

## College Athletics and NIL: Perspectives from a Practitioner and an Athlete

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### I. INTRODUCTION

“Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”<sup>1</sup>

Section 2.9 of the National Collegiate Athletic Association (NCAA) Division 1 handbook lays out the Principle of Amateurism, which was the oft-used battle cry of the NCAA to maintain control over the careers of college athletes.<sup>2</sup> The NCAA specifically used the term “avocation,” defined as “a hobby or minor occupation,” and in doing so drew an implicit distinction with vocation,” a “person’s employment or main occupation, especially regarded as particularly worthy and requiring great dedication.”<sup>3</sup> We contend that college athletes’ participation in athletics is, in fact, a vocation—one that they strategically, and with great skill, balance with their studies and their personal lives.

In the 2021 case *NCAA v. Alston*, the Supreme Court gave college athletes back their agency over their careers by holding that the NCAA’s restrictions on college athletes receiving education-related compensation violated the Sherman Act, thereby making clear that antitrust laws applied

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<sup>1</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION 1 MANUAL § 2.9, AT 3 (2020), available at <https://www.ncaapublications.com/productdownloads/D121.pdf> <https://perma.cc/PJ4M-RG22>.

<sup>2</sup> *See id.*

<sup>3</sup> *See* Alex Sinatra, *Examining the Legal Landscape Involving Amateurism and the NCAA*, SPORTS LITIGATION ALERT (Jan. 29, 2021), <https://sportslitigation-alert.com/examining-the-legal-landscape-involving-amateurism-and-the-ncaa/> [<https://perma.cc/497H-NLDD>].

with full force to the NCAA.<sup>4</sup> Shortly after, the NCAA voted to allow college athletes to profit from their name, image, and likeness (NIL) for the first time.<sup>5</sup> This marked a seismic shift in college athletics. Since the inception of the NCAA, its limitations on compensation rendered college athletes effectively indentured to the NCAA. *Alston*, and the NCAA's subsequent NIL vote, broke those shackles in one fell swoop. Finally being able to profit from their NIL, college athletes can now add another title to their repertoire: "entrepreneur." Their non-athlete colleagues—whether on full-ride scholarships for academics, paying their own way through school, or anywhere in the middle—were always able to profit off their own NIL while building businesses and brands around their unique talents.

In this piece, we provide an overview of the opportunities, challenges, key developments, and uncertainties in the post-*Alston* world informed by our experiences as a sports law practitioner and a professional athlete. Section II discusses how the new NIL regime has changed the needs of college athletes. Section III considers how the athletics ecosystem can best respond to these needs. It provides an overview of the new programs emerging at colleges, business schools, and law schools and offers the programs that we have developed at the Texas A&M University as one promising model. Section IV looks at ongoing litigation over whether college athletes are employees of their universities and how this could complicate NIL rights. Section V analyzes uncertainties over the proper role of third party collectives in providing NIL opportunities to athletes and the NCAA's efforts to regulate in this space. Section VI concludes by offering our final thoughts on the future of NIL and college athletics.

Before we go further, you may have noticed we refer to these athletes as "college athletes" and not "student-athletes." This language is by design. The term student-athlete "was coined in the 1950s by the NCAA president and the Association's legal team to avoid paying worker's compensation to the widow of a football athlete who died after a game injury, while also preventing future generations of college athletes from receiving worker's compensation or pay-for-play."<sup>6</sup> Language matters. For years, the NCAA and its member schools have indoctrinated athletes into believing they

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<sup>4</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

<sup>5</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/83XU-CUY5].

<sup>6</sup> See Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE EDUCATION (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> [https://perma.cc/V6M3-KWGR].

should not be afforded free agency over their careers because they are “student-athletes.” Now, gone are the days where the NCAA, member schools, broadcasters, and brands are the only ones able to profit off the successes of college athletes.

## II. COLLEGE ATHLETES NEED EDUCATION AND SUPPORT TO NAVIGATE NEW NIL OPPORTUNITIES

The transition from high school to college to the professional world is tough for anyone but extremely difficult for athletes. Successfully balancing academics, athletics, and personal life takes responsibility, adaptability, team-work, and talent. These skills make athletes phenomenal partners to brands and companies because these are many of the skills needed to be successful in the corporate world.

When Trayveon Williams, one of the co-authors of this piece, entered the National Football League, he was navigating many firsts on the field and in his personal life, including coaching changes, new teammates, and an entirely new city.<sup>7</sup> On their own, each of those firsts can be chaotic and stressful. But he was also entering into a new corporate world of branding, agents, marketing representatives, licensing his NIL, paid appearances, and more. He remembers feeling overwhelmed. He wasn’t prepared or educated for this new world of entrepreneurship in which he was the CEO of his own career. Trayveon wished he had the opportunity to learn about these areas of the business before he entered the professional ranks: “Adaptability was the first skill that needed to be possessed in my new environment. Name, image, and likeness are the three most translatable traits for any human being in any work environment.”

The NCAA’s recent NIL rule-change means college athletes can now enter this complicated world of entrepreneurship in college. Athletes who are properly educated in financial planning and business before they enter the professional world are better prepared for the challenges the next level brings. But while college athletes have gained this freedom, in many states high school athletes still face barriers. As of the writing of this article, states like Texas prohibit high school athletes from monetizing their NIL.<sup>8</sup> This restraint on trade puts Texas athletes at a disadvantage and has caused some high school athletes to graduate early and leave the state so they can pursue

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<sup>7</sup> See *Cincinnati Bengals select Texas A&M running back Trayveon Williams No. 182 in the 2019 NFL Draft*, NAT’L FOOTBALL LEAGUE, <https://www.nfl.com/videos/cincinnati-bengals-select-texas-a-m-running-back-trayveon-williams-no-182-430454> [<https://perma.cc/5PAX-VJVM>] (last visited Oct. 25, 2022).

<sup>8</sup> See Tex. Educ. Code § 51.9246.

NIL deals earlier.<sup>9</sup> Perhaps the tides are changing in Texas, however. The state legislature recently introduced House Bill 1802, which would amend the Education Code and allow those athletes competing in University Interscholastic League (UIL) to monetize their NIL if they meet certain requirements.<sup>10</sup>

In another positive sign for the rolling back of state NIL restrictions, another House Bill was introduced into the Texas legislature that would make it easier for college athletes to profit from their NIL.<sup>11</sup> House Bill 2804 proposes many changes including that an “employee of the institution, may identify or otherwise assist with opportunities for a currently-enrolled student athlete to earn compensation from a third party for the use of the student athlete’s name, image, or likeness” with some restrictions. Previously, employees of educational institutions could not assist with NIL deals for college athletes.

While it seems like the Texas legislature is looking to make the state more attractive to college and high school athletes, only time will tell if these changes have any meaningful impact on the state’s athletics landscape.

### III. HOW TO EDUCATE ATHLETES TO NAVIGATE NIL

It is no secret that college athletes have a plethora of athletic requirements in school, including intense practice schedules and required individual workouts during vacation periods.<sup>12</sup> Even though some events are labeled as “optional,” college athletes know that usually means “attend or else.” They are also inundated with educational opportunities from their athletic departments, such as tutoring. But how effective are these educational opportunities? Often, athletes want engaging and exciting learning opportunities that complement their athletic careers and have concrete applications to their lives. From my experience working with college athletes, however, many of the educational opportunities provided to them are

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<sup>9</sup> See KP Kelly, *Quinn Cashes In: Ewers Leaving High School to Enroll Early at Ohio State*, TEX. HS FOOTBALL (Aug. 2, 2021), <https://texashsfootball.com/quinn-cashes-in-ewers-leaving-high-school-to-enroll-early-at-ohio-state/> [https://perma.cc/S9T4-MFFN].

<sup>10</sup> Tex. H.B. No. 1802, available at <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB01802I.pdf#navpanes=0> [https://perma.cc/U2QV-FNHX].

<sup>11</sup> *Id.*

<sup>12</sup> University of North Texas, *Athletics Activities*, <https://meangreensports.com/sports/2018/7/6/compliance-compliance-currentsa-Athletics-Activities-html> [https://perma.cc/PT6Y-2HFK].

cookie-cutter and do not provide an individually curated experience for the athletes.

To fill this need, college athletic departments are starting to hire staff directly to handle NIL and serve as entrepreneurial advisors to athletes. The University of Texas at Arlington has a Director of Name, Image, and Likeness, Kate Rosenberg, who recently hosted an open house-style event at a men's basketball game on campus.<sup>13</sup> With new positions like this popping up all over the country, there is a movement toward providing educational opportunities focused on helping college athletes succeed in the new world of entrepreneurship that is now open to them. Ben Chase, the Director of NIL Strategy at the University of Florida, recently explained his role in a little more depth in an interview with On3:

From what I understand, my role is to maximize NIL opportunities for all student-athletes at the University of Florida. To help Marcus (Castro-Walker) wherever he needs me. If I help roll out something to all student-athletes, help Marcus build it out for the football team as well. With Gator Made, everyone in and around the football facility, I'm there to support them. I can also be a second set of eyes on anything we're doing there. . . . My role is coming in and probably being the education leader for alumni, fans, student-athletes, and administration. I'm going to be at it for everything that happens in all sports, especially football."<sup>14</sup>

The NCAA did a study of athlete well-being in the fall of 2021 and released their results in May 2022.<sup>15</sup> A surprising (or not so surprising if you are locked into the industry) result was the emphasis players put in four key categories of educational support. According to the report, athletes most need educational resources in the following categories: "tax and financial literacy (49%), career planning (47%), navigating name, image and likeness

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<sup>13</sup> See Isaac Appelt, *Athletics director highlights name, image ,and likeness deals for student athletes*, THE SHORTHORN (JAN. 19, 2023), [https://www.theshorthorn.com/sports/athletics-director-highlights-name-image-and-likeness-deals-for-student-athletes/article\\_03b18584-97bf-11ed-a0e6-f72ef7dab3a2.html](https://www.theshorthorn.com/sports/athletics-director-highlights-name-image-and-likeness-deals-for-student-athletes/article_03b18584-97bf-11ed-a0e6-f72ef7dab3a2.html) [https://perma.cc/S4SB-97NY].

<sup>14</sup> See Nick de la Torre, *Interview with Ben Chase, Florida's New Director of NIL Strategy*, GATORS Online (Jan. 19, 2023), <https://www.on3.com/teams/florida-gators/news/interview-with-ben-chase-floridas-new-director-of-nil-strategy/> [https://perma.cc/HX7Q-MBYF].

<sup>15</sup> See NCAA *Student-Athlete Well-Being Study (Fall 2021), Survey Results*, NAT'L COLLEGIATE ATHLETIC ASS'N, [https://ncaaorg.s3.amazonaws.com/research/other/2020/2022RES\\_NCAA-SA-Well-BeingSurveyPPT.pdf](https://ncaaorg.s3.amazonaws.com/research/other/2020/2022RES_NCAA-SA-Well-BeingSurveyPPT.pdf) [https://perma.cc/7UT5-ET53] (last visited Nov. 1, 2022).

(NIL) opportunities (40%) and professional opportunities in sport (37%).”<sup>16</sup> These numbers were averaged across gender and division.<sup>17</sup>

The need for this kind of practical educational support is clear. “We had somebody at our school have a \$35,000 deal,” Hanah Smrt, a graduate track and field athlete at the University of Nevada, told Josh Planos of 538.com in an interview.<sup>18</sup> “How are they just supposed to figure out what to do with that amount of money when they have no education on it?” The NCAA study clearly shows what educational opportunities are most important to athletes going into the second year of NIL at the college level. But are schools staffed well enough to meet the growing and ever-changing needs of their athletes? Only time will tell. Schools that want to attract the most entrepreneurial athletes will need robust NIL programs.

When the college NIL era began, many firms such as marketing agencies pivoted from sponsorship platforms catering to professional athletes to focusing on college athletes.<sup>19</sup> These platforms seem to be trying to become one-stop-shops for all things branding, education, and sponsorship deals. Too often, however, trying to be everything to everyone can lead to not being anything for anyone. These platforms created educational modules that schools spend significant amounts of money to implement into their NIL education.<sup>20</sup> However, athletes do not always have the time to enter a portal and watch pre-recorded videos. Instead, they are likely to prefer a short TikTok or YouTube video explaining the same concept in a quarter of the time. This leaves schools with the impression they are providing resources to their athletes, but athletes may not feel they are getting the support they need.

Instead of these cookie-cutter programs, athletes need carefully curated and often real-time education, such as in-the-moment advice, critiques, and coaching so they can get their individual questions answered based on their unique circumstances. Athletes are used to having coaches speak with them directly, text them, and support them in real-time—not through a pre-re-

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Josh Planos, *College Athletes Suffered When Schools Weren't Ready For NIL*, FIVETHIRTYEIGHT (Jun. 30, 2022, 6:00 AM), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [<https://perma.cc/2DXN-9752>].

<sup>19</sup> See Julian Valentin, *The Opendorse Story*, OPENDORSE (Apr. 27, 2022), <https://biz.opendorse.com/blog/the-opendorse-story/> [<https://perma.cc/H7F9-5SYW>].

<sup>20</sup> See Joey Kaufman, *Ohio State athletics to spend almost \$50k on new partnership with Opendorse*, BUCKEYEXTRA (June 10, 2021, 2:09 PM), <https://www.buckeyextra.com/story/football/2021/06/10/ohio-state-athletics-spend-almost-50-k-opendorse-nil-partnership/7635431002/> [<https://perma.cc/AQP8-5MBR>].

corded video. The methods of educating these athletes on how to navigate NIL opportunities must support them in ways that are responsive to their preferred learning and communication styles.

A model for an interactive and real-time educational program for athletes is Texas A&M Mays Business School's AmplifyU Program, which is a business and leadership education program for Aggie Athletes.<sup>21</sup> This hands-on education program grew from an idea presented by Alex Sinatra, a sports lawyer and CEO/Founder of sports consulting business Your Potential for Everything and one of the co-authors of this piece. Sinatra presented her idea to Dr. Janet Parish, who was Sinatra's professor while a student at Mays Business School and is the current Director of Reynolds and Reynolds Sales Leadership Institute at Mays.<sup>22</sup> "I realized more people than ever would be trying to take advantage of these athletes" after the NCAA changed its NIL rules, said Professor Sinatra. "I knew we needed to give them the resources and education to understand contracts and recognize when a deal is good or when a person has their best interests at heart."<sup>23</sup>

Dr. Parish, along with others, ran with the idea. Athletes apply to the program and "learn from Mays Business School faculty as well as former Aggie athletes and other successful professionals about important business, leadership, and legal topics. In addition, participants will have opportunities to apply what they learn through competitions and other experiential learning activities such as an etiquette dinner, a networking mixer, and perspective sessions with former athletes and industry representatives."<sup>24</sup>

The class Professor Sinatra teaches for the program centers around contract review, contract negotiation, and NIL law in Texas.<sup>25</sup> Athletes who successfully complete the program have a Mays Business School class on their official transcript and receive a certificate of completion. These types of in-person educational programs seem to be more impactful for athletes than pre-recorded learning modules. One of the college athletes who participated in the program was Ava Underwood, '26, who plays on the Texas A&M women's volleyball team. "It was truly life changing," she said in an inter-

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<sup>21</sup> See *AmplifyU*, TEX. A&M UNIV., <https://tx.ag/amplifyu> [<https://perma.cc/95RC-58YW>] (last visited Oct. 25, 2022).

<sup>22</sup> *Id.*

<sup>23</sup> Jeannie Ralston, *The Game of Their Lives*, TEXAS A&M FOUND. (Feb. 14, 2023), [https://www.txamfoundation.com/News/The-Game-of-Their-Lives.aspx?fbclid=IWAR0Q\\_7Zm8MFe8wVCxb6Ho2xEYJyx6jYQXA3CwzRF5O6JwTHMHfEPIvZ-rZY](https://www.txamfoundation.com/News/The-Game-of-Their-Lives.aspx?fbclid=IWAR0Q_7Zm8MFe8wVCxb6Ho2xEYJyx6jYQXA3CwzRF5O6JwTHMHfEPIvZ-rZY) [<https://perma.cc/W6VP-FAJG>].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

view for a recent article.<sup>26</sup> “The information provided is great insight on how to make the most of your talents and abilities as a student-athlete. There is nothing comparable to the unique caliber of this experience in the nation, and we are blessed as Texas A&M student-athletes to have the opportunity to be part of this special program.” Athletes of any sport are encouraged to enroll in the program and thus far, athletes from track and field, football, volleyball, and equestrian have attended. “Student athletes at Texas A&M have many, MANY opportunities for success ahead of them. Some will have long pro careers. Some will have short pro careers followed by long business careers. Some will go straight to the business world and quickly into leadership roles. Some will be entrepreneurs leveraging their own brands, creating other brands or businesses. AmplifyU aims to provide experiential business education and a network of successful former athletes to elevate the student athletes as future business leaders,” says Dr. Parish.<sup>27</sup>

Another area college and high school athletes need help navigating in the NIL landscape is the legal dimension of this new frontier. Curated legal help from law firms can be expensive, so this assistance might not be sought out by athletes. While some law schools like Harvard have sports law clinics that sometimes offer free legal assistance to athletes, there are not many services available for college and high school athletes to obtain affordable legal counsel.<sup>28</sup> While athletes who already have lucrative NIL deals will likely have agents and family attorneys, many athletes from lower income households or who are first-generation college students are navigating this NIL world alone.

In an attempt to combat this hole in the market, Professor and Attorney Dan Lust, along with his students at New York Law School, created an NIL pro bono legal program.<sup>29</sup> The mission of The NIL Project at New York Law School is to: “provide free legal assistance to athletes regarding their NIL activities. As NIL continues to evolve, there is a necessity to not only provide athletes with proper guidance to effectively navigate their NIL landscape, but a need to educate them as well. Further, this project will

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<sup>26</sup> *Id.*

<sup>27</sup> Email from Dr. Janet Parish, Director of Reynolds and Reynolds Sales Leadership Institute, Tex. A&M U. Mays Bus. Sch., to AUTHOR NAME, AUTHOR POSITION, AUTHOR INSTITUTION (Sept 16, 2022) (on file with author).

<sup>28</sup> *Sports Law Clinic*, HARV. L. SCH., <https://hls.harvard.edu/clinics/externship-clinics/sports-law-clinic/> [<https://perma.cc/66VE-KFCJ>] (last visited May 17, 2023).

<sup>29</sup> See *NYLS Sports Law NIL Pro Bono Project*, N.Y. LAW SCHOOL, <https://nylssportslawsocie.wixsite.com/nyls-sls/probonoproject> [<https://perma.cc/7HPX-WQ4D>] (last visited Oct. 25, 2022).



ensure that athletes are not being taken advantage of in the new and ever-changing world of NIL.”<sup>30</sup>

College athletes have stressed the critical need for legal advice as they navigate their athletic careers. “Honestly, in terms of the legal stuff, we don’t have a lot of help at all,” explained Smrt, the track and field athlete at the University of Nevada.<sup>31</sup> “I’m a psychology major. I’m sure there’s plenty of athletes who are business marketing majors, but I don’t know what deals to not do . . . In the end, it’s like, we’re not being told that we’re basically being taken advantage of. There’s really not a lot of guidance.”<sup>32</sup>

In order for lawyers to adequately represent college athletes in navigating NIL opportunities, lawyers have to be trained in not only the substantive law of NIL but in the personal and professional needs of college athletes. To meet this need, we have developed a program at the Texas A&M University School of Law to train law students how to best work with college and professional athlete clients. In our new course, which we taught for the first time in the spring 2023 semester, law students learn negotiation, contract review, and contract drafting geared at the needs of college athletes with a focus on experiential learning.<sup>33</sup> For example, in the first session of the course in January 2023, students presented NIL business plans. Each student picked an area of the law, target market, and content stream to focus on, with students choosing to focus on educating collectives, small-school college athletes, high school athletes, and everything in between. Throughout the semester, Mr. Williams provided his unique perspective on NIL, college athletics, and professional athletics as someone immersed in this world day in and day out. A critical point the course stresses is that athletes are people. “Too often, people see these athletes as commodities to be traded and sold, and they forget that they’re humans first,” said Sinatra. “I hope people will invest in them as human beings whose inherent value is not dependent upon their performance on the court or the pitch or the field.”<sup>34</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> See Josh Planos, *College Athletes Suffered When Schools Weren’t Ready For NIL*, FIVETHIRTYEIGHT (Jun. 30, 2022), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [<https://perma.cc/2DXN-9752>].

<sup>32</sup> *Id.*

<sup>33</sup> See Caitlin Clark, *Bengals Running Back Trayveon Williams to Co-Teach NIL Course At Texas A&M School Of Law*, TEX. A&M TODAY (July 1, 2022), <https://today.tamu.edu/2022/07/01/bengals-running-back-trayveon-williams-to-co-teach-nil-course-at-texas-am-school-of-law/> [<https://perma.cc/GDT7-MU5J>]; Alex Sinatra (@YourPotential4), Twitter, <https://twitter.com/i/broadcasts/1MYxNnPPImvxw> [<https://perma.cc/8R6P-D6CP>] (last visited Oct. 25, 2022).

<sup>34</sup> Ralston, *supra* note 23.

We contend that this unique, interdisciplinary educational approach offers an effective way to train aspiring sports lawyers to support college athletes in the new age of NIL. Student responses to the class have been positive. “Participating in the NIL & Athlete Advocacy course has been one of the most enlightening experiences of my time in law school,” student Kate Rosenberg said of the class. “Our professors teach us from two vastly different perspectives, and my fellow students continue to amaze me with their creativity and ingenuity when it comes to navigating the NIL educational space.”<sup>35</sup>

Our goal is to ultimately combine the business and law school programs at Texas A&M and bring law students and college athletes into the classroom together to learn from each other. We envision bringing versions of this class not only to other law schools, but to undergraduate and graduate programs and high schools.

There is no one-size fits all for the athletes or the schools. However, one thing is clear to us: athletes need specially curated advice and real-time help for their myriad of questions.

#### IV. POTENTIAL COMPLICATIONS TO NIL RIGHTS: COLLEGE ATHLETES AS EMPLOYEES

So far, we have discussed the challenges and opportunities for college athletes under the new NIL regime for college athletes. But this is not the only paradigm shift ushered in by *Alston* that has radically reshaped college athletics and the rights of college athletes. Another critical development is the growing movement in favor of paying college athletes for their labor as employees. While this movement is still in its early phases, it has the potential to transform the world of college athletics once again in ways that could both benefit and inhibit the ability of college athletes to monetize their talent.

In September 2021, the National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum arguing that college athletes are employees under the National Labor Relations Act (NLRA).<sup>36</sup> “Players at Academic Institutions perform services for institutions in return for com-

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<sup>35</sup> Interview with Texas A&M University School of Law student Kate Rosenberg (March 10, 2023).

<sup>36</sup> See Office of Public Affairs, *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NAT’L LAB. REL. BD. (Sept. 29, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [https://perma.cc/WR6M-9RNV].

pensation and subject to their control. Thus, the broad language of Section 2(3) of the Act, the policies underlying the NLRA, Board law, and the common law fully support the conclusion that certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment,” wrote Abruzzo.<sup>37</sup> “My intent in issuing this memo is to help educate the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, about the legal position that I will be taking regarding employee status and misclassification in appropriate cases.”<sup>38</sup>

College athletes are beginning to advance a similar interpretation in court. One recent example is *Johnson v. NCAA*, which was filed in November 2019 by former Villanova University football player Trey Johnson.<sup>39</sup> The lawsuit contends “that student athletes who engage in interscholastic athletic activity for their colleges and universities are employees who should be paid for the time they spend related to those athletic activities” under the Fair Labor Standards Act.<sup>40</sup> The action further argues that these athletes are student-workers who take classes while also performing a job for the university. It contends that since students who sell tickets to basketball games are compensated for their time, the basketball players should be paid for their time as well.<sup>41</sup> This argument has gained steam since the *Alston* decision and the NLRB memorandum,<sup>42</sup> as well as recent scrutiny of the NCAA’s unequal treatment of women’s teams in tournaments like March Madness.<sup>43</sup> In March 2021, Oregon basketball star Sedona Prince brought to light the disparity in facilities and treatment between the March Madness tournaments for men’s and women’s teams. The video went viral and caught the attention of members of Congress, leading to a report documenting the inequities in the NCAA’s treatment of women in sport and how to address it. This video precipitated a cascade of sweeping changes to the way the NCAA undervalues women’s sports despite findings that investment into women’s sports actually reaps huge financial returns.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Office of Public Affairs, *supra* note 36.

<sup>43</sup> See *NCAA External Gender Equity Review*, KAPLAN HECKER & FINK LLP (Oct. 21, 2021), <https://ncaagenderequityreview.com/> [<https://perma.cc/X7DT-RHDR>]; Sedona Price (@sedonerrr), TIKTOK (Mar. 18, 2021), <https://www.tiktok.com/@sedonerrr/video/6941180880127888646?lang=EN> [<https://perma.cc/KL2J-B85A>].

While it has not reached a final conclusion on the merits, Johnson's suit survived the NCAA's motion to dismiss in August 2021. In reaching that decision, the U.S. District Court for the Eastern District of Pennsylvania wrote that "the Complaint plausibly alleges that Plaintiffs are employees."<sup>44</sup>

The District Court's denial of the NCAA's motion to dismiss is now under appellate review in the Third Circuit.<sup>45</sup> On appeal, the NCAA and other member schools argue that college athletes are not student workers because college athletics are part of an educational program, not a business venture.

The Third Circuit panel heard oral arguments in February 2023 in which the judges largely appeared hostile to the NCAA's arguments,<sup>46</sup> but as of the writing of this article the panel has not issued a decision. Even if the Third Circuit upheld the District Court's denial of the motion to dismiss, this would not constitute a final judgment endorsing Johnson's argument that college athletes are student workers. It would merely allow the case to proceed beyond the initial motion to dismiss phase. The final outcome of this litigation therefore may not be known for some time.

If college athletes are classified as employees, then educational institutions would have to pay them for their labor. But employee status would not necessarily be straightforwardly beneficial to student athletes. It could potentially reduce athletes' ability to monetize their NIL. Many public universities have regulations that prevent their employees from having another job outside of the university or engaging in consulting work unless they receive permission from supervisors.<sup>47</sup> It is not hard to imagine that universities might withhold permission to athletes who want to engage in activities like brand ambassador work, autograph signings, or merchandise sales. Would we then go back to a time before *Alston* when college athletes could not be entrepreneurs without the permission of the NCAA? Maddie Salamone, the Vice President of the College Football Players Association, identifies further complications:

[S]imply changing the employment status of athletes will not automatically make things better for athletes or fix what is broken within college

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<sup>44</sup> Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

<sup>45</sup> Complaint, Johnson v. NCAA, No. 22-1223 (3d Cir. Feb. 8, 2022).

<sup>46</sup> Amanda Christovich, *Federal Judges Blast NCAA Amateurism Model*, FRONT OFF. SPORTS (Feb. 15, 2023), <https://frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/> [<https://perma.cc/3VWG-8D5L>].

<sup>47</sup> Human Resources, *Outside Employment*, U. TEX. AT AUSTIN, <https://hr.utexas.edu/current/compliance/outside-employment> [<https://perma.cc/52K5-A5XV>] (last visited May 17, 2023).

athletics. It's even possible that things could get worse for athletes initially, because we still don't have the appropriate structures in place to support athletes as employees, including a process for collective bargaining. The CFBPA exists to serve as a powerful collective voice for college football athletes and is committed to ensuring these athletes have the support they need now and as changes continue to take place within college athletics.<sup>48</sup>

## V. COLLECTIVES AND BOOSTERS: THIRD-PARTY SUPPORT AND PAY-FOR-PLAY CONCERNS IN THE NEW NIL LANDSCAPE

A new entity that has emerged in the wake of the NCAA allowing college athletes to profit from their NIL are "NIL collectives." These are independent, school-specific groups of alumni and other donors that "pool funds from boosters and businesses, help facilitate NIL deals for athletes and also create their own ways for athletes to monetize their brands."<sup>49</sup> Currently, these NIL collective are largely unregulated. However, many schools have argued collectives should be regulated or banned by Congress over concerns that they provide a "pay for play model" that "damages the integrity of the collegiate athletic model," and Senators Tommy Tuberville and Joe Manchin have been considering the status of collectives as part of their plans to introduce an NIL bill in the Senate.

Pay-for play in the NCAA is essentially paying athletes to play their sport. Athletes are not allowed to earn a salary or be paid to play their sport or be offered money to attend a specific school or to remain at a specific school.<sup>50</sup>

Recently, it was announced that more than 100 Texas Tech University football players will receive "\$25,000 deals" from The Matador Club, a local nonprofit collective.<sup>51</sup> The players will receive these payments to "perform community service, serve as ambassadors for local and West Texas

<sup>48</sup> Text interview with Maddie Salamone (Sept 17, 2022).

<sup>49</sup> <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>

<sup>50</sup> See *Name, Image and Likeness*, NCAA, <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx> [https://perma.cc/WT2M-SPYS] (last visited Nov. 1, 2022); See Paul Myerberg & Stever Berkowitz, *Two Senators Ask NIL Collectives to Provide Feedback on Activities Influencing College Athletics*, USA TODAY, <https://www.usatoday.com/story/sports/college/2022/09/22/senators-ask-nil-collectives-engaged-college-athletics-feedback/8082116001/> [https://perma.cc/RFA5-LRXX] (Sep. 22, 2022, 3:05 PM).

<sup>51</sup> See Max Olson, *Texas Tech Collective to Offer \$25,000 NIL Deals to 100-Plus Football Players*, THE ATHLETIC (Jul, 19, 2022, 4:33 PM), <https://theathletic.com/>

charities and appear at Matador Club events.”<sup>52</sup> “This serves as sort of a base salary for the whole locker room,” Cody Campbell, a founding member of the Matador Club and Texas Tech regent, told *The Athletic*, “And that should add a lot of stability and continuity to the program.”<sup>53</sup>

There are several issues this type of deal raises in the new NIL landscape. When an NIL deal is given in exchange for something fluid and not clearly defined, such as community service, it is harder to establish that the players are in fact being paid for their community service rather than for playing their sport and thereby running afoul of the NCAA’s pay-for-play prohibition.<sup>54</sup> The parameters of an NIL deal with a collective therefore need to be very clearly defined so as to not violate NCAA rules. When all players in a group or on a team receive an NIL deal from a collective, there is an even stronger argument that a pay-for-play situation has occurred.<sup>55</sup>

Finally, when a collective is closely entwined with its university, or where a university itself is promoting NIL deals for its athletes, there could be an argument that this entwinement triggers Title IX, which protects against sex discrimination in education. If a collective focuses only on a sport like football, which is dominated by male athletes, one wonders if its lack of NIL support for any women’s teams could violate Title IX.<sup>56</sup> University of Florida’s Director of NIL Strategy discussed Title IX in an interview with On3<sup>57</sup>:

Louisiana, Ohio, Idaho, and Tennessee, their state laws let the schools help facilitate opportunities. They don’t really need a collective because the schools can help do those deals for the student-athletes. [The state of Florida, from a legislation standpoint, I think is moving toward that because it’s a competitive disadvantage for us not to. Then Title IX stuff comes up. If they have someone on staff that is doing deals for student-athletes, where is the equity piece? That’s a lot of where my role will be. Make sure we’re doing our part on all sports.”

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news/texas-tech-boosters-nil-deal-players/ncfXRrM0sTXr/ [https://perma.cc/4FNH-QRTF].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See* Wilton Johnson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, SPORTS ILLUSTRATED (Aug. 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar> [https://perma.cc/NLX7-UW64].

<sup>56</sup> *See* Amanda Christovich, *NIL Collectives Are Slacking on Supporting Women’s Sports*, FRONT OFF. SPORTS (Jan. 10, 2023), <https://frontofficesports.com/collectives-womens-sports/> [https://perma.cc/67H9-ASVJ].

<sup>57</sup> *See* de la Torre, *supra* note 14.

This is an area of sports law to watch.

It remains to be seen what deals will ultimately run afoul of current state legislation and NCAA rules. In this uncertain landscape, it is important that the athletes themselves do not suffer. If there are rules violations, the brands, collectives, and universities, all of which have significant resources, should bear the brunt of the reprimands, rather than young athletes. The complicated regulatory landscape surrounding collectives and NIL provides another reason why athletes require education and professional and legal support.

The NCAA has started to take notice of collectives' actions. "The expectation is that there is actual NIL activity, not just payments of cash," SEC commissioner Greg Sankey says. "It's not clear that these collectives are actually engaged in meeting that expectation."<sup>58</sup> In May 2022, the NCAA approved new guidance centered around how third parties, specifically boosters and collectives generally, can engage with prospective college athletes and current athletes.<sup>59</sup> The new guidance is likely based on the assumption that some of the behaviors exhibited by third parties violate existing NCAA rules and regulations.<sup>60</sup>

As noted in the NCAA Division I Board of Directors' charge, the expectation of the membership and representatives of their athletics interests is that they are abiding by current NCAA rules regarding recruiting and pay-for-play.<sup>61</sup> The NCAA's definition of a booster is "as an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program or to assist or to have assisted in providing benefits to enrolled student-athletes or their family members."<sup>62</sup>

The policy goes on to explain that many of the third parties referenced in their policy trigger the definition of a booster and thus cannot be involved in the recruiting of prospective college athletes. Involvement in-

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<sup>58</sup> See Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [<https://perma.cc/T3CM-7GG9>].

<sup>59</sup> See NCAA, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement* (Jul. 1, 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf) [<https://perma.cc/8P68-SYY3>].

<sup>60</sup> *Id.* at 1.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> *Id.*

cludes but is not limited to: (1) recruiting conversations between an individual or entity that has triggered booster status and a prospective college athlete or (2) communication (e.g., call, text, direct message) with a prospective college athlete, a prospective college athlete's family, or others affiliated with the prospective college athlete for a recruiting purpose or to encourage the prospective college athlete's enrollment at a particular institution.<sup>63</sup>

The NCAA also places restrictions on how institutional staff and coaches can interact with prospective college athletes and third parties. They may not "organize, facilitate or arrange a meeting between a booster/NIL entity and a prospective college athlete (e.g., provide the individual or entity with a recruiting list or watch list, including the NCAA Transfer Portal)."<sup>64</sup> Additionally, they may not "communicate directly or indirectly with a PSA on behalf of a booster/NIL entity."<sup>65</sup>

The NCAA's interim policy on NIL also lays out how third parties, including collectives, can engage with current college athletes. NIL agreements cannot be "guaranteed or promised contingent on initial or continuing enrollment at a particular institution."<sup>66</sup> This also applies to prospective college athletes.<sup>67</sup> Additionally, similar to the regulations on NIL agreements for prospective college athletes, they must be based on "an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions, athletic performance, achievement, or membership on a team."<sup>68</sup>

We have begun to see the first cases involving boosters and NIL violations in this new college athletics landscape.<sup>69</sup> The NCAA recently released the negotiated resolution in a case involving around the University of Miami (Florida) head women's basketball coach and the recruiting of twins Haley

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> See NCAA, *supra* note 59; NCAA, *Bylaw, Article 19: Infractions Program*, NCAA LEG. SERV. DATABASE, <https://web3.ncaa.org/lstdbi/search/bylawView?id=11781> [<https://perma.cc/TE5A-VLH5>] (last visited May 17, 2023).

<sup>66</sup> See NCAA, *supra* note 59.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Meghan Durham, *Recruiting violations occurred in Miami (Florida) women's basketball program*, NCAA INFRACTIONS (Feb. 24, 2023), <https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx> [<https://perma.cc/L2C8-HXVF>].



and Hanna Cavinder.<sup>70</sup> In this case, the “women’s basketball head coach violated NCAA rules when she facilitated impermissible contact between two prospects and a booster, according to an agreement released by the Division I Committee on Infractions. In facilitating the contact, the head coach also violated rules on publicity before signing and, because of her direct involvement, she violated head coach responsibility rules.”<sup>71</sup> Haley and Hanna Cavinder are two of the most public, popular, and highly paid athletes in the college NIL world, so this case sends a warning signal to other schools, collectives, and boosters that the NCAA is willing to actively enforce its NIL rules. It remains to be seen whether the NCAA will have the resources, manpower, and motivation to investigate the backlog of cases they have on their docket, but this is a warning shot that many were waiting for.

After this case, the NCAA’s bylaw on NIL violations took effect on January 1, 2023. Bylaw 19.7.3 reads:

19.7.3 Violations Presumed in Select Cases. In cases involving name, image and likeness offers, agreements and/or activities in which related communications and conduct are subject to NCAA regulation, the infractions process (including interpretive requests) shall presume a violation occurred if circumstantial information suggests that one or more parties engaged in impermissible conduct. The enforcement staff may make a formal allegation based on the presumption. The hearing panel shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image and likeness activity complied with NCAA legislation. (Adopted: 10/26/22 effective 1/1/23).

These recent efforts by the NCAA are meant to shed light on the murky regulations surrounding NIL, boosters, and collectives. However, if the NCAA shies away from enforcing its rules, this guidance will have little effect in curbing impermissible activities by third parties in the NIL space. Perhaps the enforcement in the Cavinder case is an omen of things to come.

## VI. THE FUTURE OF COLLEGE ATHLETICS AND NIL

While it is impossible to confidently predict the future of NIL in college athletics given its current state of flux, there are certain indications of possible future directions. Some states are amending and even repealing

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<sup>70</sup> *Negotiated Resolution: University of Miami (Florida) — Case No. 020161*, NCAA COMM. ON INFRACTIONS PANEL (Feb. 24, 2023), [https://ncaaorg.s3.amazonaws.com/infractions/decisions/FEB2023D1INF\\_COIPublicReportUniversityMiamiFL.pdf](https://ncaaorg.s3.amazonaws.com/infractions/decisions/FEB2023D1INF_COIPublicReportUniversityMiamiFL.pdf) [<https://perma.cc/XEB3-VQNR>].

<sup>71</sup> See Durham, *supra* note 69.

their NIL laws to keep pace with states whose laws are less restrictive and more appealing to players.<sup>72</sup> Consistent enforcement of state and NCAA regulations are necessary to ensure a fair playing field, which was one of the founding principles of the NCAA.<sup>73</sup> The NCAA, however, seems to be reluctant to uniformly enforce rules and regulations because it is fearful of generating additional litigation. After its loss in *Alston* and ongoing court battles like *Johnson*, it is not surprising the NCAA fears another blow to its business. According to recent tax records, the NCAA paid out \$52.5 million in outside legal costs in FY21.<sup>74</sup> The NCAA also spent \$470,000 in lobbying while its NIL interim policy went into effect without a federal NIL law on the books.<sup>75</sup> Some say federal legislation is necessary to have conformity in the industry, but that does not seem likely in the near future.<sup>76</sup> Others believe more regulation will come soon to the NIL ecosystem.<sup>77</sup>

What is clear is that although college athletes now have more flexibility to receive NIL compensation, the profits most athletes have so far are miniscule in the context of how profitable college athletics are. According to filing documents, the NCAA had total revenues of \$1.1 billion and media rights revenues of \$915.8 million in FY21.<sup>78</sup> But “through May 31, the average NCAA Division 1 athlete has received \$3,711 of money through NIL.”<sup>79</sup>

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<sup>72</sup> See Derin Dickerson & Trenton Hafley, *State Experiments with NIL Rules Put Athletes on Defense*, BLOOMBERG L. (Apr. 1, 2022, 3:00 AM), <https://news.bloomberglaw.com/ip-law/state-experiments-with-nil-rules-put-athletes-on-defense>.

<sup>73</sup> See *History of NCAA*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [https://perma.cc/64G5-KKZH] (last visited Oct. 30, 2022).

<sup>74</sup> See Amanda Christovich, *Tax Returns Reveal Mark Emmert, Coach K Paydays and NCAA Legal Fees*, FRONT OFF. SPORTS (May 17, 2022, 4:33 PM), <https://frontofficesports.com/newsletter/fos-pm-ncaas-big-spending-reveal/> [https://perma.cc/ENX9-PB6N].

<sup>75</sup> *Id.*

<sup>76</sup> Myerberg & Berkowitz, *supra* note 50.

<sup>77</sup> Email interview with Christian Dennie, Partner, Fox Rothschild LLP & Adjunct Professor, Texas A&M University School of Law (Aug. 12, 2022).

<sup>78</sup> Christovich, *supra* note 74.

<sup>79</sup> See Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO! FINANCE (Jul. 1, 2022), [https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html?guccounter=1&guce\\_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAF4oq8FJ-FMyE\\_SGNV6yrDLrOCyYxvbUcYdDqptBSqVqScJ-vLaI7MqspZpOPuLVnmO1qHW60uRqz2S1NWj6UUdlg8TG1MZC9EfwQ0cnt4zcbE\\_Nsx3mqC1oMFg0K-1DMQq\\_Jb4gcoJ\\_6ZgO9a8Wcf1v4gIZS31sRL2S6NxXezlPs](https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html?guccounter=1&guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAF4oq8FJ-FMyE_SGNV6yrDLrOCyYxvbUcYdDqptBSqVqScJ-vLaI7MqspZpOPuLVnmO1qHW60uRqz2S1NWj6UUdlg8TG1MZC9EfwQ0cnt4zcbE_Nsx3mqC1oMFg0K-1DMQq_Jb4gcoJ_6ZgO9a8Wcf1v4gIZS31sRL2S6NxXezlPs) [https://perma.cc/N9EP-P3S2].

The world of college athletics is ever-changing. As the athletics landscape shifts toward a hopefully more human-focused ecosystem, we must remember athletes are humans first. The NCAA rule changes, new legislation, and brand partnerships should be crafted through the lens of human-focused changes and not changes solely predicated on the bottom line. We hope to see more positive changes coming into the ecosystem in the future.

