

2023

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Recommended Citation

Albers, Alex (2023) "The End of Amateurism: The NCAA and the Sudden Implementation of Name, Image, and Likeness," *Ohio Northern University Law Review*. Vol. 49: Iss. 2, Article 3.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol49/iss2/3

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Ohio Northern University Law Review

Student Comments

The End of Amateurism: The NCAA and the Sudden Implementation of Name, Image, and Likeness

ALEX ALBERS*

INTRODUCTION

The National Collegiate Athletic Association (“NCAA”), the organization that exists to manage the collegiate programs which participate in intercollegiate athletics, has a well-known role to “preserve sport traditions and integrity” within its member institutions.¹ Based on this established purpose, the NCAA requires amateur status for its student-athletes, meaning that individuals are not to be paid in order to play by any members.² However, fans of college athletics will likely recall recent memories involving substantial violations within their favorite NCAA sports because of the lack of true amateurism.³

NCAA College Basketball acts as one of the most-watched sports at the collegiate level.⁴ Its annual tournament, March Madness, generates hundreds

* Graduate of Ohio Northern University Pettit College of Law Class of 2022. Thank you to all of the editors at the Ohio Northern University Law Review for all of their work and insightful feedback.

1. *Playing Rules Purpose and Vision Statements*, NAT’L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/playing-rules/playing-rules-purpose-and-vision-statements> (last visited Apr. 14, 2023).

2. *Amateurism*, NAT’L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/student-athletes/future/amateurism> (last visited Apr. 14, 2023).

3. Alan Rubenstein, *The 25 Biggest Scandals in NCAA History*, BLEACHER REPORT (Sept. 20, 2010), <https://bleacherreport.com/articles/468221-the-25-biggest-scandals-in-ncaa-history> (citing some of the most notable NCAA program scandals, many of which include student-athlete payments).

4. Darren Geeter, *March Madness Makes Enough Money to Nearly Fund the Entire NCAA – Here’s How*, CNBC, <https://www.cnbc.com/2019/03/22/ncaa-march-madness-tournament-basketball>.

of millions of dollars in revenue for the NCAA and attracts a huge number of viewers.⁵ With the great popularity that college basketball possesses, prospective athletes create major competition among college programs to secure the nation's top talent.⁶ Because of this incredibly stiff competition for amateur athletes, strict compliance with NCAA policy has not always been the focus of the institutions hoping to assemble a competitive basketball team.

In 2017, a federal investigation revealed several bribery schemes at top NCAA basketball programs.⁷ In the initial release of the investigation, the FBI stated that it had discovered a “pay-to-play culture flourishing in some corners of the NCAA” where money was given to athletes’ families to persuade the player where to play and, eventually, what brands the athlete would wear.⁸ The allegations included several different charges of misconduct, including direct discussions of payments to prospective athletes.⁹ In one of these cases, former University of Arizona Men’s Basketball Head Coach Sean Miller was heard on an FBI wiretap discussing payments to Deandre Ayton, a five-star prospect who later committed to Miller’s school.¹⁰ This payment was not insignificant, discussions with Ayton included payment of \$100,000 to ensure his enrollment.¹¹ Further, the apparel brand Adidas was also found to be involved in the under-the-table payments, with findings that the brand’s employees were involved with “funneling money from Adidas to the families of high-profile recruits to

html (last updated Mar. 22, 2019, 2:45 PM), (reporting that the March Madness draws millions of viewers and generates more than 75% of the NCAA’s annual revenue).

5. *Id.* (reporting that March Madness “rakes in more than \$800 million each year from its television deal alone”).

6. See generally *Recruiting Database*, ESPN, <http://www.espn.com/college-sports/basketball/recruiting/playerrankings> (last visited Apr. 14, 2023) (for example, the ESPN “Recruiting Database” lists the offers received by the top basketball players eligible for NCAA competition in 2022).

7. Tom Winter & Tracy Conner, *4 NCAA Basketball Coaches, Adidas Executive Charged in Bribe Scheme*, NBC NEWS (Sept. 26, 2017, 8:12 PM), <https://www.nbcnews.com/news/us-news/college-basketball-coaches-allegedly-took-bribes-agents-deliver-athletes-n804781>.

8. Winter & Conner, *supra* note 7 (While assistant coaches from major colleges were implicated, statements from the institutions reflected a stance that they were not aware of the conduct).

9. Kyle Boone, *NCAA Notice of Allegations Against Arizona, Coach Sean Miller Include Nine Charges of Misconduct*, CBS SPORTS (Oct. 25, 2020, 2:45 PM), <https://www.cbssports.com/college-basketball/news/ncaa-notice-of-allegations-against-arizona-coach-sean-miller-include-nine-charges-of-misconduct-per-report/>.

10. *Id.* (at the time of the University of Arizona investigation, Oklahoma State, NC State, LSU, and Kansas were also dealing with ongoing cases).

11. Gary Parrish, *Arizona’s Sean Miller Caught on FBI Wiretap Talking Paying Deandre Ayton*, CBS SPORTS (Feb. 23, 2018, 10:47 PM), <https://www.cbssports.com/college-basketball/news/arizonas-sean-miller-caught-on-wiretap-discussing-paying-deandre-ayton-report-says/> (Ayton was a top draft prospect only a year after committing to Arizona).

ensure they signed with the sneaker company” when those recruits eventual were professional players.¹²

The status of these issues continues years later, with major programs such as North Carolina State, Oklahoma State, Louisiana State, and Auburn still awaiting the final results of the 2017 investigation years later.¹³ The Louisiana State case, which involves another wiretap revealing offers to recruits, may be considered “the most heated of them all” as head basketball coach Will Wade remained employed with the university until 2022.¹⁴ Wade’s employment, which was ultimately terminated based on NCAA allegations, had outlasted the tenure of Louisiana State’s football coach, who was not terminated because of NCAA infractions, only performance.¹⁵ The NCAA’s possible sanctions against the University are still to come with an expectation of a resolution growing years into the initial allegations.¹⁶ Overall, it is clear that the NCAA is far from resolving the continued issues with member-institution recruiting infractions.

The amateur nature of college sports has been in existence for well over one hundred years.¹⁷ Since then, college sports have exploded in popularity and, now, top NCAA programs resemble professional sports teams more than they resemble an “amateur” club.¹⁸ However, one main difference has not been affected over all these years, the inability to pay the athletes that attend the many universities competing in NCAA athletics.¹⁹ Even though the top NCAA teams can make millions of dollars in revenue per year, the players that help produce the money cannot benefit from their work.²⁰ All that exists

12. Mark Schlabach, *Three Sentenced in Adidas Recruiting Scandal*, ESPN (Mar. 5, 2019), https://www.espn.com/mens-college-basketball/story/_/id/26141993/three-sentenced-adidas-recruiting-scandal (Adidas employees were sentenced to prison based on the “pay-for-play scheme” for the recruits).

13. Pat Forde, *Four NCAA Infractions Cases From 2017 Scandal Make Notable Progress*, SPORTS ILLUSTRATED (Oct. 20, 2021), <https://www.si.com/college/2021/10/20/ncaa-basketball-fbi-scandal-lsu-oklahoma-state-updates>.

14. *Id.* (Wade was suspended in 2019 for a refusal to meet with school officials; however, he is still employed).

15. *Id.*; Ross Dellenger, *The Swift Fall of Ed Orgeron at LSU: Inside a Stunning Post-Title Collapse*, SPORTS ILLUSTRATED (Oct. 17, 2021), <https://www.si.com/college/2021/10/17/ed-orgeron-lsu-football-inside-program-collapse>.

16. Forde, *supra* note 13 (the case has been at Independent Accountability Review Process, a creation of the NCAA, since Sept. 23, 2020, with an unclear timeline a year later).

17. Sam Richmond, *1st College Football Game Ever was New Jersey v. Rutgers in 1869*, NAT’L COLLEGIATE ATHLETIC ASSOC. (Nov. 6, 2019), <https://www.ncaa.com/news/football/article/2017-11-06/college-football-history-heres-when-1st-game-was-played> (stating that the first known college football game occurred in 1869 between Rutgers and what is now known as Princeton).

18. See Alicia Jessop, *The Economics of College Football*, FORBES (Aug. 31, 2013, 10:32 PM), <https://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/?sh=376f1f7f6476> (discussing the millions of dollars in football revenue that major NCAA teams generate).

19. See *Amateurism*, *supra* note 2 (discussing amateur requirements to participate in NCAA sports, which includes a prohibition on paying a student-athlete).

20. *Id.*

for these young men and women hoping to make a career in their sport, besides a free or reduced cost of attending the university, is a chance to be a professional athlete following their collegiate career.²¹ This, of course, is not guaranteed and results in many athletes never seeing financial compensation for their talents.²² While the value of a scholarship can be worth hundreds of thousands of dollars over a collegiate athletic career and is important for any student-athlete, the top performers at major NCAA institutions may still have their values limited through the NCAA's amateur requirement.²³ This system, however, remained in place until 2021 when the first step was taken to compensate athletes based on their collegiate performance.²⁴

The competing interests of a university's desire to field a successful athletic team paired with its inability to compensate the potential athletes have not produced a clean record that one would expect out of this country's higher education institutions.²⁵ Rumors of scandal, NCAA investigations, and stories by former college athletes have shed light on the reality that is amateur athletics in the NCAA.²⁶ While the NCAA defends this position by stating that athletes' "participation *should be motivated primarily by education and by the physical, mental and social benefits to be derived*" from their sport, countless examples of this proposition being ineffective can be named.²⁷ As one piece of evidence of this NCAA position being ignored, college football fans may remember former Ohio State quarterback Cardale Jones's viral tweet that he came to the university to "play FOOTBALL" and not to "play SCHOOL."²⁸ Jones also added that "classes are POINTLESS."²⁹

21. *Scholarships*, NAT'L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/student-athletes/future/scholarships> (reporting that 180,000 student-athletes receive an athletic scholarship).

22. *Probability of Competing Beyond High School*, NAT'L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (reporting that, of the 495,000 athletes that compete at NCAA schools, "only a fraction will realize their goal of becoming a professional or Olympic athlete").

23. *See Scholarships*, *supra* note 21 (Of the 180,000 student-athletes, NCAA Division I and II programs award more than \$3.6 billion to their student-athletes through scholarships each year); *See Amateuism*, *supra* note 2.

24. *See infra* note 48 and accompanying text.

25. Rubenstein, *supra* note 3.

26. *Id.* (while not all examples of NCAA scandal deal with direct player payment, instances of academic misconduct question the extent of academics of student-athletes' time at a post-secondary institution).

27. Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateuism*, 59 DUKE L.J. 555, 559 (2009) (stating that the NCAA believes student-athletes should be "protected from exploitation by professional and commercial enterprises").

28. Cardale Jones (@Cardale10), Twitter (Oct. 5, 2012, 8:43 AM).

29. Cardale Jones (@CJ1two), Twitter (May 7, 2017, 12:57 PM) (Jones subsequently mocked this Tweet by adding "Sum 1 Once Said 'We Ain't Come Here To Play School'" on his Ohio State graduation cap).

Examples of NCAA rule violations date back long before the modern era of college sports began.³⁰ As early as the 1940's, reports of colleges violating amateurism policies established that most schools were not following the NCAA's prohibition on student-athlete payments.³¹ This led to the NCAA allowing for athletically related financial aid to be provided to student-athletes, and the amount of money a college can expend on a player regularly increased in the years that followed.³² Even recently, the NCAA has allowed member institutions more power in how they recruit athletes, such with longer scholarships and additional accommodations for living expenses.³³ However, all of this effort to control amateurism has not led to a reduction in impermissible financial gain by college athletes from individuals not associated with the university.³⁴

Disclosures made by professional athletes reveal that many are guilty of receiving under-the-table payments while they are playing as "amateurs."³⁵ A 1989 study reveals that nearly one-third of NFL players surveyed admitted to accepting illegal payments during their time as collegiate athletes, a direct violation of NCAA rules.³⁶ Further, the study showed that major conferences had an even larger problem, reporting that 67% of football players in the Southeastern Conference ("SEC") accepted these illegal payments.³⁷ These findings are no surprise, considering one of the largest NCAA violations was only two years earlier, the Southern Methodist University ("SMU") "death penalty."³⁸ In 1987, SMU football was found to have committed a

30. Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 250-51 (2020).

31. Meyer & Zimbalist, *supra* note 30, at 251 (stating that college sports' commercialization accelerated after the end of World War II).

32. *Id.* at 252 (these increases included money for living expenses, books, and other usual costs associated with attending a university).

33. *Id.* (referencing benefits first allowed from 2012-2014 for multi-year scholarship awards and expanded food services provided to athletes).

34. See e.g. Bill N., *Ohio State Football: Buckeye Compliance Fallacy and NCAA Enforcement Role*, BLEACHER REPORTS (June 6, 2011), <https://bleacherreport.com/articles/725496-ohio-state-football-buckeye-compliance-fallacy-and-ncaa-enforcement-role> (discussing compliance issues within the Ohio State Football program); Paul Peszko, *USC and the Reggie Bush Infractions: The Cliffs Notes Version*, BLEACHER REPORT (May 31, 2011), <https://bleacherreport.com/articles/718845-usc-and-the-reggie-bush-infractions-the-cliffs-notes-version> (discussing NCAA infractions by former USC Running Back Reggie Bush).

35. *Survey Shows Large Number of Players Were Paid in College*, L.A. TIMES (Nov. 17, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-11-17-sp-1667-story.html>.

36. *Id.* (also reporting that over half of these players did not see an issue with breaking NCAA rules).

37. *Id.* (a majority of payments were said to have come from alumni, but some coaches had also been reported as the source of payment).

38. Dennis Dodd, *30 Years Later: The Legacy of SMU's Death Penalty and Six Teams Nearly Hit with One*, CBS SPORTS (Feb. 22, 2017, 12:26 PM), <https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/>.

“widespread pay-for-play” scandal so egregious that the team was required to shut down football operations for an entire season.³⁹ This incident did not only involve university alumni, “boosters, regents, players and coaches” all conspired to turn SMU into one of the most dominant football programs in the country.⁴⁰ Following the incident, the SMU program fell off and has still not fully recovered.⁴¹ But, even after this extreme example of the possible consequences of illegal player payments, fifty major infractions were identified by the NCAA at Division I football programs in the three decades that followed.⁴² Further, following this incident, SMU may still not have even learned its lesson.⁴³ In 2012, the university hired a basketball coach with a history of NCAA penalties which continued within its own program.⁴⁴

The years since the SMU death penalty have shown that controversy will remain a part of collegiate sports.⁴⁵ The recurrence of compliance issues highlights the ineffectiveness of continued NCAA regulation. Even though SMU showed how devastating NCAA sanctions can be, Josh Luchs, a former sports agent, has stated that nearly half of the NFL athletes he represented accepted some sort of benefits while enrolled in college and has described the process of winning contracts through “illegal means.”⁴⁶ As another example, Reggie Bush and Cam Newton, both Heisman Trophy winners, have been the center of NCAA investigations into the receipt of prohibited payments with an NCAA athlete.⁴⁷

39. *Id.*

40. *Id.*

41. *Id.* (Because of the death penalty, SMU literally lost its place at the table as a major college football program).

42. *Id.* (BYU “remains the only national champion free from NCAA sanctions” since 1936, showing that it is doubtful that the rest of college football has not “been scared straight”).

43. Dodd, *supra* note 38.

44. *Id.* (Larry Brown, former SMU basketball coach, had a history of NCAA compliance issues at Kansas, UCLA, and SMU following his arrival).

45. See e.g., *Auburn Cleared of Wrongdoing in Newton Case by NCAA*, NAT’L FOOTBALL LEAGUE (Oct. 12, 2011, 4:16 PM), <https://www.nfl.com/news/auburn-cleared-of-wrongdoing-in-newton-case-by-ncaa-09000d5d82314119> [hereinafter *Auburn Cleared*] (stating father of Heisman Trophy-winning Quarterback Cam Newton “shopped” his services to another school for up to \$180,000); Michael Powell, *Violations by John Calipari’s Teams? Don’t Look at Him*, N.Y. TIMES (Mar. 25, 2015), <https://www.nytimes.com/2015/03/26/sports/ncaabasketball/coach-caliparis-wonderful-life-begin-the-disclaimers.html> (reporting that current Kentucky basketball coach John Calipari was the head coach at the University of Massachusetts when star player Marcus Camby “had accepted large sums of cash and services”).

46. *The ‘Illegal Procedure’ of Paying College Athletes*, NAT’L PUB. RADIO (Mar. 28, 2012, 11:59 AM), <https://www.npr.org/2012/03/28/148610494/the-illegal-procedure-of-paying-college-athletes> (Luchs began his payments to players in 1990, shortly after the SMU incident).

47. *Top 5 ‘Pay to Play’ Scandals Rocking College Football*, WEEK (Jan. 8, 2015), <https://theweek.com/articles/488252/5-pay-play-scandals-rocking-college-football> (Bush was forced to give the Heisman Trophy back, the award for the top college football player every year, following a discovery that he accepted “illegal gifts worth \$300,000”).

Following these repeated occurrences of NCAA institutions involvement with impermissible payments to student-athletes, the reality of these infractions came into view once again when the United States Supreme Court discussed the market for players with “varying under-the-table schemes.”⁴⁸ In June 2021, the Court unanimously ruled that the NCAA could no longer completely bar compensation for NCAA student-athletes.⁴⁹ In *NCAA v. Alston*, the Supreme Court heard the case of a class of current and former student-athletes who brought an antitrust lawsuit based on the NCAA’s compensation restrictions.⁵⁰ These athletes attempted to show that the NCAA and member schools violated the Sherman Act, which prohibits “contracts, combinations, or conspiracies in restraint of trade or commerce,” by “agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams.”⁵¹ The district court noted that the NCAA enjoys near dominance in the area of Men’s and Women’s Division I basketball and FBS Football, the sports in which the class of plaintiffs participated.⁵² Additionally, the restriction of compensation by the NCAA has anticompetitive effects within the market.⁵³ This is because NCAA acts to artificially cap the compensation that could have been offered to recruits.⁵⁴ The NCAA did not dispute any of these findings; instead, it argued that immunity from the Act was warranted based on the uniqueness of the NCAA’s product, and the competitive balance among teams competing at this amateur level.⁵⁵ It offered several justifications why it should continue the monopolistic enjoyment, all of which were unpersuasive to the Court.⁵⁶ Because of this, the NCAA’s policy of “no-pay for play” ended and student-athletes would now have the opportunity to earn some sort of compensation in the future.⁵⁷

48. Nat’l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2149 (2021) (the Court discusses past infractions and the continued allowance for greater payments to players from colleges through scholarships and more).

49. *Id.* at 2166.

50. *Id.* at 2151 (along with the NCAA, the class sued eleven conferences in Division I NCAA athletics).

51. *Id.* (the Sherman Act, which targets monopolization, aims to “enforce a policy of competition” based on the “belief that market forces yield the best allocation of the Nation’s resources”).

52. *Id.* at 2151-52 (while other organizations exist which provide similar operations as the NCAA, the NCAA controls a much more popular organization of college and university athletics).

53. *Alston*, 141 S. Ct. at 2152.

54. *Id.* (the district court noted that, while the member organizations are in fierce competition for recruits, “[s]tudent-athletes would receive offers that would more closely match the value of their athletic services” without the NCAA market restraints).

55. *Id.*

56. *Id.* at 2152-53 (the district court could not identify a useful definition of what the NCAA meant by “amateurism,” and it also was not persuaded that amateurism drove consumer demand).

57. *Id.* at 2166.

Following *Alston*, the NCAA adopted an interim policy allowing student-athletes the opportunity to capitalize on their name, image, and likeness (NIL) on June 30, 2021.⁵⁸ In the NCAA's announcement, college athletes were informed that their NIL activity needed to comply with the state where their college was located.⁵⁹ If the state did not have a NIL law in effect, the NCAA stated NIL activity would still be permissible.⁶⁰ Within the announcement, the NCAA reaffirmed that college sports are not pay-for-play, and that the policy will remain in effect until a new NCAA rule is adopted or if federal legislation is passed.⁶¹

While NIL acts as an encouraging first step in providing compensation for NCAA athletes, this recent development needs to be viewed along with the history of NCAA compliance issues. Colleges have repeatedly shown that they are willing to violate NCAA policy to produce a team that is competitive in college athletics.⁶² Based on this, adding additional policies with substantial compliance requirements will not reduce these issues and may act to increase issues. Now, student-athletes are permitted to openly deal with individuals and entities outside of their schools willing to provide payment, so long as any deals are not in violation of any current law or NCAA regulation.⁶³ This interaction, which has never been permitted, may act to invite even more unreported and impermissible compensation.

With the implementation of NIL in the NCAA, college sports will not suddenly be without the scandal that has been a part of the league throughout its history. This, of course, was not the purpose of the implementation of NIL; the NCAA was forced to allow for NIL payments following *Alston*.⁶⁴ With the path that the NCAA chose, they have not acted to encourage compliance, but have only added more requirements.⁶⁵ Because of NIL rules, state legislatures will now be responsible for passing favorable legislation for their state's colleges and universities to provide competitive advantages in

58. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASSOC. (June 20, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> (the policy officially went into effect the following Thursday, August 6, 2021).

59. *Id.* (while the NCAA stated NIL activity would need to comply with state law, the organization deferred to individual colleges and universities to be student-athlete's resources on state law questions).

60. *Id.* (without any state law, these student-athletes needed to only comply with the interim policy).

61. *Id.* (both the Division I Board of Directors chair Denise Trauth and NCAA President Mark Emmert mentioned that they plan to work for a nationwide solution at a federal level).

62. Rubenstein, *supra* note 3.

63. Hosick, *supra* note 58 (the NCAA now expressly allows the use of professional services providers to produce NIL deals, a partnership that would have been a severe violation of NCAA policy at the beginning of 2021).

64. Nat'l Collegiate Athletic Assoc. v. *Alston*, 141 S. Ct. 2141, 2166 (2021).

65. *See* Hosick, *supra* note 58.

recruiting, a relationship that will likely be messy.⁶⁶ To avoid all of these issues, the NCAA should begin to operate college athletics similar to professional leagues across this country. While NCAA member institutions are operating to provide higher education and not only assemble sports teams like professional leagues, a certain balance can be struck to compensate their student-athletes. The implementation of an athletic association, which resembles more of a free market where student-athletes have more freedom to accept payment for their services, can promote a system with limited scandal. A free market is possible in collegiate athletics and the NCAA should not be delaying its implementation.

An expectation of regular college athletic scandals does not need to continue into the future. This comment discusses the possible issues that will accompany the increasing number of NIL deals currently being made in college athletics.⁶⁷ It will point out what could act to disrupt the purpose of college athletics and why the NCAA should take action to avoid these issues.⁶⁸ Overall, the NCAA can still retain relatively normal college athletic operations, but it should not sit back and wait.

This comment will proceed in three parts. Part I discusses the current developments since NIL was adopted by the NCAA.⁶⁹ Part II analyzes the issues that will likely present themselves with the additional regulation in the already corrupted environment that is college sports.⁷⁰ Part III discusses how the NCAA would improve if its operation shifted to resemble a professional sports league and no longer hold onto the amateur model that has lasted for over a century.⁷¹

I. NAME, IMAGE, AND LIKENESS IN THE NCAA

College sports have always been a source of millions of dollars' worth of revenue for many of the major college programs in this country.⁷² Between college basketball's March Madness, college football's bowl season, the College Baseball World Series, along with the additional thousands of games

66. Liz Clarke, *State-by-State Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASH. POST (Oct. 21, 2021, 12:34 PM), <https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/> (Ramogi Huma, executive director of the National College Players Association, stated that “[s]tates really have to control their own destiny” in regards to how they feel it is appropriate in addressing NIL without any federal direction).

67. See discussion *infra* Part II.

68. *Id.*

69. See discussion *infra* Part I.

70. See discussion *infra* Part II.

71. See discussion *infra* Part III.

72. *Finances of Intercollegiate Athletics: Division I Dashboard*, NAT'L COLLEGIATE ATHLETIC ASSOC. (Oct. 2022), <https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx> (the NCAA reports \$15.8 billion in revenue among all NCAA athletics departments in 2019) [hereinafter *Finances of Intercollegiate Athletics*].

played in a year, television networks are filled with college athletes performing at a high level.⁷³ However, as recently as a few months ago, none of this money flowed into the athlete's hand.⁷⁴ Instead, it was only the schools that assembled these team's rosters that were able to benefit from them as a major financial resource.⁷⁵ Since NIL has been in place, this has all changed.⁷⁶ Now, when watching college football on Saturday, a viewer may see Clemson Quarterback DJ Uiagalelei featured in a Dr. Pepper commercial.⁷⁷ College football fans may have also seen the five-star quarterback Quinn Ewers forgo his senior season in high school to enroll in Ohio State and sign a \$1.4 million autograph deal with a sports marketing firm.⁷⁸ Paige Bueckers, a guard on the UConn Women's Basketball team, became the first NCAA Athlete to be sponsored by Gatorade when she joined many professional athletes under the brand.⁷⁹ These three examples only showcase a few of the major deals struck in the early days of the NIL era that would have brought suspension less than a year ago.

The regulations controlling athletes' ability to profit from NIL have come suddenly.⁸⁰ The first piece of legislation which allowed for this sort of payment was California's "Fair Pay to Play Act", which occurred only a few

73. Jabari Young, *With \$1 Billion on the Line, March Madness is Ready for its Comeback*, CNBC (Mar. 16, 2021, 8:58 AM), <https://www.cnbc.com/2021/03/16/with-1-billion-on-the-line-march-madness-is-ready-for-its-comeback.html> (reporting that March Madness can be worth as much as \$1 billion); Thomas Barrabi, *NCAA Football Bowls: Why Schools Don't Care about the Bonus Check*, FOX BUS. (Dec. 20, 2019, 6:25 AM), <https://www.foxbusiness.com/sports/ncaa-football-bowl-season-why-schools-dont-care-about-the-bonus-check> (reporting that college football conferences earn revenues of nearly \$450 million); *Economic Impact*, COLL. WORLD SERIES OF OMAHA, <https://cwsomaha.com/economic-impact/> (last visited Mar. 3, 2023) (reporting that the College Baseball World Series has an economic impact nearing \$100 million).

74. Nat'l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2152 (2021).

75. *Finances of Intercollegiate Athletics*, *supra* note 72 (reporting that NCAA institutions generated most of their profits from "ticket sales, broadcast rights, and NCAA and conference distributions").

76. See Hosick, *supra* note 58.

77. Ross Dellenger, *An NIL First: Clemson Quarterback D.J. Uiagalelei to Star in Dr. Pepper National Ad Campaign*, SPORTS ILLUSTRATED (Aug. 11, 2021), <https://www.si.com/college/2021/08/11/clemsons-dj-uiagalelei-to-profit-from-nil-in-dr-pepper-ad-campaign> (reporting that the first deal between a "household brand" and a college athlete was struck between Uiagalelei and Dr. Pepper just six weeks into the "NIL Era") [hereinafter Dellenger, *Clemson Quarterback*].

78. Shehan Jeyarajah, *Ohio State Freshman QB Quinn Ewers Signs \$1.4 million NIL Deal with Autograph Vendor*, CBS (Aug. 31, 2021, 2:25 PM), <https://www.cbssports.com/college-football/news/ohio-state-freshman-qb-quinn-ewers-signs-1-4-million-nil-deal-with-autograph-vendor-per-reports/> (Ewers "pointed to potential NIL opportunities as a critical reason why he left the high school ranks early").

79. Jackie Powell, *Paige Bueckers' Major NIL Deal Only Leads to More Questions*, BLEACHER REPORT (Nov. 30, 2021), <https://bleacherreport.com/articles/2950930-paige-bueckers-major-nil-deal-only-leads-to-more-questions> (other athletes include WNBA stars like Elena Della Donne and Candace Parker).

80. Sarah Traynor, *California Says Checkmate: Exploring the Nation's First Fair Pay to Play and What It Means for the Future of the NCAA and Female Student-Athletes*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 203, 204 (2020).

years ago.⁸¹ In the bill, California provided that student-athletes could receive compensation from third parties and prevented the NCAA from interfering with scholarships based on these payments.⁸² As a result of this, NCAA President Mark Emmert criticized its passage as it could put an end to the “current model of intercollegiate athletics” along with other similar state regulations.⁸³ Additionally, the NCAA Board of Governors responded to California’s bill in a letter stating that an unrestricted NIL scheme would give schools “an unfair recruiting advantage” and that California student-athletes would not be allowed to participate in NCAA competition if the bill went into effect.⁸⁴ The Board went on to say that their opposition to the bill was based on the best interest of all student-athletes nationwide and that they are to be students first, not employees of a university.⁸⁵

While the NCAA’s position was that it was open to the idea of NIL following California’s legislation, it was not until *Alston* that the NCAA finally had to address the point.⁸⁶ Following the decision, states rapidly passed legislation for their colleges to remain competitive in collegiate sports.⁸⁷ As of now, over half of the states have some sort of NIL legislation in place, with even more looking toward the potential for legislation.⁸⁸ At the federal level, discussions have occurred based on the desire for a uniform, nationwide standard.⁸⁹ Nevertheless, while several bills have been proposed and dating back to the summer of 2020, no timeline is clear as “there are more

81. *Id.* (Governor Gavin Newsom signed Senate Bill 206 into law on September 30, 2019, along with NBA star LeBron James, UCLA gymnast Katelyn Ohashi, and others).

82. *Id.* at 211.

83. *Id.* at 205, 212 (Governor Newsom stated that student-athletes are due compensation as they are a “primary source of revenue stream for the NCAA”).

84. *NCAA Responds to California Senate Bill 206*, NAT’L COLLEGIATE ATHLETIC ASS’N (Sept. 11, 2019), <https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206> (the letter highlighted the “critical distinction between college and professional athletics” and that allowing NIL deals would “negatively impact more than 24,000 California student-athletes”) [hereinafter *NCAA Responds*].

85. *Id.* (the NCAA Board of Governors did state that it currently had efforts “to develop a fair name, image and likeness approach for all 50 states”).

86. Hosick, *supra* note 58 (while the interim policy addresses the NCAA’s efforts to implement uniform NIL regulation, it had made similar statements following California’s Senate Bill 206 years earlier).

87. Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (Feb. 16, 2023), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/>.

88. *Id.* (states with some kind of NIL laws currently in place are or introduced are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia).

89. Braly Keller, *Comparing Introduced Federal NIL Bills*, OPENDORSE (Apr. 12, 2021), <https://opendorse.com/blog/comparing-introduced-federal-nil-bills/> (federal bills have all been relatively similar, but no major step has yet taken place).

pressing agenda items to address.”⁹⁰ Further, individual colleges have drafted policies that provide guidelines to the university’s athletes informing them of what is permissible with individual NIL deals.⁹¹ Generally, these rules provide that schools will allow an athlete’s ability to earn compensation through NIL activity so long as the contract is not in conflict with their team’s contracts.⁹² Additionally, the school cannot itself pay the athlete, only third parties can.⁹³ University policies will also usually require athletes enrolled in a university to disclose their NIL activity to their university at some point during the contracting period with a third party.⁹⁴ Some schools have taken the position that they are not to be involved with procuring these deals, however, students may employ professional representation in this process.⁹⁵ This use of representation is not for soliciting professional athletic contracts, only for NIL deals.⁹⁶ The schools also do not take any financial control over the student-athletes’ profits, the individual is responsible for their own tax liabilities, financial planning, and other related issues following NIL contracts.⁹⁷

90. *Id.* (while federal bills have a small chance of passing, the NCAA v. Alston case presents “outside implications”); Maria Carrasco, *Congress Weighs in on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Sept. 30, 2021), <https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law> (reporting that the House Subcommittee on Consumer Protection and Commerce has been involved with players, coaches, and administrators in considering a federal NIL law).

91. *See, e.g., Student-Athlete Name, Image, Likeness Guidelines*, OHIO STATE UNIV., <https://ohiostatebuckeyes.com/wp-content/uploads/2021/07/Ohio-State-Student-Athlete-NIL-Guidelines-FINAL.pdf> (“The Department of Athletics is committed to supporting student-athletes and their pursuit of name, image, likeness (NIL) activities in accordance with applicable NCAA and/or state or federal laws while continuing to further the mission of the Department of Athletics. . .”); *Name, Image, Likeness*, UNIV. ALA. <https://rolltide.com/sports/2021/6/28/name-image-likeness.aspx> (stating that Alabama student-athletes must follow Alabama laws as well as the “likely” federal laws and NCAA legislation that “will ultimately provide a nationwide, uniform approach to NIL governance,” meaning all current restrictions are subject to change); *see also, Name, Image, and Likeness (NIL) Policy*, BALL STATE UNIV., https://ballstatesports.com/documents/2021/7/1/BSU_NIL_Policy_Effective_July_1_2021_2.pdf (deferring only to current NCAA NIL legislation as Indiana has not passed any NIL legislation).

92. *See supra* note 91.

93. *Id.*

94. *See, e.g., Name, Image and Likeness at the University of Michigan*, UNIV. MICH. <https://mgoblue.com/sports/2021/7/1/name-image-and-likeness.aspx> (stating that student-athletes must disclose activities “as soon as practicable) [hereinafter Univ. Mich. NIL Rules]; *University of Georgia Name, Image, and Likeness Policy*, UNIV. GA. <https://georgiadogs.com/sports/2021/8/2/nil-policy.aspx> [hereinafter Univ. Ga. NIL Rules]; (stating that NIL Activity must be disclosed in advance).

95. *See* Univ. Mich. NIL Rules, *supra* note 94; *see* Univ. Ga. NIL Rules, *supra* note 94 (Michigan allows for “professional advisors” to assist athletes, such as tax advisors, marketing agents, etc., and Georgia permits “professional representation” regarding only the legal and contractual issues with NIL).

96. Univ. Mich. NIL Rules, *supra* note 94.

97. Univ. Ga. NIL Rules, *supra* note 94 (Georgia states that NIL deals may impact need-based financial aid and that students are responsible for contacting the UGA Office of Student Financial Aid).

Finally, athletic departments at NCAA member institutions must still follow the prohibitions created in the NCAA's NIL interim policy.⁹⁸ Under the interim policy, the NCAA prohibits payments without quid pro quo.⁹⁹ This means that if an athlete is to accept compensation, it must be for work performed.¹⁰⁰ Additionally, one cannot accept NIL compensation based on a requirement to attend a particular school.¹⁰¹ Last, NIL deals are not to be contingent upon athletic achievement or performance.¹⁰² While the NCAA admits that performance will certainly enhance the value of student-athletes in NIL, superior performances cannot act as consideration for the compensation.¹⁰³

Overall, a substantial amount of requirements and prohibitions are present for student-athletes hoping to cash in on a NIL deal. While the NCAA has its policy, it defers to the states and universities that athletes live in and attend to fully comply with NIL requirements.¹⁰⁴ In addition, while the NCAA cautions that additional requirements may exist, it specifically states that it "cannot provide guidance on issues of state law" and encourages student-athletes to consider these implications while a prospective student to a university.¹⁰⁵ Beyond these matters, not every regulation contemplates the age at which an individual can begin to enter into these deals, potentially impacting high school eligibility.¹⁰⁶ Due to this, the NCAA again recommends that student-athletes perform research on their own prior to making NIL decisions.¹⁰⁷

98. See, e.g., *Tennessee NIL Information*, UNIV. TENN., <https://utsports.com/sports/2021/6/30/tennessee-athletics-name-image-and-likeness-information-guidance.aspx#one> (Tennessee's NIL information is accompanied by NCAA requirements currently in effect).

99. *Name, Image and Likeness Policy Question and Answer*, NAT'L COLLEGIATE ATHLETIC ASSOC. https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (last visited March 31, 2023).

100. *Id.* (this prohibition seemingly does not add a major requirement as the prohibition against pay-for-play is still in existence, meaning that the student-athlete is required to provide something to the third party).

101. *Id.* (the NCAA goes on to say that, for example, schools cannot "guarantee[] a particular NIL opportunity upon enrollment").

102. *Id.*

103. *Id.*

104. *Name, Image and Likeness Policy Question and Answer*, *supra* note 99 (for example, the NCAA interim policy does not address reporting requirements, but states that member institutions may impose various reporting requirements).

105. *Id.* (the policy states that a prospective student-athlete may "research state law compliance requirements where they may wish to enroll" and that "NCAA schools may also have specific NIL policies that should be considered").

106. *Id.* ("Given that rules vary by state, prospective student-athletes should consult their state high school athletics association regarding questions pertaining to high school eligibility.").

107. *Id.*

II. MOVING FORWARD: WHAT ISSUES MAY COME?

With the massive number of rules put in place paired with the lack of compliance over the history of NCAA sports, an era of scandal that is bigger than ever could present itself. At this time, college athletes, who may possess a substantial NIL value to local boosters or businesses, are given the opportunity to enter giant deals with little NCAA guidance.¹⁰⁸ The NCAA not only fails to provide services to these young athletes, but they promote the usage of individual college compliance departments as well as professional service providers.¹⁰⁹ If the past is any indication of what is to come, NCAA member institutions will do their best to avoid NCAA rules and engage in direct competition for the best athletes in the nation. This may lead to several issues in the future.

A. University Competition for Athletes

NCAA member universities have developed a culture of stiff competition to score commitments from the country's most promising athletes.¹¹⁰ Campus visits, admission to games, and repeated communication with college coaches have become a part of life for high-ranked recruits coming out of high school.¹¹¹ Additionally, as mentioned above, colleges have repeatedly shown that they are willing to move past NCAA rules to gain an advantage in recruiting players.¹¹² Therefore, implementation of loads of regulations will not serve to promote any better recruiting tactics than before.

The NCAA has provided rules that govern how colleges can recruit athletes.¹¹³ The NCAA gives certain periods where athletes can be in contact with coaches, the amounts that can be spent on recruits during visits, and it defines the type of contact that coaches can make with athletes.¹¹⁴ Within these rules, coaches are able to discuss the potential for the young athlete's future with the school and explain why their college is best to fit the athlete's

108. *Id.*

109. *Name, Image and Likeness Policy Question and Answer*, *supra* note 99 (the NCAA Interim Policy's Q&A section states that individuals can search the NCAA's website for general information, however, "prospective and current student-athletes with additional questions should consult with athletics compliance department at the NCAA school they attend or plan to attend").

110. *See College Recruiting Process: How Do Colleges Recruit Athletes?* NEXT COLLEGE STUDENT ATHLETE, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-recruiting-process> (last visited March 31, 2023).

111. *Id.* (discussing the lengthy process to be recruited by college coaches).

112. Rubenstein, *supra* note 3.

113. *Recruiting – Eligibility Center*, NAT'L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/student-athletes/future/recruiting> (last visited Apr. 14, 2023).

114. *Id.* (the entire year is divided into certain times, collectively referred to as the "recruiting calendar").

need.¹¹⁵ Even though these are seemingly minor rules, colleges have still regularly violated them in the pursuit of the nation's top talent.¹¹⁶

The NCAA has also provided a “violation structure” for universities that violate their recruiting rules.¹¹⁷ These violations range from Level I – Level III, with Level I being the most severe.¹¹⁸ Level I is referred to as a “Severe Breach of Conduct” and includes violations that “[s]eriously undermine or threaten the integrity of college sports”, provide a “substantial or extensive recruiting, competitive or other advantage”, or involve a substantial impermissible benefit.¹¹⁹ Among those violations that undermine college sports is payment to recruits and booster involvement in the recruiting process with the university's knowledge, along with other significant misconduct.¹²⁰

NCAA misconduct and activity that is considered Level I is not a rare occurrence. Prohibited behavior is regularly reported from college athletic programs and staff firings generally follow, whether or not the specifics of the misconduct are made known.¹²¹ Additionally, these infractions are not only limited to the sports regularly seen on national television, they occur in every sport.¹²² Of course, while the regular occurrence of these infractions is

115. *Id.*

116. See, e.g., Megan Durham, *Notre Dame Football Program Violated NCAA Recruiting Contract Rules*, NAT'L COLLEGIATE ATHLETIC ASSOC. (Jan. 21, 2021), <https://www.ncaa.org/about/resources/media-center/news/notre-dame-football-program-violated-ncaa-recruiting-contact-rules> (reporting that a Notre Dame football assistant violated NCAA rules when the coach had impermissible contact with an athlete by meeting too early in the athlete's career, a “Level III” violation); Megan Durham, *Dayton Women's Volleyball Program Committed Recruiting Violations*, NAT'L COLLEGIATE ATHLETIC ASSOC. (Apr. 22, 2021), <https://www.ncaa.org/about/resources/media-center/news/dayton-women-s-volleyball-program-committed-recruiting-violations> (reporting that University of Dayton women's volleyball held impermissible tryouts and other recruiting violations, a “Level II” violation).

117. *Violation Structure and Levels*, NAT'L COLLEGIATE ATHLETIC ASSOC., https://ncaa.org.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsViolationLevels.pdf (last visited Apr. 14, 2023).

118. *Id.* (Level II and Level III are those violations that the NCAA does not consider severe, such as violations that will not provide a “substantial or extensive recruiting, competitive or other advantage”).

119. *Id.*

120. *Id.* (academic misconduct or unethical conduct is also a Level I violation).

121. See, e.g., Adam Sparks, *Tennessee Football's Violations were Level I and Level II: Here's What That Means*, TENNESSEAN (Jan. 18, 2021), <https://www.tennessean.com/story/sports/college/vols/2021/01/18/tennessee-vols-football-ncaa-violations-jeremy-pruitt-firing/4207318001/> (reporting that Tennessee Head Football Coach Jeremy Pruitt was fired after undisclosed Level I violations following an investigation); Nick Selbe, *Arizona Receives Five Level I Violation Charges From NCAA*, SPORTS ILLUSTRATED (Mar. 5, 2021), <https://www.si.com/college/2021/03/06/arizona-basketball-sean-miller-ncaa-violations-level-1-charges> (providing details on the firing of University of Arizona Men's Head Basketball Coach Sean Miller following five Level I infractions, including “Unethical recruiting conduct”); Joyce Lupiana, *NCAA Rules Georgia Tech Women's Basketball Program Committed Violations*, CNN (Sept. 21, 2021), <https://kesq.com/news/2021/09/21/ncaa-rules-georgia-tech-womens-basketball-program-committed-violations/> (reporting that Level I and II violations were found in Georgia Tech women's basketball program, the fifth Level I or II infraction case at Georgia Tech since 2005).

122. *Id.* (reporting that Georgia Tech has had Level I or II violations in Men's and Women's Basketball, Football, Men's and Women's Cross Country, Men's and Women's Indoor and Outdoor Track, and Men's and Women's Swimming, all since 2005).

not difficult to locate, they occur at universities that operate compliance departments to conform to NCAA rules.¹²³ Therefore, while not all NCAA member institutions are involved in restricted behavior, it seems that, at some universities, either the NCAA and universities are unable to effectively monitor their athletic programs or that, at some level, universities do not care to.

With the lack of enforcement established, it seems likely that additional regulation, paired with a greater ability to persuade athletes to your school through the existence of NIL deals, will lead to even more issues for the NCAA and member institutions. This, of course, is all happening at institutions where the focus is on educating their students, not assembling the best sports teams in the country. With NCAA regulations already having major compliance issues, taking this small step towards compensating players, with added regulation, can potentially lead to negative results. College coaches have already taken notice of its existence and begun the process of encouraging player payments.¹²⁴ Coaches at major college programs have explicitly told outside individuals to pay their players.¹²⁵ Ed Orgeron, former LSU head football coach, stated that “[w]e’re paying players now” and that “if you guys want to start paying our players, you can go ahead.”¹²⁶ Additionally, Nick Saban, current Alabama head coach, stated that his then current quarterback, Bryce Young, has “approached ungodly numbers” before Young had even started a football game.¹²⁷ This direct encouragement of dealing with student-athletes, paired with the messy layers of laws and regulations discussed above, does not seem to promote a system of widespread compliance. The incorporation of NIL deals certainly will not increase NCAA compliance and can only create more violations moving forward.

123. See, e.g., *Arizona Compliance*, UNIV. ARIZ., <https://arizonawildcats.com/sports/2014/8/5/209604905.aspx> (last visited Apr. 14, 2023) (“The University of Arizona’s Compliance Office is responsible ensuring that the University’s athletics programs are in compliance with all NCAA, Pac-12, and University rules regarding intercollegiate athletics.”); *Compliance*, UNIV. TENN. <https://utsports.com/sports/2020/5/12/about.aspx> (last visited Apr. 14, 2023) (“The University of Tennessee Athletics Compliance Office is committed to upholding the principles and practices of institutional control in a manner consistent with NCAA, SEC and University rules and regulations through a comprehensive education program and the maintenance of a strong compliance culture.”).

124. See, e.g., Zach Ragan, *LSU Football: Ed Orgeron Tell Fans to Pay His Players*, FANSIDED (July 20, 2021, 1:14 PM), <https://deathvalleyvoice.com/2021/07/28/lsu-football-ed-orgeron-tigers-news-reason/>; Harrison Holland, *Nick Saban on Bryce Young’s NIL Deals: “It’s Almost Seven Figures”*, SPORTS ILLUSTRATED (Jul. 20, 2021, 11:14 PM), <https://www.si.com/college/alabama/bamacentral/bama-central-nick-saban-bryce-young-seven-figures-nil-deal-july-20-2021>.

125. Ragan, *supra* note 124.

126. *Id.*

127. Holland, *supra* note 124 (Young’s NIL deals all came before starting a single game for Alabama).

Of course, it is reasonable to assume that NCAA member institutions will never act to fully comply with NCAA policies. Regular violations occur on campuses across this nation, but with the current NIL system in place, the necessity to pay a player through under-the-table money may be lower as a permissible avenue exists.¹²⁸ Now, when outside parties can provide compensation, without needing to work through the colleges and universities, the need to violate the NCAA policies should be substantially lower.¹²⁹ This use of NIL does not require a school to treat any of their student-athletes differently, since it is not their responsibility to attain these deals, resulting in no additional compliance issues.¹³⁰ This belief, however, does not entirely consider the timing of the impermissible payments the NCAA attempts to prevent.

While the use of NIL brings top student-athletes closer to their market value, the argument that it will alleviate all NCAA recruiting violations fails to consider the timeline of prohibited payments to players. When NCAA violations occur, they are the result of money being offered to prospective athletes in order to induce the individual to attend a specific college or university.¹³¹ On the other hand, major NIL deals will occur regardless of where a student-athlete attends; they are based on the individual's personal brand and expected performance.¹³² Therefore, the NCAA's permission for NIL deals to happen following enrollment at a college or university does not act to prevent under-the-table money from being offered when an athlete is still deciding on an institution to play their sport at.¹³³ By the time a student-athlete is permitted to enter NIL deals, that individual will have already had to choose his or her university, and the recruiting process has finished.¹³⁴ Offers to prospective athletes of direct compensation are not made

128. Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 374 (2012) (arguing that allowing student-athletes to accept endorsements deals would act to diminish secret compensation to these individuals).

129. *Id.* at 415. ("the NCAA would essentially eliminate the need for student-athletes to improperly accept money" by allowing endorsement deals).

130. *Id.* at 383. (for example, schools must currently meet Title IX standards, which requires "opportunities for athletics that are 'substantially proportionate' to the gender demographic figures", but the use of outside endorsement money does not impact what the schools provide).

131. Boone, *supra* note 9 (reporting that Arizona basketball coach Sean Miller promised payment to a five-star prospect "prior to his commitment and signing with the Wildcats."); *Auburn Cleared*, *supra* note 45 (Cam Newton's services were being "shopped" before deciding on a school).

132. *See supra* notes 77-79 (DJ Uiagalelei, Quinn Ewers, and Paige Bueckers have entered into NIL deals with national brands, nothing associated with regional markets).

133. *Name, Image and Likeness Policy Question and Answer*, *supra* note 99 ("NIL compensation contingent upon enrollment at a particular school" is prohibited under the NCAA policy).

134. *Id.*

unnecessary by the existence of NIL deals, the possibility of impermissible payments to these players is still very likely.

B. State Involvement in College Athletics and Name, Image, and Likeness

With the enactment of name, image, and likeness rules in the NCAA, many states have passed a version of state legislation or regulation to allow for the student-athletes in their states to capitalize on their value.¹³⁵ As of 2021, over half of the states have passed some form of guidance that deals with NIL.¹³⁶ With the continued movement of the NIL landscape, the total number of states with legislation will likely continue to increase over the coming months and years.¹³⁷ With this rapid development and need for state action, many of the states which have passed NIL legislation have used similar language and provisions to govern NIL.¹³⁸ These common provisions provided for the athlete's ability to earn NIL deals, a prohibition against direct payments, a prohibition against contracts with a school's brand competitors, and usually reporting requirements for the student-athletes.¹³⁹ However, several states have chosen unique ways to regulated NIL which may affect the recruiting abilities of colleges within their states.

Of the provisions that many state legislatures included in their legislation, most opted to include a reporting requirement for the student-athlete.¹⁴⁰ The exact reasoning for these required disclosures is not always made clear, however, many college athletes will have to meet their school's requirements.¹⁴¹ The disclosure could just be to verify that the contract is not in conflict with any school endorsement or to confirm that the individual providing compensation is not violating any NCAA or state laws, but the purpose has not been made available. Seemingly, this requirement will not

135. Dosh, *supra* note 87 (while many states have passed legislation, others have used executive orders or provisions added to budget proposals).

136. *Id.*

137. See, e.g., Zach Osterman, *9 of 11 States in Big Ten Working on Laws to Pay Student-Athletes. Here's Why Indiana Isn't*, INDIANAPOLIS STAR (June 11, 2021, 5:03 AM), <https://www.indystar.com/story/sports/college/indiana/2021/06/11/indiana-legislature-name-image-likeness-laws-notre-dame-purdue-iu/7598879002/> (reporting "eagerness" from state legislatures in Indiana, a state without NIL legislation, who have districts encompassing the major football programs in the state).

138. See Dosh, *supra* note 87.

139. See generally *id.*

140. See, e.g., CAL. EDUC. CODE § 67456 (Deering 2019) (effective Jan. 1, 2020) (California's requirement for disclosure of a student-athlete's contract to an official of the university); S.C. CODE ANN. § 59-158-60 (2021) (South Carolina's requirement of disclosures including "the intercollegiate athlete's name, image, or likeness, compensation arrangements, the name of the athlete agent, and a list of all parties to the name, image, or likeness contract").

141. See, e.g., *Clemson Compliance Education for Businesses*, CLEMSON UNIV., <https://clemson.tigers.com/nilinfo/-businesses> (Clemson University in South Carolina requires student-athlete disclosure of NIL activity seventy-two hours before the deal is entered into).

provide much of a hurdle for prospects making their college decisions, however, the application of reporting requirements is far from universal.

Not every state has required that student-athletes disclose the NIL deals that they may receive.¹⁴² New Mexico's NIL law has no mention of any reporting or disclosure requirements and overall provides little regulation for a student-athlete participating in collegiate sports in the state.¹⁴³ While a school without a requirement can still impose one, it is not required by law.¹⁴⁴ Even in states with certain disclosure requirements, an issue exists as to if their requirements will even be met.¹⁴⁵ Blake Lawrence, the founder of Opendorse, a company that matches players with NIL deals, has expressed major concerns about the operation of NIL deals.¹⁴⁶ In an enterprise that he believes can exceed \$1.5 billion, Lawrence "estimates that only half the national NIL transactions are being disclosed to schools, one of the only requirements of athletes."¹⁴⁷ Lawrence has also stated that the current status of NIL across the states will create chaos, but that is exactly what the NCAA wants.¹⁴⁸ He went on to say that "[i]t's the only way for them to get a federal bill faster."¹⁴⁹ And Lawrence may be right; the NCAA might be in support of nationwide legislation for NIL activity. With federal legislation, issues of varying NIL requirements in each state would no longer be an issue. However, as stated above, the NCAA has not acted that way in the past and was critical of California's move to begin NIL on its own in 2019.¹⁵⁰

The lack of reporting requirements poses serious issues with NCAA and state compliance. If rules are put into place regarding the nature of contracts

142. See, e.g., 2021 N.M. S.B. 94, 2021 N.M. Laws 124 (enacted Apr. 7, 2021).

143. *Id.* (New Mexico's statute is very favorable to student-athletes entering into NIL deals and prevents post-secondary institutions from interfering with the student-athletes NIL activity broadly).

144. *Name, Image, and Likeness*, UNIV. N.M., <https://golobos.com/name-image-likeness/> (last visited Mar. 6, 2023) (the University of New Mexico has required NIL activity to be disclosed; however, this is not required by any state law).

145. See, e.g., ALA. CODE § 8-26B-51 (2021), *repealed by* Ala. H.B. 76 (effective Feb. 3, 2022) (Alabama's former NIL law required a student-athlete to disclose an NIL contract to their college or university "in a manner prescribed by the institution").

146. Ross Dellenger, *The First Thing to Understand About NIL is That Nobody Fully Understands NIL*, SPORTS ILLUSTRATED (Aug. 26, 2021), <https://www.si.com/college/2021/08/26/ncaa-recruiting-name-image-likeness-daily-cover> [hereinafter Dellenger, *First Thing*].

147. *Id.* (the current NIL environment has also worried the executive director of the American Football Coaches Association, stating college athletics could return to a "scandal-ridden, rule breaking" era of the 1970's and 80's).

148. Ross Dellenger, *'It's Going to Be a Clusterf---:' The New Era of College Sports is Here, Is Anyone Ready?*, SPORTS ILLUSTRATED (Jul. 1, 2021), <https://www.si.com/college/2021/07/01/ncaa-athletes-profit-nil-daily-cover> [hereinafter Dellenger, *New Era of College Sports*].

149. *Id.* (Lawrence further states that "no one exactly knows who is supposed to enforce any of it—and how" regarding NIL deals).

150. *NCAA Responds*, *supra* note 84 (in 2019, the NCAA Board of Governors stated "NCAA member schools already are working on changing rules for all student-athletes to appropriately use their name, image and likeness in accordance with our values"; however, no change was made until the *Alston* decision).

that can be signed, how can they be enforced if they are not being reported? This problem, which has been in existence for only a year, is not going unnoticed. Colin Allred, a former college football player at Baylor and current U.S. Representative, stated that “lawmakers are hearing from their state university administrators about the imbalance across the country.”¹⁵¹ These concerns include lack of enforcement, among others.¹⁵²

Beyond the issue of student-athletes disclosing NIL deals, many other areas of concern can be seen through the variety of approaches state governments have taken. Illinois, for example, passed legislation with provisions allowing a university to place time and place restrictions on NIL deals in order to “protect the integrity of [the postsecondary education institution’s] educational mission and intercollegiate athletics program.”¹⁵³ Alabama’s former legislation prohibited student-athletes from entering endorsements with certain categories of companies, such as tobacco companies, alcoholic beverage companies, casinos, and more.¹⁵⁴ Mississippi’s legislation permits a postsecondary educational institution to prohibit a student-athlete from wearing clothing with certain names, logos, or insignias of an entity during any institution-sponsored event, not just in intercollegiate athletics competitions.¹⁵⁵ Texas does not allow NIL deals that extend past a student-athlete’s participation in the university’s athletic program.¹⁵⁶ Georgia imposes some of the most restrictive NIL provisions and states that student-athletes may be required to contribute up to 75% of their value into a fund that will benefit previous student-athletes at the same university.¹⁵⁷ Further, if a Georgia university imposes this “pooling” requirement, athletes are not eligible to draw from the account until 12 months after graduation or withdrawal from the institution.¹⁵⁸

Many other variations of NIL laws exist that could make an athlete’s college decision incredibly difficult. The examples above are given specific to certain states, but other states may have legislation with similar provisions.

151. Dellenger, *First Thing*, *supra* note 146 (Allred believes a national standard could pass, but the recruiting impact and role of boosters is a big concern).

152. *Id.*

153. Student-Athlete Endorsement Rights Act., S.B. 2338, 102nd Leg., Reg. Sess. (Ill. 2021) (enacted July 1, 2021) (universities “may impose reasonable limitations on the dates and time that a student-athlete may participate in endorsement, promotional, social media, or other activities related to the license or use of the student-athlete’s name, image, likeness, or voice”).

154. ALA. CODE § 8-26B-51 (2021), *repealed by* Ala. H.B. 76 (effective Feb. 3, 2022) (the full list included any tobacco, alcohol, seller of a controlled substance, adult entertainment business, casino, and anything else in the reasonable judgment of the university).

155. 2021 Miss. S.B. 2313, 2021 Miss. Laws 444 (enacted Apr. 16, 2021).

156. TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

157. GA. CODE ANN. § 20-3-681 (West 2021) (student-athletes cannot opt-out of this “pooling arrangement,” they are required to agree to contribute the percentage adopted by the university if the university decides to).

158. *Id.*

These examples are only included to give insight into the differences that a prospective athlete may face in choosing a college. Further, while these provisions address what a collegiate athlete can do, some legislatures have decided to apply the rules to high school students while others have not.¹⁵⁹

Overall, if a prospective athlete is to make an informed decision regarding the best place to receive an education, have an opportunity to display their athletic ability, and earn as much as they can through NIL deals, they have a substantial amount of research to do. Additionally, even after a prospective athlete becomes a student-athlete at a university, 39% of all undergraduates will transfer schools at least once.¹⁶⁰ While this figure includes all university undergraduates and not only student-athletes, the NCAA has reported an increase in Division I transfers each of the last three years.¹⁶¹ The decision to transfer may be just as difficult as deciding on an initial college. The NCAA agrees, informing student-athletes that “[t]he decision to transfer to another school is an important and often difficult one in your college career” and encourages anyone considering a transfer to “do your homework” before deciding.¹⁶²

There is no telling how NIL contracts may affect the ability to transfer. The state’s current involvement in NIL will only act to increase the confusion that goes into transferring. An individual who possesses NIL deals will need to ensure these deals are compliant with state and university regulations at their target institution.¹⁶³ Valid contract terms in one state may be unenforceable in another state based on their NIL legislation.¹⁶⁴ Additionally, NIL deals with local corporations will likely not want to continue to compensate athletes that are no longer enrolled in their nearby schools,

159. See, e.g., TEX. EDUC. CODE ANN. § 51.9246 (West 2021) (Texas does not allow prospective student-athletes to enter into NIL deals before enrollment at a university); *but see*, 2021 Md. SB 439, 2021 Md. Laws 138 (effective July 1, 2021) (Maryland’s legislation only prohibits “Public institution[s] of higher education, an athletic association, a conference, or any other group or organization with authority over intercollegiate athletics” from providing prospective student-athletes with NIL deals).

160. *Research on Student-Athlete Transfers*, NAT’L COLLEGIATE ATHLETIC ASSOC., <http://www.ncaa.org/sports/2019/8/5/research-on-student-athlete-transfers.aspx> (last visited Mar. 6, 2023) (the NCAA reports that student-athletes transfer less often than nonathletes; however, men’s basketball and tennis may exceed nonathletes in transfer rates).

161. *Transfer Composition of Division I Teams*, NAT’L COLLEGIATE ATHLETIC ASSOC. (July 2022), https://ncaaorg.s3.amazonaws.com/research/transfers/RES_TransCompD1TeamsSlides.pdf (this uptick is in several of both men’s and women’s sports).

162. *Want to Transfer?*, NAT’L COLLEGIATE ATHLETIC ASSOC., <https://www.ncaa.org/student-athletes/current/want-transfer> (last visited Mar. 6, 2023).

163. See, e.g., S.C. CODE ANN. § 59-158-60 (2021) (outlining the state of South Carolina’s NIL regulations); *but see*, *Clemson Compliance Education for Businesses*, *supra* note 141 (detailing Clemson University’s NIL obligations beyond the South Carolina state regulations).

164. See, e.g., 2019 Cal. S.B. 206, CAL. EDUC. CODE § 67456 (Deering 2019) (effective Jan. 1, 2020) (California’s NIL law requires disclosure of a student-athlete’s contract to an official of the university); *but see*, 2021 N.M. S.B. 94, 2021 N.M. Laws 124 (enacted Apr. 7, 2021) (New Mexico’s NIL law has no mention of any reporting or disclosure requirements).

meaning that student-athletes may breach NIL contracts by transferring from the region.¹⁶⁵ Therefore, beyond the current difficulty in transferring, student-athletes who are considering a transfer may not know the implications that a transfer may bring, adding another layer to the difficult decision that a transfer may bring.

At this time, it can easily be shown that a nationwide policy would clear up much of the confusion that currently exists. This can be done by the NCAA working with the federal government to establish common-sense restrictions, and student-athletes will be able to fully enjoy the benefits of NIL. The NCAA can ensure that it preserves its traditions while also allowing student-athletes to be compensated based on their own personal value. This, however, has not been the way that the NCAA has operated in the past. Two years before the *Alston* decision, in the summer of 2019, the NCAA began investigating the possible responses to proposed NIL legislation at the state and federal levels.¹⁶⁶ By October 2019, the group investigating this possibility recommended that NIL activity be permitted for student-athletes.¹⁶⁷ Nevertheless, by the time that the Supreme Court made its decision to allow NIL in 2021, the college sports environment saw a rush to comply with the ruling, and the NCAA enacted its policy by deferring to individual states on many issues.¹⁶⁸ So, even with early considerations given to the possibility of implementing NIL, it is unclear when the NCAA would have acted if it could have waited. If the best option currently is to create national standards for NIL deals, it is not certain that the NCAA will be proactive in implementing changes and the current state-by-state regulations may be in place for some time.¹⁶⁹

Lastly, beyond the concerns of inconsistent requires for student-athletes from state to state, it is worth noting that, while state involvement may

165. See, e.g., Charlie Potter, *NIL Tracker: Compensation Deals Announced by Alabama Athletes*, BAMAONLINE (Aug. 17, 2021), <https://247sports.com/college/alabama/Article/Alabama-Name-Image-Likeness-Tracker-Compensation-deals-announced-by-Crimson-Tide-athletes-167270860/> (reporting an Alabama football player entered into a NIL deal with a local restaurant); Dan Hope, *Five Ohio State Football Players Get New Cars for 2021 Season in Partnership with Local Car Dealer*, ELEVEN WARRIORS (Aug. 26, 2021, 3:50 PM), <https://www.elevenwarriors.com/ohio-state-football/2021/08/124329/five-ohio-state-football-players-get-new-cars-for-2021-season-in-partnership-with-local-car-dealer> (reporting that Ohio State players were given car leases through the year by a local car dealership).

166. NAT'L COLLEGIATE ATHLETIC ASSOC., NCAA BOARD OF GOVERNORS FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 1 (2020), https://ncaa.org/s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [hereinafter NCAA, GOVERNOR'S FINAL REPORT].

167. *Id.* (this recommendation was made if NIL deals were “consistent with NCAA values and principles and with legal precedent”).

168. Hosick, *supra* note 58 (NCAA President Mark Emmert acknowledged the “variety of state laws adopted across the country” when NIL was first adopted).

169. *Id.* (Emmert states that the NCAA will work with Congress, but that the lack of a current permanent solution prevents the NCAA from providing details that its student-athletes deserve).

encourage compliance, the current statutory schemes enacted lack enforcement power.¹⁷⁰ Currently, the NCAA's policy defers to individual states to guide the universities within their state.¹⁷¹ This provides an additional challenge to student-athletes as violations are no longer only against the NCAA itself, they are also in violation of state law, so long as their states have passed NIL legislation.¹⁷² While the addition of state laws may act to promote compliance, serious questions exist as to how much monitoring will be in place to track incoming NIL deals.¹⁷³ If a student-athlete is found to have violated the state legislation, no state agency is directed to enforce the law and no mention of a penalty exists.¹⁷⁴ Therefore, even with violations of a state's law, little is likely to come from it.

C. Incoming Litigation

The birth of name, image, and likeness was the result of the Supreme Court of the United States' decision in *Alston*.¹⁷⁵ As this is a major step towards student-athletes being compensated based on the value they can bring to their universities, it did not fully answer what these student-athletes may be eligible to receive. In order to discuss this point, some additional background is needed.

The NCAA's involvement in litigation has occurred for many years and multiple cases paved the way for *Alston*.¹⁷⁶ In 1984, the Supreme Court of the United States decided *NCAA v. Board of Regents of the University of Oklahoma*.¹⁷⁷ In this case, a dispute arose regarding the NCAA and its control of member schools' football games being aired on television.¹⁷⁸ The NCAA

170. See *supra* notes 154-60.

171. NCAA, GOVERNOR'S FINAL REPORT, *supra* note 166, at 1-3, 25.

172. See *id.* at 20, 24-5 (no requirement is in place for colleges and universities to assist their student-athletes, just that these institutions may provide guidance for state law); see also Matt Brown, *Enforcing NIL Regulations*, FRONT OFFICE SPORTS (July 14, 2021), <https://frontofficesports.com/newsletter/enforcing-nil-regulations/> ("With no federal NIL bill likely to pass in the immediate future, all the NCAA central office could do is advise member schools to come up with their own NIL policies if they don't have a specific state law to adhere to.")

173. Brown, *supra* note 172 (reporting that, in making NIL deals, "[s]tate law may establish some limited guardrails for this marketplace . . . kind of."); Dellenger, *New Era of College Sports*, *supra* note 148 (Lawrence further states that "no one exactly knows who is supposed to enforce any of it—and how" in regards to NIL deals); see generally, e.g., Student-Athlete Endorsement Rights Act, S.B 2338, 102nd Leg., Reg. Sess. (Ill. 2021) (enacted July 1, 2021) (the Illinois NIL statute makes no mention of enforcement against student-athletes).

174. Student-Athlete Endorsement Rights Act, S.B 2338, 102nd Leg., Reg. Sess. (Ill. 2021) (enacted July 1, 2021) (the statute explicitly gives postsecondary institutions immunity from any claim for damages under the Illinois Act).

175. Nat'l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2166 (2021).

176. See generally, Nat'l Collegiate Athletic Assoc. v. Board Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); O'Bannon v. Nat'l Collegiate Athletic Assoc., 802 F.3d 1049 (9th Cir. 2015).

177. See generally NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

178. *Bd. of Regents*, 468 U.S. at 92-94.

entered into television contracts with certain networks and allowed them to televise member schools' games, however, individual institutions were not able to surpass the number of games that the NCAA permitted to be aired.¹⁷⁹ Following an attempt to have a greater voice in the airing of football games by major football universities, the NCAA threatened disciplinary action against schools that would try to avoid the set limitations.¹⁸⁰

Ultimately, the Supreme Court ruled for the universities opposing the NCAA's restrictions as a "restraint of trade" in violation of the Sherman Act.¹⁸¹ The Court made mention of the respect they placed on the NCAA preserving a tradition of amateurism, however, the restriction on televised games could not survive.¹⁸² This violation was the key in the slow process to establish what NCAA amateurism is today.

Following the decision in *Board of Regents*, a challenge to student-athletes' prohibition against being paid for their name, image, and likeness was heard in *O'Bannon v. NCAA*.¹⁸³ The litigation began when Ed O'Bannon, a former UCLA basketball player, was made aware that he was depicted in a college basketball video game.¹⁸⁴ O'Bannon sued the NCAA based on its amateurism rules as those depicted in the game could not be paid even though they provided value to the game.¹⁸⁵ He believed that the prevention of being compensated from the usage of student-athletes' NILs was in violation of the Sherman Act as an illegal restraint of trade.¹⁸⁶

In reviewing a challenge against not compensating student-athletes, the Ninth Circuit stated that *Board of Regents* did not establish that amateurism rules were valid, only that they should not be invalidated without further analysis.¹⁸⁷ Therefore, NCAA rules "must be proved, not presumed."¹⁸⁸ Ultimately, the court did not decide on the validity of the prohibition of NIL

179. *Id.*

180. *Id.* at 94-95.

181. *Id.* at 104-05, 120, 127 (White, J., dissenting) (unlike in a free market, where "each football-playing institution would be an independent seller of the right to telecast its football games," the NCAA restrained member's freedom to sell television rights).

182. *Id.* at 120 (the Court stated that the "NCAA plays a critical role in the maintenance of a revered tradition of amateurism" and that it needs "ample latitude to play that role").

183. *O'Bannon v. Nat'l Collegiate Athletic Assoc.*, 802 F.3d 1049, 1052 (9th Cir. 2015).

184. *Id.* at 1055 (O'Bannon stated that he did not consent to his likeness being used in the video game and was never compensated for its use).

185. *Id.*

186. *Id.*

187. *Id.* at 1063 (the Court states that through *Board of Regents*, not every NCAA rule is valid if it is related to amateurism).

188. *O'Bannon*, 802 F.3d at 1064.

but provided that NCAA must permit its schools to give student-athletes compensation up to the cost of attendance.¹⁸⁹

While the Supreme Court did not review the decision in *O'Bannon*, a similar challenge was heard only a few years later.¹⁹⁰ In *Alston*, the Supreme Court of the United States made its decision regarding NIL for student-athletes.¹⁹¹ While across-the-board challenges were made to compensation restrictions, these issues were not renewed for review at the Court.¹⁹² As stated above, the Supreme Court only found that the restriction of NIL activity was in violation of the Sherman Act and the NIL era began in NCAA athletics.¹⁹³

While much has come from the *Alston* decision, it is certainly not the end of NCAA and litigation. The opinion builds on the line of cases that have challenged the NCAA through antitrust law and one could reasonably see how additional cases could be brought in the future by athletes for payment.¹⁹⁴ As evidence of this, Justice Kavanaugh drafted a concurring opinion that addressed the remaining compensation rules that the Court did not address in its opinion.¹⁹⁵ In doing so, he essentially invites challenges in the future.¹⁹⁶

Justice Kavanaugh began his concurrence by stating, "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."¹⁹⁷ He stated that "the Court does not address the legality of the NCAA's remaining compensation rules," that the Court established "how any such rules should be analyzed going forward," and "there are serious questions whether the NCAA's remaining compensation rules can pass muster" under antitrust analysis.¹⁹⁸ Currently, student-athletes are controlled by the NCAA, may be paid at below-market rates, and have no ability to negotiate.¹⁹⁹ While the NCAA states these compensation rules are in place because of the nature of

189. *Id.* at 1074 (the Ninth Circuit noted that the brand of football in college differentiates itself from others based on "an academic tradition" and can make it more popular, even if it is a lesser product of the professional sport).

190. *See generally* Nat'l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2141 (2021).

191. *Id.* at 2147.

192. *Id.* at 2154 (the Court stated that it was not contested that the NCAA does enjoy a monopoly and that it is "capable of depressing wages below competitive levels").

193. *Id.* at 2166 (the Court concluded by saying it is not their job to settle the national debate of amateurism and its place in college athletics, they could only review the antitrust law applied by the district court).

194. *See generally*, Nat'l Collegiate Athletic Assoc. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); *see generally* *O'Bannon*, 802 F.3d 104.

195. *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

196. *Id.*

197. *Id.* at 2166-67.

198. *Id.* at 2167 (Justice Kavanaugh's concurrence makes clear that the NCAA is not exempt from antitrust laws simply because of the decades of amateurism).

199. *Id.* (the NCAA asserted that, while these points are accurate, "its compensation rules are procompetitive because those rules help define the product of college sports").

college sports, Justice Kavanaugh found this justification unpersuasive.²⁰⁰ He stated that this “business model would be flatly illegal in almost any other industry in America.”²⁰¹ Overall, Justice Kavanaugh did not believe the tradition that is college athletics is unable to justify the student-athletes’ denial of a share of the billion-dollar industry they helped create.²⁰² There is no reason why college sports should be treated any differently under antitrust law.²⁰³

After this opinion, it is evident that the NCAA is not in a particularly favorable spot if its goal is to retain the prohibition against player compensation that it currently employs.²⁰⁴ In the Court’s ruling, it “cut against a century-old ‘no-pay for play’ college sports regime, but it did so with a scalpel rather than a meat cleaver.”²⁰⁵ Not only have their restrictions been taken away in court, albeit slowly, but Justice Kavanaugh’s concurrence also provides that further litigation does have a chance to be successful.²⁰⁶ Therefore, to stay out of courtrooms and oppose the organization’s former players, an overhaul of collegiate sports is needed from the NCAA. Justice Kavanaugh seemingly supports avoiding litigation, stating that legislation or collective bargaining could be useful.²⁰⁷ Of course, this is assuming that the NCAA would like to avoid these seemingly inevitable challenges.

The Supreme Court’s decision in *Alston* was released on June 21, 2021.²⁰⁸ The subsequent interim NIL policy to comply with the Supreme Court’s order was released on June 30, 2021, and went into effect days later.²⁰⁹ This quick turnaround resulted in many states “rushing to enact NIL legislation” in order to allow student-athletes to benefit from the new policy.²¹⁰ Additionally,

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

201. *Id.* at 2167-68 (Justice Kavanaugh states that one cannot price-fix their labor simply because the NCAA incorporates price-fixing into the definition of their product).

202. *Id.* at 2168 (Kavanaugh, J., concurring) (Justice Kavanaugh mentions that, while the student-athletes help generate the revenue, the money flows to everyone except the athletes such as college presidents, athletic directors, coaches, and more).

203. *Id.* (if a violation of the Sherman Act is later found, substantial issues exist based on how compensation would be distributed between revenue and non-revenue sports).

204. *Id.* at 2157-58, 2165-66 (majority opinion); *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

205. Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, FOLEY & LARDNER LLP (August 4, 2021), <https://www.foley.com/en/insights/publications/2021/08/ncaa-v-alston> (the NCAA’s desire to preserve the century-old concept of amateurism may be an “unwinnable war”).

206. *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

207. *Id.* at 2168 (still, difficult questions remain about compliance with Title IX and if only some sports would receive compensation).

208. *See generally id.* at 2141.

209. *See supra* note 58 and accompanying text.

210. Kyle Gutierrez & Ari Meltzer, *The Dawn of the NIL Era: The NCAA’s Interim Policy and What it Means for Brands*, WILEY REIN LLP (June 29, 2021), <https://www.wiley.law/alert-The-Dawn-of-the-NIL-Era-The-NCAAs-Interim-Policy-and-What-it-Means-for-Brands>.

while states were forced to act quickly in adopting their own policy, corporations were quick to begin to contact the newly eligible student-athletes for deals, even if those deals could potentially have future adverse effects.²¹¹ This sequence, with so many changes by the day, is surely not how an organization should intend to operate. If possible, organizations should plan to avoid a situation like this. Based on Justice Kavanaugh's concurrence, along with the repeated challenges to NCAA amateurism in courts throughout the years, the NCAA needs to be taking steps to plan for the implementation of direct payment as soon as possible.

The NCAA can already see the change that has begun. Their current NIL policy has flooded the news networks and brands have regularly begun to feature college sports stars. At this time, they are only limiting the players' ability to earn compensation with many restrictions still in place. Surely, the NCAA must be considering the shift to paying players directly and the new system will certainly take time to implement. The ability to pay players has not existed in the history of NCAA sport and the change cannot happen overnight. Unless the NCAA is prepared to enter another messy transition, the implementation of direct player compensation should be planned for and created with the student-athletes, not following a Court decision.

D. Name, Image, and Likeness Avoidance

Following the above analysis regarding the reasons why the NCAA must begin considerations for allowing for direct compensation to student-athletes, one issue remains: does the current NIL framework even make sense? This is not to say that student-athletes do not deserve to be paid, the question asks: why is the current regulatory system valuable? Certain factual situations have presented themselves in the early days of the NIL era that seem only to add confusion about the purpose of a system that may be unneeded. These situations are discussed below.

The incorporation of NIL compensation through the NCAA interim policy does not impact the prohibition against being paid to play a sport.²¹² NCAA bylaws still require amateur status to compete in intercollegiate competition, which means that an individual shall never use their skill to be paid in the sport they wish to participate in.²¹³ While the NCAA feels this is necessary to preserve the tradition of their sports, and that it needs latitude to

211. *Id.* (“Unlike NIL relationships with professional athletes, which are largely unregulated, relationships with student athletes will be subject to myriad rules and regulations . . .”).

212. NAT'L COLLEGIATE ATHLETIC ASSOC., 2022-23 NCAA DIVISION I MANUAL, art. 12.1.2 (2023).

213. *Id.* (if student-athletes violate this, an individual is no longer eligible for intercollegiate competition).

accomplish this, the allowance of certain NIL deals seems to undermine this century-old amateur requirement.²¹⁴

In the middle of the summer of 2021 and only a couple of weeks following the *Alston* decision, a Florida business owner attempted to capitalize on the upcoming NIL deals.²¹⁵ Dan Lambert, owner of American Top Team, a mixed martial arts gym chain, offered a \$500 per month contract to the ninety scholarship members of the University of Miami football team.²¹⁶ As consideration for this agreement, the players who accepted this offer would need to advertise the gyms on their social media pages.²¹⁷ Similarly, in another NIL story from BYU football, all 123 members of the University's football team will receive payments through a NIL deal that includes full tuition for walk-on players.²¹⁸ Built Brands, a company that produces various protein and energy products, entered into this multi-year agreement with BYU soon after NIL was introduced.²¹⁹

Since Lambert's and Built Brands' actions do not violate any NCAA, state, or respective University policy, nothing is preventing them from entering these deals.²²⁰ And certainly, it would be hard to find an argument against providing walk-on athletes a deal with the value of their tuition, they truly were not getting anything for their services before this NIL deal. The question, therefore, is how is this significantly different from direct payments to the players? Obviously, it is not from the university, and arguments as to why a university should not be paying its players are simple to make. However, when a blanket payment given to each member of the football team is permissible, is this actually for an individual's name, image, and likeness?

In challenging the current reality of payments to players, it is easy to reason that the money is not coming directly from the college, meaning they do not have to be involved in the deals. It is no secret that most NCAA programs operate at a loss.²²¹ Most college athletic departments can attribute

214. Nat'l Collegiate Athletic Assoc. v. *Alston*, 141 S. Ct. 2141, 2157 (2021) (*Bd. of Regents* gave the NCAA more latitude to preserve the importance of higher education with student-athletes; however, not all restraints on compensation will survive after *Alston*).

215. Associated Press, *Gym Owner Offers NIL Deal to all 90 Miami Football Players*, ATLANTA JOURNAL-CONSTITUTION (July 7, 2021), <https://www.ajc.com/sports/georgia-tech/gym-owner-offers-nil-deal-to-all-90-miami-football-players/3PFEHBHLRZDXTKY3AXN6O3MQGY/>.

216. *Id.*

217. *Id.* (Lamber stated that he wanted Miami to become "NIL U").

218. Brett Pyne, *BYU Football Touts Groundbreaking NIL Agreements with Built Brands*, BRIGHAM YOUNG UNIV. (Aug. 12, 2021), <https://byucougars.com/story/football/1297331/byu-football-touts-groundbreaking-nil-agreements-built-brands> (the deal involved BYU Athletics as a whole as well as individual deals for members of the football team).

219. *Id.* (Built Brands has an ongoing relationship with the University and provides additional funding to the football program, besides through NIL deals).

220. *See id.*

221. Jo Craven McGinty, *March Madness is a Moneymaker. Most Schools Still Operate in Red*, WALL ST. J. (March 12, 2021, 5:30 AM), <https://www.wsj.com/articles/march-madness-is-a-money>

a significant portion of their annual revenue to alumni contributions.²²² And, when the NIL deals are struck with an entity, many arise from the connections from those entities to a certain university.²²³ Therefore, a system of offering payments, in connection with individuals and organizations providing funding, does not seem too different from some current NIL deals. Regardless of who makes the payment to the student-athlete, the money may be from the same source. Further, it is not useful to view college athletic finances as a whole; the revenue of programs varies greatly.²²⁴ While not all NCAA institutions can pay their student-athletes, the top programs in this country will surely be able to allocate resources to provide some payment to student-athletes. Additionally, revenue figures are based on not paying their student-athletes and current budgets and fundraising efforts do not reflect what could change.²²⁵ Therefore, while financial restraints may exist in some NCAA programs, these issues are far from universal.²²⁶

Within the same set of facts provided by BYU and Miami, another issue is apparent. Under the interim policy, NIL compensation cannot be contingent upon the selection of a specific school.²²⁷ However, if a deal exists for all of a specific university's players, is a deal not contingent on the selection of that program? While the specifics of the blanket deals are not disclosed at length, it is likely that the deal is not being offered to a high school student before enrollment at a university.²²⁸ All that is in place is a NIL deal if you are a member of the team. But, as Miami is offering NIL deals to scholarship players, it seems that this could move further along until NIL deals are essentially being given contingent upon the selection of a certain college. For example, is it unreasonable to suspect that a booster would be willing to offer a NIL deal to any high-rated recruit that selects the

maker-most-schools-still-operate-in-red-11615545002 (reporting that only 63 of 351 Division I Men's Basketball programs and 73 of 252 Division I Football programs operate with a net income).

222. Kristi Dosh, *How Much do Big Ten Programs Rely on Alumni Contributions?*, BUS. COLL. SPORTS (Apr. 20, 2011), <https://businessofcollegesports.com/football/how-much-do-big-ten-teams-rely-on-alumni-contributions/> (reporting Big Ten football programs range from 9-30% of revenue contributed by alumni).

223. See, e.g. David Kenyon, *The Biggest and Most Notable NIL Deals in College Football so Far*, BLEACHER REPORT (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far> (deals with LSU, Miami, Auburn, and Alabama players all involve in-state corporations).

224. *Finances of Intercollegiate Athletics*, *supra* note 72 (reporting that the largest five conferences had a median revenue of nearly \$122 million in 2019, whereas the remaining division I programs earned just under \$40 million).

225. *Id.* (for example, as of 2019, more money was spent on coaches' compensation than on student-athlete financial aid).

226. *Id.*

227. *Name, Image and Likeness Policy Question and Answer*, *supra* note 99 (explaining that institutions cannot promise NIL opportunities based upon future enrollment).

228. See *id.* (offering the NIL opportunity based upon enrollment into BYU or Miami would be a violation).

booster's favorite college team? While the booster is not dealing with specific athletes, this situation would seemingly work right around current NCAA regulations.

Last, the NCAA requires a "quid pro quo" in making NIL deals.²²⁹ This brings about an interesting situation: will any consideration from the athlete be sufficient? For Miami, what is the value of the 90th man's Instagram post? As for BYU, how much value can be placed on each member of the 123 members of the football team?²³⁰ The deals have generated some buzz around the sport, but was the offer truly based on the individual player's NIL value, or was a booster rewarding players for selecting their favorite college football team? Of course, this value is up to the individual or company to decide. If they feel that they receive value from any individual, the NCAA will allow the partnership. Still, by requiring a quid pro quo without more, is the NCAA going to allow substantial money to be given to an athlete so long as the student-athlete provides anything of value? This requirement, with little needed from an athlete, seems to allow for direct payment from a third party with only a small formality.

Overall, this comment is not criticizing either of these deals. By providing blanket deals to members of a specific team, the contributor can reward all of the hard work of the players equally. The issue is that, with NIL deals like this, the NCAA's current policy does not act to preserve a tradition of amateurism, which acts as their reasoning for the current policy.²³¹ The two deals seem to serve as examples of how boosters work around the prohibition against direct payments and college athletics are in the very early stages of NIL deals. Without updates to the policy, it seems that the NCAA is just denying players compensation and is not acting to prefer amateurism.

III. HOW SHOULD COLLEGE SPORTS PROCEED?

Student-athletes competing in NCAA events have the potential to earn their schools a substantial amount of profit.²³² While the number of individual athletes who contribute to this may be in the minority, payment to these players is still deserved.²³³ Therefore, allowing direct compensation to student-athletes is warranted.

229. *Id.* (the NCAA states that NIL deals should include what the student-athlete should deliver and that compensation needs to be for work actually performed).

230. Pyne, *supra* note 218.

231. Nat'l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2157 (2021) (quoting NCAA v. Bd. of Regents, 468 U.S. 85 (1984)) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.").

232. *Id.* at 2168 (Kavanaugh, J., concurring) (student-athletes assist in generating billions of dollars for colleges and universities every year).

233. *See generally* Dellenger, *Clemson Quarterback*, *supra* note 77.

Following more than a century of requiring amateurism to participate in collegiate sports, the present state of the major collegiate teams shows how far from amateurs the student-athletes truly are.²³⁴ Major college teams generate millions of dollars in revenue per year with no direct compensation flowing to the players who help generate fan involvement.²³⁵ Further, while these athletes are without pay, their coaches are certainly not limited in their pay, even though that pay is from an academic institution.²³⁶ Therefore, a system with reasonable payments to players is deserved and the current NIL system only acts to create further issues.

Substantial planning and consideration are needed by both the NCAA and member institutions. A uniform system to provide direct player payment will be fundamental in sustaining the current competitive athletic system that is seen at NCAA institutions. To complete this task, the NCAA has many professional sports leagues that it can look to for guidance.²³⁷ Each of these leagues can be considered to develop a system of player payment to compensate the star student-athletes who will return the investment to their schools. This will not eliminate the need for reporting to the NCAA to ensure compliance with a new system, but the need for under-the-table payments to entice a prospective athlete to attend a specific institution will be limited. Whereas many of the improper payments come in an attempt to land recruits, permissible offers can now be used, and the need for improper payments is much less.²³⁸ Student-athletes will be able to receive compensation for participation in collegiate athletics, to a certain extent, as well as still being able to enter NIL deals.

Before deciding on any system, it is relevant to note that NCAA institutions can never operate as a professional team.²³⁹ The universities and colleges that may consider paying their players still operate an institution of higher education before their sports teams, even if it does not always appear that way. These institutions should not ever be offering compensation that

234. *Alston*, 141 S. Ct. at 2152.

235. *Finances of Intercollegiate Athletics*, *supra* note 72.

236. Samuel Stebbins, *College Coaches Dominate List of Highest-Paid Public Employees with Seven-Digit Salaries*, USA TODAY (Sept. 23, 2020), <https://www.usatoday.com/story/money/2020/09/23/these-are-the-highest-paid-public-employees-in-every-state/114091534/> (public college coaches are the highest-paid state employee in nearly 2/3 of the states); Jacob Camenker, *Brian Kelly Contract Details: LSU Makes Former Notre Dame Coach One of College Football's Highest Paid*, SPORTING NEWS (Dec. 1, 2021), <https://www.sportingnews.com/us/ncaa-football/news/brian-kelly-contract-details-lsu-notre-dame/22ip4ln3y64919gqrk0p2cc7> (Brian Kelly, the current LSU head football coach, will make nearly \$100 million over 10 years).

237. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961-62 (2d Cir. 1987) (discussing the purpose of a salary cap in the NBA as well as their permissibility within the Sherman Act).

238. Hosick, *supra* note 58.

239. See generally Kevin Patra, *NFL Sets 2021 Salary Cap at \$182.5 Million*, NAT'L FOOTBALL LEAGUE (Mar. 10, 2021), <https://www.nfl.com/news/nfl-2021-salary-cap-182-5-million> (the NFL's salary cap is over \$180 million in 2021).

competes with professional sports teams, as doing so would not be financially responsible. However, a certain amount would be possible to provide student-athletes with compensation for their athletic efforts.

Like many professional sports leagues, it seems reasonable to provide a contract to athletes under a certain capped payroll.²⁴⁰ Similar to the NFL, NHL, and NBA, a cap could act to limit the amount of money that a college could offer to their prospective athletes.²⁴¹ With a cap, a number could exist that is both financially viable to collegiate institutions as well as valuable to the student-athletes that participate in NCAA sports. The purpose of a salary cap is not only to avoid overspending by the wealthiest professional teams but also to promote a more competitive sport.²⁴² With the desire to keep college athletics competitive from the NCAA, examples exist of keeping leagues competitive, even with money given to players on teams with varying financial resources.²⁴³

Even with a salary cap, it is true that payments to athletes cannot exist at all levels of collegiate athletics; the money is simply not there.²⁴⁴ As stated above, many universities do not profit from their athletic programs, but to consider every college and university together is improper.²⁴⁵ The universities that recruit and enroll the athletes that possess the most value for their universities do have the ability to pay their student-athletes.²⁴⁶ Major college programs can generate substantial revenue and could increase expenses for player payment.²⁴⁷ There is no doubt there are a “few revenue-producing sports subsidiz[ing] the less-popular programs,” and that these players currently “have to be content with scholarships that are worth far, far less than their economic value in a truly free market.”²⁴⁸ This, of course, does not provide for an environment that encourages competition to all the NCAA programs in the country and the wealthiest universities will only get better.

240. Ramy Elitzur, *NFL and NHL Salary Caps Have Worked Out Well for Players*, CONVERSATION (Aug. 26, 2021), <https://theconversation.com/nfl-and-nhl-salary-caps-have-worked-out-well-for-players-165739>.

241. *Id.* (caps are used in order to “avoid runaway payroll spending by wealthier teams” and keep the leagues more competitive).

242. *Id.* (caps allow for large and small market teams to still be relatively competitive, even though one may possess substantially greater resources).

243. NCAA, GOVERNOR’S FINAL REPORT, *supra* note 166, at 8 (while investigating NIL in 2019, the NCAA stated that it wanted to ensure “fair and balanced competition”).

244. *Finances of Intercollegiate Athletics*, *supra* note 72 (Division I programs outside of the largest five conferences saw expenses outpace their revenues by nearly \$23 million).

245. *Id.*

246. *Id.*

247. *Id.*

248. David French, *An Open Letter to Conservatives about the NCAA*, NAT’L REV. (Sept. 29, 2017), <https://www.nationalreview.com/2017/09/ncaa-college-sports-reform-student-athletes-free-market-incentives/> (so long a university student is not an athlete, the university is free to pay that individual market rate for their work).

Additionally, this may not leave the option for universities to compensate all teams equally. However, as discussed above, it may only be a matter of time until legal challenges are made to the NCAA's prohibition on direct player payment.²⁴⁹ Waiting until the NCAA is forced to allow for payments, like with the implementation of NIL, is not the best option when such a change may be looming. As much as this has the potential to hurt some individual sports teams, looking for the best option now can minimize the danger of a sudden change. Leaving the current system in place, even if it is the only way to preserve as many sports teams as possible, is likely not the best option for the future of the NCAA.

In creating a system where student-athletes can be paid, many options have been proposed. Shawne Alston, the lead plaintiff in the *Alston* case, proposed a system where conferences offer "compensation packages to recruits," leaving the decision to the current athletic conferences in existence.²⁵⁰ Other proposals state that the NCAA should completely allow a free market for their student-athletes, meaning that a school would be free to pay student-athletes at their market rate.²⁵¹ Before *Alston*, many individuals believed that NIL would provide sufficient compensation for student-athletes, and nothing more would be required.²⁵² However, the implementation of a salary cap may be a much better alternative for the addition of NCAA player payments. While a total, mostly free market may be useful in many professional sports, the idea fails to consider the unique nature that is involved with operating an academic institution as well as athletic teams. A salary cap system could mirror professional sports, which have been successful in using a cap, but they in no way need to match the amount that professional sports teams offer. A fair amount can be offered to prospective athletes, and college commitments can be made based on this value to provide for a system with fewer issues that may be present. Salary caps have been shown to have worked in professional sports, have survived legal challenges, and have brought competitive leagues for fan enjoyment.²⁵³

The implementation of direct payments to players, even if within a salary cap, would bring athletes' pay closer to the value they provide a college.

249. Nat'l Collegiate Athletic Assoc. v. Alston, 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J., concurring) ("the NCAA has long shielded its compensation rules from the ordinary antitrust scrutiny").

250. John Doty, *Rock the Cash-bah! How Alston Presents a New Challenge to the Amateurism Justification and Ways the NCAA Can Modernize to Remain Afloat*, 29 U. MIAMI BUS. L. REV. 70, 84 (2021).

251. *Id.* at 95 (this type of proposal aims to treat the student-athletes just like of the other students are currently treated).

252. Meyer & Zimbalist, *supra* note 30, at 259 ("In our view, as long as playing college sport remains an extracurricular activity rather than a standalone commercial activity, amateurism should play a role.").

253. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961 (2d Cir. 1987) (even though the use of a salary cap acts to limit some players' values, their usage is permissible).

While high-value student-athletes may still be underpaid when compared to what outside sources may be willing to pay, the majority of athletes could get a reasonable value for their services.²⁵⁴ Additionally, athletes who may not command as great of a market value are still able to benefit from scholarships that NCAA institutions are able to offer. By providing direct payment, it would not be nearly as common to accept under-the-table money to commit to a college, and a student-athlete is permitted to receive this money within NCAA rules. The prospective athlete can receive offers to attend a certain institution, subject to the maximum amount permitted by the NCAA. Of course, based on the history of college sports corruption, it would be unwise to believe this would solve every problem. But, by allowing a certain level of player compensation, it is rational to think the occurrence of unreported payments could be limited.

This system does not need to be the end of name, image, and likeness deals. Following *Alston*, the prohibition of these deals is not even possible.²⁵⁵ For many student-athletes, the value of free education along with the ability to enter NIL deals may be sufficient. However, the current system requires a total overhaul. The NCAA's permission for these NIL deals is not the end of their responsibility to fairly compensate players, nor does it act to further the NCAA's objectives, as shown above. Therefore, a universal policy for all member institutions is necessary. The current patchwork system with substantial deferrals to states and member institutions is not appropriate for the national landscape that is present in college athletics.

The exact specifications of a NIL system can vary. If the NCAA desires that these deals not be given out before enrollment at a university, that is fair. However, these standards should not be changing based on which state an athlete is located in. Additionally, the lack of reporting, as well as individuals who are not required to report, is not appropriate in the current NIL scheme. If the NCAA still desires to have control over how athletes earn compensation, universal standards need to be imposed. If the NCAA is correct in stating it is working with the federal government to implement a nationwide system, they will likely see a much more organized and useful NIL process.²⁵⁶ But, the current state of the system has the potential for serious issues.

With all of the money that is being added to college sports, it is reasonable to believe that adverse effects will stream to NCAA institutions. As stated, college athletic programs are not as profitable as people believe.²⁵⁷ Even the

254. *Id.* at 959 (athletes may receive less under a salary cap they would have through individual negotiations).

255. Nat'l Collegiate Athletic Assoc. v. *Alston*, 141 S. Ct. 2141, 2166 (2021).

256. *See supra* note 58.

257. *See supra* note 72.

temporary budgetary shortfalls following the COVID-19 pandemic caused several college athletic teams to fold from large NCAA programs.²⁵⁸ If more money is allocated to the major, profit-earning teams, those operating teams at a net loss will need to find third party funding, require payment from athletes to participate, or just terminate operations. Although this seems harsh for many student-athletes in less popular sports, its occurrence seems inevitable. As stated in *Alston*, Justice Kavanaugh seemed to encourage a challenge against the no-pay-for-play model by student-athletes.²⁵⁹ Just because the profit earned from major teams at a university currently funds the lesser-known teams, the system may not persuade the Court to continue to allow compensation restrictions.²⁶⁰ Therefore, if the NCAA wants to avoid this litigation and the sudden implementation of a payment system, like what was done with NIL, this issue needs to be addressed.²⁶¹ By confronting the budgetary issues now, the NCAA and member institutions will be able to construct a system that can limit unfortunate results.

CONCLUSION

Implementation of direct payments to athletes as well as a uniform system will provide better college athletics. No longer will fans, student-athletes, and universities need to be concerned about sudden changes coming down from the NCAA. The amateur model that has existed for over a century no longer has a place in major college athletics.

The integration of the current name, image, and likeness scheme can only cause issues moving forward. Not only can scandal continue, if not be increased through permissible booster contact with student-athletes, but litigations beyond this small step are also likely. Additionally, prospective athletes must now consider individual state and university policies in making their commitments, which is on top of the already difficult decisions that high school students must make. And, after all of the added difficulties, it is arguable that the NIL policy is not even effective in upholding the NCAA's state values.

258. *Tracker: College Sports Programs Curt During COVID-19 Pandemic*, BUS. COLL. SPORTS (June 22, 2021), <https://businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/> (in total, 112 sports teams had been cut at the Division I level from 35 institutions).

259. *Alston*, 141 S. Ct. at 2166-67 (Kavanaugh, J., concurring) (Justice Kavanaugh stated that he added the concurrence "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws.").

260. *Id.* at 2169 ("Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.").

261. *Id.* at 2168 (Justice Kavanaugh mentions that issues can be solved, without litigation, in a similar way to how "professional football and basketball players have negotiated for a share of league revenues.").

A remodel of the NCAA's requirements for players will give fair compensation in return for the value that they provide. College athletics have become a staple in the fandom of many Americans, with little in return for the individuals who provide this entertainment. With consideration for the educational mission of academic institutions, a system can be created to adequately compensate the hard work of many student-athletes.