

## NOTES

### NCAA “NIL,” STUDENT-ATHLETES “WON”: THE RECOMMENDED APPROACH FOR INDIANA’S NAME, IMAGE, AND LIKENESS LEGISLATION FOLLOWING *NCAA v. ALSTON*

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#### INTRODUCTION

On June 21, 2021, the Supreme Court decided *NCAA v. Alston*, unleashing a flurry of new name, image, and likeness (“NIL”) possibilities for collegiate athletes.<sup>1</sup> The main issue in *Alston* was whether the National Collegiate Athletic Association (“NCAA”) could limit the “education-related benefits” that the student-athletes could receive.<sup>2</sup> In *Alston*, the Court ruled that the NCAA violated antitrust law by limiting student-athlete access to education-related benefits.<sup>3</sup>

While the *Alston* case does not directly discuss NIL, Justice Kavanaugh made it clear in his concurrence that “[t]he NCAA is not above the law.”<sup>4</sup> The *Alston* ruling, and Justice Kavanaugh’s concurrence, indicated that if the NCAA tried to prohibit NIL agreements for student-athletes, the Supreme Court would once again strike down the restriction.<sup>5</sup>

Starting on July 1, 2021, the NCAA permitted student-athletes to profit from their NIL, “potentially directing millions of dollars to college athletes every year.”<sup>6</sup> While the new NIL policy has not been in effect for long, countless

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1. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

2. *Id.*

3. *Id.* at 2144.

4. *Id.* at 2169 (Kavanaugh, J., concurring).

5. *See id.* at 2166–69.

6. Alan Blinder, *College Athletes May Earn Money from Their Fame*, N.C.A.A. Rules, N.Y.

student-athletes are already taking advantage of this new opportunity to profit off their likeness by entering agreements while still in college. Although the contract values are generally not public, NIL agreements range from receiving free products from companies all the way to six-figure marketing and commercial deals for individuals and teams alike.<sup>7</sup>

Take Bryce Young, the starting quarterback for the football team at the University of Alabama; Brigham Young University's entire football team; Olivia Dunne, a gymnast at Louisiana State University; and Gable Steveson, a wrestler at the University of Minnesota as examples. Before Young had even played for Alabama, Nick Saban, the head Alabama football coach, reported that Young had already signed contracts worth close to seven figures.<sup>8</sup> One deal with Cash App is reportedly worth six figures on its own and will place Young in national commercials alongside current NFL stars.<sup>9</sup>

For the BYU football team, an NIL agreement with Built Brands will provide "compensation to all 123 members of the Cougars' football team as well as provide full tuition for walk-on players."<sup>10</sup> While this arrangement seems similar to prohibited pay-to-play arrangements, the NCAA investigated the issue and indicated to the BYU athletic director that the NCAA was not taking further action at this time.<sup>11</sup> Under the old NCAA regulations, Built Brands would have been able to sign an endorsement deal with BYU but would not have been able to directly compensate the players.<sup>12</sup>

While mainstream sports like football and basketball are bound to garner more attention from advertisers, NIL agreements have given athletes in smaller sports, such as gymnastics and wrestling, more attention as well. For example, LSU gymnast Olivia "Livvy" Dunne has amassed an incredibly large social

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TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/CFF9-7EDE>].

7. Dennis Dodd, *How College Football's Star Quarterbacks Are Managing NIL Rights Alongside On-Field Expectations*, CBS SPORTS (Aug. 31, 2021, 10:44 AM), <https://www.cbssports.com/college-football/news/how-college-footballs-star-quarterbacks-are-managing-nil-rights-alongside-on-field-expectations/> [<https://perma.cc/PZH9-BMSZ>].

8. Khristopher J. Brooks, *Endorsement Deals Come Thick and Fast for College Athletes, as NCAA Floodgates Open*, CBS NEWS (July 29, 2021, 8:12 AM), <https://www.cbsnews.com/news/college-athletes-endorsements-sponsorship-ncaa-nil/> [<https://perma.cc/M8HE-GA74>].

9. Dodd, *supra* note 7.

10. Wilton Jackson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, SPORTS ILLUSTRATED (Aug. 12, 2021, 5:41 PM), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar> [<https://perma.cc/SJ2S-L7LR>].

11. Erin Walsh, *Report: Miami, BYU Investigated by NCAA Enforcement over Potential NIL Violations*, BLEACHER REP. (Dec. 10, 2021), <https://bleacherreport.com/articles/10020519-report-miami-byu-investigated-by-ncaa-enforcement-over-potential-nil-violations> [<https://perma.cc/PZ9E-RK97>].

12. See Blinder, *supra* note 6; David Fletcher, *10 Biggest Sponsorship Deals in College Sports!*, ATHLETICADEMIX (Nov. 21, 2020), <https://athleticademix.com/10-biggest-sponsorship-deals-in-college-sports/> [<https://perma.cc/TRS6-L58L>].

media following and has leveraged that following to sign multiple NIL agreements.<sup>13</sup> Dunne’s first deal was with the activewear brand Vuori, and she has since signed deals with companies including American Eagle, Bartleby, Madden/EA Sports, and GrubHub.<sup>14</sup> The exact details of Dunne’s contracts are not public, but experts predict Dunne will make close to one million dollars per year.<sup>15</sup>

Gable Steveson, while already an NCAA champion in wrestling, rose to more widespread fame after winning the gold medal at the 2020 Tokyo Olympics.<sup>16</sup> Shortly afterwards, Steveson signed with media company Barstool Sports and appeared on the popular sports podcast Pardon My Take, where they launched a branded t-shirt, giving Steveson eighty percent of the sales revenue.<sup>17</sup> Steveson then became the first NIL athlete to sign a deal with World Wrestling Entertainment, Inc. (“WWE”), a professional performance wrestling organization.<sup>18</sup> The deal will allow Steveson to defend his NCAA title, as well as occasionally appear on nationally televised WWE programs.<sup>19</sup> Steveson would not have been able to profit off his television appearances under the old NCAA regulations without losing eligibility.<sup>20</sup> Following the conclusion of his NCAA career, Steveson’s full WWE contract will automatically activate.<sup>21</sup>

In light of all these new opportunities for collegiate athletes, there is little regulation governing new NIL agreements. The NCAA has given some limited guidance on NIL, namely upholding the restrictions on “pay-for-play and improper inducements . . . to attend a particular school.”<sup>22</sup> While many states have passed NIL legislation, Indiana and the federal government have not, and neither appear close to passing any regulations.<sup>23</sup> This leaves Indiana student-athletes,

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13. Jenna Lemoncelli, *Inside the Life of Olivia Dunne: The LSU Gymnast Cashing in Big on NIL Movement*, N.Y. POST (Oct. 8, 2021, 8:56 AM), <https://nypost.com/2021/10/08/inside-the-life-of-olivia-dunne-the-lsu-gymnast-whose-cashing-in-big-on-nil-movement/> [https://perma.cc/SS9T-DDRQ].

14. *Id.*

15. *Id.*

16. Mike Chiari, *Gable Steveson, Olympic Gold Medalist, Agrees to WWE’s 1st NIL Contract*, BLEACHER REP. (Sept. 9, 2021), <https://bleacherreport.com/articles/10012054-gable-steveson-olympic-gold-medalist-agrees-to-wwes-1st-nil-contract> [https://perma.cc/9EFM-XVW6].

17. Dan Katz (@BarstoolBigCat), TWITTER (Aug. 9, 2021, 12:53 PM), <https://twitter.com/barstoolbigcat/status/1424775966329610244?lang=en> [https://perma.cc/F4SY-AG7S]; Pardon My Take, *Gable Steveson Recaps Gold Medal Victory & We Pitch Daymond John Ideas*, YOUTUBE (Aug. 11, 2021), [https://www.youtube.com/watch?v=ESsfZ91EDsg&ab\\_channel=PardonMyTake](https://www.youtube.com/watch?v=ESsfZ91EDsg&ab_channel=PardonMyTake).

18. Chiari, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

22. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/V77X-MTGV].

23. Zach Osterman, *9 of 11 States in Big Ten Working on Laws to Pay Student-Athletes. Here’s*

universities, and businesses to operate in a mostly unregulated and developing field. With regulation in Indiana being left entirely to the universities, this will lead to inequalities by giving additional advantages to student-athletes at select universities.

This Note argues that Indiana legislators need to protect the state's student-athletes and create a policy that will allow for a base-level of protection for the student-athletes among all NCAA divisions. Part I looks at the history of the NCAA and the development of student-athlete compensation throughout the years to provide a background for the current NIL policy. Part II discusses the direct and indirect effects of the *Alston* decision and explains what the holding means for the NCAA's current compensation policies. Part III discusses the current approaches to NIL regulation and examines select state regulations and university policies. Part IV provides a recommendation for the Indiana legislature's regulation of NIL agreements in collegiate athletics. The legislation recommended by this Note would ensure adequate protection for all student-athletes, regardless of the NCAA division, by requiring a minimum level of NIL-related education and programming to better prepare student-athletes for the possible complications associated with entering NIL agreements.

## I. GENERAL BACKGROUND OF THE NCAA

### *A. History*

The NCAA was first “founded in 1906 to regulate the rules of college sport and protect young athletes.”<sup>24</sup> At the time, football was gaining the reputation of being a brutal sport with numerous injuries and deaths occurring during collegiate competition.<sup>25</sup> Additionally, colleges and universities were recruiting and hiring people who were not enrolled in college to play on their university football teams.<sup>26</sup> Because of these issues, many schools stopped playing football altogether.<sup>27</sup>

In 1905, President Theodore Roosevelt held a meeting with athletic directors from the nation's top football schools and “urged them to clean up the game.”<sup>28</sup> On December 28, 1905, sixty-two colleges and universities joined together to form the Intercollegiate Athletic Association of the United States (“IAAUS”).<sup>29</sup> The IAAUS became an official “rules-making body [on] March 31, 1906,” and

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*Why Indiana Isn't*, INDIANAPOLIS STAR (June 11, 2021, 12:48 PM), <https://www.indystar.com/story/sports/college/indiana/2021/06/11/indiana-legislature-name-image-likeness-laws-notre-dame-purdue-iu/7598879002/> [https://perma.cc/7QCB-AMXA].

24. *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [https://perma.cc/CT56-H76L] (last visited Sept. 9, 2021).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

eventually became known as the NCAA.<sup>30</sup> Over time, collegiate athletics continued to grow rapidly with some schools devoting more funding to athletics.<sup>31</sup> The differing levels of funding created an unfair advantage for the schools that chose to spend more money on their athletic programs, leading the NCAA to divide the schools into three separate divisions, Division I, Division II, and Division III.<sup>32</sup>

### *B. Compensation Regulation*

As the NCAA has grown and changed over the years, its view on student-athlete compensation has also changed.<sup>33</sup> From its inception, the NCAA held the view that “[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.”<sup>34</sup> However, in 1948, the NCAA first began to soften that stance by adopting the “Sanity Code,” which “reiterated the NCAA’s opposition to ‘promised pay in any form’” but did allow schools to pay the student-athletes’ tuition.<sup>35</sup> Then, in 1956, the NCAA began to allow payments that “include[d] room, board, books, fees, and ‘cash for incidental expenses such as laundry.’”<sup>36</sup> Continuing with the theme of providing student-athletes with additional compensation, in 1974, the NCAA began allowing paid professional athletes to continue competing in the NCAA as long as they were competing in a sport other than the one they were being paid in.<sup>37</sup> In 2014, the NCAA allowed schools to give student-athletes more money by permitting schools to award “scholarships up to the full cost of attendance.”<sup>38</sup> Academic and athletic scholarships typically cover tuition, housing, and books, but the full cost of attendance covers the entire cost the university estimates that a student spends to go to school, including transportation and miscellaneous expenses.<sup>39</sup>

In addition to these changes to compensation, the NCAA has also created funds to allow for “benefits that are not related to education” to be given to some

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30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*; Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2148 (2021).

34. *Alston*, 141 S. Ct. at 2148 (quoting Intercollegiate Athletic Ass’n of the United States Constitution By-Laws, Art. VII, § 3 (1906)).

35. *Id.* at 2149.

36. *Id.* (quoting *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019)).

37. *Id.*

38. *Id.* at 2150 (quoting *O’ Bannon v. Nat’l Collegiate Athletic Ass’n.*, 802 F.3d 1049, 1054–55 (9th Cir. 2015)).

39. *What Does Cost of Attendance (COA) Mean?*, FED. STUDENT AID, <https://studentaid.gov/help-center/answers/article/what-does-cost-of-attendance-mean> [<https://perma.cc/6XTZ-TNHK>] (last visited Jan. 3, 2022).

student-athletes, including “loss-of-value insurance premiums.”<sup>40</sup> These payments can be made in cash and are without any limits on the amount an individual student-athlete can receive, leading some student-athletes to take in over ten-thousand dollars in payments.<sup>41</sup> The NCAA also pays for family travel to certain athletic events, such as the NCAA basketball tournament and the College Football Playoff.<sup>42</sup> Finally, the NCAA has even allowed payments “incidental to athletics” to athletes who qualify for certain college football bowl games or perform well at the Olympics.<sup>43</sup>

Over time, the revenue earned by the NCAA has greatly increased, with the majority of those benefits not being passed through to the student-athletes.<sup>44</sup> For example, “[i]n 1985, Division I football and basketball raised approximately \$922 million and \$41 million respectively[,]” and by 2016, those same schools “raised more than \$13.5 billion.”<sup>45</sup> Additionally, television rights for the NCAA basketball tournament went from \$16 million per year in 1984 to around \$1.1 billion in 2016.<sup>46</sup>

Although the NCAA provided many exceptions to the limits on student-athlete compensation, it still heavily regulated compensation in most respects, which limited the amount of money student-athletes might have otherwise received.<sup>47</sup> In response to the continuing limitations on student-athlete compensation, many current and former collegiate basketball and football athletes brought suit against the NCAA in 2019 alleging violation of federal antitrust laws because of the limitation on student-athlete compensation.<sup>48</sup> The district court held that the “limits on other education-related benefits” were not allowed based on the Sherman Act.<sup>49</sup> The Ninth Circuit subsequently affirmed this ruling in 2020.<sup>50</sup>

## II. OVERVIEW OF THE *NCAA v. ALSTON* DECISION

### *A. Case Background*

In 2019, a class of current and former football and basketball student-athletes filed a class action lawsuit against the NCAA and eleven Division I conferences

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40. *Alston*, 141 S. Ct. at 2150 (quoting *O’Bannon*, 802 F.3d at 1072 n.15).

41. *Id.*

42. *Id.*

43. *Id.*

44. *See generally id.* at 2150-51.

45. *Id.* at 2158.

46. *Id.*

47. *See generally id.* at 2150-54.

48. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

49. *Id.* at 1109.

50. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020).

claiming that the NCAA rules violated Section One of the Sherman Act.<sup>51</sup> The pertinent part of Section One of the Sherman Act prohibits contracts, combinations, or conspiracies “in restraint of trade or commerce among the several States.”<sup>52</sup> The district court invalidated the NCAA limits on “education-related benefits.”<sup>53</sup> However, the district court rejected the student-athletes’ challenge to the NCAA rule that limited athletic scholarships to the full cost of attendance.<sup>54</sup> The district court reasoned that if the NCAA allowed student-athletes unlimited cash payments, it would violate the NCAA concept of amateurism and create a product more similar to professional athletics.<sup>55</sup>

Following the court’s decision in the Northern District of California, both sides appealed to the Ninth Circuit Court of Appeals.<sup>56</sup> The student-athletes argued that the district court should have invalidated all of the compensation-related restrictions on NCAA student-athletes, not just the restrictions for education-related benefits.<sup>57</sup> The NCAA challenged the decision of the district court and argued that the NCAA should be allowed to impose restrictions on all forms of compensation, including education-related benefits.<sup>58</sup> Following review by the Ninth Circuit, the court affirmed the district court’s decision.<sup>59</sup> The Ninth Circuit held that “the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.”<sup>60</sup>

After the Ninth Circuit’s decision, the NCAA appealed the case to the United States Supreme Court.<sup>61</sup> The NCAA asked the Supreme Court “to reverse to the extent the lower courts sided with the student-athletes.”<sup>62</sup> To support its appeal, the NCAA argued “that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis” and, instead, should have used “an abbreviated deferential review.”<sup>63</sup> Following the Supreme Court’s review, the Court affirmed the ruling of the lower courts and held that “the district court acted within the law’s bounds.”<sup>64</sup>

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51. 375 F. Supp. 3d at 1061–62.

52. 15 U.S.C. § 1.

53. 375 F. Supp. 3d at 1109.

54. *Id.* at 1104.

55. *Id.* at 1105.

56. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2154 (2021).

57. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (9th Cir. 2020).

58. *Alston*, 141 S. Ct. at 2154.

59. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1263.

60. *Id.*

61. *Alston*, 141 S. Ct. at 2154.

62. *Id.*

63. *Id.* at 2155; *see In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1096 (explaining the steps in a rule of reason analysis).

64. *Alston*, 141 S. Ct. at 2166.

### *B. Direct Effect of the Decision*

By holding that “the district court acted within the law’s bounds,” the Supreme Court, in a unanimous decision, affirmed the ruling that the NCAA could not limit education-related benefits.<sup>65</sup> The Supreme Court held that the NCAA rules were properly subjected to a rule of reason analysis and that the scope of the injunction prohibiting the NCAA from limiting education-related benefits was proper.<sup>66</sup> However, the Supreme Court did provide some flexibility with the injunction by also affirming the ruling of the district court that gave the NCAA considerable leeway in developing its own definition of education-related benefits.<sup>67</sup>

The holdings of the case in the district court, appellate court, and Supreme Court can be distilled down to a few key points. First, any benefits that are unrelated to education can be restricted by the NCAA.<sup>68</sup> Second, the NCAA cannot place any limits on education-related benefits.<sup>69</sup> However, individual schools and conferences are free to limit “any compensation or benefits, including the education-related benefits.”<sup>70</sup> Third, the NCAA can in “good faith” define the education-related benefits and can “regulate how schools provide them to student-athletes.”<sup>71</sup>

### *C. Indirect Effect on NIL Regulation*

While the Supreme Court holding has undoubtedly affected the NCAA and its power to enforce compensation restrictions, the largest change for NIL was in Justice Kavanaugh’s concurrence. In Justice Kavanaugh’s concurrence, he made it clear that all of the other NCAA compensation rules “raise serious questions under the antitrust laws.”<sup>72</sup> Justice Kavanaugh reiterated that the compensation rules would be subject to the rule of reason analysis and believed that the NCAA may not be able to “supply a legally valid procompetitive justification for its remaining compensation rules.”<sup>73</sup> Justice Kavanaugh went further and stated that “it is highly questionable whether the NCAA . . . can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that colleges do not pay student athletes.”<sup>74</sup> This theory of restricting compensation would not be valid in any other market in

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65. *Id.*

66. *Id.* at 2141.

67. *Id.* at 2164.

68. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1109.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Alston*, 141 S. Ct. at 2166-67 (Kavanaugh, J., concurring).

73. *Id.* at 2167.

74. *Id.* at 2168.

America, and Justice Kavanaugh does not see why collegiate athletics should be any different.<sup>75</sup> Justice Kavanaugh ended his concurrence with the powerful statement: “[t]he NCAA is not above the law.”<sup>76</sup>

While the NCAA had been working on modernizing its stance on NIL since the fall of 2019, the NCAA delayed its vote on NIL because of the “possible antitrust implications of changing its rules.”<sup>77</sup> Following the *Alston* decision and Justice Kavanaugh’s concurrence, the NCAA was forced to act and adopted an interim NIL policy allowing student-athletes to benefit from their NIL.<sup>78</sup> Alongside the policy, the NCAA also renewed its commitment to avoid “pay-for-play and improper inducements tied to choosing to attend a particular school.”<sup>79</sup> The NCAA’s temporary NIL policy is set to remain in place until federal legislation is passed or the NCAA adopts new NIL rules.<sup>80</sup> Following the Court’s guidance, the temporary policy allows schools and conferences to create their own individual policies.<sup>81</sup> The NCAA temporary NIL policy declares:

- individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions;
- college athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness;
- individuals can use a professional services provider for NIL activities; and
- student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.<sup>82</sup>

This policy was the main guidance issued by the NCAA before student-athletes started signing NIL agreements in the following days.<sup>83</sup>

Since the passage of the NIL policy in July 2021, the NCAA has not released much additional NIL guidance, but it has passed a new NCAA constitution in light of the new antitrust concerns.<sup>84</sup> The new NCAA constitution primarily

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75. *Id.* at 2169.

76. *Id.*

77. Dan Murphy, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31086019/everything-need-know-ncaa-nil-debate](https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate) [<https://perma.cc/PMB4-KTJ7>].

78. Hosick, *supra* note 22.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See generally id.*

84. Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022, 6:12 PM), <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx> [<https://perma.cc/XHJ6-GZWZ>].

empowers the individual schools and divisions to create their own guidance and simplified the previous constitution.<sup>85</sup> This will allow the Division I schools to create their own policies, including NIL policies, without worrying about how they might affect the smaller Division II and III schools or having to get approval from the smaller divisions.<sup>86</sup> With the new NCAA governance structure, the NCAA hopes it can avoid more antitrust litigation in the future.<sup>87</sup>

Additionally, in light of the issues with passing governance quickly during the pandemic, the new constitution will allow for quicker passage of regulations.<sup>88</sup> The new constitution will go into effect on August 1, 2022.<sup>89</sup> While the new constitution does not set NIL guidelines, it does allow NIL agreements while prohibiting pay-for-play.<sup>90</sup> Additionally, the constitution reinforces the NCAA's stance that student-athletes are not employees.<sup>91</sup> This is an area which will likely be the next big litigation challenge for the NCAA.

Another recent area of concern for the NCAA stemming from the allowance of NIL compensation is booster-led collectives, which can pool money and create NIL deals for all the student-athletes on select teams.<sup>92</sup> The NCAA has continued to uphold its prohibition on pay-for-play and improper inducement, and it is unclear if these agreements are effectively pay-for-play since they offer NIL deals to everyone on the team.<sup>93</sup> These deals may also be considered improper inducements since they influence future student-athletes to come to the university because of the pay awaiting them on the team.<sup>94</sup> Both the BYU deal discussed above and a similar deal for all Miami scholarship football players are under investigation by the NCAA; however, while the NCAA has investigated, it otherwise has not yet taken any action.<sup>95</sup> In light of the antitrust concerns post *Alston*, it appears that the NCAA is unlikely to challenge these arrangements at this time for fear of additional litigation where the NCAA's power may be further dampened.<sup>96</sup> Without state or federal legislation limiting similar arrangements, these collectives are likely to become more prevalent in college athletics. However, many states will be reluctant to enact such legislation because it would

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85. Billy Witz, *N.C.A.A. Reorganizes Around New Constitution That Shifts Power to Universities*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/sports/ncaaf/football/ncaa-constitution-transgender-athletes.html> [https://perma.cc/L9P7-43ST].

86. *Id.*

87. *See id.*

88. *Id.*

89. *Id.*

90. McGuire, *supra* note 84.

91. Witz, *supra* note 85.

92. Daniel Libit & Eben Novy-Williams, *NCAA Probes BYU, Miami NIL Deals for Possible Pay-for-Play Violation*, YAHOO! SPORTS (Dec. 10, 2021), <https://sports.yahoo.com/ncaa-probes-byu-miami-nil-213627746.html> [https://perma.cc/2ZRK-A4A4].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

place the universities located in the state at a recruiting disadvantage compared to states without the limiting legislation.

### III. CURRENT APPROACHES TO NIL REGULATION

With limited restriction by the NCAA, NIL agreements are almost entirely regulated by the state and university where the student-athlete is located because there is no federal NIL legislation in place.<sup>97</sup> This can lead to discrepancies in regulation, which affords additional benefits to student-athletes of select states, such as the previously mentioned BYU and Miami collective deals.

Some states were more prepared than others for the onslaught of NIL activity following the Supreme Court’s decision in *Alston*.<sup>98</sup> California was the first state to pass legislation regarding NIL agreements for student-athletes back in the fall of 2019.<sup>99</sup> While California’s legislation spurred other states to act, the effective date of the legislation is not until January 1, 2023, so it gave the NCAA more time to work on the issue.<sup>100</sup> However, nine months after California’s act, Florida passed similar legislation, but it had an effective date of July 1, 2021.<sup>101</sup>

As of January 2022, Florida, along with twenty-six other states have fully enacted legislation, with many of the states’ legislation already in effect.<sup>102</sup> In total, forty-one states have either enacted or proposed NIL legislation.<sup>103</sup> The only states to have not proposed any legislation are Alaska, Delaware, Idaho, Indiana, Maine, North Dakota, South Dakota, Utah, and Wyoming.<sup>104</sup> In those nine states, there are only four Power Five schools, with Indiana having three of them: Indiana University, Purdue University, and Notre Dame.<sup>105</sup> While NIL agreements can exist at all levels of collegiate athletics, Power Five schools, which are schools located in the Big Ten, Big 12, ACC, Pac-12, and SEC, account for the majority of deals.<sup>106</sup> Because of the likely larger volume of NIL contracts in Power Five schools,<sup>107</sup> Indiana appears to have the most pressing need for legislation out of the remaining states.

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97. See generally Hosick, *supra* note 22.

98. See generally Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (June 22, 2022), <https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> [https://perma.cc/4TFE-GVHW].

99. *Id.*

100. *Id.*

101. *Id.*

102. See *id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Russell Steinberg, *The State of NIL in College Sports*, BOARDROOM (Nov. 26, 2021), <https://boardroom.tv/opendorse-nil-ncaa-compensation-data/> [https://perma.cc/4UDJ-VTZJ].

107. *Id.*

*A. Select State NIL Regulations*

While each state has created their own unique legislation, the majority of state NIL laws share some common regulations.<sup>108</sup> The common regulations include: (1) no limitations on the student-athlete's ability to be compensated; (2) the student-athlete is allowed representation by an agent on NIL agreements; (3) NIL activities cannot impact eligibility for athletic competition or scholarship; (4) the NIL agreement cannot conflict with current university contracts; (5) the student-athlete cannot be compensated by the university or conference directly; and (6) the student-athlete can be restricted from entering NIL agreements with vice industries.<sup>109</sup>

While those regulations are considered to be the most common, some states choose to create more or less restrictive policies to advance the interests of their state.<sup>110</sup> Of the states that already have legislation in effect, New Mexico has the least restrictive policy.<sup>111</sup> In contrast, Alabama, Illinois, and Mississippi have enacted the most restrictive NIL legislation.<sup>112</sup> To get an idea of the options for potential Indiana legislative action, this section compares the New Mexico and Illinois statutes to better understand what both states feel are necessary to cover in their legislation since the states are on opposite ends of the spectrum in terms of restrictions.<sup>113</sup>

*1. New Mexico NIL Legislation.*—Of the states with NIL legislation, New Mexico currently has the least restrictive policy because of the freedom given to student-athletes for entering into NIL agreements.<sup>114</sup> Even compared to states without NIL legislation, New Mexico gives student-athletes more rights than what is allowed under the broad NCAA policy by prohibiting universities in the state from enacting certain restrictions.<sup>115</sup> The majority of the provisions in the New Mexico legislation protect the student-athletes' interests, instead of restricting the student-athletes.<sup>116</sup>

The New Mexico statutes protect the student-athletes in the state by preventing universities from restricting the student-athletes from earning compensation from a third-party for using the student-athlete's NIL.<sup>117</sup> Universities cannot restrict the student-athlete from receiving “food, shelter,

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108. Keller, *supra* note 98.

109. *Id.*

110. See 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/> [<https://perma.cc/5BY8-A8AC>].

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.*

116. *See* N.M. STAT. ANN. § 21-31-3 (West 2021).

117. *Id.*

medical expenses or insurance from a third party.”<sup>118</sup> Additionally, the universities cannot prohibit student-athletes from wearing footwear of the athlete’s choosing, even at official team activities, unless they are reflective, have lights, or pose a health risk.<sup>119</sup> The compensation that student-athletes receive cannot affect the student-athlete’s “grant-in-aid or stipend eligibility, amount, duration or renewal.”<sup>120</sup> Finally, the universities cannot prohibit the student-athletes from seeking representation by lawyers or agents for use with NIL deals.<sup>121</sup>

While New Mexico is very student-athlete friendly, there are still a few restrictions.<sup>122</sup> Keeping in line with the NCAA’s improper inducements restriction, universities in New Mexico cannot arrange compensation or use it to recruit prospective student-athletes.<sup>123</sup> While lawyers and agents are allowed, the lawyer or agent cannot have represented the university in the previous four years.<sup>124</sup> Lastly, third parties cannot offer an NIL deal to the student-athlete that requires the student-athlete “to advertise for the sponsor in person during official, mandatory team activities,” unless approved by the university.<sup>125</sup>

2. *Illinois NIL Legislation.*—While New Mexico is the least restrictive state for student-athlete NIL deals, Illinois is considered the most restrictive state.<sup>126</sup> In contrast to New Mexico, the majority of the Illinois NIL statutes place restrictions on the student-athletes, instead of protecting their rights.<sup>127</sup> Even for the few protections the Illinois statutes provide, student-athletes are still restricted in some way.<sup>128</sup>

The Illinois statutes allow student-athletes to earn NIL compensation; however, the compensation is restricted to market value.<sup>129</sup> Additionally, the student-athlete may sign an agent for use with NIL deals, but the student-athlete must provide the university with the name of the agent within seven days of signing.<sup>130</sup>

The remainder of the Illinois statutes generally allow the universities to place restrictions on the student-athletes.<sup>131</sup> Under the Illinois statutes, the university is

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118. *Id.*

119. *Id.*

120. *Id.*

121. § 21-31-4.

122. *See* § 21-31-3.

123. *Id.*

124. § 21-31-4.

125. § 21-31-3.

126. Clarke, *supra* note 110.

127. *See* 110 ILL. COMP. STAT. ANN. 190/10 (West 2021); *see also* 110 ILL. COMP. STAT. ANN. 190/15 (West 2021).

128. *Id.*

129. 110 ILL. COMP. STAT. ANN. 190/10 (West 2021).

130. 110 ILL. COMP. STAT. ANN. 190/15 (West 2021).

131. *See* 110 ILL. COMP. STAT. ANN. 190/15 (West 2021); *see also* 110 ILL. COMP. STAT. ANN. 190/20 (West 2021).

allowed to impose reasonable limitations on the date and time that a student-athlete can profit from their NIL.<sup>132</sup> The university has the exclusive control over all its marks and logos and the student-athlete cannot use the logos without the written consent of the university.<sup>133</sup> The university can also prohibit the athlete from wearing any item of gear with the “name, logo, or insignia of any entity” during competition or university-sponsored events.<sup>134</sup> The student-athlete is not allowed to enter agreements marketing any of the prohibited NCAA subjects, as well as any other product or service “that is reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution or that negatively impacts or reflects adversely on a postsecondary educational institution or its athletic programs.”<sup>135</sup> Lastly, the NIL agreement must end if the student-athlete transfers to another university or no longer participates in the sport at the university.<sup>136</sup>

### *B. Select University Regulations*

As previously mentioned, the NCAA regulations offer only limited guidance on NIL.<sup>137</sup> Where the NCAA regulations fall short, state legislation can provide additional guidance.<sup>138</sup> For states without legislation, or for areas the state legislation does not cover, it is up to the universities to set the guidelines for their student-athletes.<sup>139</sup> These universities are tasked with creating the regulation and ensuring compliance with the regulations to maintain student-athlete eligibility.<sup>140</sup>

While it is tempting to think of NIL affecting only Division I programs, NIL agreements are allowed at all levels of the NCAA.<sup>141</sup> The size and funding of the universities at the different divisions differ greatly, so the larger universities are able to devote more resources to the athletic and compliance department, enabling them to frequently offer more benefits to student-athletes.<sup>142</sup>

As Indiana does not have any statewide legislation,<sup>143</sup> the universities are solely responsible for creating and implementing their own NIL policies.<sup>144</sup> Similar to state legislation, most universities have some regulations in common,

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132. 110 ILL. COMP. STAT. ANN. 190/15 (West 2021).

133. *Id.*

134. *Id.*

135. 110 ILL. COMP. STAT. ANN. 190/20 (West 2021).

136. 110 ILL. COMP. STAT. ANN. 190/25 (West 2021).

137. *See* Hosick, *supra* note 22.

138. *See id.*

139. *See id.*

140. *See id.*

141. *Id.*

142. *See* Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa> [<https://perma.cc/AF68-MC54>].

143. Keller, *supra* note 98.

144. *See* Hosick, *supra* note 22.

but even for universities located in Indiana, there are key differences.<sup>145</sup> To see the differences for universities located in the same state, this section compares the NIL policies of two universities of differing sizes located in Indiana, including Indiana University and Franklin College. This section then analyzes the NIL policy of Brigham Young University as it is an example of the most restrictive policy in the country because student-athletes must conform to the BYU Honor Code Standards during NIL deals.<sup>146</sup> When creating a state NIL policy for Indiana, the legislature can get feedback from the universities and also evaluate how the policies affect the student-athletes to decide what is most important in creating a state policy.

1. *Indiana University*.—As one of the largest public Division I universities in the state of Indiana,<sup>147</sup> and a member of the highest revenue earning conference, the Big Ten,<sup>148</sup> Indiana University (“IU”) has a major interest in creating a comprehensive NIL policy. As soon as the NCAA allowed student-athletes to be compensated on their NIL, IU quickly passed a policy on July 1, 2021, to provide guidance to the over 800 student-athletes at the university.<sup>149</sup> Additionally, IU maintains a frequently asked questions page where student-athletes or potential sponsors can get guidance on common NIL issues.<sup>150</sup>

In general, IU’s NIL policy allows student-athletes to be compensated for their NIL.<sup>151</sup> The NIL compensation can come from donors, sponsors, and other related entities, as long as the compensation is for an NIL activity.<sup>152</sup> IU also provides educational opportunities for the student-athletes where they educate student-athletes on their brand, selection of agents, personal finance, taxes, and contracts, among others.<sup>153</sup> Student-athletes are not only allowed, but encouraged,

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145. See generally *Indiana Athletics NIL Policy*, IND. UNIV. (July 1, 2021), <https://iuhoosiers.com/sports/2021/6/30/nilpolicy.aspx> [<https://perma.cc/YG2E-Y7YW>]; *Franklin College Name, Image and Likeness Policy*, FRANKLIN COLL. (Aug. 30, 2021), [https://franklingrizzlies.com/information/NIL/Name-\\_Image\\_and\\_Likeness](https://franklingrizzlies.com/information/NIL/Name-_Image_and_Likeness) [<https://perma.cc/4WLS-SMHR>].

146. Jon McBride, *BYU Institutes NIL Policies*, BYU (May 5, 2022), <https://byucougars.com/story/athletics/1296873/byu-institutes-nil-policies> [<https://perma.cc/6ZQC-G2K2>].

147. *Indiana Colleges Ranked by Largest Enrollment*, COLLEGESIMPLY, <https://www.collegesimply.com/colleges/rank/colleges/largest-enrollment/state/indiana/> (last visited Feb. 1, 2021) [<https://perma.cc/WDX3-RECW>].

148. Steve Berkowitz, *Power Five Conference Revenues Slowed by COVID-19 Pandemic, Tax Records Show*, USA TODAY (May 20, 2021, 5:52 PM), <https://www.usatoday.com/story/sports/college/2021/05/20/power-five-college-sports-conference-revenues-slowed-covid-pandemic/5184848001/> [<https://perma.cc/P67M-8MHW>].

149. *Indiana Athletics NIL Policy*, *supra* note 145; *Indiana University – Bloomington Sports Information*, COLL. FACTUAL, <https://www.collegefactual.com/colleges/indiana-university-bloomington/student-life/sports/> (last visited Feb. 1, 2021) [<https://perma.cc/T944-VQFP>].

150. *Frequently Asked Questions*, IND. UNIV. (2021), <https://iuhoosiers.com/sports/2021/6/30/nilfaq.aspx> [<https://perma.cc/25KD-TXBB>].

151. *Indiana Athletics NIL Policy*, *supra* note 145.

152. *Id.*

153. *Id.*

to obtain agents to assist with NIL; however, the agent must be registered in Indiana.<sup>154</sup> Student-athletes are allowed to use the university's facilities as long as they pay the standard facility rental rate.<sup>155</sup>

Regarding restrictions, student-athletes must disclose any NIL activities to IU within ten days of signing the deal.<sup>156</sup> Student-athletes cannot use IU's intellectual property without prior written consent, but the student-athlete can autograph and sell officially licensed products.<sup>157</sup> However, the student-athlete cannot sell products provided by IU.<sup>158</sup> The student-athlete cannot engage in NIL activities during team activities, and the NIL activity must not interfere with academic obligations.<sup>159</sup> Lastly, any NIL agreements might have an impact on the financial aid the student-athlete receives from IU.<sup>160</sup>

2. *Franklin College*.—In contrast to IU, Franklin College (“Franklin”) is a much smaller, Division III, liberal arts college located in Indiana.<sup>161</sup> Franklin has a smaller athletic department with around 430 student-athletes and just over 1,000 total students at the university.<sup>162</sup> Naturally, Franklin will have less resources to commit to the athletic department and different NIL policy concerns.<sup>163</sup> Regardless of the size of the university, Franklin could still have student-athletes entering NIL agreements. To provide guidance to these student-athletes, Franklin passed its NIL policy on July 1, 2021.<sup>164</sup>

Before entering into any NIL agreement, student-athletes are required to report the NIL activity to the athletic department by filling out an online form.<sup>165</sup> The athletic department will then contact the student-athlete: (1) letting them know the agreement “does not violate institutional policy or NCAA rules”; (2) giving a warning that it may violate rules; or (3) giving “a request for additional information.”<sup>166</sup> Other than allowing student-athletes to enter into NIL contracts, the remainder of the policy places restrictions on the student-athlete.<sup>167</sup>

After hearing back from the athletic department, the student-athlete may enter the NIL agreement subject to the NIL policy.<sup>168</sup> The student-athlete can only receive compensation up to the fair market value and must actually perform work

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154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Franklin College Facts*, FRANKLIN COLL. (2021), <https://franklincollege.edu/about-fc/franklin-college-facts/> [<https://perma.cc/7CAG-RD64>].

162. *Id.*

163. *See Franklin College Name, Image and Likeness Policy*, *supra* note 145.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See id.*

168. *See id.*

or services.<sup>169</sup> Per NCAA guidelines, the compensation cannot be pay-for-play or used to recruit student-athletes to Franklin.<sup>170</sup> Student-athletes cannot use Franklin’s “brand, image, logos, or wordmarks” or use athletic facilities without approval.<sup>171</sup> The NIL agreement cannot extend past athletic participation at Franklin.<sup>172</sup> Also, the NIL agreement cannot “conflict with academic or team related activities.”<sup>173</sup> Boosters cannot compensate student-athletes or arrange compensation unless the compensation is from a company “which the Booster has a direct relationship.”<sup>174</sup> The student-athlete is allowed to sign an agent or lawyer but only for use with NIL deals.<sup>175</sup> Finally, any NIL compensation may impact need based financial aid at Franklin.<sup>176</sup>

3. *Brigham Young University*.—While Brigham Young University (“BYU”) is not located in Indiana, the BYU NIL policy is considered the most restrictive in the NCAA.<sup>177</sup> The Indiana legislature can look at the policy to see the extreme end of possible NIL restrictions. BYU is “supported, and guided by The Church of Jesus Christ of Latter-day Saints,” which places restrictions on what its students can do.<sup>178</sup> BYU students, including student-athletes, must follow the BYU Honor Code and the University Dress and Grooming Standards, including while marketing NIL deals.<sup>179</sup>

The most pertinent aspect of the Honor Code is that students must “abstain from alcoholic beverages, tobacco, tea, coffee, vaping, and substance abuse.”<sup>180</sup> While many of those substances are already banned under the NCAA NIL policy, BYU student-athletes are also prohibited from marketing any coffee or tea brands.<sup>181</sup> The Dress and Grooming Standards differ for men and women, but in general, the students, staff, and faculty must remain “modest, neat, and clean.”<sup>182</sup>

For men, clothing must have sleeves and cannot be revealing or tight.<sup>183</sup> All shorts must be “knee-length or longer.”<sup>184</sup> Their hair should be “above the collar”

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* McBride, *supra* note 146.

178. *About*, BYU (2022), <https://www.byu.edu/about> [<https://perma.cc/G7GA-5GCZ>].

179. McBride, *supra* note 146. *See Church Educational System Honor Code*, BYU (2022), <https://policy.byu.edu/view/church-educational-system-honor-code> [<https://perma.cc/88J2-UXYJ>]; *Dress and Grooming Standards*, BYU (2022), <https://policy.byu.edu/view/dress-and-grooming-standards> [<https://perma.cc/PZM5-NM2G>].

180. *Church Educational System Honor Code*, *supra* note 179.

181. *See id.*; McBride, *supra* note 146.

182. *Dress and Grooming Standards*, *supra* note 179.

183. *Id.*

184. *Id.*

with the ear uncovered.<sup>185</sup> The men cannot have beards and must be clean-shaven.<sup>186</sup> Their sideburns must not extend onto the cheek or below the earlobe, and if they have mustaches, they must be above the corners of the mouth.<sup>187</sup> Finally, men must not have any earrings or body piercings.<sup>188</sup>

For women, clothing cannot be “sleeveless, strapless, backless, or revealing” and cannot have “slits above the knee” or be “form fitting.”<sup>189</sup> Additionally, any bottoms must be “knee-length or longer.”<sup>190</sup> Their hairstyles must also be “clean and neat.”<sup>191</sup> Finally, women cannot have more than one piercing per ear and no other body piercings.<sup>192</sup>

While BYU student-athletes are not required to follow the dress code while practicing or competing because of impracticality,<sup>193</sup> they are required to follow it during NIL activities which could impact their marketability and limit the available opportunities.<sup>194</sup> The other aspects of the BYU NIL policy limit compensation to the fair market value and prohibit pay-for-play.<sup>195</sup> The policy does allow student-athletes to use BYU marks and logos, but the rights must first be “secured through a formal agreement.”<sup>196</sup> The student-athlete cannot use university facilities, and they must get university approval before entering any NIL agreement.<sup>197</sup> BYU has also created the “BYU Built4Life program,” which provides student-athletes with “education on different aspects of financial literacy, tax law and contract law.”<sup>198</sup>

#### IV. RECOMMENDATION FOR INDIANA NIL REGULATION

##### *A. Benefits of Enacting and Abstaining from Legislation*

Indiana currently has no state NIL laws and is one of only a handful of states without any law regarding student-athlete NIL rights.<sup>199</sup> The Indiana legislature

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Michelle Tsai, *Latter-Day Sportswear*, SLATE (Mar. 16, 2007, 3:25 PM), <https://slate.com/news-and-politics/2007/03/do-mormon-athletes-wear-the-temple-garment-under-their-uniforms.html> [<https://perma.cc/EKF4-QFFG>].

194. McBride, *supra* note 146.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See* Keller, *supra* note 98.

has also expressed little to no interest in passing any statewide NIL legislation.<sup>200</sup> Following the NCAA’s temporary guidance, this leaves the regulation of student-athletes’ rights regarding NIL entirely up to the universities that they attend.<sup>201</sup> As the previous section has shown, each university will restrict different aspects of NIL agreements. Depending on the university, they may offer more education, benefits, and support than other universities. Enacting state legislation can provide certain guaranteed protections to student-athletes, while abstaining from legislation will allow each university to tailor their policy to their specific interests and needs.

*1. Benefits of Enacting Legislation.*—By enacting legislation, the state can ensure a baseline of uniform protections across the state. Additionally, the state can offer more protections than are currently offered by the limited NCAA guidance.<sup>202</sup> The current statutes for other states differ greatly, which provides a competitive recruiting advantage to certain states by enticing student-athletes with more protection and compensation opportunities.<sup>203</sup> For example, Kentucky’s NIL executive order mandates certain required education for student-athletes.<sup>204</sup> The Kentucky executive order makes it mandatory for universities to “provide financial literacy, social media and brand management, and time management education and resources for student-athletes” at postsecondary institutions.<sup>205</sup> Also, as seen above, some states, such as Illinois, offer incredibly restrictive NIL laws that do not afford their student-athletes many of the same opportunities offered by other states.<sup>206</sup> By enacting legislation, Indiana can provide its own competitive advantage for prospective student-athletes looking to attend universities based on where they can best capitalize on their NIL.

Additionally, Indiana is in a unique situation, as the NCAA headquarters are located in Indianapolis.<sup>207</sup> Since the NCAA is headquartered in Indianapolis, the NCAA must abide by Indiana law. However, the NCAA is an important organization for Indiana and has been able to influence certain Indiana legislation in the past by threatening to move or stop hosting events in Indianapolis.<sup>208</sup> The Indiana legislature must keep this in mind while enacting legislation so that they do not unduly burden the NCAA. However, by enacting legislation in Indiana, the NCAA might be influenced in future regulations by looking at the effects of the

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200. Osterman, *supra* note 23.

201. Hosick, *supra* note 22.

202. *See generally id.*

203. *See generally* Clarke, *supra* note 110.

204. Ky. Exec. Order No. 2021-418 (June 24, 2021), [https://governor.ky.gov/attachments/20210624\\_Executive-Order\\_2021-418\\_Student-Athletes.pdf](https://governor.ky.gov/attachments/20210624_Executive-Order_2021-418_Student-Athletes.pdf) [<https://perma.cc/WMZ3-8A68>].

205. *Id.*

206. 110 ILL. COMP. STAT. ANN. 190/15 (West 2021).

207. *Contacting the NCAA*, NCAA (2022), <https://www.ncaa.org/about/who-we-are/contact-us> [<https://perma.cc/7C74-4W8Y>].

208. *See* David Wharton, *NCAA Feeling Pressure to Take Stand Against Controversial Indiana Law*, L.A. TIMES (Mar. 30, 2015, 8:43 PM), <https://www.latimes.com/sports/la-sp-indiana-law-protest-20150331-story.html> [<https://perma.cc/63UR-GQZJ>].

legislation in the state where they are located. When passing regulations, the NCAA will look to see what is working and apply that to their new guidance.

While it may be too early to see what is working best in other states, Indiana can at least see what is not working. Many universities, including Ohio State, are already amending their university policies to allow for more flexibility so they can have a recruiting advantage.<sup>209</sup> By passing a form of legislation that incorporates features from the legislation already passed in other states and university policies, Indiana has a unique opportunity to influence the future regulations of the NCAA and possibly the federal government.

2. *Benefits of Abstaining from Legislation.*—Abstaining from enacting legislation also provides some advantages to the universities in Indiana. The main benefit from abstaining from passing any NIL legislation is that it allows the universities ample freedom to create their own policies. The athletic departments are free to create any policy or regulation they see fit, so long as it does not violate the limited guidance given by the NCAA.<sup>210</sup> This is a much easier process for universities, as they do not have to worry about complying with the more restrictive state statutes. Additionally, many state statutes are hard to interpret, leaving the compliance staff who might not be versed in statutory interpretation to try to comply to the best of their ability. While the general counsel of the university will likely assist the compliance department with interpretation, it will be up to the compliance department to ensure the student-athletes continuously comply. The flexibility afforded to universities and their athletic departments also ensures that the smaller universities are not overly burdened with the restrictive regulatory requirements or services for which many statutes call.<sup>211</sup> These smaller universities can choose to create no regulation and allow their student-athletes to profit on their NIL restricted only by the NCAA. Finally, universities can use their NIL policies as another tool to recruit student-athletes to their school. While schools are not allowed to entice student-athletes to attend with the promise of getting them NIL agreements, they can create policies that make it easier for the student-athlete to enter into agreements by including less restrictions.<sup>212</sup>

For Indiana, many of the benefits of abstaining from legislation are tied to the freedom that it affords its universities. However, as mentioned above, the NCAA is located in the state and might have to comply with some of the regulations Indiana passes. The NCAA hosts many events and championships in Indianapolis, bringing in a lot of revenue for the city and state, so Indiana should do its best to keep the NCAA hosting in the state.<sup>213</sup> By abstaining from legislation, Indiana would ensure that the NCAA has the maximum amount of freedom in passing its own NIL policies.

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209. Eric Prisbell, *Ohio State Relaxes Its Own NIL Rules in School's Latest Savvy Move*, ON3, (Jan. 26, 2022), <https://www.on3.com/news/ohio-state-relaxes-its-own-nil-rules-in-schools-latest-savvy-move/> [<https://perma.cc/466Q-NM3Y>].

210. *See generally* Hosick, *supra* note 22.

211. *See generally* Keller, *supra* note 98.

212. *See generally* Hosick, *supra* note 22.

213. *See* Wharton, *supra* note 208.

*B. Overall Recommendation for Indiana Legislation*

As mentioned above, Indiana is one of a few states without any NIL legislation, which leaves the regulation of NIL issues entirely to the universities that the student-athlete attends.<sup>214</sup> While the flexibility afforded to members of compliance is appreciated by the university compliance teams, this flexibility will create a discrepancy in opportunities for the student-athletes.<sup>215</sup> While Indiana’s Division I universities can afford to staff a compliance team and build out a comprehensive NIL policy, Indiana’s smaller universities might struggle. People might not think about NIL affecting student-athletes at smaller universities, but as social media continues to gain popularity, more athletes with large followings will inevitably end up at some smaller universities. In Indiana alone, there are over sixty-five universities, the vast majority of which are not in Division I.<sup>216</sup>

To ensure adequate protection and education, Indiana should pass legislation offering this protection to all of Indiana’s student-athletes. By not immediately passing legislation, Indiana is in a unique situation where they can afford to look at the strengths and weaknesses of the current legislation in other states.

By looking at other states’ NIL legislation, Indiana’s NIL legislation should have a few key points. Indiana’s legislation should require all universities to educate the student-athletes on key NIL issues, such as financial literacy, social media and brand management, and time management. The mandatory education does not need to be burdensome on the university but should provide the student-athlete with information that is adequate in preventing the athlete from entering into unfair contracts, summarizes the tax implications of NIL agreements, educates about how to receive legal advice and guidance, and other topics helpful to the athlete. The legislation should provide some flexibility in how the school may distribute the information and also what exactly the education will cover.

Additionally, the legislation should allow the student-athlete to seek representation by lawyers and agents wherever necessary in negotiating or sourcing NIL agreements. This representation is necessary to protect the state’s student-athletes from entering into burdensome NIL contracts or deals. These agents or advisors should be required to register with the state in some capacity. While the state or university should not be required to conduct a rigorous and burdensome evaluation on each advisor, the advisor should be required to submit a background check at a minimum. This will enable the state to ensure the advisor has not committed financial crimes or any other crimes that might place the student-athlete at risk. The state should maintain a list that shows the registered advisors so that every student-athlete will have easy access to advisors and can

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214. See Hosick, *supra* note 22.

215. See generally *Indiana Athletics NIL Policy*, *supra* note 145; *Franklin College Name, Image and Likeness Policy*, *supra* note 145.

216. *List of Indiana Colleges and Universities*, IND. DEP’T OF EDUC., <https://www.doe.in.gov/sites/default/files/elme/list-indiana-colleges-universities.pdf> [<https://perma.cc/68MV-S4PC>] (last visited Nov. 28, 2021).

be better represented in NIL agreements.

Next, the legislation should make clear that any NIL compensation does not affect the existing academic or athletic aid the student-athlete is receiving from the university. This will encourage Indiana student-athletes to seek out additional compensation without the fear of reduced aid. However, this should not prohibit the reduction of need-based financial aid because if a non-athlete student earned additional income, it could reduce their aid, and student-athletes should not be treated differently than a regular student in this respect. Additionally, it provides clarity to the universities on the issue of how NIL agreements affect aid, which was left open by the NCAA guidance.<sup>217</sup>

The Indiana legislation explicitly must not limit the amount of NIL compensation that a student-athlete can receive. This will provide for more taxable income for the state and will also give the universities in the state a competitive advantage over more restrictive neighboring states, such as Illinois.<sup>218</sup> When high profile, high school student-athletes are looking at universities to attend, they will likely be influenced greatly by potential NIL opportunities.

Indiana should not limit booster collectives from creating and providing NIL deals for all student-athletes on a team. While not everyone will agree with these arrangements being allowed, until the federal government or NCAA prohibits them, they will likely be one of the most valuable tools in recruiting prospective student-athletes. If Indiana were to pass legislation prohibiting similar collectives, Indiana's universities would automatically be at a severe recruiting disadvantage when compared to many universities located in other states.

Also, the legislation should not impose reporting requirements on the NIL agreements. By imposing reporting requirements on all universities, the state will burden the smaller universities who have less compliance staff available to monitor and track deals. If universities feel that it is necessary to further protect their student-athletes, they will be free to implement their own reporting requirements.

The legislation should not touch the issue of NIL agreements with brands competing against the university's existing sponsors. While it would be beneficial to a student-athlete to contract with a competing brand, NIL agreements like this would greatly reduce the value of exclusive university brand deals. These exclusive deals are a major source of income for many of the universities in the state, so each university should be allowed to protect their existing contracts and restrict certain competing NIL agreements. Similarly, the legislation should not prohibit marketing any specific categories of products and should leave that up to the university and their own guidance.

However, any Indiana legislation must be careful to balance the needs and wants of student-athletes with the interests of the universities. The proposed legislation will provide for ample education and allow student-athletes a great freedom to enter into contracts as they see fit. The legislation also protects the interests of the universities and allows for flexibility among programs. By

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217. *See generally* Hosick, *supra* note 22.

218. *See generally* Clarke, *supra* note 110.

allowing a certain amount of flexibility, the state will protect smaller universities from the overly burdensome NIL requirements of other states. It will also allow universities within the state to try to create additional protections or opportunities to recruit student-athletes to their respective university. The proposed Indiana legislation is not intended to provide a fully comprehensive NIL policy but instead act as a baseline providing student-athletes with the necessary education and protections for NIL agreements.

As always, the federal government might preempt Indiana’s legislation, but there is no federal law regarding NIL at this time.<sup>219</sup> Until that time, an Indiana law will help clarify the rights and protections of student-athletes, provide educational opportunities for all student-athletes, and create a recruiting advantage for the state as a whole.

#### CONCLUSION

Following the *NCAA v. Alston* decision in June 2021, the NCAA amended its policy and allowed student-athletes to profit off their NIL starting July 1, 2021. While the NCAA was already considering this as a possibility due to pending state legislation, the NCAA, and many states and universities, were unprepared for the almost immediate allowance of NIL agreements in collegiate athletics. At this time, it is unclear exactly what this will mean for the future of the NCAA, but so far, the landscape of collegiate athletics has remained largely unchanged. However, moving forward, the discrepancies in state regulation could lead to imbalances between universities because of the benefits that certain student-athletes can receive. Indiana is one of the few states to not have enacted or proposed any NIL legislation, leaving the universities to decide what opportunities and support they want to give to their student-athletes. Thus, Indiana student-athletes at certain universities have access to benefits and opportunities not given to student-athletes at others.

By examining current state legislative policies and select university-specific regulation, this Note recommends that Indiana passes legislation that provides a uniform set of rules for universities in Indiana on which to base their own policies. The proposed legislation allows the universities to create policies that give them a competitive advantage over competing schools. The proposed NIL legislation gives Indiana student-athletes certain guaranteed base protections while not over-burdening the smaller universities.

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219. See Osterman, *supra* note 23.