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NCAA v. Alston: The Future of College Sports in the Name, Image, and Likeness Era

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ABSTRACT

In National Collegiate Athletic Association v. Alston*, the archaic amateur model for college sports was abolished. The United States Supreme Court ruled in favor of student-athletes across the country by striking down National Collegiate Athletic Association ("NCAA") restrictions on student-athlete education benefits based on antitrust grounds. In doing so, the Court opened the door for student-athletes to benefit from their name, image, and likeness ("NIL") rights.*

Following the decision, the legal landscape for rights of publicity in college sports has quickly evolved as many states have passed NIL laws and the federal government has tried to develop a framework for what a universal NIL law will look like. The current set of NCAA and state laws have granted student-athletes with varying degrees of opportunities to be compensated by selling their NIL rights. As a result, many questions surrounding this new era of college sports remain unanswered. This Note addresses the impact of Alston *on college sports, discusses the NIL market and student-athletes' rights in their NIL, and provides several key principles that Congress may consider when adopting a universal NIL law.*

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INTRODUCTION

After many years of debate and uncertainty, the National Collegiate Athletic Association ("NCAA") had almost all of its rigid restrictions on student-athlete compensation revoked on June 21, 2021.[1] Indeed, following a far-reaching political movement against the NCAA's archaic amateurism model, most of these restrictive measures have come to an end.[2] Beginning in July 2021, more than two dozen states passed laws governing compensation for student-athletes.[3] In response, the NCAA adopted an interim policy that enabled every student-athlete across the country to do something they were never *legally* able to do before: benefit from their own name, image, and likeness ("NIL") through product endorsements, public appearances, and business ventures.[4] Its proposed enactment time was just *eight hours* prior to the effective dates of several states' laws that would have made it illegal for the NCAA and its member institutions to restrict student-athlete NIL rights within those states.[5]

1. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).
2. *Id.* at 2152, 2166.
3. 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.
4. *See* Ross Dellenger, *'It's Going to Be a Clusterf—-:' The New Era of College Sports Is Here. Is Anyone Ready?*, SPORTS ILLUSTRATED (July 1, 2021), https://www.si.com/college/2021/07/01/ncaa-athletes-profit-nil-daily-cover.
5. *See* Press Release, Michelle Brutlag Hosick, NCAA, NCAA Adopts Interim Name, Image and Likeness Policy (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy; *see also* The Athletic College Football Staff, *Name, Image and Likeness (NIL): What It Means,*

After many years of being prohibited from earning money, student-athletes may now work with iconic brands and businesses to take advantage of their NIL rights. Almost immediately, high-profile college football and basketball players announced large contracts with brands and businesses.[6] For example, Miami Hurricanes quarterback D'Eriq King announced an NIL deal with The Wharf, a local restaurant in Miami, in which he would be paid an appearance fee at $2,000 per hour.[7] Similarly, Hanna and Haley Cavinder of the Fresno State Bulldogs announced one of the largest NIL deals to date with Boost Mobile.[8] While student-athletes can now benefit from selling their NIL rights, the concession by the NCAA has resulted in a patchwork of NIL laws on a state-by-state basis, creating unprecedented chaos in college sports, including in the NIL market and student recruiting.[9]

Justice Gorsuch's unanimous decision in *National Collegiate Athletic Ass'n v. Alston*,[10] which has been characterized as one of the most important sports law decisions in U.S. history,[11] gave rise to this dramatic change. In response to this decision, the NCAA's board of directors adopted a temporary policy that opened the door for NIL activity, in which it instructed its member institutions to set their own rules for student-athlete compensation with minimal guidelines.[12] Student-athletes are now faced with varying degrees of opportunities to

Why It Matters and How It's Impacting the NCAA and College Sports, ATHLETIC (July 1, 2021), https://theathletic.com/2580642/2021/07/01/name-image-and-likeness-nil-what-it-means-why-it-matters-and-how-it-will-impact-college-sports/ (stating that while the NCAA's tentative rules open up the monetization of NIL for all NCAA Division I athletes, the states that forced the NCAA into taking such action by implementing state NIL laws with July 1, 2021 start dates were Alabama, Florida, Georgia, Illinois, Kentucky (via executive order), Mississippi, New Mexico, Ohio (via executive order), Oregon, Pennsylvania, and Texas).

6. *See* Dellenger, *supra* note 4.

7. *See* Trevor Booth, *D'Eriq King's NIL Deals: How Much Money Does Miami's QB1 Make in Endorsements?*, SPORTING NEWS (Sept. 4, 2021), https://www.sportingnews.com/us/ncaa-football/news/deriq-king-nil-money-miami/gcktu1j64id710vetq46qnx36.

8. *See id.*; *see also* Joan Niesen, *Why Women and Social Media Stars Are Becoming College Sports' Big Winners*, GUARDIAN (Sept. 2, 2021, 6:00 AM), https://www.theguardian.com/sport/2021/sep/02/why-women-and-social-media-stars-are-becoming-college-sports-big-winners?fr=operanews.

9. Dellenger, *supra* note 4 (emphasis added) ("Disparities will exist both *between state laws* and school policies, and *among the state laws* themselves.").

10. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2141 (2021).

11. *See* Michael McCann, *Supreme Court Rules Unanimously Against NCAA in* Alston *Case*, SPORTICO (June 21, 2021, 10:29 AM), https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-1234632182/.

12. *See* Press Release, Michelle Brutlag Hosick, *supra* note 5.

earn money by selling their NIL rights due to the current set of NCAA rules and state laws.[13] This Note will address the key issue arising from *Alston*, namely the practical effect of the decision and the NCAA's strategic retreat on student-athletes' NIL rights. Part I of this Note will provide an overview and analysis of the legal implications following the Supreme Court's unanimous decision in *Alston*. Part II will discuss the impact of *Alston* on college sports. Part III will review the NIL market by first examining the history of student-athletes' rights in their NIL and then discussing the current status of NIL legislation and regulation. Finally, Part IV will raise several important principles that Congress may consider when adopting a universal NIL law.

I. OVERVIEW AND LEGAL ANALYSIS OF *ALSTON*

A. The Majority Opinion

In its groundbreaking nine-to-zero decision, the Supreme Court in *Alston* upheld a ruling by the U.S. Court of Appeals for the Ninth Circuit that struck down NCAA caps on student-athlete academic benefits on antitrust grounds.[14] In doing so, the Court invalidated the NCAA's archaic "no-pay-for-play" college sports regime.[15] The *Alston* decision and Justice Kavanaugh's concurrence propelled the NCAA into a new era, where certain restrictions on student-athlete compensation no longer exist.[16]

The NCAA has long argued that antitrust law allows it to restrict student-athlete compensation to promote competitive equity and to distinguish college sports from professional sports.[17] In *Alston*, a class of former men's and women's student-athletes led by Shawne Alston, a former football player at West Virginia University, filed an antitrust class action against the NCAA, arguing that the NCAA's restrictions on "education-related benefits" violated antitrust law under the Sherman Antitrust Act of 1890 ("Sherman Act").[18] The district court ruled in favor of the student-athletes, concluding that while the NCAA may still restrict cash or cash-equivalent awards for academic purposes, the NCAA must allow for certain types of academic benefits, such as postgraduate

13. *See* Murphy, *supra* note 3.
14. *Alston*, 141 S. Ct. at 2166.
15. *See id.* at 2147, 2152.
16. *See id.* at 2166–69.
17. *Id.* at 2152.
18. *Id.* at 2147.

scholarships or vocational school scholarships.[19] The U.S. Court of Appeals for the Ninth Circuit affirmed, recognizing the NCAA's interest in preserving amateurism but holding nevertheless that the NCAA's regime of limiting the benefits that student-athletes might receive violated antitrust law.[20]

The Supreme Court found that the NCAA violated Section 1 of the Sherman Act by limiting education-related compensation that student-athletes are allowed to receive from their schools.[21] Indeed, Section 1 of the Sherman Act bars any "contract, combination . . . or conspiracy, in restraint of trade or commerce."[22] To arrive at this conclusion, the Court affirmed the lower court's application of the "rule of reason," a judicial doctrine of antitrust law, to examine the NCAA's regulatory scheme.[23]

Courts choose between three standards when reviewing antitrust cases, which are the rule of reason, quick look standard, and per se rule.[24] The rule of reason is used to determine if the pro-competitive benefits arising from a given conduct are sufficient to offset the anticompetitive effects.[25] Meanwhile, the quick look standard is a method in which the competitive harm is presumed, but not automatically condemned, and the defendant can show competitive justifications for the restraint.[26] Finally, the per se rule establishes that some restraints will result in anticompetitive outcomes and will not create any benefits or procompetitive effects.[27] The NCAA requested the Court to examine the case under the quick look standard rather than the rule of reason applied by the lower court.[28] It argued that the NCAA is a joint venture, which makes collaboration among its members necessary if they are to offer consumers the true value of

19. *Id.* at 2147, 2164; *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061 (N.D. Cal. 2019).

20. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1265–66 (9th Cir. 2020); *Alston*, 141 S. Ct. at 2154.

21. *Alston*, 141 S. Ct. at 2162.

22. Sherman Antitrust Act of 1890 § 1, 15 U.S.C. § 1.

23. *Alston*, 141 S. Ct. at 2151.

24. *See* DON T. HIBNER, JR. & HEATHER M. COOPER, "PER SE" OR NOT "PER SE": AN HISTORICAL "QUICK LOOK" AT MINIMUM RPM UNDER CALIFORNIA LAW 1–2, 6 (2009), https://www.antitrustlawblog.com/wp-content/uploads/sites/51/2009/11/Per-Se-or-Not-Per-Se-Article1.pdf.

25. *See id.* at 31–32.

26. *See id.*; *see also* Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999) (holding that quick look analysis is appropriate for cases in which anticompetitive effects can "easily be ascertained").

27. *See* HIBNER & COOPER, *supra* note 24, at 24–26.

28. *Alston*, 141 S. Ct. at 2155.

college sports.[29] The Court dismissed the NCAA's request and applied the rule of reason because it determined the dispute was over whether and to what extent NCAA's restrictions on education-related compensation or benefits in its labor market yielded benefits to its consumer market that could be attained using substantially less restrictive means.[30] Thus, the Court held that the dispute presented complex questions requiring more than the quick look standard.[31]

The student-athletes argued that the NCAA compensation restraints reduced competition among the NCAA member institutions as to what those institutions would otherwise provide the student-athletes,[32] and therefore, the NCAA had to establish a procompetitive justification sufficient to validate the restraints on education-related compensation for student-athletes.[33] The NCAA's position was that the status of student-athletes as amateurs required antitrust deference and heavily relied on *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, where the Court struck down NCAA rules on member schools' televising games, and *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation*.[34] The NCAA contended that its procompetitive justification for the constraints on student-athlete compensation was that the survival of the *amateurism* of college sports depends on such constraints.[35] It reasoned that college sports is differentiated from professional sports through the amateur status of student-athletes.[36] The NCAA further argued that if student-athletes were allowed to receive compensation then the purity of amateurism through unrestricted student-athlete compensation would be diminished, and therefore, college sports would be obsolete.[37]

The Court in *Alston* rejected this argument, holding that *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation* was inapplicable to questions of student-athlete compensation.[38] While the NCAA argued that it enjoys "ample

29. *Id.*
30. *Id.* at 2155–57.
31. *Id.*
32. *Id.* at 2147.
33. *See id.* at 2155.
34. *See id.* at 2149, 2157–58 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 94 (1984); *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)).
35. *Id.* at 2157–58.
36. *Id.* at 2153.
37. *See id.*
38. *Id.* at 2157–58; *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid*, 375 F. Supp. 3d at 1058.

latitude" under federal antitrust law, the Court reasoned that *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation* does not protect the NCAA from antitrust scrutiny.[39] Specifically, the Court found that the NCAA in *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation* failed to show any economic analysis as to how the consumer market for college sports might be affected by student-athletes receiving educational benefits from their schools.[40] In contrast, the plaintiffs in *Alston* showed that the popularity of college sports had actually increased in the years following increased allowances in educational benefits allocation.[41]

Despite ruling in the plaintiffs' favor, the Court generally agreed with several of the NCAA's arguments.[42] The Court affirmed that antitrust law does not require the NCAA to use anything like the least restrictive means of achieving its legitimate business purposes and that congressional action on student-athlete benefits would best serve all parties.[43] Thus, the holding in *Alston* was narrowly construed to affect only NCAA regulations concerning student-athlete *educational benefits*.[44] Importantly, NCAA prohibitions on *athletics-related benefits*, or rather "pay-for-play" and performance-based payments, remained unaffected by the decision,[45] arguably leaving individual athletic conferences and colleges free to restrict all non-educational benefits.

The Court also highlighted the monopsony power held by the NCAA in the labor market.[46] Monopsony is defined as a monopoly on the buying side and is not a new concept to antitrust law.[47] Unfortunately for student-athletes, the NCAA actively exerts its market power in the college sports world over the student-athletes.[48] As Justice Gorsuch acknowledged, "[u]nlike customers who would look elsewhere when a small van company raises its prices above market

39. *Alston*, 141 S. Ct. at 2153; *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid*, 375 F. Supp. 3d at 1104.

40. *Alston*, 141 S. Ct. at 2152; *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid*, 375 F. Supp. 3d at 1100.

41. *Alston*, 141 S. Ct. at 2153.

42. *See id.* at 2161–63.

43. *Id.* at 2160–61.

44. *Id.* at 2165–66.

45. *See id.* at 2166 (Kavanaugh, J., concurring) ("The NCAA has long restricted the compensation and benefits that student athletes may receive.").

46. *Id.* at 2151–52 (majority opinion).

47. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297–301 (1991).

48. *See Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

levels, the district court found (and the NCAA does not . . . contest) that student-athletes have nowhere else to sell their labor."[49]

The Supreme Court also affirmed the three-step framework established in *Ohio v. American Express Co.* and followed by the district court in *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation*.[50] The three-step framework requires the burden of proof to shift between the parties, whereby the plaintiff must first prove substantial anticompetitive effects of the restrictions and harm to consumers.[51] In the second step of the framework, the Court concluded the NCAA failed to establish that the limitation on a school's ability to pay education-related benefits would yield any procompetitive benefit to the consumers.[52] The Court determined that because the NCAA is the monopsonist, it bears the burden of proving that restrictions on student-athlete compensation lead to procompetitive results or that there was not less restrictive means that could result in the same benefits.[53]

The NCAA contended that it could not provide broader benefits to its student-athletes because it would diminish the value of its product—namely the amateurism aspect of college sports and its differences from professional sports.[54] According to the Court, "[t]he NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product–amateur college sports as distinct from professional sports."[55] The district court found, and the Supreme Court affirmed, that the NCAA could achieve the same procompetitive effects by utilizing substantially less restrictive means.[56] The NCAA generates an extraordinary amount of revenue in broadcasting deals for March Madness and the college football playoffs wherein the deals are worth $1.1 billion and $470 million respectively.[57] Meanwhile, the student-athletes, or rather the "product," are not able to

49. *Id.* at 2156 (majority opinion).

50. *Id.* at 2160; Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018). When determining whether a restraint violates the rule of reason, a three-step framework applies. *Am. Express Co.*, 138 S. Ct. at 2284. The Supreme Court has determined that "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Id.* If the plaintiff satisfies that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

51. *Alston*, 141 S. Ct. at 2160; *Am. Express Co.*, 138 S. Ct. at 2284.

52. *Alston*, 141 S. Ct. at 2161–62.

53. *Id.*

54. *Id.* at 2162–63.

55. *Id.* at 2152.

56. *Id.* at 2163–64.

57. *Id.* at 2150.

reap the benefits, but coaches and administrators are generously compensated.[58]

B. Justice Kavanaugh's Concurring Opinion

Justice Kavanaugh issued an expansive concurrence, in which he noted that "the bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes."[59] Justice Kavanaugh continued that the NCAA "must supply a legally valid" justification that "its remaining compensation rules" have sufficient value to promoting competitive balance and that the benefits outweigh the harm done to the student athletes.[60] Justice Kavanaugh was clear: "Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition."[61]

Justice Kavanaugh argued that the remaining compensation rules of the NCAA raise serious concerns under antitrust laws and that the NCAA would not be able to provide procompetitive justifications to its compensation rules under the rule of reason.[62] Indeed, Justice Kavanaugh wrote that "there are serious questions whether the NCAA's remaining compensation rules can pass muster."[63] Justice Kavanaugh did not accept the argument related to the amateurism feature of college sports and blatantly affirmed that "the NCAA's business model would be flatly illegal in almost any other industry in America."[64]

In addition, Justice Kavanaugh told the NCAA that it is not above the law and that it should be thankful that the Court was delivering what seemed to be only a slap on the wrist.[65] Justice Kavanaugh believed that the NCAA's argument that consumers benefit from the NCAA's restrictions on benefits was like a group of restaurants that cut cooks' wages on the theory that customers prefer to eat meals prepared by low-paid cooks.[66] He also saw only circular logic behind

58. *See id.* at 2151.
59. *Id.* at 2168 (Kavanaugh, J., concurring).
60. *Id.* at 2167.
61. *Id.* at 2168.
62. *Id.*
63. *Id.* at 2167.
64. *Id.*
65. *See id.* at 2169.
66. *Id.* at 2167.

the NCAA's "no pay" amateur model, which he starkly and sharply explained as "[p]rice-fixing labor is price-fixing labor."[67] While he believes that *Alston* was "an important and overdue course correction,"[68] Justice Kavanaugh's concurrence will have a significant effect on future discussions pertaining not only to the NCAA market behavior, but also to discussions pertaining to labor and antitrust markets.

II. IMPACT OF *ALSTON* ON COLLEGE SPORTS

What does *Alston* mean for college sports moving forward? In the immediate future, the decision simply invalidates NCAA restrictions on educational benefits.[69] Recognizing that it was not going to receive some sort of antitrust exemption with respect to compensation rules, the NCAA decided to allow student-athletes to earn money by selling their NIL rights.[70] Determining how individual schools will now define and distribute educational benefits alone will be complicated and unpredictable. The NCAA will face many other challenges as well. Indeed, in the long term, the NCAA will not receive special leniency from antitrust scrutiny on matters of student-athlete compensation.[71]

The *Alston* decision did not address the question of whether student-athletes can be compensated for their NIL rights.[72] *Alston*, however, has reinforced a growing trend by state legislatures to take initiative to mitigate the amount of control the NCAA has in relation to compensation

67. *Id.*

68. *Id.* at 2166.

69. *See id.* at 2165–66 (majority opinion).

70. The *Alston* decision did not compel the NCAA's NIL decision because the ruling left untouched the NCAA's rules limiting compensation unrelated to education. *See id.* at 2159, 2165; Nicole Auerbach, *NCAA Drafts Interim NIL Policy for College Athletes: Sources*, ATHLETIC (June 26, 2021, 1:53 PM), https://theathletic.com/news/ncaa-drafts-interim-nil-policy-for-college-athletes-sources/msQIs5nnGf5z/.

71. *See Alston*, 141 S. Ct. at 2165–66.

72. *Id.* at 2166, 2168 (Kavanaugh, J., concurring) (discussing the Court's decision to only decide on the correct applicability of antitrust law); *id.* at 2165–66 (majority opinion) (holding that student-athletes' argument that compensation can be given beyond education-related benefits is premature).

of student-athletes.[73] In *O'Bannon v. National Collegiate Athletic Ass'n*,[74] the U.S. Court of Appeals for the Ninth Circuit acknowledged that student-athletes have rights under intellectual property and personal property theories.[75] The recognition of these rights by Governor Newsom of California was a catalyst that urged the NCAA to reconsider its NIL guidelines in allowing student-athletes to be compensated.[76] In *Alston*, the student-athletes argued that the NCAA could no longer rely on the holding in *O'Bannon* that the "NCAA limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports" because the NCAA "has [now] endorsed the very 'same NIL benefits' at issue there."[77]

In the future, the NCAA must prepare for an evolving landscape that will certainly require its member institutions to continue to develop strategies for student-athlete compensation. The question before the Supreme Court in *Alston* did not require the Court to address the legality of all NCAA prohibitions on student-athlete

73. *See* The Athletic College Football Staff, *supra* note 5; Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports (discussing recent legislation by a group of bipartisan congresspeople to adopt a federal NIL standard for universities to abide by); Ross Dellenger, *Two Democrat Senators Spar with NCAA over NIL, College Athletes' Rights*, SPORTS ILLUSTRATED (Jan. 14, 2021), https://www.si.com/college/2021/01/14/ncaa-athlete-rights-compensation-congress-nil (highlighting Senators Blumenthal's and Booker's proposed Athletes' Bill of Rights that will guarantee student-athletes "monetary compensation, long-term healthcare, lifetime educational scholarships and even revenue sharing").

74. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1067–68 (9th Cir. 2015).

75. *See id.* In her district court decision, Judge Wilken also recognized that student-athletes have rights under intellectual property law. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049, 1067 (9th Cir. 2015); *see also* Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA, et al. Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L.J. 367, 388 (2015) ("Judge Wilken rejected the NCAA's argument that college athletes have no rights under intellectual and personal property theories, and further determined that college athletes had an interest in television revenues, despite the NCAA's First Amendment argument and recognition that certain states prohibit college athletes from receiving any such compensation by statute.").

76. *See* Kevin Allen, *Here Are Some Benefits NCAA Athletes Already Are Eligible for That You Might Not Know About*, USA TODAY (Oct. 1, 2019, 4:06 PM), https://www.usatoday.com/story/sports/college/2019/10/01/ncaa-football-basketball-benefits-college-athletes-now-can-receive/2439120001/ ("The NCAA had asked Newsom, in a letter, not to sign the bill into the law, arguing that it would 'erase the critical distinction between college and professional athletics.'"); Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (June 21, 2021), https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html.

77. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1265 (9th Cir. 2020), *aff'd sub nom. Alston*, 141 S. Ct. at 2166.

compensation.[78] It appears that the *Alston* decision could lead to extensive student-athlete antitrust litigation on a variety of compensation restrictions. Further, *Alston*, even with its narrowly construed holding, serves as an example of the drastic change that college sports is set to undergo and that, in many respects, is already underway with the NIL movement.[79]

Alston is a clear victory for all student-athletes across the country. Now, a university or conference can provide educational benefits to student-athletes that cannot be capped by the NCAA.[80] This decision leads to an important issue that must be addressed by Congress: do the universities or individual conferences make the rules for what benefits recruiters can offer? In either scenario, there are many drawbacks. A fifteen-year-old high school swimmer deciding between three different schools, for example, may ask those schools to offer all sorts of academically related benefits, including internships, a year abroad, scholarships, or graduate school. Similarly, if individual conferences take over the responsibility of making the NIL rules, then the less "wealthy" conferences will be at a huge disadvantage.[81] The "Power Five" (SEC, ACC, Pac-12, Big Ten, and Big 12) could continue to spend hundreds of millions of dollars annually, leaving the less-funded conferences to compete at a much lower level.[82] Still, the NCAA is determined to prohibit non-education-related compensation, with Division II Presidents Council Chair Sandra Jordan claiming, "[t]he new policy preserves the fact college sports are not pay-for-play."[83] The Court's decision in *Alston*, however, signifies that the pay-for-play issue may soon be revisited.[84] The NCAA lost a battle in *Alston* in what appears to be an unwinnable war to preserve its belief of "amateurism" in college sports.[85]

78. *Alston*, 141 S. Ct. at 2147, 2154.

79. *Id.* at 2166–68 (Kavanaugh, J., concurring).

80. *See id.* at 2166.

81. *See* Bailey Lipschultz, *NCAA Supreme Court Ruling Threatens to Further Divide the Haves and Have-Nots of College Sports*, FORTUNE (June 23, 2021, 10:07 AM), https://fortune.com/2021/06/23/ncaa-supreme-court-ruling-division-i-student-athletes-college-sports/ ("Schools that aren't cash rich or don't compete in conferences like the Southeastern Conference, the Big Ten or the Pac-12, will probably be forced to reevaluate where athletics fit in.").

82. *See id.*

83. Press Release, Michelle Brutlag Hosick, *supra* note 5.

84. *See Alston*, 141 S. Ct. at 2166–69.

85. *Id.* at 2168–69.

III. THE NIL MARKET

A. The History of Student-Athletes' Rights in Their NIL

The restrictions by the NCAA and its member institutions on student-athletes' use of their NIL rights were a natural result of the NCAA's principles of amateurism, under which only amateur athletes are eligible for college sports.[86] Bylaw 12.5.2.1 was included in these principles, which makes ineligible for college sports any student-athlete who "[a]ccepts any remuneration for or permits the use of [his or her] name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind" or "receives remuneration for endorsing a commercial product or service through [his or her] use of such product or service."[87] This bylaw and similar NCAA rules that limit a student-athlete's ability to use his or her NIL for endorsement deals have been the subject of extensive litigation. In 2004, for example, a Colorado state appellate court affirmed the dismissal of a challenge to NIL restrictions by a University of Colorado ("CU") football player, concluding that "[t]he clear import of the bylaws is that, although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition."[88] In that case, the plaintiff was a professional and Olympic skier prior to attending CU.[89] Moreover, the plaintiff had earlier participated in various endorsement activities, including endorsing ski equipment and modeling for Tommy Hilfiger.[90] While being recruited by CU, the NCAA forced him to choose between those endorsement opportunities and his career as a collegiate football player.[91]

86. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332–37 (2007) (detailing the recent history of amateurism in college sports leading to modern NCAA amateurism rules).

87. *Bylaw 12.5.2.1*, NCAA, https://web3.ncaa.org/lsdbi/bylaw?ruleId=7341 (last visited Nov. 11, 2022); *see* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 625 (Colo. App. 2004) ("[T]he NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."). For an example of the bylaw's application, see Beth Brown, *Breaking Down the NCAA Bylaw Johnny Manziel Is Accused of Violating*, EAGLE (Oct. 17, 2019), https://theeagle.com/sports/college/aggiesports/article_148231f2-66ae-50c8-885b-09d2b6c34914.html (discussing how the rule applies to former Texas A&M star quarterback Johnny Manziel, who was suspended by the NCAA for signing autographs for an individual who later sold those autographs, even though it was not proven that Manziel was paid for signing those autographs).

88. *Bloom*, 93 P.3d at 626.

89. *Id.* at 622.

90. *Id.*

91. *Id.*

In contrast, the NCAA lost a challenge to its NIL policies on antitrust grounds in *O'Bannon*.[92] There, the U.S. Court of Appeals for the Ninth Circuit found significant anticompetitive effect in the NCAA's system of prohibiting student-athletes' compensation for the use of their NIL rights and determined it was not offset by any of the NCAA's offered procompetitive rationales.[93] However, unlike in *Alston*, neither the U.S. District Court for the Northern District of California nor the U.S. Court of Appeals for the Ninth Circuit were persuaded to enjoin the NCAA from enforcing its restriction on student-athlete NIL use.[94] Importantly, at that time, the courts relied on the Supreme Court's ruling in *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*,[95] which instructed courts to provide the NCAA "ample latitude" in the "maintenance of a revered tradition of amateurism in college sports" to be "consistent with the goals of the Sherman Act."[96]

Despite its history of placing restrictions on student-athletes' NIL rights, there have been several recent developments that forced the NCAA to change its stance on student-athlete compensation. First, many states have passed laws intended to force the NCAA and its member institutions to allow student-athletes to benefit from their NIL rights.[97] California started this movement when Governor Newsom signed the Fair Pay to Play Act into law on September 30, 2019.[98] The NCAA in response simply threatened California with ineligibility for college sports.[99] However, California's bill was soon copied by several other states, including in a law passed by the Florida legislature.[100] As a result,

92. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015).

93. *Id.* at 1070–74.

94. *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021); *Bloom*, 93 P.3d at 626, 628; *O'Bannon*, 802 F.3d at 1076–77 (vacating the district court's injunction that required the NCAA to allow its member schools to pay $5,000 in deferred compensation to student-athletes because courts must afford the NCAA "ample latitude" to uphold the "principles" of college athletics).

95. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

96. *Id.*

97. *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (June 23, 2022), https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/.

98. *See* CAL. EDUC. CODE § 67456 (West 2021); Press Release, Gavin Newsom, Governor of California, Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports (Sept. 30, 2019), https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/.

99. Letter from Stevie Baker-Watson et al., Bd. of Governors, NCAA, to Gavin Newsom, Governor of California (Sept. 11, 2019), https://www.documentcloud.org/documents/6400600-NCAA-Letter-To-Newsom.html.

100. *See* Ben Kercheval, *Florida Gov. Ron DeSantis Signs Bill Allowing College Athletes to Be Paid for Name, Image and Likeness*, CBS SPORTS (June 12, 2020, 1:07 PM),

the NCAA was forced to propose new rules that would permit student-athletes to benefit from their NIL rights.[101] Indeed, these changes would have allowed student-athletes to be compensated by selling their NIL rights for social media activity, third-party endorsements, and personal appearances, but only with provisions to ensure that the NIL use was completed "in a manner consistent with the collegiate model" of amateurism.[102] These provisions included bans on NIL deals tied to athletic participation and limitations on student-athlete NIL deals with industries that were considered to have a history of "encouraging or facilitating recruiting and other rules infractions,"[103] prohibition of the use of school or conference intellectual property in connection with endorsement deals, and restrictions on the use of student-athlete NIL in certain industries, including alcohol, tobacco, gambling, and adult entertainment.[104] The U.S. Department of Justice warned the NCAA of the potential antitrust violations these proposed rule changes would create.[105] Upon receiving the letter, along with the grant of certiorari in *Alston*, the NCAA decided to table the proposed rule changes and to wait for the *Alston* ruling.[106]

https://www.cbssports.com/college-football/news/florida-gov-ron-desantis-signs-bill-allowing-college-athletes-to-be-paid-for-name-image-and-likeness/.

101. *See* Barrett Sallee & Adam Silverstein, *NCAA Takes Big Step Toward Allowing Name, Image and Likeness Compensation for Athletes*, CBS SPORTS (Apr. 29, 2020, 9:52 AM), https://www.cbssports.com/college-football/news/ncaa-takes-big-step-toward-allowing-name-image-and-likeness-compensation-for-athletes/.

102. FED. & STATE LEGISLATIVE WORKING GRP., REPORT TO THE NCAA BOARD OF GOVERNORS 4 (2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf (attachment to NCAA BD. OF GOVERNORS, REPORT OF THE NCAA BOARD OF GOVERNORS (2019)) (suggesting NCAA guidance that the board of governors' NIL proposal would ensure that allowing student-athletes to be paid for NIL would be done "in a manner consistent with the collegiate model"); *see* Sallee & Silverstein, *supra* note 101.

103. Sallee & Silverstein, *supra* note 101; *see also* Tom Winter & Tracy Connor, *4 NCAA Basketball Coaches, Adidas Executive Charged in Bribe Scheme*, NBC NEWS (Sept. 26, 2017, 8:12 PM), https://www.nbcnews.com/news/us-news/college-basketball-coaches-allegedly-took-bribes-agents-deliver-athletes-n804781.

104. *See* Sallee & Silverstein, *supra* note 101.

105. Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021, 4:00 PM), https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/.

106. *See* Michelle Brutlag Hosick, *Division I Council Tables Proposals on Name, Image, Likeness and Transfers*, NCAA (Jan. 11, 2021, 6:48 PM), https://www.ncaa.org/news/2021/1/11/division-i-council-tables-proposals-on-name-image-likeness-and-transfers.aspx.

Though the Court's decision in *Alston* was limited to the issue before the Court, educational benefits, the rationale has broader reach.[107] In *Alston*, the Court discarded the "ample latitude" to preserve amateurism instruction set forth in *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* and *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation*, noting that the commercial landscape of college sports had changed considerably since *Board of Regents* and that the NCAA deserved no such "ample latitude" unless Congress was willing to grant it through legislation.[108]

One of the many issues facing the NCAA was that the *Alston* ruling was released only ten days before the first set of state NIL laws were scheduled to come into effect.[109] To prevent future litigation under antitrust laws and states from enforcing their NIL laws, the NCAA decided to change its stance on the NIL movement.[110] Because there is no accepted universal law,[111] the NCAA decided to adopt an interim NIL policy that gave all the power to its member institutions and their

107. *See, e.g.*, Amanda Christovich, *Supreme Court Issues Unanimous Pro-Athlete Decision in* NCAA v. Alston, FRONT OFF. SPORTS (June 21, 2021, 10:59 AM), https://frontofficesports.com/scotus-ruling-alston/; DJ Bien-Aime II, *SCOTUS Ruling's True Effect on NCAA Likely Won't Be Seen for Years*, N.Y. DAILY NEWS (June 23, 2021, 5:38 PM), https://www.nydailynews.com/sports/more-sports/ny-ncaa-alston-scotus-20210623-txlfbayf4vcsfgk4kdth4qcugq-story.html; Samuel Estreicher & Zachary Fasman, NCAA v Alston*: A Brave New World for College Sports*, JUSTIA: VERDICT (June 25, 2021), https://verdict.justia.com/2021/06/25/ncaa-v-alston-a-brave-new-world-for-college-sports.

108. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154–58 (2021) ("When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984 . . . . Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that."); *see* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019).

109. *See* Megan L.W. Jerabek, NCAA v. Alston*: A 'Buzzer-Beater' Victory for College Athletes as Name, Image and Likeness Shot Clock Counts Down to July 1*, NAT'L L. REV. (June 24, 2021), https://www.natlawreview.com/article/ncaa-v-alston-buzzer-beater-victory-college-athletes-name-image-and-likeness-shot.

110. *See* David Cruikshank, *The Fair Pay to Play Act: Likely Unconstitutional, Yet Necessary to Protect Athletes*, 81 OHIO STATE L.J. ONLINE 253, 259 (2020), https://kb.osu.edu/bitstream/handle/1811/92249/1/OSLJ_Online_V81_253.pdf (noting that the NCAA changed its rules to allow compensation for student-athletes' NILs "less than two months after the organization's vehement public opposition to California's law, the NCAA doubled back on [its] position" that the California Act would unconstitutionally "eliminate the distinction between college and professional sports").

111. *See* Michael McCann, *Federal NIL Bill Stalls in Congress, Setting Table for July Chaos*, YAHOO! (June 17, 2021), https://www.yahoo.com/video/federal-nil-bill-stalls-congress-212108976.html.

respective states to govern NIL.[112] The NCAA interim policy provides the following guidance to student-athletes, recruits, their families, and member schools: (1) individuals can engage in NIL activities that are consistent with the law of the state where the school is located; (2) 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 NIL; (3) individuals can use a professional services provider for NIL activities; and (4) student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.[113] The Division I Board of Directors approved the policy on June 30, 2021, opening the doors for student-athletes to receive compensation for their NIL rights.[114]

B. Current NIL Legislation and Regulation of Student-Athletes' Rights in Their NIL

There is currently no federal law governing the NIL movement in college sports.[115] Rather, the NCAA has allowed each member institution and their respective state to set their own policies.[116] This decision has led to a tremendous amount of chaos and a variety of state laws, which the NCAA had feared from the beginning.[117] Despite the different sets of rules, there are several key provisions that are followed by many states and member institutions.[118] Indeed, all mostly prohibit NCAA member schools, member conferences, the NCAA, and the National Association of Intercollegiate Athletics ("NAIA") from limiting student-athletes' ability to profit from their NIL.[119]

112. *See* Auerbach, *supra* note 70.

113. Press Release, Michelle Brutlag Hosick, *supra* note 5.

114. Ben Kercheval & Dennis Dodd, *NCAA Approves Interim Name, Image and Likeness Policy Removing Restrictions for College Athletes to Earn Money*, CBS SPORTS (June 30, 2021, 5:44 PM), https://www.cbssports.com/college-football/news/ncaa-approves-interim-name-image-and-likeness-policy-removing-restrictions-for-college-athletes-to-earn-money/.

115. *See* Ralph D. Russo, *NCAA Moving Toward Hyperlocal Solution to NIL as Placeholder*, ABC NEWS (June 24, 2021), https://abc6onyourside.com/news/nation-world/ncaa-moving-toward-hyperlocal-solution-to-nil-as-placeholder-06-25-2021.

116. *Id.*

117. *See* Dennis Dodd, *Desperation Is Setting in for the NCAA as Congress Looks Slow to Move on Name, Image and Likeness*, CBS SPORTS (June 9, 2021, 4:44 PM), https://www.cbssports.com/college-football/news/desperation-is-setting-in-for-the-ncaa-as-congress-looks-slow-to-move-on-name-image-and-likeness/; *see also* Tara Adhikari, *How 'Name, Image, Likeness' Rights Change the Game for NCAA Athletes*, CHRISTIAN SCI. MONITOR (Sept. 30, 2021), https://www.csmonitor.com/USA/Society/2021/0930/How-name-image-likeness-rights-change-the-game-for-NCAA-athletes.

118. *See* Keller, *supra* note 97.

119. *See id.*

Presently, almost all member institutions and states have their own rules concerning what student-athletes can and cannot do while selling their NIL rights.[120] Moreover, all set up various enforcement mechanisms to preclude entities from punishing student-athletes by revoking the athletes' scholarships or by making them ineligible for competition.[121] Further, all allow student-athletes to hire attorneys and sports agents to represent them in NIL negotiations, depending on the respective state requirements for agents.[122]

California's Fair Pay to Play Act was amended midway through its legislative cycle[123] to include a provision forbidding student-athletes from entering into NIL agreements that are "in conflict with a provision of the athlete's team contract."[124] The provision was widely reported at the time of its proposal as guided by a desire to ban deals that create a conflict with exclusive school sponsorship deals.[125] Since then, bills passed by other states have contained similar language,[126] but some are more direct with their language and allow their schools to prohibit student-athletes from agreeing to conflicting deals.[127] In the executive order delivered by

120. *See id.*

121. *See id.*

122. *See id.*; *Ohio and Texas Show that Not All State NIL Bills Are Equal*, EXTRA POINTS WITH MATT BROWN (May 26, 2021), https://www.extrapointsmb.com/p/ohio-state-buckeyes-texas-longhorns-nil-college/ (discussing the provision's implications).

123. Mit Winter, *California's College Athlete Name, Image, and Likeness Bill Amended to Prohibit Conflicts Between Athlete Contracts and University Contracts*, KENNYHERTZ PERRY, https://kennyhertzperry.com/californias-college-athlete-name-image-and-likeness-bill-amended-to-prohibit-conflicts-between-athlete-contracts-and-university-contracts/ (last visited Nov. 17, 2022); *see* S. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

124. CAL. EDUC. CODE § 67456(e)(1) (West 2021).

125. *See, e.g.*, Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay to Play Act*, 120 COLUM. L. REV. 109, 114 (2020) (comparing the discussed provision in California's NIL bill to the International Olympic Committee's infamous Rule 40 which prohibits conflicting sponsorships and endorsements).

126. *See, e.g.*, S. 646, 2020 Leg., Reg. Sess. (Fla. 2020) ("An intercollegiate athlete may not enter into a contract for compensation for the use of her or his name, image, or likeness if a term of the contract conflicts with a term of the intercollegiate athlete's team contract."); S. 439, 2021 Gen. Assemb., Reg. Sess. (Md. 2021) (as passed by Senate, Apr. 8, 2021) (to be codified at MD. CODE ANN., EDUC. § 15-131) ("A student athlete may not enter into a contract providing compensation to the student athlete for use of the student athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the student athlete's athletic program contract.").

127. *See, e.g.*, S. 381, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021) ("An institution of higher education may prohibit a college student athlete's involvement in name, image or likeness activities that conflict with existing institutional sponsorship arrangements at the time the college student athlete discloses a contract to the institution of higher education . . . ."); S.C. CODE ANN. § 59-158-40(B)(1)(a) (2021) ("An institution of higher learning may prohibit an intercollegiate athlete from using his name, image, or likeness for compensation if the proposed use of his name, image, or likeness conflicts with . . . existing institutional

Kentucky Governor Andy Beshear, for example, he bans these types of sponsorship deals by including an exception for "[c]ompensation in exchange for a contract of endorsement, promotion or other activity that the postsecondary educational institution determines is in conflict with an existing contract of endorsement, promotional or other activity entered by the postsecondary educational institution."[128] The main concern of these provisions can be seen when applied to endorsement deals where, for example, a student-athlete wishes to wear Nike shoes but is required under the terms of his or her scholarship with the school to only wear Under Armour shoes.[129] Another important issue is that the breadth of the statutory language in most of these bills may allow a school to reject a student-athlete's deal in less direct conflicts. For example, a student-athlete's potential sponsorship deal with a local car dealership may be rejected because his or her school has its own sponsorship agreement with another car dealership.

California, Florida, and Colorado, the first states with NIL laws, did not contain exceptions for the adult industries.[130] Instead, an exception for these industries was first introduced in one of the early federal NIL bills.[131] While the bill did not gain any traction in Congress, Representative Anthony Gonzalez (R-Ohio) and Representative Emanuel Cleaver (D-Mo.) introduced the bipartisan House bill in September 2020.[132] Several other states copied this adult industry clause including, for example, Texas, which bans its student-athletes from agreeing to deals if the compensation is provided "in exchange for an endorsement of alcohol, tobacco products, e-cigarettes or any other type of nicotine delivery device, anabolic steroids, sports betting, casino gambling, a

sponsorship agreements or other contracts . . . ."); S. 60, 2021 Leg., Reg. Sess. § 3703(E)(1)(a) (La. 2021) ("A postsecondary education institution may prohibit an intercollegiate athlete from using the athlete's name, image, or likeness for compensation if the proposed use of the athlete's name, image, or likeness conflicts with . . . [e]xisting institutional sponsorship agreements or contracts.").

128. Ky. Exec. Order No. 2021-418 § I(B) (June 24, 2021), https://governor.ky.gov/attachments/20210624_Executive-Order_2021-418_Student-Athletes.pdf.

129. Winter, *supra* note 123.

130. Andy Wittry, *Pandora's Keg: Will There Be an Unrestricted Market for Alcohol-Related Name, Image and Likeness Endorsements for College Athletes?*, OUT OF BOUNDS WITH ANDY WITTRY (Feb. 26, 2021), https://andywittry.substack.com/p/pandoras-keg-will-there-be-an-unrestricted?s=r. The author did note that the California, Colorado, and Florida bills contained broad clauses prohibiting sponsorship deals that conflict with team contracts and that schools may include clauses in their team contracts forbidding alcohol sponsorships in similar fashion to team rules regarding alcohol use. *Id.*

131. *Id.*

132. *See id.*; Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. § 2(a)(2) (2020).

firearm the student athlete cannot legally purchase, or a sexually oriented business."[133] Similarly, Arkansas's NIL bill comprises the same clause but expands its scope, including adult entertainment, alcohol products, casinos and gambling products, tobacco, marijuana, vaping, pharmaceuticals, drug paraphernalia, weapons, and "[a]ny product, substance, or method that is prohibited in competition by an athletic association, athletic conference, or other organization governing varsity intercollegiate athletic competition."[134] While Mississippi's NIL bill contains a clause forbidding student-athletes from signing deals in similar adult industries, the law goes further, including a clause that bans student-athletes from agreeing to deals regarding:

> 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 education institution or its athletic programs, including, without limitation, bringing about public disrepute, embarrassment, scandal, ridicule or otherwise negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution.[135]

Further, NIL laws passed in New Jersey and Illinois contain similar language forbidding deals with enumerated adult industries and any other deals considered to be "inconsistent with the values or mission of a postsecondary educational institution."[136] In contrast, while Alabama's NIL law contains the same broad statutory language, it leaves more discretion to its schools, stating that applicable educational institutions "may prohibit" endorsement contracts, even in the adult industries.[137] Similarly, the governors of both Kentucky and North Carolina passed executive orders which contain similar language that allows but does not require restrictions on NIL deals in conflict with institutional values.[138]

133. S. 1385, 87th Leg., Reg. Sess. § 2(g)(2)(B)(iv) (Tex. 2021).

134. H.R. 1671, 93d Gen. Assemb., Reg. Sess. § 4-75-1307(b)(9) (Ark. 2021).

135. S. 2313, 2021 Leg., Reg. Sess. § 4(14) (Miss. 2021).

136. *See id.*; S. 971, 219th Leg., Reg. Sess. § 2(b) (N.J. 2020); S. 2238, 102d Gen. Assemb., Reg. Sess. § 20(i) (Ill. 2021).

137. H.R. 404, 2021 Leg., Reg. Sess. § 2(b)(1)(d) (Ala. 2021).

138. N.C. Exec. Order No. 223 § 1(B)(iii) (July 2, 2021), https://governor.nc.gov/media/2546/open (stating that schools "may impose reasonable limitations" on endorsement of products or brands that the institution determines to be "antithetical to the values of the institution"); Ky. Exec. Order No. 2021-418 § I(D) (June 24, 2021), https://governor.ky.gov/attachments/20210624_Executive-Order_2021-418_Student-Athletes.pdf (allowing schools to reject "contracts for compensation of name, image and likeness that the postsecondary educational institution determines is

Along with many states, several NCAA member institutions have released their own NIL policies on or around July 1, 2021.[139] Most universities created policies that are broad, but some do contain language similar to that in state laws.[140] Florida State University ("FSU")'s NIL guidelines, for example, note that "state law prohibits student-athletes from entering into a contract for NIL compensation that conflicts with a term in an FSU team contract."[141] The guidelines also suggest that endorsement deals in the adult industries are discouraged because "[s]tudent-athletes should fully evaluate any potential consequences to their personal brand before engaging in NIL activities, in particular those involving gambling/sports wagering, alcohol, tobacco, marijuana/CBD, athletic performance-enhancing supplements, and adult entertainment."[142] Similarly, the University of Alabama ("UA"), in taking its own state law further, bans student-athlete endorsement deals in tobacco, alcohol, controlled substance, adult entertainment, and gambling industries, as well as deals determined by the school to conflict with a term of a contract held by UA.[143] There are even more examples of these types of decisions by NCAA member institutions.[144] The University of Louisiana System schools, for example, passed rules prohibiting endorsements in the areas of "tobacco, alcohol, illegal substances or activities, banned athletic substances, and gambling" and additionally allowing schools to prohibit contracts where students collect compensation for their NIL if a contract "conflicts with an existing institutional sponsorship agreement/contract or goes against the values of the postsecondary education institution."[145]

Meanwhile, some universities located in states without NIL laws have decided to create their own policies which include NIL restrictions. North Dakota State University ("NDSU"), for example, bars its student-athletes from endorsement deals associated with "tobacco, alcohol,

incompatible or detrimental to the image, purpose or stated mission of the postsecondary educational institution, such as, but not limited to, the promotion or advertisement of alcohol, tobacco products, firearms or sexually-oriented activities").

139. *See Tracker: NIL Policies by Institution*, BUS. OF COLL. SPORTS (Apr. 1, 2022), https://businessofcollegesports.com/tracker-nil-policies-by-institution/.

140. *Id.*

141. *Florida State NIL Guidelines*, SEMINOLES (June 29, 2021), https://seminoles.com/nilinfo/.

142. *Id.*

143. *Student-Athlete Name, Image, and Likeness Compensation Policy*, UNIV. OF ALA., https://rolltide.com/sports/2021/6/28/name-image-likeness (last visited Nov. 18, 2022).

144. Wittry, *supra* note 130.

145. Pol'y and Procs. Memorandum on Intercollegiate Athlete Name, Image and Likeness (NIL) Pol'y from the Univ. of Louisiana Sys. 3, 5 (July 1, 2021), https://s25260.pcdn.co/wp-content/uploads/2021/06/IA-V.-3-NIL-Policy-7.1.21.pdf.

banned athletic substances, illegal substances or activities, or sports wagering" and asks for preclearance when student-athletes attempt to "engag[e] in NIL activities that involve NDSU corporate sponsors," even though its state has not yet passed NIL legislation.[146]

As a result of the varying degrees of state laws, the NCAA is left in a precarious situation: if it enacts a permanent NIL policy with an excessive number of guardrails in place, the NCAA is likely to get crushed in litigation.[147] However, not taking any action would, and has, created chaos amid a patchwork of NIL laws in states across the country, especially when one considers the transfer portal available to student-athletes to change schools without any loss of athletic eligibility.[148] While the Court does not address the NIL movement by name, the *Alston* decision will certainly influence the NCAA's efforts to navigate through the NIL movement.[149]

IV. IMPORTANT PRINCIPLES TO CONSIDER FOR A UNIVERSAL NIL LAW

The NCAA has asked Congress to draft a federal NIL law to address a variety of concerns, including how the NIL movement might impact less visible players, for example, those at small Division III schools.[150] University of Georgia's football coach, Kirby Smart, warned that "[y]ou're going to have the haves and have nots" and "[t]he schools that have the capacity and the ability and are more competitive in the NIL market are going to be schools that step ahead on top of other schools."[151] Similarly, Opendorse, a sports technology company that connects student-athletes

146. N.D. STATE UNIV. ATHLETICS, STUDENT-ATHLETE NAME, IMAGE AND LIKENESS POLICY 1–2 (2021), https://www.scribd.com/document/513854314/North-Dakota-State-NIL; *see* Murphy, *supra* note 3.

147. *See* Press Release, Michelle Brutlag Hosick, *supra* note 5 (NCAA President Mark Emmert said that "[w]ith the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment — both legal and legislative — prevents us from providing a more permanent solution and the level of detail student-athletes deserve.").

148. *See id.*; *see generally supra* notes 97, 100–07.

149. *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

150. *See* Press Release, Michelle Brutlag Hosick, *supra* note 5; Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Oct. 1, 2021), https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law (explaining that Congress held a hearing on NIL with testimonies from the NCAA, the National College Players Association, the Central Intercollegiate Athletic Association, and others).

151. Chris Low, *Nick Saban, Kirby Smart Both Call for Increased NIL Regulation in College Football: 'You're Going to Have the Haves and Have Nots'*, ESPN (Jan. 9, 2022), https://www.espn.com/college-football/story/_/id/33027223/nick-saban-kirby-smart-call-increased-nil-regulation-college-football-going-haves-nots.

with endorsements, found that through May 31, 2022, college football players have earned the most compensation through NIL deals, at 49.9%.[152] Further, some experts believe that elite student-athletes could earn more than $10 million based on their fair market value.[153]

In the wake of *Alston* and the rise of varying NIL laws in states around the country, Congress must intervene to provide a federal framework around the NIL movement. There are now more than two dozen states with NIL laws already in place and multiple others that are actively pursuing legislation.[154] As of now, the current set of state laws fail to provide the same protections for student-athletes across the country, which only creates more chaos in college sports.[155] States and member institutions with more lenient NIL laws will have more competitive teams as they have an advantage with recruiting and in the transfer portal. On the other hand, states and member institutions with more restrictive laws will be at a disadvantage because of the lack of opportunities for their student-athletes to explore financial options. Ten states, for example, prohibit student-athletes from NIL deals with certain categories of goods, such as the Pennsylvania NIL law.[156] California, Florida, Colorado, and other states, meanwhile, generally do not have any limitations on the nature of the NIL deals.[157] Indeed, student-athletes in Florida have signed NIL deals with local breweries, and student-athletes over twenty-one years old in Colorado have been offered NIL deals with a sports betting operator.[158]

Interestingly, not everyone believes adopting a universal NIL law is in the best interest of college sports. National College Players Association ("NCAP") Executive Director Ramogi Huma, a former University of California, Los Angeles, football player, said there is "room for

152. *NIL Insights*, OPENDORSE (Oct. 31, 2022), https://opendorse.com/nil-insights/. Opendorse additionally found that the average NIL compensation for Division I athletes through May 31, 2022 was $3,711, while those in Division II earned an average of $204 and those in Division III earned $309. *Id.* These numbers reflect the large disparity in opportunities and NIL deals available to Division II and Division III athletes.

153. Jabari Young, *Chaos Has Arrived in the NCAA and Athletes Will Need to Learn Their Fair Market Value Following Supreme Court Ruling*, CNBC (June 22, 2021, 3:11 PM), https://www.cnbc.com/2021/06/22/ncaa-athletes-to-explore-market-value-following-supreme-court-ruling.html.

154. *See* Murphy, *supra* note 3.

155. *See, e.g.*, S. 381, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021); Keller, *supra* note 97.

156. Pa. S. 381.

157. *See* Keller, *supra* note 97.

158. Amanda Christovich, *Alcohol, Betting NIL Deals Fair Game for Some Athletes*, FRONT OFF. SPORTS (Oct. 11, 2021, 12:26 PM), https://frontofficesports.com/alcohol-betting-nil-deals-fair-game-for-some-athletes/.

uniformity," but not a need for Congress to act on NIL.[159] Huma argues that because any student nationwide can profit from their NIL, federal legislation should instead mandate broad-based reforms, where such reforms include creating an entity responsible for certifying student-athlete representatives and preventing conflicts of interest by restricting colleges from representing their student-athletes or arranging NIL deals.[160] In contrast, Baylor University President Linda Livingstone explained that the current patchwork of state NIL laws is confusing.[161] As such, Livingstone believes that any potential federal legislation should be based on three main principles: treating student-athletes as students first, ensuring equity in the treatment of men and women as employees, and addressing resource discrepancies among different institutions.[162] Livingstone is clearly arguing that Congress should do exactly what the NCAA can no longer do for itself.

Although state laws have started to go into effect before a federal law, several federal options have been proposed.[163] Senator Chris Murphy (D-Conn.) and Senator Bernie Sanders (I-Vt.) proposed legislation that would revise labor laws to formally make student-athletes employees of their schools and allow them to unionize.[164] The NCAA strongly opposes this proposal even though this piece of legislation would result in labor exemptions from antitrust law that would not necessarily favor student-athletes.[165]

Further, a bipartisan bill introduced by Representative Anthony Gonzalez (R-Ohio) and Representative Emanuel Cleaver (D-Mo.) "would open the door for college athletes to make money from a wide [range] of

159. Liz Clarke, *Q&A with Ramogi Huma: Why Congress Should Be Addressing Way More Than NIL*, WASH. POST (Oct. 6, 2021, 7:00 AM), https://www.washingtonpost.com/sports/2021/10/06/name-image-likeness-ramogi-huma-college-athletes/.

160. *See id.*

161. Tommy Witherspoon, *Livingstone Tells House Subcommittee Congress Should Unify NIL Standards*, WACO TRIB.-HERALD (Sept. 30, 2021), https://wacotrib.com/news/local/education/livingstone-tells-house-subcommittee-congress-should-unify-nil-standards/article_bdb710ae-21f8-11ec-beb4-e36c0a8df4f0.html.

162. *See id.*

163. *See* Murphy, *supra* note 73; Ray Glier, *Chris Murphy and Bernie Sanders Introduce Senate Bill That Would Allow College Athletes to Unionize*, FORBES (May 27, 2021, 11:50 AM), https://www.forbes.com/sites/rayglier/2021/05/27/sen-chris-murphy-sen-bernie-sanders-introduce-bill-that-would-allow-college-athletes-to-unionize/?sh=13ace9ed5e8d; Ross Dellenger, *Bipartisan Name, Image, Likeness Bill Focused on Endorsements Introduced to Congress*, SPORTS ILLUSTRATED (Sept. 24, 2020), https://www.si.com/college/2020/09/24/name-image-likeness-bill-congress-endorsements.

164. Glier, *supra* note 163.

165. *See id.*

endorsement deals" and would provide a universal rule for colleges.[166] Representatives Gonzalez and Cleaver sought to create a balanced bill by supporting only some of the guidelines in the NCAA's proposal and by incorporating protections for student-athletes as well.[167] Under the proposed bill, student-athletes would not be allowed to sign contracts with companies that promote "alcohol, tobacco, marijuana, gambling or adult entertainment."[168] The law would give schools the right to prohibit student-athletes from promoting their endorsers in any school related event.[169] As such, if a student-athlete was sponsored by Nike, but the school promoted Under Armour, that student-athlete would not be able to wear Nike during an athletic event.

Finally, in December 2020, Senators Cory Booker (D-N.J.), Richard Blumenthal (D-Conn.), Kirsten Gillibrand (D-N.Y.), and Janice Schakowsky (D-Ill.) proposed a bill which would grant student-athletes rights to earn NIL compensation and require schools to share 50% of their profits from revenue generated by student-athletes, after accounting for the cost of scholarships.[170] Congress has come to the realization that student-athletes do have intellectual property rights in their NIL, and due to the recent party shift in the Senate, Senator Booker's student-athlete bill of rights could become a reality.[171] State legislatures enacting

166. *See* Murphy, *supra* note 73; Dellenger, *supra* note 163.

167. *See* Dellenger, *supra* note 163 ("The bill assigns the Federal Trade Commission to oversee and enforce NIL while also creating a commission that will continue studying the issue and report to Congress on an annual basis."). Gonzalez stated that "the endorsement restrictions on athletes are 'modest' and mirror those on the professional level." Dellenger, *supra* note 163.

168. *See* Murphy, *supra* note 73 (discussing the federal proposal's limitations in reference to student-athlete endorsements).

169. *See id.* ("The proposed law does not include any restrictions about athletes signing deals with the competitors of companies that sponsor their school, which is a provision that some college sports leaders wanted."). Additionally, "Gonzalez said they debated including a provision that would address concerns about athletes endorsing companies that compete with brands who sponsor their school, but ultimately decided any such rule would be unfair to the athletes." *Id.*

170. *See* Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020), https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football (discussing the various rights Senator Booker hopes to grant student-athletes). These rights also include "scholarship[s] for as many years as it takes for them to receive an undergraduate degree, and it also bans coaches and administrators from influencing or retaliating against a college athlete for their choice of academic major or course." *Id.* Senator Booker also intends to implement a medical trust fund that "would be created for athletes to use to cover the costs of any out-of-pocket medical expenses while in college and for five years after their eligibility expires, if used to treat a sport-related injury." *Id.*

171. *See* Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games—So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020),

their own NIL laws and Congress proposing its own bill reinforces the belief that student-athletes should be afforded the right to their NIL under the law.[172]

A. Restrictions on NIL Deals for Student-Athletes

While a student-athlete can now be compensated for the use of his or her NIL, there are some important restrictions that Congress needs to incorporate in any potential federal law. First, Congress should prohibit schools from withholding scholarships or eligibility to participate in sports from student-athletes who exercise their NIL rights. Moreover, Congress should create a law that is cognizant of the institution's prior contracts by maintaining restrictions on agreements that conflict with school or team contracts and by protecting the intellectual property rights of schools. In addition, any federal law must address that compensation cannot be contingent upon a student's enrollment at a particular school or his or her athletic accomplishments as a student-athlete. Further, any legislation must also prohibit student-athletes from accepting NIL deals unless they play. As set forth in *Alston*, the NCAA still prohibits pay-to-play and performance-based payments.[173] Without these payments, high school recruits would only attend the schools that offer the most money.

Finally, Congress must establish some restrictions on NIL deals for which student-athletes may sign, including restricting student-athletes under twenty-one years old from signing deals with local breweries and sports betting operators, and prohibiting all student-athletes from endorsing marijuana or adult entertainment activities.

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https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing (suggesting that the NCAA is still trying to hold on to its amateurism guidelines that have not been successful as being both a violation of antitrust law and right of publicity). *Contra* Dellenger, *supra* note 170 (suggesting that Senator Booker plans to grant athletes permission to access group licensing, which could in turn result in the NCAA videogame comeback).

172. *See* Dellenger, *supra* note 170 (acknowledging recent legislation by bipartisan congresspeople to adopt a federal NIL standard for universities to abide by); Bank, *supra* note 125, at 116–17 (iterating the limitations of California's Fair Pay to Play Act and illustrating what the NCAA would look like with student-athletes being paid); *see also* Bank, *supra* note 125, at 109 ("[T]he Fair Pay to Play Act will allow student-athletes enrolled in California colleges and universities to be compensated for the use of their name, images, and likenesses just like non-athletes.").

173. *See* Leah Vann, *One Week into NIL, Lawyers Caution Athletes on Barstool, YOKE Gaming and Misinformation That Could Affect Iowa Athletes*, GAZETTE (Aug. 27, 2021, 1:24 PM), https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/; *see generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

Without a federal law placing restrictions on NIL deals, it is likely there will be more concerns like those currently facing Barstool Sports ("Barstool").[174] While Barstool has signed sponsorship deals with many student-athletes since the NIL doors opened on July 1, 2021, many entities have warned student-athletes against working with Barstool due to its involvement with sports betting.[175] Such a link makes a partnership with Barstool questionable under many states' NIL laws.[176] As such, the American International College ("AIC")'s compliance office tweeted in early July 2021 that a partnership with Barstool is forbidden due to these gambling connections.[177]

Indeed, the University of Louisville, a school with elite athletic teams, sent an email to its student-athletes in August 2021 informing them that they must "cease involvement with 'Barstool Sports'" as "Barstool Sports does not comply with University of Louisville policies and it does not comply with the criteria outlined in the Kentucky Governor's Executive Order."[178] Unlike AIC, however, the University of Louisville initially gave no reason why partnerships with Barstool do not comply with its institutional and Kentucky's state-level NIL restrictions.[179]

174. Vann, *supra* note 173.

175. *Id.*

176. *See id.*

177. AIC Compliance (@AIComplies), TWITTER (July 8, 2021, 12:37 PM), https://twitter.com/aicomplies/status/1413175306102394886 ("Working with Barstool is not allowed because even if you don't promote gambling directly, you are still promoting a company that owns a sports betting site/app and that goes against NCAA rules and Massachusetts state laws[.]"). Massachusetts, however, did not have an NIL law in place when that tweet was posted, so AIC's statement regarding "state law" may have been based on Massachusetts state gambling law rather than the state NIL laws.

178. Darren Heitner (@DarrenHeitner), TWITTER (Aug. 9, 2021, 10:45 PM), https://twitter.com/darrenheitner/status/1424924871277129740 ("Louisville Assistant AD has told athletes to cease #NIL involvement with Barstool Sports.").

179. Ransom Campbell, *Louisville Tells Student-Athletes to Cease NIL Involvement with Barstool Sports*, TALKING POINTS SPORTS (Aug. 11, 2021), https://talkingpointssports.com/college-football/college-sports/louisville-tells-student-athletes-to-cease-nil-involvement-with-barstool-sports/. The university's stated rationale ended up being much simpler: University of Louisville Athletics spokesman Kenny Klein later told the Louisville Eccentric Observer that the reason for the directive was Barstool's unauthorized use of materials and images without obtaining the appropriate permissions and licenses from the university. Erica Rucker & Danielle Grady, *UofL Tells Student Athletes Not to Work with Barstool Sports – But the Reason Is Business, Not Personal*, LEO WKLY. (Aug. 13, 2021), https://www.leoweekly.com/2021/08/uofl-tells-student-athletes-not-to-work-with-barstool-sports-but-the-reason-is-business-not-personal/.

B. Enhanced Business, Financial, and Economic Literacy

In college, most students are learning how to manage money for the first time and may not be willing to ask questions about financial decisions. Because of this, researchers at Kansas State University and the University of Texas at Austin conducted a study in 2019 to determine how student-athletes budgeted and spent their money and discovered their preferred modes of receiving financial education.[180] The researchers developed a financial literacy education program geared specifically toward student-athletes using data collected from a variety of methods.[181] The program was implemented at both institutions and was intended to measure the student-athletes' financial literacy.[182]

The study found that of the 21% who had a monthly budget, 92% followed it, 47% experience anxiety when managing money, and when monthly spending was tracked, over 46% of transactions were food-related.[183] The study also found a 7.26 out of ten average ranking of interest in financial literacy, while 60% did not receive any financial education in high school, and 65% did not receive any financial education during college orientation.[184] In relying on this study, Congress should adopt a universal law that requires NCAA member institutions to implement basic financial courses to the student-athletes curriculum.[185] While the NCAA and some of its member institutions may prefer not to increase the educational burden on its student-athletes, this requirement would ensure that student-athletes are put in the best position for financial success.[186]

Along those lines, Florida's NIL law requires each of its universities to hold a financial literacy and skills workshop at the beginning of the student-athlete's first and third academic years to improve education and to prepare them to handle the financial gains that come from NIL deals.[187] Congress should follow Florida's lead and ensure that the NCAA and its member institutions are providing student-athletes with education that enhances business, financial, and economic literacy. The NCAA and its members can provide several other options for student-

180. LISA M. RUBIN ET AL., ENHANCING FINANCIAL LITERACY AMONG STUDENT-ATHLETES 4–7 (2018), https://ncaaorg.s3.amazonaws.com/research/grants/innovations/2018/2018RES_InnoGrant_FinancialLitKSU_FinalReport.pdf.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.*

186. *See id.*

187. *See* S. 646, 2020 Leg., Reg. Sess. (Fla. 2020).

athletes to receive financial education. These options may include meeting with a peer counselor, attending a student-athlete centered workshop, or one-on-one personal financial counseling.

C. National Entity for Certifying Student-Athlete Representatives

It is equally important that there be a national entity responsible for certifying student-athlete representatives to ensure no student-athletes are taken advantage of by such individuals. Each state has their own set of rules for which student-athletes can engage with professional representation.[188] However, it is important that there be an entity at the federal level to ensure all student-athlete representatives are following the requirements. The majority of states have enacted the Uniform Athlete Agent Act ("UAAA"), which, among other things, requires a potential student-athlete agent to provide important information to allow student-athletes to better evaluate the prospective agent.[189] In an attempt to modernize the UAAA, the Uniform Law Commission ("ULC") drafted the Revised Uniform Athlete Agents Act ("RUAAA") in 2015.[190] Despite its importance, the RUAAA still disregards student-athletes' interests in preference of those of the NCAA and its member institutions. Indeed, the RUAAA indoctrinates into law the NCAA's amateurism model by requiring that all agency contracts include form language that pertains to the NCAA's amateurism rules.[191] Because *Alston* strikes down the NCAA's archaic amateurism model, the RUAAA must be replaced with a national entity for certifying student-athlete representatives.[192]

188. *See supra* Section III.B.

189. *See* Joshua Lens, *Application of the UAAA, RUAAA, and State Athlete-Agent Laws to Corruption in Men's College Basketball and Revisions Necessitated by NCAA Rule Changes*, 30 MARQ. SPORTS L. REV. 47, 65–73 (2019); *A Few Facts About the Revised Uniform Athlete Agents Act (2015) (Last Amended 2019)*, UNIF. L. COMM'N (Oct. 9, 2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=44a2a284-2af1-c1b8-6a53-8255dfcb6613&forceDialog=0 (detailing individual states' adoptions of student-athlete and agent laws).

190. *See* Lens, *supra* note 189, at 65–73 (explaining the benefits of RUAAA).

191. *See id.* at 81–82 (explaining language required for agency contracts under UAAA and RUAAA); *Need for and Benefits of the Uniform Athlete Agents Act (UAAA)*, NCAA, https://www.ncaa.org/sports/2013/11/20/need-for-and-benefits-of-the-uniform-athlete-agents-act-uaaa.aspx (last visited Nov. 18, 2022) (listing perceived benefits of UAAA).

192. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021).

CONCLUSION

In *NCAA v. Alston*, the U.S. Supreme Court held that the NCAA violated Section 1 of the Sherman Act by limiting education-related compensation that student-athletes are allowed to receive from their schools.[193] The Court grounded its holding by applying the rule of reason to examine the NCAA's regulatory scheme.[194] In response to this decision, many states around the nation began to implement their own NIL laws.[195] Since then, unprecedented disruption in college sports has ensued, which highlights the importance of a federal NIL law.[196] The principles set forth in this Note serve as important considerations for Congress to weigh when adopting a universal law.[197] Regardless of what other factors Congress may consider, it must act quickly to ensure the survival of college sports in this new NIL era.

193. *Id.* at 2162.
194. *Id.* at 2155–56.
195. *See* Press Release, Michelle Brutlag Hosick, *supra* note 5.
196. *See* Murphy, *supra* note 3.
197. *See supra* Part IV.