policy stems from right of publicity cases involving video games depicting college players.[34] One such litigation is *Keller v. Electronic Arts* ("EA").[35] College quarterback Samuel Keller sued EA, the maker of the *NCAA Football* video games, for creating an avatar that played for his team and had his "same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year."[36] EA did not contest Keller's right of publicity claims but instead asserted defenses to those claims that were ultimately rejected by the courts.[37] The parties settled, but the case,

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2000), https://vault.si.com/vault/2000/12/25/card-game-selling-gum-was-the-goal-for-topps-50-years-ago-then-it-put-baseball-cards-in-its-packs-and-created-an-industry.

31. *Id.*; *see also* Pinsker, *supra* note 27.

32. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953).

33. Wayne Cavadi, *College Softball's All-time Home Run Leaders*, NCAA (Feb. 1, 2023), https://www.ncaa.com/news/softball/article/2023-02-01/college-softballs-all-time-home-run-leaders.

34. Jessop, *supra* note 9, at 314–16.

35. Keller v. Elec. Arts, Inc. (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013).

36. *Id.* at 1272.

37. *Id.*

combined with subsequent litigation and legislative efforts, pushed the NCAA to adopt its current policy.[38]

The Alo/Weston hypothetical and the Keller/EA litigation highlight a crucial issue that is often missed in the discussion of NIL and college athletes: licensing NIL does not require employment, work, or services. Weston could have taken the photo of Alo that it used on its bats when she was playing at the 2022 Women's College World Series.[39] Keller clearly did not engage with EA at all and yet EA appropriated his NIL in the making of their game. A paid license in the Alo/Weston or Keller/EA context would simply mean that the college athlete was paid money in exchange for surrendering the right to a litigation recovery against a potential defendant for violating their right of publicity; no work required.

Of course, some college athletes are being paid for more than mere licensing. Take for example Olivia Dunn, Louisiana State University gymnast and social media star.[40] Dunn's mid-six-figure deal with Vuori athletic wear includes an agreement to "take part in marketing campaigns" including "promotional photoshoots and attending events."[41] Dunn's television advertisements for Vuori are already ubiquitous.[42] Dunn, in contrast to Alo and Keller, has been paid for her services—including performing in front of a camera, being filmed for advertisements.

In sum, college athletes can license their NIL. A license will serve as an affirmative defense in any lawsuit brought by a college athlete for violation of their right of publicity. Finally, income from an NIL license can be, but need not be, combined with compensated services, work, or employment.

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38. Jessop, *supra* note 9, at 314–16.

39. Interestingly, baseball cards have had a mix of posed photos, often taken during Spring training or before games, and, as technology has developed, in-action photos. *See* George Vrechek, *Former Employee Butch Jacobs Explains How Topps Picked the Pictures*, SPORTS COLLECTORS DIGEST (Aug. 4, 2015), https://sportscollectorsdigest.com/cards/former-employee-butch-jacobs-explains-how-topps-picked-the-pictures.

40. Amber Ferguson, *Who Is Olivia Dunne? The College Gymnast Has 6.7 Million TikTok Followers*, WASH. POST (Jan. 14, 2023, 10:12 AM EST), https://www.washingtonpost.com/sports/2023/01/14/who-is-olivia-dunne-college-gymnast-has-67-million-tiktok-followers/.

41. *Id.*

42. *See, e.g.*, *Vuori Studio Pocket Legging TV Spot, 'Movement and Breathability' Featuring Olivia Dunne*, ISPOT.TV (July 5, 2022), https://www.ispot.tv/ad/bXxv/vuori-studio-pocket-legging-movement-and-breathability-featuring-olivia-dunne; *see also* Fast Commercials, *Vuori Commercial - #fashion #livvy #joggers*, YOUTUBE (July 11, 2022), https://www.youtube.com/watch?v=UwHDHhxnv0w.

III. Right-of-Publicity-Enabled NIL Income Unconnected to Work Is Allowable Under the F Visa

As mentioned in the Introduction, the NCAA acknowledges that international student-athletes, like their U.S. citizen counterparts, are free as a matter of NCAA policy to "engage in . . . NIL activity."[43] The important question for international student-athletes is whether they can "engage in . . . NIL activity" while "maintaining their immigration status."[44] Indeed, they can. In this section, we set out one reason, which leverages the preceding analysis. In brief: since NIL income need not involve any work, NIL income need not violate the employment prohibition that applies to the typical noncitizen student-athlete.

The vast majority of international athletes who attend U.S. universities do so on an F-visa.[45] This is a nonimmigrant visa, meaning the holder of the visa is allowed into the United States for only a limited time and to do a limited activity.[46] For F-visa holders, the limited time usually means the duration of their degree-pursuing studies in the United States. And the activity that they are limited to is studying for that degree.

Government regulations strictly limit "employment" by F-visa holders.[47] For example, F-visa holders are permitted to undertake "on-campus employment," but for no more than twenty hours per week.[48] After one year of schooling, an F-visa recipient in good academic standing can petition for "off-campus work authorization," but only if "necessary to avoid severe

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43. *NIL Policy Question and Answer*, *supra* note 3 ("International individuals are covered by the interim NIL policy . . . .").

44. *Id.*

45. Ed Pagano et al., *NIL Considerations for International Student Athletes*, SPORTS BUS. J. (Jan. 23, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/23-PaganoHigginsHutson.aspx. There are many, many ways in which noncitizens could attend college. There are J-1 visas for exchange students, though those are typically limited to semester- or year-long visits that would be an unlikely option for an NCAA athlete. The student might be undocumented, meaning they lack immigration status altogether. The student might have one of the many liminal immigration statuses, such as temporary protected status or Deferred Action for Childhood Arrivals. Or the student might by the derivative beneficiary of a parent's employment-based nonimmigrant visa. The possibilities, while not truly endless, are many. This Article focuses on the most common path followed by international athletes.

46. KIT JOHNSON, IMMIGRATION LAW: AN OPEN CASEBOOK 77 (version 2.0, 2023), http://kitjohnson.net/casebook/files/Immigration_Law_An_Open_Casebook_2.0.pdf; *see also Students and Employment*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment (last updated Mar. 31, 2023).

47. *See* 8 C.F.R. § 214.2(f)(9).

48. *Id.* § 214.2 (f)(9)(i).

economic hardship due to unforeseen circumstances beyond the student's control."[49]

The consequences for noncitizens who fail to comply with the terms of their visas—including by undertaking unauthorized employment—are severe. They are subject to deportation.[50] Moreover, anyone deported from the United States is barred from lawfully reentering the country for five years.[51] Thus, should an international student-athlete be deported for undertaking unlawful "employment," they would be barred from reentering the United States during what would likely be their peak performance years.[52]

Given these high stakes, it is perhaps unsurprising that, as noted in the introduction, many have argued that international student-athletes should not jeopardize their long-term status in the United States by seeking to monetize their NIL.[53] Yet these risk assessments rest on a faulty foundation. They assume that monetization of NIL equates with the "employment" that regulations regarding F-visa recipients restrict. As Part I explained, NIL licensing can occur without work or exertion of any kind, save signifying agreement to the license.[54] Thus, F-visa holding students are free to engage in NIL activity that does not involve employment but does involve licensing their name, image, or likeness in return for monetary compensation.

IV. Student-Athletes Can Receive NIL Income From Deals Requiring Work or Services Without Engaging in Employment Prohibited by an F-Visa

In this section, we show that in addition to plain licensing, unaccompanied by any work or services, international student-athletes on an F-visa can, in fact, engage in work and provide services in connection with the licensing of their name, image, or likeness while not engaging in *employment,* which the F-visa prohibits.

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49. *Id.* § 214.2 (f)(9)(ii).

50. 8 U.S.C. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has failed . . . to comply with the conditions of any such status, is deportable."); *see also, e.g.*, Nwaokolo v. INS, 314 F.3d 303, 304 (7th Cir. 2002) (noting, in factual background, that when an F-visa holder accepted employment in violation of the terms of her visa, she was ordered deported).

51. 8 U.S.C. § 1182(a)(9)(A)(i).

52. *See, e.g.*, Erik Malinowski, *For Athletes' Peak Performance, Age Is Everything*, WIRED (July 12, 2011, 12:45 PM), https://www.wired.com/2011/07/athletes-peak-age/ ("French researchers have found that . . . most [athletes] enter their athletic prime somewhere between 20 and 30, before undergoing an 'irreversible' decline.").

53. *See supra* notes 9–10 and accompanying text.

54. *See infra* Part I.

Here, we consider another vein of analysis: Is entering into an NIL license that does not include payment for services somehow impermissible "employment"? Put another way: If Alo had a contract with Weston that allowed the sporting goods company to use a photo taken of her during a game, without any posing or active participation by her, would the act of signing such an agreement or allowing it to persist be "employment" within the meaning of the F-visa regulations? Would Alo be engaging in self-employment or work as an independent contractor, and would that sort of "employment" be allowed under current immigration law? Ignoring the former question (how should signing an NIL license be construed), we conclude that the latter question (would self-employment or work as independent contractor be prohibited) is an answerable one: No.

The regulations that delineate restrictions regarding "employment" of F-visa holders do not, themselves, define the term.[55] One treatise on immigration law claims that the regulations "apply to self-employment."[56] The case cited in support of this statement is the 1983 Sixth Circuit decision of *Wettasinghe v. United States Department of Justice*.[57] Academics have cited *Wettasinghe* as an important case in the NIL context, arguing that the decision "constru[es] very narrowly an F-1 student's opportunity to work."[58] As we discuss, however, these sources' reliance on *Wettasinghe* is misplaced. There are numerous reasons. For one, the F-visa regulations interpreted in *Wettasinghe* were subsequently changed. Additionally and separately, statutory immigration law has subsequently changed, and regulations now provide direction on the meaning of "employment" in the immigration context, a meaning that is inconsistent with *Wettasinghe*. And further, subsequent Supreme Court caselaw teaches that "employment" in the F-visa context, if not specifically defined by statute, must be construed pursuant to a common-law meaning that excludes independent-contractor-type work.

The *Wettasinghe* opinion is a mere six paragraphs long. It considered whether an F-visa recipient engaged in "unauthorized employment" when he, in addition to attending school, bought a fleet of ice cream trucks that he leased to ice cream vendors, purchased ice cream for vendors, stocked the trucks daily, drove trucks on occasion, and, in turn, received both rental income from the truck leases as well as a percentage of the sales made by the

55. *See* 8 C.F.R. § 214.2(f)(9) (providing no definition of employment).

56. 1 SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE § 5:63 (2d ed. 2023), Westlaw IMMLS2D § 5:63.

57. 702 F.2d 641 (6th Cir. 1983).

58. Haneman & Weber, *supra* note 9, at 40 n.225.

lessees.[59] The Sixth Circuit upheld the finding that the international student had engaged in "unauthorized employment."[60]

One key reason that the Sixth Circuit reached the above conclusion was its holding that "8 C.F.R. § 214.2(f)(6) explicitly prohibits unauthorized self-employment."[61] The regulation referenced by the Sixth Circuit became effective on September 2, 1975.[62] It read: "A nonimmigrant student is not permitted to engage in off-campus employment in the United States, either for an employer *or independently*, unless his application to do so has first been approved by the Immigration and Naturalization Service ("INS")."[63] That language may have dictated the outcome of *Wettasinghe*, but three significant changes following the decision indicate that the case should no longer be viewed as controlling authority.

First, just eleven days after the *Wettasinghe* decision, the INS published a final rule regarding international students that became effective a little over four months after the *Wettasinghe* opinion was decided.[64] This new rule eliminated the language referenced in *Wettasinghe*. The regulations moved discussion of employment from subsection (f)(6) to subsection (f)(9) and put into place the structure that remains in place today—limited opportunities for on- and off-campus "employment" with no reference to work "either for an employer or independently."[65] Thus, the language that was core to the *Wettasinghe* decision is no longer operative, indicating the decision itself

59. *Wettasinghe*, 702 F.2d at 642.

60. *Id.*

61. *Id.* The Sixth Circuit listed three reasons for its holding. Interpretation of this regulation, the most important to this Article, was its second reason. *See id.* The court's first reason was policy-based. *See id.* The court wrote that "[a]liens with student status are forbidden to work in order to insure that those who seek entry into the country to pursue educational opportunities in fact do so full time." *Id.* The court's third reason was that the noncitizen at issue acted as more than an "investor-manager," a role that had been previously found to be compatible with F-visa status. *Id.* (citing Bhakta v. INS, 667 F.2d 771 (9th Cir. 1981)).

62. Special Requirements for Extension and Maintenance of Status of Students; Approval of Schools; and Withdrawal of School Approval, 40 Fed. Reg. 32312, 32313 (Aug. 1, 1975) (effective Sept. 2, 1975).

63. *Id.* (emphasis added).

64. Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14575, 14575 (Apr. 5, 1983) (codified at 8 C.F.R. § 214.2(f)(9)) (effective Aug. 1, 1983). The *Wettasinghe* decision was argued on February 21, 1983, and decided on March 25, 1983. *Wettasinghe*, 702 F.2d at 641.

65. 48 Fed. Reg. at 14585–86.

should no longer be regarded as good law with regard to permissible work for F-visa holders.

Second, when Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), three years after the revisions of the F-visa regulations, it established a system for penalizing employers who hire noncitizens that lack employment authorization.[66] The IRCA-based regulations provided the first-ever definition of "employment" for purposes of immigration law.[67] That definition, which continues in effect today, includes "any service or labor performed by an employee for an employer within the United States."[68] The term "employee" is also defined, and it specifically "does not mean independent contractors."[69] This development, too, undercuts *Wettasinghe*: How can "self-employment" continue to equate with "unauthorized employment" when, under IRCA, independent contracting is not considered employment at all?

Finally, in 1989, the U.S. Supreme Court issued its decision in *Community for Creative Non-Violence ("CCNV") v. Reid*.[70] In the course of that decision, the Supreme Court evaluated the meaning of "employee" and "scope of employment" for purposes of the Copyright Act of 1976.[71] These terms were not defined by the statute itself. The Court noted that the absence of statutory definitions indicated an intent "to incorporate the established meaning of these terms."[72] That established meaning, it held, was "the conventional master-servant relationship as understood by common-law agency doctrine."[73] This definition of employment is inconsistent with and excludes the services of independent contractors.[74] And so, even if one were to conclude the IRCA definition of employment, as discussed immediately above, does not apply to analysis of work by F-visa holders, then the absence

66. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(2)). IRCA intentionally does not penalize individuals who work without authorization, only their employment. *See* Arizona v. United States, 567 U.S. 387, 404 (2012) (noting that federal law does not impose criminal sanctions on noncitizens "who seek or engage in unauthorized work").

67. *See* 8 C.F.R. § 274a.1(h).

68. *Id.*

69. *Id.* § 274a.1(f).

70. 490 U.S. 730 (1989).

71. *Id.* at 732, 737–38 (citing 17 U.S.C. § 101).

72. *Id.* at 739.

73. *Id.* at 740.

74. *See id*. at 751–52 (evaluating, looking at factors set out in the Restatement of Agency, whether a sculptor who produced a statue for a non-profit entity was an employee or an independent contractor).

of a statutory definition of "employment" would, under *CCNV*, necessarily exclude independent contracting from "employment."[75]

Thus, it appears that, contrary to the assertions of many and a leading treatise on immigration law,[76] international student-athletes are free to engage in self-employment or independent contracting. Thus, to the extent that entering and fulfilling the obligations of an NIL licensing deal were viewed as self-employment or independent contracting, immigration regulations do not currently prohibit such actions. Of course an NIL deal could also include bona fide employment of the kind prohibited by F-visa restrictions. But it need not. And many or most of the typical types of services or work that would accompany NIL licensing—such as posing for photographs, making sporadic public appearances, or posting to social media—could, and often likely would, involve independent-contractor-type work rather than bona fide employment.

V. An Important Caveat: The Specter of Agency Change-of-Mind

For all of our analysis, we recognize that there is a strong caveat to be made here, one that likely underlies much of the overwhelming reticence to greenlight international student-athletes to engage in NIL monetization. Through agency action, the U.S. government is free to conclude, quite suddenly, that NIL licensing by an international student-athlete is inconsistent with maintaining F-visa status. Such a conclusion would be inconsistent with the development of the law to date, as discussed above, but it would not be impermissible, as a legal or theoretical matter, for the government to change directions and pronounce such activity verboten.

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75. *See* United States v. Siddikov, No. 11A00022, at 9–10 (OCAHO, Dep't of Justice Aug. 14, 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/08/19/1257.pdf [https://perma.cc/NAU2-4NP4] (noting that when a person acts as an independent contractor and works for themselves, they are not in an employment relationship subject to the immigration law restrictions on employment). Administrative law judges within the Office of the Chief Administrative Hearing Officer (OCAHO) preside over hearings regarding IRCA compliance. *See Office of the Chief Administrative Hearing Officer*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer (updated July 1, 2021). *Siddikov*, the most recent OCAHO decision regarding independent contractors under IRCA, holds that ALJs should, in identifying independent contractors, "first look to the regulatory definition at 8 C.F.R. § 274a.1(h), then to prior OCAHO decisions, and finally to 'principles of agency law discussed in federal cases.'" Jacob Hamburger, *Hybrid-Status Immigrant Workers*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4327199 (quoting *Siddikov*, No. 11A00022, at 4).

76. *See supra* note 56 and accompanying text (referencing the Dizon and Dadhania treatise).

Recall that the rules regarding employment for F-visa holders are not based on statute but regulations.[77] As such, the Department of Homeland Security ("DHS") could engage in the formal notice-and-comment process to amend those regulations so as to explicitly prohibit international student-athletes from engaging in NIL licensing.[78] More likely, a sub-agency under DHS, such as the Student and Exchange Visitor Program ("SEVP"),[79] could issue an "interpretive rule"[80] or "policy statement,"[81] which would be exempt from the notice-and-comment requirements.[82] SEVP could state that signing an NIL licensing deal is incompatible with the statute underlying F-visas, making those visas available only to individuals entering the United States

77. *See supra* notes 47–52 and accompanying text. The only definition of "employment" in immigration law likewise comes from regulations and not statute. *See supra* notes 66–69 and accompanying text. We note that some lawmakers have endeavored to pass federal legislation that would explicitly permit international student-athletes on F visas to monetize their NIL. Senator Christopher Murphy (D-CT) has twice introduced the "College Athlete Economic Freedom Act" in order to "[a]llow international college athletes to market their NIL in the same ways their non-immigrant peers can without losing their F-1 visa status." Press Release, Chris Murphy, Murphy, Trahan Reintroduce Legislation to Codify College Athletes' Unrestricted Right to their Name, Image, Likeness (July 26, 2023), https://www.murphy.senate.gov/newsroom/press-releases/murphy-trahan-reintroduce-legislation-to-codify-college-athletes-unrestricted-right-to-their-name-image-likeness; *see also* S. 2554, 118th Cong. (2023); S. 238, 117th Cong. (2021).

78. *See* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012) (discussing the notice-and-comment process). Alternatively, the agency could return to its 1975 language, re-adopting the 1975 language prohibiting "employment in the United States, either for an employer or independently," and then coupling that broad language with clarifying text that "independent" employment would include signing contracts resulting in monetary gain. This approach would undermine an entirely different line of cases regarding the ability of F-visa holders to undertake "investment" while in the United States, a topic that exceeds the limited boundaries of this Article.

79. *See supra* notes 6–8 and accompanying text.

80. "Interpretive rules advise the public of the agency's interpretation of a statute . . . ." Family, *supra* note 78, at 570.

81. "[P]olicy statements advise the public of how the agency plans to exercise its power." *Id.* Notably, in April 2022, a "coalition of college sports stakeholders" launched an online petition asking the federal government to issue a "Policy Memorandum" on point. *See* Dean Golembeski, *Visa Rules Block International College Athletes from Making NIL Money*, BEST COLLEGES (May 18, 2022), https://www.bestcolleges.com/news/2022/05/18/ncaa-nil-international-college-athletes-student-visas/; *Name, Image and Likeness Rights for International Student-Athletes*, CHANGE.ORG, https://www.change.org/p/name-image-and-likeness-rights-for-international-student-athletes?utm_source=share_petition&utm_medium=custom_url&recruited_by_id=afdf5d40-5454-11ec-b913-4df214d0dea1 (last visited Sept. 13, 2023) (showing 840 signatures).

82. *Id.*

"solely for the purpose of pursuing such a course of study."[83] SEVP could also commit to revoking certification for any institution of learning that does not itself, in turn, revoke certification for an enrolled F-visa international athlete who it learns has signed an NIL-licensing deal.[84] Agency interpretive rules and policy statements do not technically have "force of law," but, as a practical matter, they are often followed as if they do.[85] For international student-athletes, the threat of deportation would incentivize them to comply with SEVP pronouncements rather than to challenge those pronouncements in court.

Given the capacity for agency changed-minds to change the legal landscape, the extent to which student-athletes and universities wish to avoid NIL deals will necessarily involve elements of testing the political winds and checking one's own risk tolerance. But as context, it is important to point out that this species of uncertainty in federal immigration law is not unique to NIL deals for international student-athletes. Rather, agency-change-of-mind uncertainty is endemic to much or most of modern immigration law. As a particular example, SEVP could suddenly declare that being recruited to play Division I sports is inconsistent with an F-visa because the noncitizen's entry is then not "solely for the purpose of pursuing such a course of study." Such a change would be seismic and wildly surprising. And the behavior of Division I universities and their international student-athletes tacitly indicates that such a technical possibility is broadly construed to be of a vanishingly small probability.

At the end of the day, settled expectations among stakeholders and agency desire to avoid public backlash will of course play a huge role in any assessment of the likelihood of changes to immigration rules. And we think it is quite obvious that the longer agency silence on this issue endures, the less likely it will be that the landscape will be suddenly rearranged by agency action. Likewise, the more that international student-athletes take advantage

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83. 8 U.S.C. § 1101(a)(15)(F). Such an interpretation would be consistent with the Sixth Circuit's policy rationale voiced in the *Wettasinghe* opinion: "Aliens with student status are forbidden to work in order to insure that those who seek entry into the country to pursue educational opportunities in fact do so full time." Wettasinghe v. U.S. Dep't of Justice, 702 F.2d 641, 642 (6th Cir. 1983).

84. SEVP has the authority to de-certify institutions of higher learning, which means the institution would not be allowed to enroll international students. 8 C.F.R. § 214.4(a)(2). This is an enormous threat given the economic importance of international students to U.S. institutions of higher learning. *See*, *e.g.*, Kit Johnson, *Opportunities & Anxieties: A Study of International Students in the Trump Era*, 22 LEWIS & CLARK L. REV. 413 (2018).

85. Family, *supra* note 78, at 570.

of non-employment NIL deals, and the longer that practice endures, the less likely it will be that agency action will upset the apple cart.

We recognize that some universities apparently concur with some or all of our analysis, even if they have not made that explicit. For instance, members of the University of Arizona basketball team, including top international student-athletes, get a cut of the profits of the sales of jerseys featuring athlete names.[86] This type of deal is precisely the kind that would allow international student-athletes to accrue lawful NIL income without running afoul of current F-visa restrictions. And the more ubiquitous such deals become, the more unexpected it becomes that agency action would put an end to the practice.

Conclusion

This Article has taken a new approach to analyzing the rights of international student-athletes when it comes to NIL licensing. We started by clearly delineating the nature of NIL licensing, which is an affirmative defense to suits for violation of the right of publicity. We showed how NIL licensing can be accomplished without work. And we explained how NIL licenses that require work can be compatible with the F-visa's prohibition of employment. Universities should sideline any lingering reticence they have and not stand in the way of international student-athletes who have the opportunity to participate in NIL licensing deals that do not require bona fide employment.

86. *See* Pascoe, *supra* note 8.