

## THE COLLECTIVE CONUNDRUM

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### *Introduction*

Within weeks of the National Collegiate Athletic Association's ("NCAA") announcement that the organization would not contest state laws allowing athletes to monetize their name, image, and likeness ("NIL") rights, college supporters began exploring opportunities for the athletes at their school of choice.<sup>1</sup> The NCAA's abandonment of a policy prohibiting athletes from monetizing their own image rights, which had been foundational to the organization, was cheered by athlete supporters. Within hours of the NCAA's brief press release signaling that athletes could enter agreements, the first agreements were signed.<sup>2</sup> Haley and Hanna Cavinder, now former twin basketball players at Fresno State with a substantial social media following, signed one of the first deals, with Boost Mobile.<sup>3</sup> Many star athletes landed significant deals early in the process. Several athletes also signed a number of novelty-type deals in the first few weeks after the policy change, including University of Alabama defensive back Ga'Quincy "Kool-Aid" McKinstry signing a deal with the Kool-Aid drink brand.<sup>4</sup> A few deals that garnered many high-profile headlines and several businesses offered significant deals to large groups of players, sometimes entire teams.<sup>5</sup>

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1. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> (noting that the NCAA would allow college athletes across the country to proceed with monetizing their name, image, and likeness rights even in states that had not passed a law granting athletes such rights).

2. Elizabeth Karpen, *Players Getting Paid: Here's Who Signed NIL Deals on Policy's First Day*, N.Y. POST (July 1, 2021, 4:29 PM), <https://nypost.com/2021/07/01/here-are-players-who-signed-nil-deals-on-policys-first-day/>.

3. Mike D. Sykes, II, *A Definitive List of the 16 Most Fun (and Kind of Weird!) NIL Deals Signed by College Athletes*, FOR THE WIN: USA TODAY SPORTS (Mar. 24, 2022, 9:00 AM ET), <https://ftw.usatoday.com/lists/nil-college-basketball-football-best-weirdest-deals>.

4. *Id.*

5. See, e.g., Dillon Cader, *NIL Deal Offered to Entire Ole Miss Football Team*, DAILY MISSISSIPPIAN (Sept. 22, 2021), <https://thedmonline.com/nil-deal-offered-to-entire-ole-miss->

Long-time University of Miami booster and billionaire John Ruiz signed a deal with 115 athletes, triggering a call from the NCAA.<sup>6</sup> The call was merely informational; however, a far cry from the NCAA's investigation into University of Miami booster Nevin Shapiro's actions a little more than a decade earlier.<sup>7</sup> Ultimately, the University of Miami escaped major NCAA sanctions after it was revealed that the NCAA had improperly used Shapiro's bankruptcy proceeding to obtain information about improprieties.<sup>8</sup> While the school ultimately evaded serious sanctions, for a time it appeared that both the football and basketball programs potentially faced the NCAA's most punitive sanction; the death penalty.<sup>9</sup> The school escaped the ultimate penalty, which had only previously been leveled against one football team, the Southern Methodist University ("SMU") Mustangs, in 1987.<sup>10</sup>

A lot can change in a decade; paying athletes is no longer taboo. The NCAA's NIL interim policy allowed athletes to monetize their image rights consistent with state law. Where there is no state law, athletes are also free

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football-team/ (describing an offer from Blue Delta Jeans company to the University of Mississippi football team that would have paid players with a pair of jeans for promoting the company on social media).

6. Paul Kasabian, *Report: NCAA Launches Inquiry into Miami NIL Deals Involving Booster John Ruiz*, BLEACHER REP. (June 14, 2022), <https://bleacherreport.com/articles/10038734-report-ncaa-launches-inquiry-into-miami-nil-deals-involving-booster-john-ruiz>.

7. See Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! (Aug. 16, 2011), [https://sports.yahoo.com/cr-renegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611.html](https://sports.yahoo.com/cr-renegade_miami_booster_details_illicit_benefits_081611.html) (noting Shapiro reported providing impermissible benefits to Miami athletes over an eight-year period, including cash payments, yacht trips, prostitutes, and bounties for on-field play).

8. See *NCAA Finds Issue with Investigation*, ESPN (Jan. 23, 2013), [https://www.espn.com/college-sports/story/\\_/id/8872992/ncaa-reveals-found-improper-conduct-investigation-miami-hurricanes](https://www.espn.com/college-sports/story/_/id/8872992/ncaa-reveals-found-improper-conduct-investigation-miami-hurricanes). The school did receive a loss of scholarships, but avoided the NCAA's most serious penalties. Tim Reynolds, *Miami's NCAA Saga Ends with Sanctions*, JACKSONVILLE (Oct. 22, 2013, 10:45 PM ET), <https://www.jacksonville.com/story/sports/college/2013/10/23/miamis-ncaa-saga-ends-sanctions/15811975007/>.

9. See Eric Underwood, *Miami Hurricanes: Death Penalty Possible for Latest Team to Commit Violations?*, BLEACHER REP. (Aug. 17, 2011), <https://bleacherreport.com/articles/808901-miami-hurricanes-latest-to-commit-violations-death-penalty-a-possibility> (noting that the pattern of behavior associated with Shapiro's ongoing conduct could merit the death penalty for the football program).

10. See Marc Edelman, *The NCAA's "Death Penalty" Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK L. REV. 385, 392 (2014) (detailing SMU's death penalty shutting down the football team for one year). The ban also required the team to play a limited schedule the following year. *Id.* The punishment was in response to alleged monthly payments to players of between \$50 and \$750 per month. *Id.*

to engage in NIL deals.<sup>11</sup> The NCAA's interim policy also okayed the use of agents by athletes and recommended that athletes report their activities to an official at their school.<sup>12</sup> Beyond that requirement, and the reservation that "[t]he new policy preserves the fact that college sports are not pay-for-play," there was little in the way of guardrails when the market opened on July 1, 2021.<sup>13</sup>

The NCAA provided a three-page supplement to the interim guidance of June 30, 2021, five months later in November.<sup>14</sup> The updated guidance, in the form of a question-and-answer document, detailed that the policy prohibits payment without an athlete delivering something of value, which cannot include on-field performance.<sup>15</sup> Deals and compensation cannot be conditioned on enrollment at a school, and guaranteeing opportunities to prospective athletes would violate the interim guidance.<sup>16</sup> Lastly, compensation for athletic performance is prohibited.<sup>17</sup> The limited guidelines imposed by the NCAA, undoubtedly partially driven by Justice Brett Kavanaugh's grand concurrence in *NCAA v. Alston* where he declared that "[t]he NCAA is not above the law,"<sup>18</sup> has spurred creativity and a willingness

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11. Brutlag Hosick, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Name, Image and Likeness Policy: Question and Answer*, NCAA (Nov. 2021) [hereinafter *NIL Policy Question and Answer*], [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf).

15. *Id.*

16. *Id.*

17. *Id.*

18. 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring). Justice Kavanaugh's concurrence has been widely viewed as an invitation to bring future challenges to NCAA rules that restrict competition. See Larry Stone, *Here's What the Supreme Court's Ruling Against the NCAA Means for the Financial Future of College Athletes*, SEATTLE TIMES (June 23, 2021, 11:20 AM), <https://www.seattletimes.com/sports/uw-huskies/heres-what-the-supreme-courts-ruling-against-the-ncaa-means-for-the-financial-future-of-college-athletes/> ("Kavanaugh practically sent an engraved invitation for future plaintiffs to mount further challenges of the NCAA's claims of antitrust protection in its defense of amateurism."); see also Molly Hensley-Clancy, *With the Courts (and Kavanaugh) on Their Side, Advocates Plot Future Challenges to the NCAA*, WASH. POST (June 21, 2021, 6:34 PM ET), <https://www.washingtonpost.com/sports/2021/06/21/kavanaugh-ncaa-advocates-legal-challenges/> ("In his concurrence, which no other justices joined, Kavanaugh painted the NCAA's refusal to pay athletes as a matter of racial justice, declaring its business model as one that would be 'flatly illegal in almost any other industry in America.'").

to test boundaries.<sup>19</sup> The NCAA would provide guidance again in May 2022, reinforcing the ban on boosters' direct communication with prospective students.<sup>20</sup> The May 2022 guidance also detailed that agreements must be based on the value that an athlete brings.<sup>21</sup> As such, "[E]nrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team" cannot be the basis for an agreement.<sup>22</sup>

Creative ways to fund college athletes and make schools more attractive has included the innovative "collective."<sup>23</sup> Collectives have become the NIL era's booster groups and, in some cases, likely bag men.<sup>24</sup> Collectives have emerged as structured entities that provide funding for athletes outside of the university, potentially opening revenue opportunities for athletes beyond star players in revenue-generating sports. What collectives provide in exchange for payments to athletes can vary.<sup>25</sup> One of the most common collective models involves a subscription that gives fans access to content from athletes.<sup>26</sup> Other collectives like Horns with Heart, a collective to benefit the University of Texas's offensive line, pay signed athletes to participate in

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19. See, e.g., Carly Wanna, *NCAA Athletes Are Receiving Millions of Dollars from Collectives Created by Rich College Sports Fans*, FORTUNE (May 16, 2022), <https://fortune.com/2022/05/16/ncaa-athletes-millions-compensation-funds-wealthy-college-sports-fans/> (observing that while the NCAA bans the use of name, image, and likeness deals to induce an athlete to attend a certain school, some groups are testing those boundaries).

20. NCAA, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement 1–2 (effective July 1, 2022) [hereinafter NCAA, NIL Third Party Guidance], <https://image.mail2.ncaa.com/lib/fe5715707d6d067e7c1c/m/7/38f59518-6731-4fde-983a-310d6468ef8f.pdf>.

21. *Id.* at 2.

22. *Id.*

23. See 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/> (describing collectives as independent of a school and functioning as a way to "pool funds from a wide swath of donors to help create NIL opportunities for student-athletes through an array of activities").

24. Bag men are individuals who, despite NCAA prohibitions, would provide college athletes with money. Sometimes bag men were known to make payments to family members instead of athletes themselves. See Steven Godfrey, *Meet the Bag Man: 10 Rules for Paying College Football Players*, BANNER SOCIETY (Apr. 10, 2014, 10:13 AM EDT), <https://www.bannersociety.com/2014/4/10/20703758/bag-man-paying-college-football-players>.

25. See generally Brandon Marcello, *NIL Collectives Provide Big Checks, New Challenges for College Athletes*, 247 SPORTS (Mar. 9, 2022), <https://247sports.com/Article/College-Football-NIL-Collectives-Money-Behind-The-Scenes-184104753/>.

26. See *id.*

charity work.<sup>27</sup> While there has been a lot of enthusiasm for the opportunities created by collectives, particularly for athletes who are not signing shoe deals with multinational companies, there is a great deal of variation amongst collectives and important questions about the model's sustainability.<sup>28</sup>

This Article grapples with these questions in four substantive parts. In Part I, this Article examines the emergence of NIL rights for college athletes and the contemporary landscape. Part II discusses the evolution of the collective model for NIL rights from prohibition to open market. Part III analyzes some of the challenges facing the NCAA, conferences, and individual schools in regulating collectives. Finally, Part IV proposes a systemic means for regulating collectives that protects athletes while enabling a robust, emerging market.

### *I. The Emergence of Name, Image, and Likeness Right*

College athletes are now free to exercise their right to profit off their own likeness for the first time in almost 120 years.<sup>29</sup> Until 2021, the NCAA's amateurism rules prevented college athletes from monetizing their NIL.<sup>30</sup> The NCAA's amateurism principle stipulated that college athletes would lose their amateur status and, therefore, would be ineligible for intercollegiate competition if the individual "[u]ses his or her athletics skill (directly or indirectly) for pay of any form in that sport."<sup>31</sup> Thus, before 2021, NCAA athletes relinquished complete commercial marketing control of their own likeness rights to maintain their eligibility. A well-known illustration of these

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27. Wescott Eberts, *Horns with Heart to Pay Texas OL \$50,000 Annually for Charity Work*, BURNT ORANGE NATION (Dec. 6, 2021, 1:37 PM CST), <https://www.burntorange.nation.com/2021/12/6/22820911/horns-with-heart-texas-longhorns-offensive-line-nil>.

28. See Matt Brown, *NIL Collectives, Explained: The Good, the Bad, and the Stupid*, EXTRA POINTS (Mar. 15, 2022), <https://www.extrapointsmb.com/p/nil-collectives-explained-the-good-the-bad-and-the-stupid/> (describing contracts with concerning terms and questions about the long-term viability for donors who may think twice about contributing to teams that are not performing on the field).

29. Emily Giambalvo, *What to Know About Name, Image and Likeness and How It Will Affect the NCAA*, WASH. POST (June 29, 2021, 10:30 PM ET), <https://www.washingtonpost.com/sports/2021/06/15/nil-ncaa-paying-college-athletes/>; NCAA, 2022-23 NCAA DIVISION I MANUAL art. 12.1.2, at 42 (2022) [hereinafter 2022-23 NCAA DIVISION I MANUAL], <https://www.ncaapublications.com/productdownloads/D123.pdf>.

30. See Brutlag Hosick, *supra* note 1; see also John T. Holden et al., *Reimagining the Governance of College Sports After Alston*, 74 FLA. L. REV. 427, 430-37 (2022) (discussing the history of the NCAA's opposition to college athletes being compensated).

31. NCAA, 2020-21 NCAA DIVISION I MANUAL art. 12.1.2(a), at 63 (2020), <https://www.ncaapublications.com/productdownloads/D121.pdf>.

restrictions' real-world effect can be found in the example of the world's most successful female swimmer, Katie Ledecky. In 2016, Ledecky became the most decorated female swimmer of all time at the Olympics in Rio de Janeiro.<sup>32</sup> Yet, she forwent any sponsorship opportunities to remain eligible to compete for Stanford University's swimming team.<sup>33</sup> The commercial opportunities sacrificed by college athletes have stood in stark contrast to the burgeoning revenue of the NCAA, with revenue that surpassed \$1 billion annually in 2017.<sup>34</sup> Public scrutiny of the NCAA's amateurism model has increased as those associated with college sports, such as coaches, have enjoyed mushrooming salaries in juxtaposition to the college athletes who are still forbidden from receiving payment.<sup>35</sup>

The NCAA has a long history of arguing that restrictions on college athletes' earnings are in service of upholding the distinctive amateur nature, and therefore attractiveness, of intercollegiate athletics.<sup>36</sup> In 2004, one of the first legal challenges to the NCAA's NIL rules came from University of Colorado ("UC") football player and Olympic skier Jeremy Bloom.<sup>37</sup> Bloom was recruited to play football at UC in 2002.<sup>38</sup> Before his enrollment at UC, Bloom competed at the Olympics and professional World Cup skiing events

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32. Melissa Willets, *Katie Ledecky Now Holds a Record for the Most Individual Gold Medals at the Olympic Games*, YAHOO! (July 30, 2021), <https://web.archive.org/web/20210801190200/https://www.yahoo.com/now/heres-why-katie-ledecky-likely-185140859.html>.

33. See Roger Groves, *Endorsements or Stanford: A Choice Ledecky Should Not Have to Make*, FORBES (Aug. 25, 2016, 12:16 PM EDT), <https://www.forbes.com/sites/roger-groves/2016/08/25/endorsements-or-stanford-a-choice-ledecky-should-not-have-to-make/?sh=500b6a951aa8>.

34. See Deloitte & Touche LLP, National Collegiate Athletic Association and Subsidiaries: Consolidated Financial Statements for Years Ended August 31, 2018 and 2017, at 5 (Dec. 11, 2018), [https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin\\_NCAAFinancialStatement.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf).

35. See, e.g., Aaron Suttles, *Alabama Approves Nick Saban Contract Making Him Highest-Paid Coach in Football*, ATHLETIC (Aug. 23, 2022), <https://theathletic.com/3531391/2022/08/23/nick-saban-alabama-contract-salary/>. For discussion of coach salaries amidst amateur status of athletes, see Laura McKenna, *The Madness of College Basketball Coaches' Salaries*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/s>.

36. *O'Bannon v NCAA*, 802 F.3d 1049, 1054–55 (9th Cir. 2015); see also Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 345–46 (2016) (describing how the *Board of Regents* case played a significant role in the NCAA's ability to impose restrictions on athletes).

37. *Bloom v. NCAA*, 93 P.3d 621, 622 (Colo. App. 2004).

38. *Id.*

and received various paid endorsements and entertainment opportunities.<sup>39</sup> The NCAA denied Bloom and UC's request for waivers of the NCAA's restrictions on endorsements and media activities. Bloom sought injunctive relief from the courts, asserting that his endorsement activities were essential to support his professional skiing career and wholly unrelated to his football prowess.<sup>40</sup> Nonetheless, a 2004 Colorado state appellate court upheld a lower court decision to dismiss Bloom's request for injunctive relief.<sup>41</sup> The appellate court specifically cited the United States Supreme Court's recognition of the NCAA as "the guardian of an important American tradition,' namely, amateurism."<sup>42</sup>

As in *Bloom*, the NCAA's defense of amateurism and its ongoing restraint of college athletes' NIL rights has benefited from dicta found in *NCAA v. Board of Regents of the University of Oklahoma*.<sup>43</sup> The 1984 case was a courtroom loss for the NCAA, which was successfully sued by the University of Oklahoma and the University of Georgia for engaging in anti-competitive behavior.<sup>44</sup> The NCAA had restricted television college football game exposure to preserve in-person attendance. Despite the Supreme Court ruling in favor of the schools, Justice John Paul Stevens provided a statement that would be used for three subsequent decades to justify the NCAA's ongoing restrictions on athlete earnings.<sup>45</sup> Firstly, Justice Stevens wrote that "athletes must not be paid."<sup>46</sup> Moreover, Justice Stevens stated:

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

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39. *Id.*

40. *Id.*

41. *Id.* at 628.

42. *Id.* at 626 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984)).

43. 468 U.S. at 101 ("Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice — not only the choices available to sports fans but also those available to athletes — and hence can be viewed as procompetitive.").

44. *Id.* at 89.

45. Baker & Brison, *supra* note 36; John T. Holden et. al, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV. 1, 28 (2022).

46. *Bd. of Regents*, 468 U.S. at 102.

consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.<sup>47</sup>

The NCAA has obstinately utilized its “ample latitude” to enforce its amateurism principles and to justify the ongoing prohibition of college athletes’ earnings.<sup>48</sup> Consistently, the NCAA’s amateurism rules have withstood antitrust challenges on the grounds that these rules serve a pro-competitive purpose.<sup>49</sup>

A critical threat to the NCAA’s formal bylaws came when former UCLA men’s basketball player Ed O’Bannon sued the Association.<sup>50</sup> The plaintiff alleged that preventing college athletes from receiving compensation for their likeness in NCAA video games violated federal antitrust laws.<sup>51</sup> The NCAA argued that its bylaws that prevent college athletes from profiting from their NIL help to preserve consumer interest in the NCAA and facilitate the integration of athletes into their academic environments.<sup>52</sup> The NCAA’s argument, that restricting college athletes’ earnings is necessary to maintain consumer interest in intercollegiate athletics, has persisted without empirical support for the assertion.<sup>53</sup> In *O’Bannon v. NCAA*, the district court questioned the reliability of the NCAA’s evidence that amateurism was a *primary* driver of demand for college sports.<sup>54</sup> Still, the court ultimately agreed that amateurism served some limited procompetitive purposes.<sup>55</sup> The district court also accepted the procompetitive justification that restricting college athletes’ compensation benefits the “integration” of academics and athletics by ensuring that student-athletes participate fully in academic life.<sup>56</sup>

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47. *Id.* at 120.

48. *Id.*

49. *See, e.g.*, *O’Bannon v. NCAA*, 802 F.3d 1049, 1063 (9th Cir. 2015) (“The Court’s opinion supports the proposition that the preservation of amateurism is a legitimate procompetitive purpose for the NCAA to pursue . . .”).

50. *See id.* at 1055.

51. *Id.* at 1060.

52. *Id.*

53. *See, e.g.*, Thomas A. Baker III et. al, *Debunking the NCAA’s Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 685 (2018) (concluding that the NCAA’s restrictions on athletes’ earning power do not increase consumer interest).

54. 7 F. Supp. 3d 955, 976 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

55. *Id.* at 977–78.

56. *Id.* at 980.



The district court acknowledged, however, that most of the benefits of athletic and academic integration were achieved via other rules, such as limiting the number of hours athletes can practice.<sup>57</sup> The court agreed that, by prohibiting college athletes from receiving financial compensation for their NIL, the NCAA helped to prevent a social “wedge” between student-athletes and the rest of the student body.<sup>58</sup> Legal scholars have questioned these assertions by highlighting that the NCAA, member institutions, and partners extensively publicize student NIL in commercial broadcasts and advertising.<sup>59</sup>

In *O’Bannon v. NCAA*, the district court agreed that the NCAA’s amateurism standard, which restricted football and basketball players’ ability to earn compensation, violated section 1 of the Sherman Antitrust Act.<sup>60</sup> The Ninth Circuit Court of Appeals affirmed the ruling, holding that the NCAA’s amateurism standard was subject to antitrust scrutiny.<sup>61</sup> The *O’Bannon* court’s ruling was significant; however, its impact was only a limited expansion of college athlete compensation. The Ninth Circuit ruled that by allowing college athletes to receive full-tuition scholarships, the NCAA could overcome antitrust violations.<sup>62</sup> Consequently, the NCAA’s stranglehold on college athletes’ NIL rights remained unperturbed until 2021. It took a Supreme Court decision and a cascade of state legislatures to finally turn the tide on the NCAA’s dominion.

#### A. Fighting NIL

Efforts to end the NCAA’s restraint on college athlete endorsement opportunities arose at the state level. On September 30, 2019, California made a monumental move toward ending the NCAA’s limitations on college athletes’ NIL rights; Governor Gavin Newsom signed Senate Bill 206, also known as the Fair Pay to Play Act, into law.<sup>63</sup> The Fair Pay to Play Act made it illegal for institutions in California to restrict student-athletes from using

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57. *See id.*

58. *Id.*

59. Thilo Kunkel et al., *There Is No Nil in NIL: Examining the Social Media Value of Student-Athletes’ Names, Images, and Likeness*, 24 *SPORT MGMT. REV.* 839, 860–61 (2021).

60. 7 F. Supp. 3d at 1009.

61. *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

62. *See id.* (partially vacating the lower court’s injunction so that NCAA could require universities to limit benefits to the cost of the attendance).

63. *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 30, 2019), <https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/>; *see also* Fair Pay to Play Act, 2021 Cal. Stat. 4081.

and profiting from their NIL, except when the potential sponsor is a direct competitor of a brand already in partnership with the institution.<sup>64</sup> It was Democratic California State Senator Nancy Skinner who first introduced state-level college athlete NIL law.<sup>65</sup> Senator Skinner has been recognized as a social-justice advocate and began pursuing NIL legislation after meeting college sports-reform exponent Andy Schwarz at a Rotary Club event in Oakland in 2016.<sup>66</sup> Slated to go into effect in 2021, the delayed implementation of the law purported to allow other states an opportunity to follow suit.<sup>67</sup> When announcing the bill's signing, Governor Newsom expressed the intention to "initiate dozens of other states to introduce similar legislation. And it's going to change college sports for the better by finally having the interest of the athletes on par with the interest of the institutions."<sup>68</sup>

### B. Cascade of States

Initially, the NCAA responded to the California Senate bill with fierce resistance and sent a letter to Governor Newsom wrongly contending that the new law violated the Dormant Commerce Clause.<sup>69</sup> The NCAA Board of Governors' letter stressed its belief that the bill would remove the distinction between college and professional athletes and "upend the level playing field for all student-athletes."<sup>70</sup> The NCAA also threatened to ban Californian

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64. CAL. EDUC. CODE § 67456 (West 2022).

65. Billy Witz, *A State Skirmish Over N.C.A.A. Amateurism Rules Has Quickly Become a National Battle*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2020/12/28/sports/ncaa-amateurism-rules.html>.

66. Chuck Culpepper, *This State Senator Once Caused McDonald's to Change. No Wonder She Took on the NCAA*, WASH. POST (June 30, 2021, 5:39 PM EDT), <https://www.washingtonpost.com/sports/2021/06/30/first-name-image-likeness-law-california-nancy-skinner/>.

67. See *California Fair Pay to Play Act to Become Effective September 1, 2021*, NAT'L L. REV. (Sept. 1, 2021), <https://www.natlawreview.com/article/california-fair-pay-to-play-act-to-become-effective-september-1-2021>.

68. Sydney Umeri, *How College Athletes Finally Earned the Right to Make Money*, SB NATION (July 1, 2021, 9:37 AM EDT), <https://www.sbnation.com/2021/7/1/22558078/college-athletes-name-image-likeness-nil-explained>.

69. *What If the NCAA Litigated State NIL Legislation?*, HARV. J. SPORTS & ENT. L. (Dec. 28, 2020), <https://journals.law.harvard.edu/jsel/2020/12/what-if-the-ncaa-litigated-state-nil-legislation/>; *NCAA Responds to California Senate Bill 206*, NCAA MEDIA CTR. (Sept. 11, 2019), <https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill206.aspx>.

70. *NCAA Responds to California Senate Bill 206*, *supra* note 69.

member schools from NCAA championships.<sup>71</sup> Experts have since questioned whether the NCAA could follow through on its threats on antitrust grounds.<sup>72</sup> Some athletic directors from outside California also responded with hostility to the potential of the Fair Pay to Play Act and threatened to cancel competitions with California-based schools.<sup>73</sup> Yet NCAA member institutions soon recognized the substantial recruiting advantage that California schools, such as Stanford and UCLA, would be afforded if the state became an NIL oasis for college athletes.

Florida followed California by passing legislation to benefit college athletes' NIL rights and expedited the timeline with an effective date of July 1, 2021.<sup>74</sup> A cascade of state legislation ensued. The various states' NIL laws generally prohibit institutions from restricting college athletes from earning compensation from their NIL and prohibit schools from directly compensating athletes.<sup>75</sup> Other common characteristics of the new state laws include the requirement that the athletes disclose any contracts to school officials within a specific timeframe and allow schools to block agreements that conflict with school partnerships.<sup>76</sup> In addition, some states require schools to provide financial education to athletes and others prohibit the endorsement of vice industries.<sup>77</sup>

*NCAA v. Alston* was a *coup de grâce* to the NCAA's fierce opposition to allowing college athletes compensation. *Alston* centered around caps on

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71. *Id.*; Steve Berkowitz, *NCAA Says California Schools Could Be Banned from Championships If Bill Isn't Dropped*, USA TODAY (June 24, 2019, 8:56 AM ET), <https://www.usatoday.com/story/sports/2019/06/24/ncaa-california-schools-could-banned-championships-over-bill/1542632001/>.

72. Marc Edelman, *NCAA's Threat to Ban California Member Colleges Could Lead to Antitrust Lawsuit Reminiscent of 1984*, FORBES (Oct. 1, 2019, 8:30 AM EDT), <https://www.forbes.com/sites/marcedelman/2019/10/01/ncaas-threat-to-ban-california-member-colleges-could-lead-to-antitrust-lawsuit-reminiscent-of-1984/?sh=6ff2a091af39>.

73. Steve Berkowitz, *If California Bill Goes into Effect, One AD Says Schools in State 'Won't Be Members of the NCAA'*, USA TODAY (Sept. 26, 2019, 5:57 PM ET), <https://www.usatoday.com/story/sports/college/2019/09/26/ohio-state-athletic-director-ncaa-drop-california-if-bill-passes/3778683002/>.

74. *Florida NIL Law for NCAA*, SPRY, <https://spry.so/nil-state-guide/florida-nil-law-for-ncaa/#:~:text=On%20June%2012th%2C%202020%2C%20Florida,is%20effective%20July%201%2C%202021> (last updated Aug. 22, 2022).

75. *See generally State-By-State NILS Executive Summary*, DRAKE GRP., <https://www.the-drakegroup.org/wp-content/uploads/2020/03/July-1-Update-State-NIL-Legislation-Xsummary-and-Database.pdf> [<https://perma.cc/5RDK-FFUP>] (last updated July 1, 2021) (detailing the key components of each states' NIL laws).

76. *Id.*

77. *See, e.g.*, New Jersey Fair Play Act, N.J. REV. STAT. § C.18A:3B-87 (2023).

academic compensation whereby college athletes alleged that the NCAA illegally maintained a horizontal price-fixing agreement that restrained trade among colleges.<sup>78</sup> The NCAA petitioned the Supreme Court to review the case and uphold the validity of its bylaws.<sup>79</sup> The Supreme Court, however, ruled 9-0 against the NCAA.<sup>80</sup> Significantly, the decision confirmed that the NCAA's amateurism principle was not shielded from antitrust scrutiny.<sup>81</sup>

### C. Capitulation

While the NCAA publicly objected to the California law, it simultaneously formed a working group of school presidents and athletic administrations to reexamine its position against athletic endorsement opportunities in light of states' legislative changes.<sup>82</sup> Eventually, mounting pressure from state legislatures forced the NCAA to surrender its staunch opposition and permit athletes to monetize their NIL. As a result, the NCAA announced its interim-NIL policy on June 30, 2021, just hours before the first of the new state laws were due to take effect.<sup>83</sup> The temporary policy provided guidance for deregulating NIL and was ultimately more permissive than some state laws.<sup>84</sup> The interim policy provided four guiding principles:

- The NCAA no longer prohibited college athletes from engaging in NIL activities that are consistent with the state laws where the school is located;
- The NCAA no longer prohibited college athletes who attend schools in a state without an NIL law from engaging in NIL activities;
- The NCAA would no longer prohibit college athletes from using professional services providers for NIL activities; and
- College athletes should report NIL activities consistent with state law or school and conference requirements.<sup>85</sup>

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78. NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021).

79. *Id.* at 2145.

80. *Id.* at 2147.

81. *Id.* at 2145.

82. Dan Murphy, *Source: NCAA Group to Propose Possible Changes to Allow Athlete Endorsements*, ESPN (Apr. 28, 2020), [https://www.espn.com/college-sports/story/\\_id/29109389/source-ncaa-group-propose-possible-changes-allow-athlete-endorsements](https://www.espn.com/college-sports/story/_id/29109389/source-ncaa-group-propose-possible-changes-allow-athlete-endorsements).

83. Brutlag Hosick, *supra* note 1.

84. *See, e.g.*, New Jersey Fair Play Act, N.J. REV. STAT. § C.18A:3B-86 (2023).

85. Brutlag Hosick, *supra* note 1.

The deregulated system is not without restrictions by the NCAA. In a question-and-answer statement released by the NCAA in November 2021, the NCAA clarified restrictions:<sup>86</sup>

- The NCAA would continue to forbid college athletes from engaging in NIL agreements where the athlete is paid without performing actual work;
- The NCAA would continue to forbid NIL compensation contingent on the student enrolling in a particular college;
- The NCAA would continue to forbid NIL agreements where the compensation is for athletic participation or achievement; and
- The NCAA would continue to forbid institutions from compensating student-athletes for using their NIL.<sup>87</sup>

The NCAA also noted that it maintains regulatory responsibilities to enforce its policies and procedures, particularly when information suggests policy violations related to pay-for-play.<sup>88</sup>

#### *D. The Emergence of NIL*

Before the signing of the Fair Pay to Play Act, the commissioners of the five biggest collegiate conferences wrote a letter petitioning Congress for a national standard for NIL regulation that supersedes state law.<sup>89</sup> In the press release announcing the NCAA's interim-NIL policy, NCAA President Mark Emmert emphasized the Association's hope that NIL regulation would soon occur through Congressional legislation.<sup>90</sup> The NCAA has persistently lobbied Congress to take action on NIL regulations. Several federal bills have been introduced, but none have passed. On August 31, 2022, the five commissioners wrote another letter to Congress seeking federal intervention

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86. *NIL Policy Question and Answer*, *supra* note 14.

87. *Id.*

88. *New Interim Key Policy Takeaways*, NCAA (July 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_PolicyKeyTakeaways.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf).

89. Emily Giambalvo, *Power Five Conferences Ask Congress to 'Not Wait for the NCAA' on Player Compensation*, WASH. POST (May 29, 2020, 5:30 PM EDT), <https://www.washingtonpost.com/sports/2020/05/29/power-five-conferences-ask-congress-not-wait-ncaa-player-compensation/>.

90. Brutlag Hosick, *supra* note 1.

and stressing concerns about donors and collectives abusing the current NIL structure.<sup>91</sup>

College athletes must now contend with a mix of NCAA regulations, collegiate policies, and state laws and still do not enjoy a truly free market to profit from their likeness. And yet, amidst a patchwork of legislation and persistent lobbying for a national standard, a new college sports landscape with NIL opportunities has arrived. In the first year since the change permitted college athletes to monetize their NIL, some athletes have greatly benefited from these new financial opportunities.<sup>92</sup> Reports suggest that the number and value of endorsement deals steadily grew over the first twelve months as companies became more comfortable marketing through college athletes.<sup>93</sup> In addition, college athletes are being compensated for their involvement in social media campaigns, traditional advertising, and other activities such as hosting camps.<sup>94</sup> Football players are reported to have seen the highest proportion of the NIL dollars and number of deals.<sup>95</sup> Undoubtedly, several headline-grabbing endorsement deals have been made by some superstar athletes; however, for most athletes, the financial implications are unlikely to be life-changing.

## II. A Brief Collective History

Collegiate boosters have played a significant role in college sports for many years.<sup>96</sup> In its most straightforward conception, a booster group is an often independent, non-profit fundraising wing that a university sanctions to

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91. Ross Dellenger, *Power 5 Commissioners Urge Congress to Take Action on NIL Regulations*, SPORTS ILLUSTRATED (Aug. 31, 2022), <https://www.si.com/college/2022/08/31/nil-regulations-power-five-commissioners-urge-congress>.

92. Dan Murphy, *Let's Make a Deal: NCAA Athletes Cashing In on Name, Image and Likeness*, ESPN (July 1, 2021) [hereinafter Murphy, *Let's Make a Deal*], [https://www.espn.com/college-sports/story/\\_/id/31738893/ncaa-athletes-cashing-name-image-likeness](https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness).

93. Dan Murphy, *NIL Turns One: After a Year of Radical Change, What Happens Next?*, ESPN (July 1, 2022), [https://www.espn.com/college-sports/story/\\_/id/34173052/year-radical-change-happens-next](https://www.espn.com/college-sports/story/_/id/34173052/year-radical-change-happens-next).

94. Murphy, *Let's Make a Deal*, *supra* note 92.

95. See Susan M. Shaw, *NIL Exacerbates Inequities for Women Athletes Even As It Provides Opportunities*, FORBES (May 23, 2023, 1:36 PM EDT), <https://www.forbes.com/sites/susanmshaw/2023/05/23/nil-exacerbates-inequities-for-women-athletes-even-as-it-provides-opportunities/?sh=2c5652646077>.

96. See, e.g., Peter Alfano, *The College Sports Industry: Power in Purse Strings*, N.Y. TIMES (June 11, 1986), <https://www.nytimes.com/1986/06/11/sports/the-college-sports-industry-power-in-purse-strings.html>.

raise revenue.<sup>97</sup> While booster groups have historically raised money for universities, the universities have not always had discretion over how to employ the group's proceeds.<sup>98</sup> Booster groups often have influential individuals backing the group; many times, these individuals are not only connected to the university but can also be politically connected.<sup>99</sup> The modern relationship between booster organizations and athletic departments can be difficult to delineate.<sup>100</sup> By the mid-1980s, booster organizations supplemented a significant portion of university athletic department budgets. With booster money, however, also comes integrity concerns.<sup>101</sup>

#### *A. Overview of Booster Organizations*

Booster organizations have origins that date back more than a century.<sup>102</sup> Seemingly, as long as there have been booster organizations in collegiate sports, there have been efforts by the NCAA to rein in some of the activities.<sup>103</sup> A 1929 Carnegie Foundation report noted that “Extramural Relationships” were an area of concern within college athletics, notably the influence of alumni on athletic recruiting.<sup>104</sup> For much of the last half-century, athletic departments and university leadership have feared the potential business integrity issues accompanying boosters.<sup>105</sup>

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97. *Id.*

98. *Id.*

99. See Andrew McGregor, *Want to Understand College Football? It's All About Politics*, WASH. POST (Dec. 1, 2017, 6:00 AM EST), <https://www.washingtonpost.com/news/made-by-history/wp/2017/12/01/want-to-understand-college-football-its-all-about-politics/>.

100. See, e.g., Curt Weiler, *Unexpected Turn: Florida State Announces Michael Alford Will Be New Director of Athletics*, TALLAHASSEE DEMOCRAT (Dec. 9, 2021, 3:49 PM ET), <https://www.tallahassee.com/story/sports/college/fsu/2021/12/09/florida-state-fsu-director-of-athletics-ad-michael-alford-seminole-boosters-david-coburn-vince-tyra/6451271001/> (noting that Florida State University named the former head of the University's booster organization as the school's athletic director).

101. Alfano, *supra* note 96. Many of the NCAA's most infamous scandals have involved inappropriate activities by university boosters. See Alan Rubenstein, *The 25 Biggest Scandals in NCAA History*, BLEACHER REP. (Sept. 20, 2010), <https://bleacherreport.com/articles/468221-the-25-biggest-scandals-in-ncaa-history>.

102. Josh Planos, *The NCAA Doesn't Know How to Stop Boosters From Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022, 6:00 AM), <https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/>.

103. *Id.*

104. HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS, at ch. IX (1929), <http://www.thecoaia.org/wp-content/uploads/2014/09/Carnegie-Commission-1929-excerpts-1.pdf>.

105. Planos, *supra* note 102.

Boosters are a broad term donned by a range of supporters for a particular team or athletic department.<sup>106</sup> The NCAA defines a booster as “representatives of the institution’s athletic interests” and includes a wide variety of individuals, including anyone who has donated to a college to obtain season tickets to a sporting event.<sup>107</sup> Other activities that can make someone a booster, according to the NCAA, include being a part of an organization that promotes the university’s athletic programs, arranging employment for college athletes, assisting in recruiting, and providing benefits to an enrolled student or their family.<sup>108</sup> According to the NCAA, much like a brand, once an individual has been labeled as a booster, they retain that status for life.<sup>109</sup> Generally, boosters are prohibited from engaging with prospective college athletes with whom they do not have a pre-existing relationship, other than to attend games where the athletes may be competing or notify university staff about potential recruits.<sup>110</sup> In addition, schools are required by the NCAA to maintain institutional control. This requirement means that athletic departments must ensure compliance with NCAA rules, such as monitoring and identifying violations, and notifying the NCAA. Thus, athletic departments must take responsibility for the actions of both university employees and supporters of the university—i.e., boosters.<sup>111</sup>

Failure to maintain institutional control can result in the NCAA’s ultimate penalty.<sup>112</sup> While the last 100 years of college sports have resulted in scandals, only the most serious have resulted in NCAA allegations that there was a so-called lack of institutional control.<sup>113</sup> SMU is the best known example held up for lack of institutional control, where years of turning a blind eye to boosters effectively paying players and recruits finally caught up to the school. The NCAA announcement on February 25, 1987, gave SMU

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106. Kelci Lynn Lucier, *What Is a College Booster?*, THOUGHTCO. (Feb. 8, 2019), <https://www.thoughtco.com/what-is-a-college-booster-793481>.

107. *Role of Boosters*, NCAA, <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> (last visited Aug. 18, 2023). Prior to the Tax Cuts and Jobs Act of 2017, boosters were able to deduct eighty percent of the value of tickets purchased from their income taxes. John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 AM. U. L. REV. 845, 883 (2022).

108. *See Role of Boosters*, *supra* note 107.

109. *Id.*

110. *Id.*

111. *Id.*

112. The NCAA’s ultimate penalty is the death penalty. A sanction that has only been handed down against SMU’s football team. *See Edelman*, *supra* note 10, at 392.

113. *See* Craig Powers, *Explaining the NCAA’s ‘Lack of Institutional Control’ Charge Against Miami*, SBINATION (Feb. 20, 2013, 10:22 AM EST), <https://www.sbnation.com/college-football/2013/2/20/4008392/ncaa-lack-of-institutional-control-definition-miami>.



the death penalty.<sup>114</sup> SMU would not be the last school to face consequences from the NCAA after boosters had sent impermissible benefits to athletes, though it was the last major program to get the ‘death penalty’.<sup>115</sup> Nevertheless, even though there is often a negative connotation with the terms,<sup>116</sup> boosters and collectives have historically served to advance the needs of organizations.

### B. *The Emergence of Collectives*

The term “collective” has a simple definition: “done by people acting as a group.”<sup>117</sup> While the term has been in use for several hundred years, it rose in prominence during the twentieth century.<sup>118</sup> In the business sense, a collective has been used to describe a business managed without a hierarchy, not to be confused with a cooperative managed democratically by its members.<sup>119</sup> In contemporary usage, the term collective is often associated with the collective bargaining process whereby workers negotiate the terms and conditions of their employment.<sup>120</sup> Future use of the word may, however, be more closely associated with the emergence of NIL groups.

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114. Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM EST), <https://time.com/3720498/ncaa-smu-death-penalty/>.

115. See, e.g., Robinson, *supra* note 7 (describing the scandal at the University of Miami involving booster Nevin Shapiro).

116. See Kevin Trahan, *‘Booster’ Is a Dirty Word in the NCAA’s World, but Not in Court*, SB NATION (June 24, 2014, 2:06 PM EDT), <https://www.sbnation.com/college-football/2014/6/24/5838468/college-sports-boosters-obannon-ncaa> (noting the NCAA’s repeated associations during the *O’Bannon* case between boosters and illicit activity).

117. *Collective*, OXFORD DICTIONARY OF ENGLISH 339 (Catherine Soanes & Angus Stevenson eds., 2d ed. rev. 2005), [https://archive.org/details/oxforddictionary0000unse\\_z0z2/page/339/mode/1up?q=%22done+by+people%22](https://archive.org/details/oxforddictionary0000unse_z0z2/page/339/mode/1up?q=%22done+by+people%22).

118. See *Collective*, GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=collective&year\\_start=1800&year\\_end=2019&corpus=en-2019&smoothing=3](https://books.google.com/ngrams/graph?content=collective&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3) (last visited Aug. 24, 2023) (documenting a sharp rise in the use of the word “collective” in the twentieth century). See *generally* *Collective*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/collective> (last visited Aug. 24, 2023) (tracing the origins of the word “collective” to the fifteenth century).

119. *What’s the Difference Between Cooperatives and Collectives?*, COOP. DEV. INST. (Feb. 13, 2015), <https://cdi.coop/coop-cathy-coops-and-collectives-difference/>.

120. *Collective Bargaining*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> (last visited Aug. 18, 2023).

Collectives began to emerge shortly after the NCAA abandoned its opposition to athletes being able to monetize their NIL rights.<sup>121</sup> According to college sports journalist Matt Brown:

A collective attempts to greatly simplify the NIL dealmaking process, while also involving another group of stakeholders, fans. Rather than each athlete trying to set up deals individually, a collective pools money from different brands, fans, and boosters and then allocates it to athletes who opt into the collective, in exchange for brand work and social media appearances. Brands get access to athletes they might not otherwise have, fans can (legally) financially support their favorite athletes, and more athletes get access to NIL and networking opportunities.<sup>122</sup>

But NIL collectives are not a monolith; many kinds of collectives exist. Pete Nakos of *On3 Sports* identified three distinct types of collectives.<sup>123</sup> The first is marketplace collectives that connect athletes to businesses.<sup>124</sup> Under the marketplace model, businesses can connect with athletes and enter into representation agreements.<sup>125</sup> The second type of collective identified are donor-driven collectives.<sup>126</sup> This model of collective sees supporters pooling money to pay athletes, often in exchange for content from the athletes.<sup>127</sup> Donor-driven collectives are sometimes criticized because, in some instances, it does not appear that the athletes are providing much in the way of a service in exchange for payment.<sup>128</sup> The final collective model is a hybrid of the marketplace and donor-driven model, whereby the collective serves both functions.<sup>129</sup> Variation among collectives extends to their organizational status, with some operating as for-profit businesses while others attempt to

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121. See Alex Kirshner, 'Everything's on Fire': NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay, GLOB. SPORT MATTERS (Jan. 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/>.

122. Brown, *supra* note 28.

123. Nakos, *supra* note 23.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See id.*

129. *Id.*

exist as tax-exempt organizations.<sup>130</sup> While the tax status of collectives remains something of an open question, a qualification for tax-exempt status would enable a collective to tell donors their gift is tax deductible.<sup>131</sup> Despite the relative newness of collectives, some have come out of the gate eager to test the NCAA's willingness to regulate markets in the wake of Justice Brett Kavanaugh's concurrence in *Alston*, that "the NCAA is not above the [antitrust] law."<sup>132</sup>

### III. Regulating Collectives

Collectives have rapidly emerged as the primary source of NIL revenue for many college athletes, supplanting individually sourced deals.<sup>133</sup> Many collectives have made headlines through their high-profile founders who are willing to invest their own time and assets into representing only a selective group of athletes.<sup>134</sup> A little more than a year after the NCAA permitted college athletes to monetize their NIL rights, nearly every school in a Power Five conference<sup>135</sup> has at least one collective dedicated to providing or generating NIL opportunities for the school's athletes.<sup>136</sup> The rapid

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130. In 2023, the IRS provided specific guidance restricting the tax-exempt status of collectives "if their main purpose is paying players instead of supporting charitable works." Jim Vertuno, *IRS Throws a Chill into Collectives Paying College Athletes While Claiming Nonprofit Status*, AP SPORTS (June 30, 2023, 8:09 AM CDT), <https://apnews.com/article/nil-athlete-endorsements-ncaa-irs-9d006bdb429f76adaa3d108196fd2c8c>.

131. *See id.*

132. NCAA. V. *Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

133. 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 ET), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/>.

134. *See id.* (noting that the University of Texas has a collective devoted to paying each offensive lineman on the football team \$50,000).

135. The "Power Five conferences" are a term referring to the Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference, and the Southeastern Conference. Collectively, these conferences generate the majority of the NCAA's revenue. *See* David Broughton, *Power Five: An \$8.3 Billion Revenue Powerhouse*, SPORTS BUS. J. (Aug. 17, 2020), <https://www.sportsbusinessjournal.com/Journal/Issues/2020/08/17/Colleges/Revenue.aspx>.

136. *See Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> [<https://perma.cc/JNA9-YVJE>] (last updated Aug. 12, 2023) (providing a list of each universities various collectives).

emergence of these groups, coupled with the lack of clear guidance from the NCAA, has resulted in no shortage of early controversy.<sup>137</sup>

#### A. *Collective Controversies*

Even before collectives became a household name, there was concern over the conduct of groups' NIL dealings.<sup>138</sup> Both Brigham Young University ("BYU") and the University of Miami attracted attention when a protein bar company and Brazilian jiu-jitsu gym, respectively, offered deals to large groups of players.<sup>139</sup> The NCAA reportedly investigated both BYU and Miami's NIL arrangements but no statement or violation has been announced to date.<sup>140</sup> Recently, the NCAA's power to enforce the rules have been questioned,<sup>141</sup> with Justice Kavanaugh's threat lingering over the organization's enforcement office. Some have suggested that the NCAA is "all bark and no bite" when enforcing what few NIL rules exist.<sup>142</sup> A number of high-profile figures in college sports have speculated that NIL deals are being used to impermissibly induce recruits. For example, University of Alabama football coach Nick Saban suggested: "[Texas] A&M bought every player on their team, made a deal for name, image and likeness. We didn't buy one player. But I don't know if we're going to be able to sustain that in the future because more and more people are doing it."<sup>143</sup>

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137. See Nicole Auerbach, *College Leaders 'Extremely Concerned' with NIL Collectives' Direction: Survey*, ATHLETIC (May 4, 2022), <https://theathletic.com/3499920/2022/05/04/college-leaders-extremely-concerned-with-nil-collectives-direction-survey/> (noting concerns from university leaders over improper collective conduct).

138. Erin Walsh, *Report: Miami, BYU Investigated by NCAA Enforcement over Potential NIL Violations*, BLEACHER REP. (Dec. 10, 2021), <https://bleacherreport.com/articles/10020519-report-miami-byu-investigated-by-ncaa-enforcement-over-potential-nil-violations>.

139. *Id.*

140. See Daniel Libit & Eben Novy-Williams, *NCAA Probes BYU, Miami NIL Deals for Potential Pay-for-Play Violation*, SPORTICO (Dec. 10, 2021, 4:36 PM), <https://www.sportico.com/leagues/college-sports/2021/ncaa-byu-miami-nil-probe-1234650215/> (noting the existence of an NCAA probe into BYU and the University of Miami).

141. Ross Dellenger, *As Coaches Squabble About NIL, Enforcement May Still Be Leagues Away*, SPORTS ILLUSTRATED (May 23, 2022), <https://www.si.com/college/2022/05/23/nick-saban-jimbo-fisher-nil-ncaa-congress>.

142. Blake Toppmeyer, *NCAA Is All Bark, No Bite, When Enforcing NIL Rules Against Recruiting Inducements*, TENNESSEAN (May 11, 2022, 3:54 PM CT), <https://www.tennessean.com/story/sports/college/2022/05/11/ncaa-nil-guidelines-rules-boosters-collectives-antitrust-lawsuit/9681621002/>.

143. Adam Gorney, *Shots Fired: Nick Saban Takes Aim at Texas A & M, Miami Over NIL*, ALA. RIVALS (May 19, 2022), <https://alabama.rivals.com/news/shots-fired-nick-saban-takes-aim-at-texas-a-m-miami-over-nil>.

While the NCAA bans NIL deals that are “pay-to-play” or deals that induce an athlete to attend or transfer to a certain school, there seem to be differing interpretations of the rules.<sup>144</sup> While inducements are an area of particular concern, some deals raise additional questions. In particular, one emerging type of NIL collective rewards athletes with compensation for essentially engaging in community service.<sup>145</sup> While the authors of this Article in no way wish to disparage charity work, paying an athlete to complete volunteer work may lack a fair market value that would justify payment by a collective.<sup>146</sup> Perhaps adding insult to injury, the NCAA’s lack of meaningful enforcement has meant that schools who read and enforce the guidelines strictly are at a disadvantage compared to schools willing to push the boundaries of permissibility.

*B. How Has the NCAA Responded to Collectives?*

The NCAA’s response to athletes’ grant of NIL rights has generally been lackluster. First, the NCAA lead with their announcement hours before state laws were to take effect; then, it only followed several months later with an ineffective question-and-answer document.<sup>147</sup> For an organization that annually produces a rules document that is hundreds of pages long, the NCAA has taken an extremely hands-off approach to regulating NIL.<sup>148</sup> The NCAA may be waiting for Congress to provide a national guideline. But successful federal legislation does not appear to be on the horizon, thus raising questions about the NCAA’s willingness to enforce any guardrails.<sup>149</sup>

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144. See Derin B. Dickerson & Trenton Hafley, *The NIL Paradox for NCAA Athletes-Enforce or Recruit?*, BLOOMBERG (June 27, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/the-nil-paradox-for-ncaa-athletes-enforce-or-recruit>.

145. See, e.g., *Latest NIL Twist: Millions Being Pledged to College Athletes*, USA TODAY (Dec. 14, 2021, 3:24 PM ET), <https://www.usatoday.com/story/sports/ncaaf/2021/12/14/latest-nil-twist-millions-being-pledged-to-college-athletes/49526915/>.

146. See Jeremy Crabtree, *Why Are U.S. Senators Introducing Bill Targeting 501(c)(3) NIL Collectives?*, ON3 (Sept. 29, 2022), <https://www.on3.com/nil/news/why-are-u-s-senators-introducing-bill-targeting-501c3-nil-collectives/> (statement of Attorney Mitt Winter) (“How does that serve the public good by paying to do volunteer work?”).

147. Brutlag Hosick, *supra* note 1; *NIL Policy Question and Answer*, *supra* note 14.

148. See generally 2022-23 NCAA DIVISION I MANUAL, *supra* note 29 (detailing the NCAA’s extensive rules manual that is updated annually).

149. See Arne Green, *Kansas State AD Gene Taylor on Growth of NIL: ‘People Were Kind of Ignoring the Rules,’*, TOPEKA CAPITOL-J. (May 27, 2022, 4:00 PM CT), <https://www.cjonline.com/story/sports/college/cat-zone/2022/05/27/kansas-state-ad-gene-taylor-growth-name-image-likeness-ncaa-nil-nijel-pack/9922617002/> (statement of Kansas State athletic director Gene Taylor) (“People were kind of ignoring the rules that already existed in terms of recruiting inducements and boosters being involved.”).

Following months of questions about whether the NCAA was going to act, the organization released some guidance in May 2022 that effectively reiterated its previous guidance.<sup>150</sup>

The NCAA's revised guidance on "Third Party Involvement" spells out that the term "third parties" references boosters and breaks down guidance into two groups; prospective athletes and current student-athletes.<sup>151</sup> Regarding prospective athletes, the interim guidance states:

- Recruiting conversations between an individual or entity that has triggered booster status ("booster/NIL entity") and a PSA [Prospective Student Athlete] are not permissible.
- Booster/NIL entity may not communicate (e.g., call, text, direct message) with a PSA, a PSA's family, or others affiliated with the PSA for a recruiting purpose or to encourage the PSA's enrollment at a particular institution.
- An NIL agreement between a PSA and a booster/NIL entity may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.
- Institutional coaches and staff may not organize, facilitate or arrange a meeting between a booster/NIL entity and a PSA (e.g., provide the individual or entity with a recruiting list or watch list, including the NCAA Transfer Portal).
- Institutional coaches and staff may not communicate directly or indirectly with a PSA on behalf of a booster/NIL entity.
- NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team (e.g., being on roster).<sup>152</sup>

Regarding current college athletes, the guidance was more limited:

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150. Liz Clarke, *NCAA Targets Boosters with New NIL Guidelines*, WASH. POST (May 9, 2022, 8:27 PM EDT), <https://www.washingtonpost.com/sports/2022/05/09/ncaa-nil-boosters-collectives/>.

151. NCAA, NIL Third Party Guidance, *supra* note 20, at 1.

152. *Id.*

- An NIL agreement between a SA and a booster/NIL entity may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.
- NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team.<sup>153</sup>

Considering this new guidance, what remains to be seen is whether the NCAA intends to enforce these rules with any more vigor than they did the initial guidance. The NCAA has posted a job for an Associate Director of NIL compliance,<sup>154</sup> but there is no indication that the organization that once struck fear into college athletic departments for allowing athletes to make long-distance phone calls<sup>155</sup> has any real inclination to police college sports.

### C. A Lack of Certainty

Many athlete advocates would like to see the NCAA in its past iteration disappear, or at least be significantly reconstituted.<sup>156</sup> In this instance, schools likely need the NCAA to decide how to move forward. Schools likely want to avoid getting too close with NIL collectives out of fear that a court could find them joint employers of athletes.<sup>157</sup> Athletic programs need certainty in order to ensure competitive balance and fairness. Colleges should all be able to operate on the same baseline assumptions. It is a fundamental principle

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153. *Id.*

154. See Pete Nakos, *NCAA Posts Job for Associate Director of NIL Enforcement*, ON3 (Oct. 3, 2022), <https://www.on3.com/nl/news/ncaa-posts-job-for-associate-director-of-nil-enforcement-pay-to-play-recruiting-inducement/>.

155. See generally *NCAA Nails Sampson for Phone Call Scandal*, DAILY ILLINI (Feb. 14, 2008), <https://dailyillini.com/sports-stories/2008/02/14/ncaa-nails-sampson-for-phone-call-scandal/> (detailing NCAA sanctions against a NCAA basketball coach for impermissible phone calls).

156. See, e.g., Stewart Mandel, *Mandel: It's Time for Major College Football Programs to Devise Their Own Solutions as the NCAA's Power Dissolves*, ATHLETIC (July 20, 2021), <https://theathletic.com/2716539/2021/07/20/mandel-its-time-for-major-college-football-teams-to-devise-their-own-solutions-as-the-ncaas-power-dissolves/> (advocating for governance changes for college football).

157. See Michael E. Bonner & Brett P. Owens, *5 Potential Pitfalls for NIL Collectives in College Sports to Avoid*, FISHER PHILLIPS (June 22, 2022), <https://www.fisherphillips.com/en/news-insights/5-potential-pitfalls-nil-collectives-college-sports.html>.

that everyone gets to start from the same place, so when some schools can push the boundaries and cross the line, it is necessary for there to be predictable consequences. Without enforcement, the schools and athletes punished are the ones that choose to adhere to the guidance provided.

*IV. The Multi-Million Dollar Question: How to Fairly Deal with Collectives?*

For the NCAA and its member institutions, there are limited options available to regulate NIL collectives. First, the NCAA could do nothing, choosing not to establish clear rules for enforcement nor enforcing the present flimsy policy controls. If instead the NCAA decides to act, it could draw a clear line in the sand and establish a date by which the rules it creates will be enforced. Alternatively, the NCAA could attempt to create a policy designed to set a fair market value to protect athletes and member programs from abuse. Lastly, NCAA member institutions could fill the space currently occupied by collectives and agents servicing college athletes in pursuit of NIL opportunities. This Part explores each of these four options.

*A. Do Nothing*

To date, the NCAA's governance of NIL collectives could best be described as a form of *laissez-faire* leadership. While the use of *laissez-faire* to describe leadership is sometimes pejorative, positive outcomes may flow from doing nothing and permitting problems to work themselves out.<sup>158</sup> In the context of taking action against NIL collectives and their legally questionable conduct, the NCAA has a legitimate reason why it may continue with its current course of doing nothing. In particular, the reason may be found within a warning from Justice Kavanaugh in his concurring opinion in *Alston*.<sup>159</sup>

Before delving into Justice Kavanaugh's cautionary note to the NCAA, it is first necessary to recognize that the court's ruling in *Alston* involved the legality of only a narrow subset of NCAA rules, specifically affecting only the rules governing education-related expenses.<sup>160</sup> Thus, the court's ruling left the NCAA's governance of NIL unaffected. The majority in *Alston* made clear that nothing within its holding prevented the NCAA from forbidding

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158. Laissez-faire leadership is "considered non-strategic or absent leadership." See generally Inju Yang, *Positive Effects of Laissez-Faire Leadership: Conceptual Exploration*, 34 J. MGMT. DEV. 1246, 1246-47 (2015) (defining laissez-faire leadership and exploring potential benefits).

159. 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

160. *Id.* at 2145 (majority opinion).



in-kind payments to college athletes or enforcing a “no Lamborghini rule.”<sup>161</sup> Unfortunately for the NCAA, the majority’s assurances were later undermined (if not gutted) by the warning from Justice Kavanaugh’s concurring opinion.<sup>162</sup>

First and foremost, Justice Kavanaugh hones in on the fact that the NCAA’s compensation rules are subject to rule of reason review.<sup>163</sup> Justice Kavanaugh highlights the majority’s rejection of a line of circuit cases that interpreted “stray comments” from Justice Stevens in *NCAA v. Board of Regents of the University of Oklahoma*<sup>164</sup> as removing the NCAA’s regulation of college athletes from the full and searching rule of reason review.<sup>165</sup> At first blush, this claim may appear to do little more than reflect what was first recognized by the Ninth Circuit in *O’Bannon v. NCAA*, that the NCAA is no longer insulated by a misreading of Justice Stevens’ dicta in *Board of Regents*.<sup>166</sup>

Yet Justice Kavanaugh went much further than just recognizing the use of the rule of reason test to resolve conflicts in NCAA rules. Justice Kavanaugh warned the NCAA that he holds “serious questions” about whether the remaining rules governing college athlete compensation would survive rule of reason scrutiny if put before the court by yet another antitrust challenge.<sup>167</sup> Those concerns were grounded in Justice Kavanaugh’s recognition of the reality that the NCAA and its members were suppressing college athlete compensation through their preservation of “amateurism,” even though

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161. *Id.* at 2165. The Court referenced Lamborghinis based on the NCAA’s fears that by permitting schools and conferences to set standards for educational-related expenses, the court would effectively legalize situations in which college athletes could be provided “luxury cars” to get to class. *Id.*

162. *Id.* at 2167.

163. *Id.* (Kavanaugh, J., concurring) (“After today’s decision, the NCAA’s remaining compensation rules should receive ordinary ‘rule of reason’ scrutiny under the antitrust laws.”). In general, the rule of reason analysis provides that the court, acting as factfinder “must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.” *Clear Connection Corp. v. Comcast Cable Commc’ns Mgmt., LLC*, 149 F. Supp. 3d 1188, 1197 (E.D. Cal. 2015) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

164. 468 U.S. 85, 102 (1984).

165. *Alston*, 141 S. Ct. at 2167 (rejecting dicta from *Board of Regents* that removed from rule of reason any NCAA rules affecting the interests of college athletes).

166. 802 F.3d 1049, 1063–64 (9th Cir. 2015).

167. *Alston*, 141 S. Ct. at 2167.

college athletes were generating billions of dollars in revenue for the NCAA and its membership.<sup>168</sup>

Justice Kavanaugh rejected the NCAA's argument that its rules were necessary to preserve its ever-changing definition of amateurism, which he dismissed as a circular argument.<sup>169</sup> The NCAA's argument began with its definition of amateurism as justification for the restraints it imposes on college athlete compensation, circling back to preserve its internal definition of the term.<sup>170</sup> In recognizing the argument's cyclical nature, Justice Kavanaugh determined that through the enforcement of its definition of amateurism, the NCAA effectively engaged in the practice of price-fixing labor "which is ordinarily an antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."<sup>171</sup> He added that a monopsony "cannot launder its price-fixing of labor by calling it product definition."<sup>172</sup> Justice Kavanaugh rightly recognized that no other industry is permitted to price-fix labor by incorporating price-fixed labor into its definition of the product it creates.<sup>173</sup> Justice Kavanaugh then concluded his concurrence with a sobering reminder that the "NCAA is not above the law."<sup>174</sup>

Thus, Justice Kavanaugh warned the NCAA to the reality that its amateurism rules are in serious jeopardy if another antitrust challenge comes before the court.<sup>175</sup> The NCAA's current problem is that it risks losing its control over college athlete compensation if it exercises its authority to restrain or sanction NIL collectives, the athletes with whom they work, or the universities they serve. For this genuine reason, the NCAA may elect to do nothing for fear of losing what little authority it retains over the regulation of college athlete compensation.

#### *B. Draw a Line in the Sand by Establishing Binding Precedent*

While doing nothing might be the best response for preserving what control the NCAA retains over the regulation of college athlete compensation, the option begs the following question: what good is having authority that either cannot or should not be exercised? If the NCAA

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168. *Id.* at 2167-68.

169. *Id.*

170. *Id.*

171. *Id.* at 2168 (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

172. *Id.*

173. *See id.* at 2169.

174. *Id.*

175. *See id.*

perceives that the lack of regulation over collectives harms the sports or participants thereof, then a compelling reason exists for punitive action. For this reason, the NCAA may draw a bright line by setting and enforcing a policy that details what NIL activity is not permitted. The NCAA may have done so already.

On May 9, 2022, the NCAA took its first meaningful moves toward flexing its authority concerning reining in NIL collectives when it supplemented its approach to NIL management with guidelines aimed at addressing membership concerns.<sup>176</sup> The NCAA's concerns focused on allegations that boosters were operating as collectives and funneling money to college recruits to induce the recruit to select and sign with the booster's favorite athletic programs.<sup>177</sup> The NCAA addressed these concerns by drawing a line via definition between collectives and boosters: collectives work with college athletes to help them secure NIL deals after the student is enrolled; while boosters use collective-generated money to secure the athlete's signing with the school.<sup>178</sup> Ohio State Athletic Director Gene Smith interpreted the NCAA's guidelines as providing guardrails for policing boosters/collectives that cross the line by inducing athletes with NIL money.<sup>179</sup> Smith added that the NCAA issued its guidelines after first considering the risks and that he believes the NCAA intends to enforce its policies despite the possibility that enforcement might produce litigation.<sup>180</sup>

Others do not share Smith's confidence in the NCAA's fidelity to its new guidelines. Critics point to the lack of any real punitive action taken by the NCAA against any collective/booster or program since the NCAA first allowed for NIL use by college athletes on July 1, 2021.<sup>181</sup> Furthermore, a warning from the Department of Justice to the NCAA looms in the background, cautioning against taking any measures that restrain college athletes in the commercial use of their NIL beyond what currently exists.<sup>182</sup>

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176. NCAA, NIL Third Party Guidance, *supra* note 20, at 1.

177. *Id.*

178. *See id.*

179. Dan Hope, *Ohio State Athletic Director Gene Smith Believes NCAA's New NIL Are Necessary, Worth Risk of Potential Lawsuits*, ELEVEN WARRIORS (May 11, 2022, 8:35 AM), <https://www.elevenwarriors.com/ohio-state-athletics/2022/05/130836/gene-smith-believes-ncaa-s-new-nil-guidelines-are-necessary-worth-risk-of-potential-lawsuits>.

180. *Id.*

181. Toppmeyer, *supra* note 142.

182. Sarah Polus, *NCAA Tables Name, Image and Likeness Vote After DOJ Warns of Potential Antitrust Violations*, THE HILL (Jan. 12, 2021, 1:30 PM ET), <https://thehill.com/business-a-lobbying/533830-ncaa-suspends-name-image-and-likeness-vote-after-doj-warns->

Still, the public position of the NCAA is that investigations into possible violations are ongoing and that a lack of public comment on the subject does not reflect a lack of progress on its part.<sup>183</sup> Until the NCAA takes action against a school for actions of an NIL collective based on its latest guidelines, skepticism is likely to remain, as does the question of whether the NCAA has the conviction needed to enforce its line in the sand.

*C. Establish Rules That Set Fair Market Value*

A third possible approach involves the NCAA establishing the monetary guidelines for what college athletes could earn from using their NIL by studying and publicizing fair market value of various activities. In this scenario, the NCAA would determine the fair market value for college athlete NIL activities that would apply to all college athletes, either within a particular sport or for all sports offered on campus. The primary problem with this approach is that a unilaterally imposed cap on athlete NIL earnings may operate as another price-fixing scheme in violation of section 1 of the Sherman Act.<sup>184</sup> Price-fixing caps also run afoul of the Department of Justice warning, which cautioned the NCAA against taking any additional measure to restrict athlete NIL use.<sup>185</sup> Put another way, a move to cap athlete NIL earnings could expose the NCAA to further antitrust litigation.

In addition to the “serious questions” expressed by Justice Kavanaugh in his concurring thoughts in *Alston*, the NCAA’s chances of prevailing in a subsequent antitrust action may decrease with each passing year.<sup>186</sup> To appreciate why, one must dig deeper into the NCAA’s circular procompetitive justifications for the anticompetitive effects of its amateurism rules. First, the NCAA must define what Justice Kavanaugh described as “stray comments” from Justice Stevens in *Board of Regents*.<sup>187</sup> Justice Stevens’ comments were not stray, but instead dicta designed to illustrate

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of-potential/. In fact, the NCAA tabled a vote to amend its NIL bylaws based on committee suggestions after receiving the letter. *Id.*

183. Daniel Chavkin, *NCAA Says It’s Investigating ‘Potential Violations’ Regarding NIL*, SPORTS ILLUSTRATED (June 9, 2022), <https://www.si.com/college/2022/06/09/ncaa-enforce-ment-nil-issues-letter-potential-violations>.

184. 15 U.S.C. § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or *commerce* among the several *States*, or with foreign nations, is declared to be illegal.”). The Supreme Court has interpreted this language to prohibit certain price-fixing arrangements. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

185. Polus, *supra* note 182.

186. *NCAA v. Alston*, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

187. *Id.*

why the per se rule does not apply to the NCAA's governance of intercollegiate athletics.<sup>188</sup> In his dicta, Justice Stevens referenced the amateurism rules for the purpose of analogy to demonstrate how price fixes of that nature would typically function as a per se violation in antitrust law.<sup>189</sup> But in that case, the court needed to apply the rule of reason because the NCAA's products required some degree of cooperation and agreement rather than a per se violation on its face.<sup>190</sup> Justice Stevens raised the subject of the amateurism rules as the type of mutual agreement that restrains trade yet functions as procompetitive rather than anticompetitive activity.<sup>191</sup> The rules serve a procompetitive purpose by involving the widening consumer choice via the provision of amateur options to professional sports.<sup>192</sup> According to this reasoning, if the amateurism rules did not exist, then the NCAA's sports products would function as minor league products, and consumers would thus lose interest.<sup>193</sup> Justice Stevens therefore recognized that the NCAA needed "ample latitude" to preserve the "revered tradition of amateurism" that maintains consumer interest in intercollegiate sports products.<sup>194</sup>

Note that the NCAA's amateurism rules were not before the Court in *Board of Regents*.<sup>195</sup> Justice Stevens, therefore, did not need to ground his dicta in economic evidence of consumer interest in amateur sports.<sup>196</sup> Economic evidence of that type, however, now exists, demonstrated by the consumer response to the NCAA's current laissez-faire approach to NIL management that, since July 1, 2021, has allowed college athletes unmolested use of their NIL. With each passing day, the NCAA's justification for regulating NIL is further weakened by the fact that consumers have not lost interest in college athletics, even though college athletes are now profiting from the commercial use of their NILs in the same

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188. *Id.*

189. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984).

190. *See id.*

191. *Id.* at 100–03.

192. *Id.* at 102.

193. *Id.* at 101–02.

194. *Id.* at 120. Justice Stevens added, "[P]reservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.* at 120.

195. Baker & Brison, *supra* note 36, at 346.

196. *See Bd. of Regents*, 468 U.S. at 104 (citing economic evidence). In *O'Bannon v. NCAA*, the Ninth Circuit emphasized the need for NCAA-specific evidence in the form of studies focused on college sports because consumer interest studies that measured the influence of amateurism on professional tennis and the Olympics were "not fit analogues to college sports." 802 F.3d 1049, 1077 (9th Cir. 2015).

ways as professionals. Moreover, the continued success of intercollegiate athletics in the era of NIL freedom will make difficult the NCAA's task of convincing courts in any future antitrust actions that a cap on NIL compensation is necessary to preserve consumer interest in NCAA sports.

With no legitimate procompetitive justification, the NCAA has only one remaining route left if it wants to legally set a cap on athlete NIL compensation. The only way to institute a cap on NIL compensation likely to survive rule of reason review is for the cap to be the product of arms-length, collective negotiation with a recognized union that represents the interests of all college athletes who fall under the cap's application. Granted, this route is not easy and depends on recognition of the union by the National Labor Relations Board, a hurdle that college athletes have yet to clear.<sup>197</sup> Still, incorporating a cap as part of a collective bargaining agreement would trigger the non-statutory labor exemption to antitrust that protects the fruits of negotiation between labor and management.<sup>198</sup> Since the NCAA has no plans to negotiate with college athletes, it should refrain from imposing a cap on athlete NIL compensation to avoid liability under the Sherman Act.

#### *D. Go In-House and Beat Them at Their Own Game*

Up to this point, the options addressed have targeted either the NIL collectives in their use of inducement *or* the placing of a cap on college athlete NIL compensation. But what if it were possible for NCAA member institutions to adopt a proactive approach that addresses both issues? The University of South Carolina's athletic department has taken measures that might make that possibility a reality. Specifically, South Carolina is the first athletic program to establish an in-house NIL firm to compete directly with outside agencies and alumni-managed collectives.<sup>199</sup>

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197. In the *Northwestern University* decision, the National Labor Review Board ruled against an attempt to establish a union for Northwestern University football players because, "of the roughly 125 colleges and universities that participate in [Football Bowl Subdivision (FBS)] football, all but 17 are state-run institutions," which fall outside the scope of the NLRB's jurisdiction. 362 N.L.R.B. 1350, 1354 (2015). For more on the complications related to college athlete unionization, see Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1642–52 (2016).

198. See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (providing non-statutory exemption to antitrust in application to sport labor relationships).

199. Adam Rittenberg, *South Carolina Partners With Sports Marketing Agency to Become First Major College Program with In-House NIL Firm*, ESPN (Aug. 30, 2022, 4:17 PM ET),

The athletic department at South Carolina decided to work with Everett Sports Management (“ESM”), a sports management agency specializing in NIL representation and advisement.<sup>200</sup> Compared to outside agencies, what makes the in-house option at South Carolina so desirable is that athletes for the school will have access to free services, including deal facilitation, content generation, and branding services.<sup>201</sup> This approach, however, is no panacea, and the provision of NIL services increases the school’s obligation to its college athletes.

South Carolina needs to ensure that NIL services are provided by vetted agents and are afforded to all college athletes, regardless of sport or gender. Furthermore, the athletic department needs to monitor what takes place between its athletes and its in-house agents. Schools must appreciate that ESM’s agents will effectively represent the school in addition to their agency in the provision of services. The most crucial component of oversight must, at all times, prioritize the protection of college athlete interests and professional development despite this potential conflict of interest. Still, the approach taken at South Carolina could be replicated at other NCAA-member institutions and provides college athletes with access to agents vetted and selected by the university to construct its in-house firm. For that to happen, however, some states would need to modify their NIL laws prohibiting schools from participating directly in the NIL process. For example, Florida’s NIL law (Senate Bill 646) prohibits schools from causing athlete compensation to be directed to an athlete.<sup>202</sup> This language may apply to deals through an in-house firm.

### Conclusion

The emergence of NIL rights for college athletes has been applauded by many observers who have long criticized the NCAA’s absurd commitment to the fiction that college athletics need to rely on unpaid labor to remain viable.<sup>203</sup> Indeed, granting college athletes NIL rights is long overdue. As

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[https://www.espn.com/college-sports/story/\\_/id/34489568/south-carolina-partners-sports-marketing-agency-become-first-major-college-program-house-nil-firm](https://www.espn.com/college-sports/story/_/id/34489568/south-carolina-partners-sports-marketing-agency-become-first-major-college-program-house-nil-firm).

200. *Id.*

201. *Id.*

202. 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/>.

203. *See, e.g.*, Amanda Christovich (@achristovichh), TWITTER (July 1, 2021, 09:14 AM), <https://twitter.com/achristovichh/status/1410602839303331848> (“On a call w Sen Chris Murphy, Rep Lori Trahan, and current/former college athletes. They’re launching a new

long as the NCAA remains in place, however, it owes an obligation to schools and athletes to create a predictable enforcement system, so that schools that push or cross the boundaries are not rewarded and schools that are cautious and play by the book are not penalized. The NCAA needs to decide how it wants to move forward. This Article presents four possible solutions for addressing concerns regarding collectives, and it is not immediately clear that there is a correct answer. Whatever the choice, even if it is to do nothing, the NCAA must be unequivocal in its communications, so schools can compete on an equal playing field.

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advocacy group, the United College Athlete Advocates. Murphy: ‘The country is waking up to the injustices that have been inherent in college athletics for far too long.’”).