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NOTES

THE RACE IS ON: SHOULD INDIANA JOIN THE LEGISLATIVE RACE AS STATES, CONGRESS, AND THE NCAA COMPETE TO PASS NAME, IMAGE, AND LIKENESS LAWS?

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INTRODUCTION

On September 30, 2019, California signed its Fair Pay to Play Act into law, allowing student-athletes to profit from their name, image, and likeness (“NIL”).¹ Other states, Congress, and the National Collegiate Athletic Association (“NCAA”) are racing to pass similar NIL legislation.² Several states have already introduced, or will soon introduce, NIL legislation.³ Many state legislators hope NIL legislation will provide their state with a competitive advantage, especially when it comes to recruiting and retaining student-athletes.⁴

Competitive recruitment is important because a successful athletic program has a substantial economic impact on its university.⁵ Successful athletic programs generate considerable university revenue: a single football season at Pennsylvania State University and University of Michigan generates about \$130 million and \$122 million, respectively;⁶ one home football game at the University of Wisconsin generates around \$16 million.⁷ Further, successful college athletic

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1. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/JWD5-DFCS>]. The Act takes effect in 2023.

2. *Id.*

3. Roshaun Colvin & Joshua Jansa, *California’s ‘Fair Pay to Play’ Law for College Athletes Has Other States Racing to Join Up. Here’s Why.*, WASH. POST (Nov. 18, 2019, 6:00 AM), <https://www.washingtonpost.com/politics/2019/11/18/californias-fair-pay-play-law-college-athletes-has-other-states-racing-join-up-heres-why/> [<https://perma.cc/L2KF-AQ44>].

4. *Id.*

5. See Andrew Brandt, *Football’s Economic Impact on College Towns, College Players and the NFL*, SPORTS ILLUSTRATED (Aug. 18, 2020), <https://www.si.com/nfl/2020/08/18/economic-fallout-nfl-impact-of-college-football-season-cancellations> [<https://perma.cc/7S5Q-R7NV>].

6. *Id.*

7. *Id.*

programs increase the quality and quantity of student enrollment, university donations, and university developmental opportunities.⁸

Substantial university-wide economic impact feeds back into the surrounding local economy.⁹ A 2015 Brookings Institute study found that “[c]ities with high-level, four-year universities see an extra \$265,000 a year economic boost for every student enrolled at the school.”¹⁰ For instance, the University of Notre Dame has an estimated \$2.65 billion annual economic impact on its local economy.¹¹ However, before states can reap the benefits of successful athletic programs, its schools must first build those successful programs—which starts with recruiting and retaining top student-athletes.

State NIL legislation will impact a university’s ability to recruit student-athletes. If state legislation provides student-athletes with the potential to generate NIL revenue, then student-athletes will presumably factor that opportunity into their final university commitment decision.¹² Former Arkansas athlete Taiwan Johnson illustrates this point. Johnson said California’s Fair Pay to Play Act would have influenced his recruitment decision.¹³ During recruitment, Johnson ultimately decided against a California school.¹⁴ But if California’s Fair Pay to Play Act had been in place, Johnson said he would not have dismissed the school so quickly.¹⁵ With NIL legislation, student-athletes can receive compensation for use of their NIL in video games, sport training and skills camp sponsorships, and endorsement agreements with local restaurants or car dealerships, which are all enticing prospects for student-athletes.¹⁶ Opendorse, an athlete marketing platform,¹⁷ estimates that Indiana University’s basketball student-athlete Trayce Jackson-Davis could earn about \$25,000 a year in NIL endorsements, based solely on his social media following.¹⁸ With the potential to generate such NIL revenue, college athletes are almost certain to factor NIL legislation into their college choice. Therefore, with Florida’s version of California’s Fair Pay to Play Act taking effect in July of 2021,¹⁹ states without NIL legislation, like Indiana,

8. *Id.*

9. See Zoe Nicholson & Ed Semmler, *No Students. No Graduation. ‘Total Devastation’ in College Towns During Coronavirus Pandemic*, USA TODAY (May 16, 2020, 2:51 AM), <https://www.usatoday.com/story/news/education/2020/05/15/coronavirus-unemployment-2020-college-graduation-economy/5205202002/> [<https://perma.cc/9Q6N-7YRH>].

10. *Id.*

11. *Id.*

12. Colvin & Jansa, *supra* note 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. McCann, *supra* note 1.

17. OPENDORSE, <https://opendorse.com> [<https://perma.cc/XU2S-TW9Q>].

18. Jon Blau, *IU Chooses to Lean into Upcoming NIL Changes*, HOOSIER SPORTS REP. (Oct. 5, 2020), <https://www.hoosiersportsreport.com/2020/10/iu-chooses-to-lean-into-upcoming-nil-changes/> [<https://perma.cc/4S7R-Y9SU>].

19. Eric Olson, *Congressman: No NCAA Antitrust Exemption in Athlete Pay Bill*, U.S. NEWS

could be at a competitive-disadvantage. However, Congress and the NCAA each have suggested plans to prevent any type of state competitive advantage by implementing uniform NIL legislation, and thereby taking a unified approach that would once again level the recruitment playing field.²⁰

With current and proposed federal, state, and NCAA legislation, the controversial idea of paying student-athletes is no longer just an idea—it is reality. The federal government, states, the NCAA, and universities have the choice to either get on board or get left behind. Those that are left behind will be at a disadvantage when it comes to recruiting and retaining top student-athletes, and states that depend on college athletics as a revenue generating tool will suffer the consequences. Thus far, Indiana has been watching the state, congressional, and NCAA NIL legislative race from the sidelines. Is Indiana’s wait-and-see approach correct? Or is it time for Indiana to get involved?

Section I of this Note provides relevant background information on intercollegiate athletics, explaining how intercollegiate competition is governed and how college sports generate revenue. Section II explores the historical prohibition on paying student-athletes, analyzing relevant case law and the eventual emergence of NIL legislation. Section III outlines current and proposed legislation from states, Congress, and the NCAA. Section IV argues why a unified and uniform approach to NIL legislation is necessary for the continued success of intercollegiate athletics, and, therefore, is the preferred destination for all those involved in the current legislative race. Finally, Section V analyzes Indiana’s options as it relates to NIL legislation, specifically addressing the benefits and consequences of either passing state NIL legislation or electing not to do so; if Indiana elects to pass NIL legislation, this Note explains how Indiana should proceed given its unique position.

I. BACKGROUND ON INTERCOLLEGIATE ATHLETICS

A. *What Is the NCAA?*

The Intercollegiate Athletic Association of the United States (“IAAUS”) was founded in 1906, with support from President Theodore Roosevelt, following an increase in student-athlete injuries and deaths resulting from college football competition.²¹ The IAAUS was founded during a time when the choice was to abolish college football or establish rules for intercollegiate competition that would “discourage hazardous play.”²² However, the original constitution the

(June 4, 2020, 7:10 PM), <https://www.usnews.com/news/sports/articles/2020-06-04/congressman-no-ncaa-antitrust-exemption-in-athlete-pay-bill> [<https://perma.cc/T8JL-SQLK>].

20. *Id.*

21. *NCAA and the Movement to Reform College Football: Topics in Chronicling America*, LIBR. OF CONG. [hereinafter *Movement to Reform College Football*], <https://guides.loc.gov/chronicling-america-ncaa-college-football-reform> [<https://perma.cc/7XH3-G8HL>].

22. W. Burette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215-16 (2006).

IAAUS gave to schools for ratification went beyond college football regulation, allowing the IAAUS to “take control of campus athletics across the board.”²³ In its current form, the IAAUS, later renamed the National Collegiate Athletic Association (“NCAA”),²⁴ is a non-profit, “member-led organization dedicated to the well-being and lifelong success of college athletes,”²⁵ that “prioritiz[es] academics, well-being and fairness.”²⁶

The NCAA has 1,098 members, comprised of colleges, universities, and 102 athletic conferences.²⁷ Each college or university is split among the NCAA’s three divisions: Division I consists of 350 schools, Division II has 310, and Division III has 438.²⁸ Divisions are used to “align like-minded campuses in the areas of philosophy, competition and opportunity.”²⁹ Across these three divisions, the NCAA hosts 90 championships throughout 24 different sports.³⁰ Almost 20,000 teams send over 57,000 student-athletes to participate in these championships.³¹

The NCAA’s members propose, adopt, and implement the rules of college athletics, including both rules of sport and rules governing each division.³² The NCAA enforces the member-created rules to “uphold integrity and fair play among member schools.”³³ These rules and their enforcement allows the NCAA to “prioritiz[e] academics, well-being and fairness, so college athletes can succeed on the field, in the classroom and for life.”³⁴ The NCAA supports student-athletes by providing financial assistance; giving student-athletes a voice on NCAA committees; promoting student-athlete health and wellness; providing services for academic success and personal and professional development; and giving student-athletes the opportunity and experience to compete in NCAA championships.³⁵

B. Show Me the Money: College Sports Revenue Generation and Distribution

1. *NCAA*.—The majority of the NCAA’s revenue comes from television and marketing rights fees associated with its Division I men’s basketball

23. *Id.*

24. *Movement to Reform College Football*, *supra* note 21.

25. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/WBA6-TAMR>].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Our Three Divisions*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [<https://perma.cc/WK52-YLSE>].

30. *What is the NCAA?*, *supra* note 25.

31. *Id.*

32. *Id.*

33. *Enforcement*, NCAA, <https://www.ncaa.org/enforcement> [<https://perma.cc/EGH6-N22G>].

34. *What is the NCAA?*, *supra* note 25.

35. *How We Support College Athletes*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/how-we-support-college-athletes> [<https://perma.cc/C5ZZ-3CW9>] (last visited Nov. 28, 2020).

championship (often referred to as “March Madness”), with championship ticket sales accounting for most of its remaining revenue.³⁶ For the fiscal year that ended August 31, 2019, the NCAA reported total revenues over \$1.1 billion on its consolidated financial statements.³⁷ In 2019, over \$1 billion of that \$1.1 came from two categories, (1) television and marketing fees and (2) championships and NIT tournaments.³⁸ With its revenue, the NCAA awards athletic scholarships, holds athletic championships, funds catastrophic-injury insurance for student-athletes, assists with other student educational expenses, and funds its operating expenses at the NCAA national headquarters, located in Indianapolis, Indiana.³⁹ Because of the NCAA’s non-profit status, it is exempt from paying federal income taxes under Section 501(c)(3) of the Internal Revenue Code.⁴⁰

2. *Conferences, Colleges, and Coaches.*—Like the NCAA, conferences, colleges, and coaches generate revenue from intercollegiate athletics competition. Conferences generate income through television broadcasting rights.⁴¹ In 2016, the Big Ten conference signed a six-year, \$2.64 billion media rights contract that would pay out \$440 million annually to the conference.⁴² Also, the NCAA distributes a portion of its March Madness revenue, labeled the “basketball fund,” to participating conferences each year.⁴³ In 2014, participating conferences earned a projected \$1.67 million, distributed from the NCAA basketball fund over six years, for each member school’s March Madness appearance, regardless if the school won a game.⁴⁴ If a member school made it to the “Sweet Sixteen,” the dollar amount increased to about \$5 million; a final four appearance earned an estimated \$8.3 million.⁴⁵ Conferences use this money to cover operating expenses and then distribute remaining amounts to member schools.⁴⁶

Aside from potential conference payouts, schools generate revenue from college sports through government support, student fees, media rights, NCAA distributions, ticket sales, donor contributions, royalties and licensing fees, and

36. *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/resources/finances> [<https://perma.cc/DG5W-3F2W>] (last visited Oct. 16, 2020).

37. NAT’L COLLEGIATE ATHLETIC ASS’N, CONSOLIDATED FINANCIAL STATEMENTS 4 (2019), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2018-19NCAAFin_NCAAFinancials.pdf [<https://perma.cc/39AD-E3F4>].

38. *Id.*

39. *Where Does the Money Go?*, *supra* note 36.

40. NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 37, at 10.

41. See Lev Facher, *Report: Big Ten Getting \$2.64 Billion in New TV Deal*, INDYSTAR (June 20, 2016, 10:24 AM), <https://www.indystar.com/story/sports/college/2016/06/20/report-espn-pay-more-than-1-billion-big-ten-football-games/86133418/> [<https://perma.cc/7UTM-53DU>].

42. *Id.*

43. Will Hobson, *Fund and Games*, THE WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/> [<https://perma.cc/3HH7-96TU>].

44. *Id.*

45. *Id.*

46. *Id.*

advertising.⁴⁷ In 2018, Indiana University's athletic department brought in revenues of about \$123 million for a net profit of about \$6.6 million.⁴⁸ Of Indiana University's \$123 million in revenue, about \$41 million came from media rights, \$5 million from NCAA distributions, \$12.62 million from conference distributions, \$10 million from royalties and licensing fees, and \$25.5 million from contributions.⁴⁹

Schools in turn use revenue to fund their athletic departments, which includes paying coaches' salaries. On average, salaries for college football coaches exceed \$2 million, excluding bonuses.⁵⁰ The highest paid college football coach, University of Alabama's head coach, Nick Saban, earned a \$9.7 million 2021 salary.⁵¹ In 2021, 70 Division I head college basketball coaches earned a salary exceeding \$1 million.⁵² The University of Kentucky's head basketball coach, the highest paid college basketball coach, earned a 2021 salary of about \$8.1 million.⁵³

II. FROM DICTA TO DOCTRINE: A HISTORICAL PROHIBITION ON PAYING STUDENT-ATHLETES

A. National Collegiate Athletic Ass'n v. Board of Regents

In 1984, dicta from *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984), provided the NCAA with legal support for its historical prohibition against paying student-athletes.⁵⁴ There, the University of Oklahoma and the University of Georgia argued that the NCAA's college football television plan was an unreasonable restraint on trade.⁵⁵ At the time plaintiffs brought the case, the NCAA controlled all college football television broadcasting rights.⁵⁶ A growing concern that televised games were negatively impacting live

47. *Finances of Intercollegiate Athletics Database*, NCAA (Sept. 2020), <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database> [<https://perma.cc/SH2S-XJGU>].

48. Zach Osterman, *IU Athletics Reported Record \$123 Million in Revenues in 2018*, INDYSTAR (Feb. 8, 2019, 4:29 PM), <https://www.indystar.com/story/sports/college/indiana/2019/02/08/indiana-university-athletics-report-record-revenues-expenses-2018/2815129002/> [<https://perma.cc/9QXR-UXTL>].

49. *Id.*

50. *NCAA Football Coach Salaries in Real-Time*, EDSMART, <https://www.edsmart.org/ncaa-football-coach-salaries/> [<https://perma.cc/UV64-ZEPH>].

51. Steve Berkowitz et al., *College Football Head Coach Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/football/coach> [<https://perma.cc/G5Q5-GH7J>].

52. Steve Berkowitz et al., *Mens Basketball Head Coach Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach> [<https://perma.cc/N8J3-J9CM>].

53. *Id.*

54. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101-02 (1984).

55. *Id.* at 88.

56. *Id.* at 90.

attendance resulted in the NCAA obtaining exclusive broadcasting rights for college football games.⁵⁷ Because the NCAA had exclusive rights, it could prohibit member institutions from developing their own TV broadcasting agreements.⁵⁸ Comparing the NCAA to a cartel, the district court found that the NCAA's exclusive control over televised college football games violated the Sherman Act, stating that the NCAA "ha[d] established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products."⁵⁹

The Supreme Court affirmed the lower court's decision, stating that, "consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die," but "rules that restrict output are hardly consistent with this role."⁶⁰ The Court's decision ultimately paved the way for conferences and colleges to begin generating more revenue from college athletics through TV broadcasting rights, as outlined in Section I.B.2, *supra*.

While the case did not directly deal with the issue of paying student-athletes, dicta from the case highlighted the importance of amateurism in college athletics as an essential and unique quality of the NCAA "product."⁶¹ The Court stated, "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement."⁶² At the time, the case gave the NCAA legal standing to continue its prohibition on paying student-athletes in the name of preserving amateurism.

B. O'Bannon v. National Collegiate Athletic Ass'n

O'Bannon v. National Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015), was the first case that addressed whether student-athletes should profit from their name, image and likeness. The case examined whether the NCAA's prohibition against NIL compensation was an unlawful restraint of trade.⁶³ Ed O'Bannon, the plaintiff, was a former University of California, Los Angeles ("UCLA") basketball player.⁶⁴ In 2008, O'Bannon discovered Electronic Arts manufactured a college basketball video game containing an avatar that depicted him.⁶⁵ The avatar looked like O'Bannon, played for UCLA, and wore O'Bannon's college jersey number.⁶⁶ Electronic Arts depicted O'Bannon in the

57. *Id.* at 91.

58. *Id.* at 94-95.

59. *Id.* at 96.

60. *Id.* at 120 (emphasis added).

61. *See id.* at 101-02.

62. *Id.* at 102.

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

64. *Id.* at 1055.

65. *Id.*

66. *Id.*

video game without his consent and without providing him compensation.⁶⁷ As a result, O'Bannon sued the NCAA claiming that the NCAA's prohibition against student-athletes receiving NIL compensation was an unlawful restraint of trade that violated Section 1 of the Sherman Act.⁶⁸

The trial court found that the NCAA was violating antitrust laws and that the plaintiffs had proposed "two legitimate, less restrictive alternatives to the current NCAA rules."⁶⁹ These two alternatives required that the NCAA no longer prohibit schools from giving student-athletes scholarships covering the full cost of attendance or from giving the students "up to \$5,000 per year in deferred compensation."⁷⁰ The trial court's decision required schools to hold a portion of their licensing revenues in trust for the student-athletes.⁷¹ As the student-athletes left the school, the school would pay them up to \$5,000 in deferred compensation for each year the student participated in college athletics.⁷²

The appellate court reversed the latter part of the trial court's decision (the deferred compensation held in trust) but agreed that schools should be able to provide student-athletes scholarships covering the full cost of attendance.⁷³ Scholarships covering the full cost of attendance represented a reasonable alternative to the NCAA's NIL compensation prohibition.⁷⁴ Notably, this decision did not change NCAA rules because in August 2014, the same month the trial court reached its decision, the NCAA announced it would allow member schools to provide student-athletes scholarships covering full cost of attendance.⁷⁵

However, in reversing the "up to \$5,000 per year in deferred compensation" decision, the appellate court concluded that student-athletes cannot receive cash NIL compensation from schools.⁷⁶ "[I]n finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."⁷⁷ Again, like the court in *Board of Regents*, the court here also concluded that the amateur nature of college athletics is what makes them marketable.⁷⁸ The court went on to say that "paying students for their NIL rights will vitiate their amateur status as collegiate athletes."⁷⁹ *O'Bannon* provided the NCAA with direct legal support for its prohibition against paying student-

67. *Id.*

68. *Id.*

69. *Id.* at 1060.

70. *Id.* at 1061.

71. *Id.*

72. *Id.*

73. *Id.* at 1053.

74. *Id.*

75. *Id.* at 1054-55.

76. *Id.* at 1053, 1076.

77. *Id.* at 1076.

78. *Id.* at 1076-77; *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-02 (1984).

79. *O'Bannon*, 802 F.3d at 1077.

athletes, beyond the dicta in *Board of Regents*.

C. Analysis of Case Precedent

The analysis set forth in both *Board of Regents* and *O'Bannon* convey the underlying presumption that if college athletes are not considered amateurs, then the NCAA will no longer have a marketable product.⁸⁰ But the NCAA's mission is not to provide the public with a marketable product; rather, the NCAA's mission is to promote "the well-being and lifelong success of college athletes."⁸¹ To stay in line with this mission, the time for an institutional shift in thought has come. Student-athletes are not a "product" for the NCAA to market. The rules of college sports should focus on protecting and supporting the student-athletes' best interests, rather than protecting the best interests of college sports as a marketable product. NIL legislation does just that; it puts the interests of student-athletes first.

D. The Race Begins: Emergence of Name, Image, and Likeness (NIL) Legislation

In 2013, two years before the Ninth Circuit reached its final decision in *O'Bannon*, public opinion weighed heavily against paying student-athletes.⁸² According to a 2013 poll conducted by Seton Hall University, 71% of people felt providing student-athletes with a scholarship was sufficient compensation.⁸³ That number dropped to 60% by 2017.⁸⁴ By 2019, public opinion changed entirely, with 60% of people fully supportive of student-athletes profiting from use of their names, images, or likenesses.⁸⁵ Notably, in the 2019 poll, 59% of people said the NCAA should oversee the implementation of NIL legislation.⁸⁶ Coinciding with this shift in public opinion toward paying student-athletes, California's governor signed Senate Bill No. 206, the Fair Pay to Play Act, into law on September 30, 2019.⁸⁷ Following a pattern of policy diffusion, after California introduced its Act, other states quickly started proposing their own NIL legislation.⁸⁸ On the

80. *See id.*; *Bd. of Regents*, 468 U.S. at 101-02.

81. *What is the NCAA?*, *supra* note 25.

82. Marty Appel, *Seton Hall Sports Poll on NCAA Tournament and Student-Athlete Pay*, SETON HALL UNIV. (Mar. 30, 2017), <https://www.shu.edu/business/news/sports-poll-on-ncaa-basketball-players-and-tournament.cfm> [<https://perma.cc/EWT7-5H69>].

83. *Id.*

84. *Id.*

85. Michael Ricciardelli, *American Public Supports College Athletes Receiving Endorsement Money for 'Image and Likeness,' as Approved in California this Week*, SETON HALL SPORTS POLL (Oct. 3, 2019), <https://blogs.shu.edu/sportspoll/2019/10/03/american-public-supports-college-athletes-receiving-endorsement-money-for-image-and-likeness-as-approved-in-california-this-week/> [<https://perma.cc/TNV4-W993>].

86. *Id.*

87. McCann, *supra* note 1.

88. Colvin & Jansa, *supra* note 3.

same day that California's governor signed the Fair Pay to Play Act into law, state Rep. Emanuel "Chris" Welch introduced a similar bill in Illinois.⁸⁹ The rush by states to pass similar legislation stemmed from a desire to remain competitive when it came to recruiting and retaining talented college athletes.⁹⁰ When introducing Illinois's NIL legislation, Welch said "[his] goal [was] to get this passed into law so that [Illinois was] on a level playing field with California going into recruiting season."⁹¹ Other states quickly followed suit.

Headed by Rep. Anthony Gonzalez (R-Ohio), a federal response to state NIL legislation soon followed.⁹² Gonzalez began drafting the Student Athlete Level Playing Field Act in hopes of preempting disparate state NIL legislation.⁹³ In response to state NIL legislation and proposed federal NIL legislation, the NCAA issued a press release on October 29, 2019, officially stating that, after a unanimous Board of Governors vote, the NCAA would allow student-athletes to profit from their NIL.⁹⁴ The press release did not contain specific legislative proposals, but did anticipate that all new rules would be proposed and voted on by January 2021.⁹⁵ However, the NCAA's self-imposed deadline for passing NIL legislation passed without a vote occurring due to Department of Justice intervention.⁹⁶ As a result, the NCAA was forced to pass an interim policy "suspending NCAA name, image, and likeness rules for all incoming and current student-athletes in all sports."⁹⁷

While the debate on paying student-athletes has a long and controversial history, a clear winner has finally emerged. College athletes will be paid. The only remaining question is, how?

89. Jamie Munks, *Illinois Legislator Introduces Bill to Let College Athletes Be Paid, Saying He Wants to Stay Competitive with California*, CHI. TRIB. (Sept. 30, 2019, 5:43 PM), <https://www.chicagotribune.com/politics/ct-illinois-college-athletes-pay-bill-20190930-yhmkshh2k5aapogs5iwfdh6eei-story.html> [<https://perma.cc/VM9V-28GE>].

90. Colvin & Jansa, *supra* note 3.

91. Munks, *supra* note 90.

92. Olson, *supra* note 19.

93. *Id.*

94. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [<https://perma.cc/G2CQ-94W7>].

95. *Id.*

96. *Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, NCAA (Jan. 15, 2021, 1:36 PM), <https://www.ncaa.org/about/resources/media-center/news/student-athlete-committees-issue-joint-statement-name-image-likeness-legislation-delay> [<https://perma.cc/7T3Z-MMZH>].

97. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/RQ9F-FM98>].

III. CURRENT AND PROPOSED NIL LEGISLATION

A. State NIL Legislation

As of the writing of this Note, twenty-five states have passed NIL legislation;⁹⁸ sixteen states have introduced NIL legislation either in a current or past legislative session;⁹⁹ and nine states, including Indiana, have not introduced any NIL legislation.¹⁰⁰ The substantive provisions and effective dates in enacted and introduced state NIL legislation greatly vary as highlighted below.

1. California's Enacted NIL Legislation.—The Fair Pay to Play Act, signed into law in September 2019, prohibits California colleges from enforcing any rules that deny student-athletes the chance to receive compensation for their name, image, or likeness.¹⁰¹ Further, under California's law, any NIL compensation a student-athlete receives cannot affect that student-athlete's

98. Alabama (H.B. 150, 2021 Reg. Sess. (Ala. 2021)); Arizona (ARIZ. REV. STAT. § 15-1892 (LexisNexis 2021)); Arkansas (ARK. CODE ANN. §§ 4-75-1301 to -1308 (2021)); California (CAL. EDUC. CODE ANN. § 67456(a)(1) (Deering 2020)); Colorado (S. 123, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020)); Connecticut (H.B. 6402 § 14, 2021 Reg. Sess. (Conn. 2021)); Florida (FLA. STAT. ANN. § 1006.74 (LexisNexis 2020)); Georgia (Ga. Code Ann. §§ 20-3-680 to -683 (2021)); Illinois (S. 2338 102nd Gen. Assemb., Reg. Sess. (Ill. 2021)); Kentucky (Exec. Order No. 2021-418 (Ky. 2021)); Louisiana (LA. STAT. ANN. §§ 17:3701-03 (2021)); Maryland (H.B. 125, 441st Gen. Assemb., Reg. Sess. (Md. 2021)); Michigan (MICH. COMP. LAWS SERV. §§ 390.1731–390.1741 (LexisNexis 2020)); Mississippi (S. 2313, 2021 Reg. Sess. (Miss. 2021)); Montana (S. 248, 67th Reg. Sess. (Mont. 2021)); Nebraska (NEB. REV. STAT. ANN. §§ 48-2610, 48-2614 (LexisNexis 2020)); Nevada (A.B. 254, 81st Reg. Sess. (Nev. 2021)); New Jersey (N.J. REV. STAT. §§ 18A:3B-86 to -89 (2020)); New Mexico (S. 94, 55th Leg., Reg. Sess. (N.M. 2021)); Ohio (S. 187, 134th Gen. Assemb., Reg. Sess. (Ohio 2021)); Oklahoma (H.B. 1994, 58th Leg., 1st Sess. (Okla. 2021)); Oregon (S. 5, 81st Leg. Assemb., Reg. Sess. (Or. 2021)); South Carolina (S. 685, Gen. Assemb., 124th Sess. (S.C. 2021)); Tennessee (H.B. 1351, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021)); and Texas (S. 1385, 87th Leg., Reg. Sess. (Tex. 2021)).

99. Hawaii (S. 2673, 30th Leg., Reg. Sess. (Haw. 2020)); Iowa (S. 245, 89th Gen. Assemb., Reg. Sess. (Iowa 2021)); Kansas (H.B. 2264, 89th Leg., 2021 Reg. Sess. (Kan. 2021)); Massachusetts (H.D. 337, 192nd Gen. Ct., Reg. Sess. (Mass. 2021)); Minnesota (H.F. 3329, 91st Leg., Ref Sess. (Minn. 2020)); Missouri (H.B. 498, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021)); New Hampshire (H.B. 1505, 2020 Sess., Reg. Sess. (N.H. 2020)); New York (S. 4771, 244th Leg. Sess. (N.Y. 2021)); North Carolina (S. 324, Gen. Assemb., Sess. 2021 (N.C. 2021)); Pennsylvania (H.B. 632, Gen. Assemb., Sess. 2021 (Pa. 2021)); Rhode Island (H.B. 5082, Gen. Assemb., Jan. Sess. (R.I. 2021)); Vermont (S. 328, Gen. Assemb., 2021 Sess. (Vt. 2021)); Virginia (H.B. 7001, Gen. Assemb., 2021 Special Sess. (Va. 2021)); Washington (H.B. 1084, 66th Leg., 2019 Reg. Sess. (Wash. 2019)); West Virginia (H.B. 2583, 85th Leg., Reg. Sess. (W. Va. 2021)); and Wisconsin (A.J.R. 147, Wis. Leg., 2019-2020 Sess. (Wis. 2020)).

100. Alaska, Delaware, Idaho, Indiana, Maine, North Dakota, South Dakota, Utah, and Wyoming.

101. CAL. EDUC. CODE ANN. § 67456(a)(1) (Deering 2020).

scholarship eligibility.¹⁰² This provision is significant because otherwise schools could use NIL compensation to displace student-athletes scholarships, defeating the ultimate purpose of the NIL legislation to provide student-athletes with a larger share of college sports revenue. The law prohibits the NCAA from preventing paid students, and educational institutions with paid students-athletes, from participating in intercollegiate athletics.¹⁰³ At the time this bill was enacted, this was an important legislative provision because any student-athlete, or school with a student-athlete, receiving NIL compensation would have been violating NCAA membership requirements.¹⁰⁴ However, with the NCAA's interim policy, this concern is currently alleviated. The law also allows a lawyer or agent to represent the student-athlete in NIL related matters.¹⁰⁵ Student-athletes cannot enter any NIL compensation contracts that conflict with team contracts.¹⁰⁶ Notably, the statute does not mention any prohibitions against student-athlete contracts that conflict with institutional contracts.

Under California's legislation, an "educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics" cannot compensate the student-athletes; student-athletes must receive NIL compensation from a third party.¹⁰⁷ This clarification is likely aimed at both keeping the NIL legislation outside the purview of Title IX and preventing student-athletes from becoming classified as university employees. It is currently unclear if the legislation's language will be enough to keep NIL compensation statutes from resulting in Title IX violations, or from altering the current employment relationship between schools and student-athletes (currently, student-athletes are not considered university employees). A full discussion and analysis of these important issues is beyond the scope of this Note.

Regardless, California's law takes effect on January 1, 2023.¹⁰⁸ Importantly, California's legislature intends to monitor the NCAA working group and amend the statute as necessary to further the bill's purpose, which is "to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities."¹⁰⁹ This language suggests California may be open to NCAA governance in this area, depending on the NCAA's final rules and how those rules compare to California law.

2. *Florida's Enacted NIL Legislation.*—Florida's NIL law, which goes into effect on July 1, 2021, allows a student-athlete to be compensated, by a third party, for the market value of the student's NIL.¹¹⁰ While Florida's law does not

102. *Id.*

103. *Id.* § 67456(a)(2)-(3).

104. 2020-21 NCAA DIVISION I MANUAL 5 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/52RF-66C7>].

105. CAL. EDUC. CODE ANN. § 67456(c)(1) (Deering 2020).

106. *Id.* § 67456(e)(1).

107. *Id.* § 67456(b).

108. *Id.* § 67456(h).

109. S.B. 206, 2019 Reg. Sess. (Cal. 2019).

110. FLA. STAT. ANN. § 1006.74(2)(a) (LexisNexis 2020).

define what constitutes “market value,” this provision is likely aimed at preventing prohibited recruitment inducements and pay-to-play agreements disguised as NIL compensation contracts. To keep the amateur nature of college sports, no student-athlete can receive compensation “in exchange for athletic performance or attendance at a particular institution.”¹¹¹ Postsecondary educational institutions cannot prohibit student-athletes from earning NIL compensation.¹¹² Additionally, student-athletes can hire a lawyer and agent to represent them regarding NIL compensation matters.¹¹³ But the student-athlete must disclose any NIL compensation contracts to the educational institution.¹¹⁴

Florida’s NIL legislation has a few notable distinctions from California’s NIL legislation. First, the duration of student-athletes’ NIL compensation contracts cannot extend beyond their “participation in an athletic program at a postsecondary educational institution.”¹¹⁵ This provision helps maintain the distinction between student-athletes’ amateur college sports careers and their potential professional careers. Second, the law requires the institution to hold a financial literacy workshop for student-athletes at the beginning of their “first and third academic year[.]”¹¹⁶ Finally, Florida’s law, unlike California’s law, does not specifically forbid the NCAA from banning paid student-athletes and institutions with paid student-athletes from participating in intercollegiate athletics.¹¹⁷ At the time, this was a significant omission because it meant that student-athletes and their respective colleges would not be able to participate in NCAA intercollegiate athletic competition if the student-athletes received NIL compensation, because that would have violated NCAA legislation.¹¹⁸ With the NCAA’s interim policy, however, this omission is not currently as concerning.

3. *South Carolina’s Proposed NIL Legislation.*—With Senate Bill 935 (“SB 935”), South Carolina proposed its own state NIL legislation. Like California’s law, SB 935 would allow student-athletes to earn NIL compensation and prohibit the NCAA from preventing NIL compensated student-athletes, or higher-education institutions with NIL compensated student-athletes, from participating in intercollegiate sports.¹¹⁹ Further, the Bill would permit student-athletes to obtain representation for NIL matters from an agent or lawyer.¹²⁰ Under the Bill, student-athletes would be required to report any NIL contracts to their college and would be prohibited from entering into an NIL contract that conflicts with team contracts.¹²¹ SB 935 would expressly prohibit revoking a student-athletes

111. *Id.*

112. *Id.* § 1006.74(2)(b).

113. *Id.* § 1006.74(2)(d).

114. *Id.* § 1006.74(2)(i).

115. *Id.* § 1006.74(2)(j).

116. *Id.* § 1006.74(2)(k).

117. *See id.* § 1006.74.

118. 2020–21 NCAA DIVISION I MANUAL, *supra* note 105.

119. S. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020).

120. *Id.*

121. *Id.*

institutional scholarship because that student-athlete earned NIL compensation.¹²²

However, South Carolina's Bill would go a step beyond allowing student-athlete NIL compensation. SB 935 would also allow an institution to award student-athletes a stipend from the school's intercollegiate sport gross revenue.¹²³ Intercollegiate sport gross revenue would include items such as money earned from ticket sales, television rights, and merchandise sales.¹²⁴ The stipend would be tied to the number of hours each student-athlete spent "associated with the intercollegiate sport."¹²⁵ The Bill would also create a Student Athlete Trust Fund.¹²⁶ All state participating institutions would be required to create a trust fund that would hold a percentage of each institution's intercollegiate sports gross revenue.¹²⁷ Each year that a student-athlete maintained good academic standing would result in \$5,000 dollars deposited on that student's behalf.¹²⁸ Then, upon graduation, the student-athlete would receive a one-time payment of the full amount deposited on that student's behalf.¹²⁹ While the congressional session expired before South Carolina's proposed NIL legislation became enacted law, it provides an example of the different approaches states are taking towards NIL legislation and how some states feel NIL compensation alone is insufficient.

B. Proposed Federal NIL Legislation

Under the U.S. Constitution's Supremacy Clause, states are bound by federal law.¹³⁰ Because federal law trumps state law, where states have legislation that contrasts with federal legislation, federal legislation will preempt that state legislation.¹³¹ Therefore, any federal NIL legislation would preempt current state NIL legislation, and thereby promote uniformity among states.¹³² But, states may fight any attempt at federal preemption as the state's view federal NIL legislation "as inferior to their own law."¹³³ However, before states can raise any preemption challenges, Congress must first agree on and enact its own NIL legislation. Currently, Congress is considering an array of different NIL legislative proposals.

1. *College Athlete Economic Freedom Act.*—On February 4, 2021, Sen. Chris

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. U.S. CONST. art. VI, cl. 2.

131. *Id.*

132. The Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. § 6 (2020).

133. Michael McCann, *Latest NIL Bill Overrides States but Leaves Tax and Labor Questions Behind*, SPORTICO (Sept. 29, 2020, 2:55 AM), <https://www.sportico.com/law/analysis/2020/latest-nil-bill-overrides-states-1234613887/> [<https://perma.cc/6UUE-YL6B>].

Murphy (D-CT) introduced the College Athlete Economic Freedom Act.¹³⁴ Like state NIL legislation, the Act requires institutions of higher education and intercollegiate athletic associations (such as the NCAA) to allow student-athletes to earn NIL compensation.¹³⁵ Also, any earned NIL compensation cannot impact a student-athlete's scholarship eligibility.¹³⁶ Further, student-athletes have an individual right to representation as provided by the Act.¹³⁷

Unlike state NIL legislation, the Act allows student-athletes to form collective representation for group licensing efforts.¹³⁸ Also, the Act expressly states that student-athletes cannot waive compliance with the Act.¹³⁹ Interestingly, it establishes a program for administering grants to institutions that participate in a market study aimed at assessing the Act's effect.¹⁴⁰ Importantly, the Act expressly preempts all state NIL legislation.¹⁴¹ Finally, the Act tasks the Federal Trade Commission with enforcement, citing any violations as an unfair or deceptive practice.¹⁴²

2. *Amateur Athletes Protection and Compensation Act of 2021.*—On February 24, 2021, Sen. Jerry Moran (R-Kan) introduced the Amateur Athletes Protection and Compensation Act of 2021.¹⁴³ This Act is slightly more restrictive than the College Athlete Economic Freedom Act. First, the Act states that any NIL compensation must come from a third party, meaning not from the institution of higher education or national athletic association.¹⁴⁴ Second, institutions of higher education and athletic associations can prohibit student-athletes from engaging in NIL contracts if those contracts violate a stated code of student conduct.¹⁴⁵ Third, institutions can prohibit student-athletes from partaking in endorsement related activities during and immediately before and after an intercollegiate athletic event.¹⁴⁶ Finally, the Act requires student-athletes to disclose any NIL contracts with their schools.¹⁴⁷

In other ways, however, the Act is broader than the College Athlete Economic Freedom Act. First, the Act allows student-athletes to enter the draft without losing their eligibility under certain circumstances.¹⁴⁸ Second, student-

134. See College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021).

135. *Id.* § 3(a)(1).

136. *Id.* § 3(a)(5).

137. *Id.* § 3(b)(1).

138. *Id.* § 3(a)(3).

139. *Id.* § 3(c).

140. *Id.* § 4.

141. *Id.* § 6.

142. *Id.* § 5(a)(1).

143. See Amateur Athletes Protection and Compensation Act of 2021, S. 414, 117th Cong. (2021).

144. *Id.* § 3(1).

145. *Id.* § 4(b)(2)(A).

146. *Id.* § 4(b)(3).

147. *Id.* § 4(b)(4).

148. *Id.* § 4(d).

athletes can freely transfer schools, at least once, without facing any eligibility restrictions.¹⁴⁹ Third, schools that generate a certain amount of annual athletics revenue must cover a proportionate amount of student-athlete medical expenses.¹⁵⁰ Finally, the Act further distinguishes itself by creating the Amateur Intercollegiate Athletics Corporation (“AIAC”).¹⁵¹ The purpose of the AIAC is to (1) provide best practices for protecting student-athlete rights relating to agency and endorsement contracts; (2) establish and enforce the provisions of this Act; (3) promulgate, administer, and enforce standards for reviewing and approving student-athlete endorsement contracts; (4) provide student-athletes with timely resolution of endorsement contract problems; and (5) ensure compliance with AIAC rules.¹⁵²

3. *The Student Athlete Level Playing Field Act.*—On September 24, 2020 Congressman Anthony Gonzalez (R-OH) introduced the Student Athlete Level Playing Field Act.¹⁵³ The Act was co-sponsored by seven Congress members consisting of Emanuel Cleaver (D-MO), Steve Stivers (R-OH), Marcia Fudge (D-OH), Rodney Davis (R-IL), Colin Z. Alfred (D-TX), Jeff Duncan (R-SC), and Josh Gottheimer (D-NJ).¹⁵⁴ Like proposed state legislation, the Act would allow college athletes to earn compensation from NIL use by third parties, and allow the students to hire an agent and lawyer to represent them regarding NIL matters.¹⁵⁵ Also like state laws, the Act would not allow schools, conferences, or the NCAA to enforce rules that prohibit a student-athlete from entering NIL compensation contracts, with limited exceptions.¹⁵⁶

The Act tasks the Federal Trade Commission (“FTC”) with enforcing student-athlete NIL rights.¹⁵⁷ Violations of the Act “shall be treated as an unfair and deceptive act or practice in violation of a regulation under section 18(a)(1)(B) of the Federal Trade Commission Act.”¹⁵⁸ The Act creates a congressionally appointed commission tasked with providing NIL legislation recommendations.¹⁵⁹ Importantly, like state laws, the Act prohibits institutions from directly compensating student-athletes for NIL use to prevent student-athletes from becoming university employees.¹⁶⁰ In fact, the Act specifically states that nothing within the Act “shall affect the employment status of a student athlete who enters into an endorsement contract.”¹⁶¹ Also noteworthy, the Act states that nothing in

149. *Id.* § 4(f).

150. *Id.* § 4(g).

151. *Id.* § 8(a).

152. *Id.* § 8(b)(1)-(8).

153. Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).

154. *Id.*

155. *Id.* § 2(a).

156. *Id.*

157. *Id.* § 2(b).

158. *Id.* § 2(b)(1).

159. *Id.* § 3.

160. *Id.* § 2(a).

161. *Id.* § 7(d).

it “may be construed to affect the rights of student athletes or affect any program funded under Title IX.”¹⁶² While important to be included, it remains to be seen whether Title IX will reach proposed NIL legislation.

4. *Other Opinions on Federal NIL Legislation.*—Congress is also considering four other NIL legislative proposals, each with varying substantive provisions: the Fairness in Collegiate Athletics Act,¹⁶³ the College Athlete Compensation Rights Act,¹⁶⁴ the College Athlete Bill of Rights,¹⁶⁵ and the Student-Athlete Equity Act.¹⁶⁶

Also, aside from those that have proposed legislation, other Congressmembers have weighed in on the NIL legislative debate. Sen. Mitt Romney (R-UT), while generally supportive of federal NIL legislation, argues that equity among schools and student-athletes must be a priority.¹⁶⁷ “Only about 2%, or 9,000, of the 460,000 athletes in NCAA sports” become professional athletes.¹⁶⁸ While institutions cannot equally pay all their athletes without then classifying student-athletes as employees, Sen. Mitt Romney suggests capping student NIL compensation at \$50,000 to retain some semblance of competitive equity.¹⁶⁹

Finally, Congress may also face backlash from schools against proposed federal legislation that allows student-athletes to sign endorsement agreements that conflict with institution-wide endorsement agreements.¹⁷⁰ The school’s concern would be that “a sponsor drop[s] the school and sign[s] the athlete instead.”¹⁷¹ Further, John Hartwell, the athletic director of Utah State University, expressed concerns with Congress that sponsorship deals between Nike or Under Armour and individual student-athletes could take money away from deals those companies make with the schools to provide the entire team with sports equipment.¹⁷² Finally, the Federal Trade Commission would be responsible for enforcing many of the federal NIL legislative proposals.¹⁷³ This is another cause for concern as the FTC “has not prioritized enforcement of sports-related matters” in the past and “lacks obvious expertise in such matters.”¹⁷⁴

162. *Id.* § 7(b).

163. *See* Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020).

164. *See* College Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020).

165. *See* College Athlete Bill of Rights, S. 5062, 116th Cong. (2020).

166. *See* Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

167. Dennis Romboy, *Sen. Mitt Romney Suggests Capping College Athlete Pay at \$50K*, DESERET NEWS (Sept. 15, 2020, 11:55 AM), <https://www.deseret.com/utah/2020/9/15/21437202/college-athletes-pay-name-image-likeness-congress-mitt-romney-utah-ncaa> [https://perma.cc/D4P5-TUD8].

168. *Id.*

169. *Id.*

170. McCann, *supra* note 134.

171. *Id.*

172. Romboy, *supra* note 167.

173. Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. § 2(b) (2020).

174. McCann, *supra* note 134.

D. Proposed and Enacted NCAA NIL Legislation

On October 29, 2019, the NCAA began the process of adopting NIL legislation when its Board of Governors voted unanimously to allow student-athletes to benefit from their NIL.¹⁷⁵ The NCAA hoped member institutions would vote on the new rules no later than January 2021.¹⁷⁶ Although the NCAA did not provide specifics of what its NIL legislation would include, it did list principles and guidelines that its NIL legislation should follow: (1) equity in treatment among student-athletes and non-student-athletes; (2) prioritize education; (3) enforceable rules that facilitate fair competition; (4) maintain the distinction between college and professional opportunities; (5) clarify that student-athletes must not receive compensation for athletic participation; (6) emphasize the student in student-athlete; (7) “enhance principles of diversity, inclusion and gender equity;” and (8) protect college recruitment.¹⁷⁷

On April 28, 2020, the NCAA clarified that it would allow NIL compensation from third parties for athletic endorsements and NIL compensation for “other student-athlete opportunities,” but a school is prohibited from paying a student NIL compensation.¹⁷⁸ Until the NCAA can pass its own permanent NIL legislation, it is petitioning Congress to preempt state NIL legislation and to create a “safe harbor” that protects the NCAA from lawsuits related to NIL rules.¹⁷⁹

The NCAA’s NIL legislation was moving swiftly through its legislative process and was set to be voted on in January 2021.¹⁸⁰ However, before the NCAA could complete its vote, the Department of Justice voiced antitrust concerns about the NCAA’s proposed legislation.¹⁸¹ As a result, the NCAA decided to postpone its vote, causing the NCAA to miss its self-imposed deadline for enacting NIL legislation.¹⁸² Despite this setback, the NCAA remains confident that its proposed NIL legislation “align[s] with NCAA student-athletes’ best interests.”¹⁸³ However, because the enactment date for state legislation was rapidly approaching, the NCAA was forced to adopt an interim NIL policy that

175. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 95.

176. *Id.*

177. *Id.*

178. *Questions and Answers on Name, Image and Likeness*, NCAA, <http://www.ncaa.org/questions-and-answers-name-image-and-likeness> [<https://perma.cc/S3HS-TPH5>].

179. *Id.*

180. *Id.*

181. *See Student-Athlete Committees Issue Joint Statement on Name, Image, Likeness Legislation Delay*, NCAA (Jan. 15, 2021, 1:36 PM), <https://www.ncaa.org/about/resources/media-center/news/student-athlete-committees-issue-joint-statement-name-image-likeness-legislation-delay> [<https://perma.cc/7T3Z-MMZH>].

182. *Id.*

183. *Id.*

suspended its current rules prohibiting student-athlete NIL agreements.¹⁸⁴ The interim policy allows student-athletes to engage in NIL activities as permitted by their state laws.¹⁸⁵ For those student-athletes in states without NIL legislation, the policy still allows those students to engage in NIL activities without violating NCAA legislation.¹⁸⁶ And, if needed, the policy also allows schools and conferences to develop their own additional NIL policies.¹⁸⁷

The NCAA's interim policy will remain in place until either Congress passes federal legislation, or the NCAA's membership votes on and implements new NIL rules.¹⁸⁸ In announcing the NCAA's interim NIL policy, NCAA President Mark Emmert stated that the NCAA would continue to work with Congress in the hopes of developing a more permanent national solution.¹⁸⁹ Even if the NCAA does successfully pass permanent NIL legislation, there is no guarantee it will align directly with already passed state NIL legislation, which means those state laws could still conflict with NCAA legislation.

IV. CREATING ORDER OUT OF CHAOS: A UNIFORM APPROACH TO NIL LEGISLATION

A. Why Uniformity Is Preferred

A state-by-state approach to NIL legislation is already leading to a trend of competitive policy diffusion. Policy innovation occurs when a state enacts novel legislation, like NIL legislation.¹⁹⁰ As the state's policy innovation spreads from one state to another, policy diffusion occurs.¹⁹¹ Regarding NIL legislation, California was the policy innovator that resulted in subsequent NIL policy diffusion across other states. However, states are not simply adopting NIL legislation to match California's innovative law; states are adopting NIL legislation to *compete* with California's law. "States adopt policies to attract resources away from other states or to prevent their own resources from leaving."¹⁹² With NIL legislation, states are hoping to attract and retain top college athletes, the resource, away from other states.¹⁹³ Therefore, states are passing their own version of NIL legislation to outdo previously passed state

184. See Hosick, *supra* note 98.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. OF POL. SCI. 840, 841 (2008).

191. *Id.*

192. Colvin & Jansa, *supra* note 3.

193. See *supra* Section I.B (discussing the economic reasons explaining why states want to attract top college athletes).

legislation.¹⁹⁴

South Carolina's proposed NIL legislation provides an example of policy innovation leading to policy diffusion due to its addition of a student-athlete revenue sharing model as a novel idea in state NIL legislation.¹⁹⁵ Until preemptive uniform NIL legislation is adopted, the diffusion of competitive state legislation will continue. As states continue to try and outperform each other with escalating NIL legislative proposals, equity in student-athlete recruitment will continue to erode. Recruitment equity is at the heart of successful intercollegiate athletic competition; take it away and the entire foundation of intercollegiate athletics begins to crumble to the detriment of schools, states, and most importantly, student-athletes.

Further, state NIL legislation overrides any NCAA legislation, which means schools whose states enacted NIL legislation must comply with that state law.¹⁹⁶ However, to maintain membership eligibility, a school must comply with all NCAA bylaws.¹⁹⁷ This creates an issue because following state law that conflicts with NCAA legislation breaches NCAA membership requirements. Therefore, a school would no longer be eligible for NCAA membership and would lose the benefits that go along with NCAA membership. If a school loses its NCAA membership, it will no longer be eligible to participate in NCAA sponsored championships, resulting in a substantial loss of income as explained in Section I.B.2, *supra*.¹⁹⁸ The ousted school could then lose conference membership, which in turn would negatively impact conference television broadcasting rights negotiations.¹⁹⁹ Although the NCAA's interim policy limits this concern currently, it could still become an issue if the NCAA successfully passes permanent legislation, and if that legislation conflicts with state law.

Even if the NCAA doesn't expel schools for complying with state NIL legislation, how can it continue to guarantee a level playing field in college sports per its foundational tenant of fairness? This state-by-state approach to NIL legislation goes directly against the NCAA's core principle of competitive equity, which ensures that "student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent with participation in intercollegiate athletics."²⁰⁰ Passed and proposed state legislation already shows a lack of consistency, as outlined in Section III.A, *supra*. State legislators will likely continue to take different approaches to NIL legislation, with some enacting legislation quickly, others more slowly, and some not at all. States will continue to compete to provide their schools a leg-up in recruitment, making it difficult for schools without matching legislation to compete. Therefore, even if the NCAA still allows schools in states with NIL legislation to retain membership, other

194. Colvin & Jansa, *supra* note 3.

195. S. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020).

196. McCann, *supra* note 1.

197. 2020–21 NCAA DIVISION I MANUAL, *supra* note 105.

198. McCann, *supra* note 1.

199. *Id.*

200. 2020–21 NCAA DIVISION I MANUAL, *supra* note 105, at 3.

universities may retaliate by refusing to schedule games with those NIL schools.²⁰¹

Competitive equity issues aside, how will all the different state NIL rules be regulated and by whom? Will the NCAA, institutions, or states be responsible for ensuring compliance with state legislation, and when is compliance required? For example, if one state has a law allowing student-athletes to sign autographs for compensation as part of its NIL legislation, could that student athlete still legally sign autographs for compensation when she travels out-of-state for an away game? Or would her institution be responsible for knowing the “out-of-state” laws and policing its student-athletes for compliance? To continue reaping the economic rewards of successful intercollegiate athletics, states need a unified and uniform approach to NIL legislation that creates competitive equity and simultaneously enhances student-athlete well-being.

Not only is a unified and uniform approach preferable, but the NCAA arguably is best equipped to provide such regulation. The NCAA already has legislation proposed and ready for membership voting, whereas Congress has yet to reach consensus amongst the multiple NIL legislative proposals currently on the table.²⁰² Further, the federal government does not have the expertise necessary to effectively govern college athletics.²⁰³ The NCAA’s member institutions, however, are experts on proposing, implementing, and enforcing rules for intercollegiate athletics. Finally, the NCAA also has a vested interest in ensuring college athletics’ effective governance because without college athletics, there would be no need for the national membership organization (*i.e.*, the NCAA), in general.

B. Indiana’s Unique Position

When it comes to enacting state NIL legislation, Indiana is in a unique position. Not only does enacting state NIL legislation have potential legal consequences, but for Indiana there are important political and economic considerations as well. Politically, the NCAA has a longstanding relationship with the state of Indiana beginning with the 1997 announcement that the NCAA headquarters would move to Indianapolis after a 45-year stint in Kansas City.²⁰⁴

Indiana also has a vested economic interest in the continuance of successful

201. McCann, *supra* note 1.

202. Dan Murphy, *Congressional Proposal Would Overhaul College Sports, Require Revenue Sharing, Cover Athletes’ Medical Costs*, ESPN (Dec. 17, 2020), https://www.espn.com/college-sports/story/_id/30533536/congressional-proposal-overhaul-college-sports [<https://perma.cc/93HY-59DD>]; Dan Murphy, *Federal Bill Pushes for Unrestricted NIL Endorsements for NCAA Athletes*, ESPN (Feb. 4, 2021), https://www.espn.com/college-sports/story/_id/30833820/federal-bill-pushes-unrestricted-nil-endorsements-ncaa-athletes [<https://perma.cc/Z2AW-5B83>].

203. McCann, *supra* note 134.

204. Jack Thompson, *NCAA HQ Shifts to Indianapolis*, CHI. TRIB. (June 1, 1997), <https://www.chicagotribune.com/news/ct-xpm-1997-06-01-9706010214-story.html> [<https://perma.cc/6QFC-74ZL>].

collegiate athletic competition. Indiana has hosted, and will continue to host, an array of college sporting events.²⁰⁵ Indiana Sports Corp., a sports commission aimed at increasing Indiana's economic activity through sporting events,²⁰⁶ announced on Oct. 14, 2020, that the NCAA selected Indiana to host its championships in seven sports (water polo, wrestling, indoor track and field, lacrosse, swimming and diving, golf, and men's basketball) through the years 2022-2026.²⁰⁷ Further, on January 4, 2021, the NCAA announced it would hold the entire 2021 NCAA Division I "March Madness" Men's Basketball Tournament in Indiana.²⁰⁸ Hosting the March Madness Tournament includes bringing 68 basketball teams to Indiana to play 67 games.²⁰⁹ In making the decision, NCAA President Mark Emmert called this "a historic moment for the NCAA and the state of Indiana."²¹⁰

Not only does Indiana generate revenue indirectly from the intercollegiate athletics of its schools, but also from hosting numerous NCAA sporting events. Therefore, Indiana must balance its interest in providing its schools with a competitive advantage in recruiting top talent, with its need for the successful continuation of the NCAA's intercollegiate athletic events. Given this unique position, Indiana's best hope of balancing both needs is a unified and uniform NIL legislative approach, as that will ensure competitive equity amongst colleges for recruitment purposes and the continued success of NCAA championships.

V. INDIANA'S APPROACH TO NIL LEGISLATION

A. Indiana Enacts NIL Legislation

1. *Recommended NIL Legislation.*—If Indiana chooses to enact its own state NIL legislation, its focus should be on the welfare of student-athletes. Like other state NIL legislation, Indiana must prohibit colleges, conferences, the NCAA, and other institutions that govern college athletics from enacting rules that forbid

205. See *Indiana Sports Corp Selected as Host for Upcoming NCAA Championships*, IND. SPORTS CORP. (Oct. 14, 2020) [hereinafter *Indiana Sports Corp Selected*], <https://www.indianasportscorp.org/news/indiana-sports-corp-selected-as-host-for-upcoming-ncaa-championships> [https://perma.cc/MUK7-JPX7].

206. *About*, IND. SPORTS CORP., <https://www.indianasportscorp.org/about> [https://perma.cc/SM55-49HG].

207. *Indiana Sports Corp Selected*, *supra* note 205.

208. David Worlock, *NCAA Announces Further Details for 2021 Division I Men's Basketball Championship*, NCAA (Jan. 4, 2021, 11:15 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-announces-further-details-2021-division-i-men-s-basketball-championship> [https://perma.cc/54MG-59XS].

209. Zach Osterman et al., *It's Official: 2021 NCAA Tournament to be Played Entirely in Central Indiana, Indianapolis*, INDYSTAR (Jan. 4, 2021, 11:05 AM), <https://www.indystar.com/story/sports/college/2021/01/04/2021-march-madness-played-entirely-indianapolis-central-indiana/4124594001/> [https://perma.cc/XXG9-FCEB].

210. Worlock, *supra* note 208.

student-athletes from receiving third-party NIL compensation.²¹¹ However, to maintain the current employment status of student-athletes and to try and avoid Title IX compliance issues, Indiana should expressly prohibit schools from paying student-athletes NIL compensation.²¹² Language prohibiting NIL compensation “in exchange for athletic performance or attendance at a particular institution”²¹³ will help maintain the amateur nature of college athletics. Indiana should also include a provision that expressly prohibits an institution from revoking a student-athlete’s scholarship because that student-athlete earns NIL compensation.²¹⁴

Further, to promote student-athletes’ best interests, Indiana’s legislation should allow student-athletes to obtain representation by a lawyer or agent regarding NIL matters.²¹⁵ Finally, Indiana must require higher-education institutions to implement an educational workshop for the student-athletes covering both new rules and financial literacy. This legislative amendment marks a significant departure from past college sports rules, and student-athletes will need assistance navigating the new legislation. Also, some student-athletes will receive a large influx of money under the new legislation and a financial literacy workshop would further student-athletes’ well-being.

While other enacted and proposed state NIL legislation provides Indiana with a model to emulate, South Carolina’s Senate Bill 935 takes the push toward compensating student-athletes a step too far. Indiana should not follow South Carolina’s proposed plan of providing student-athletes a stipend and one-time trust fund payment upon graduation.²¹⁶ The NIL legislation that the NCAA adopts will likely prohibit the trust compensation and stipend proposal presented in SB 935. Therefore, if Indiana adopts a similar proposal, it will be going against the NCAA and against the overarching goal of establishing uniformity and equity within intercollegiate sports.

2. *Consequences of Enacting State NIL Legislation.*—Enacting NIL legislation in Indiana carries consequences. First, enacted federal legislation could ultimately preempt all state NIL laws, thereby making Indiana’s state NIL legislation moot. If federal legislation is enacted, states may fight any attempt at federal preemption as the state’s view some federal proposals “as inferior to their own law.”²¹⁷ Therefore, if Indiana does enact its own NIL laws, it could consume valuable resources going through the legislative process, while risking political fallout from the NCAA, for legislation that is ultimately preempted.

211. See CAL. EDUC. CODE ANN. § 67456(a)-(b) (Deering 2020); FLA. STAT. ANN. § 1006.74(2)(a) (LexisNexis 2020).

212. See CAL. EDUC. CODE ANN. § 67456(b) (Deering 2020); FLA. STAT. ANN. § 1006.74(2)(a) (LexisNexis 2020).

213. FLA. STAT. ANN. § 1006.74(2)(a) (LexisNexis 2020).

214. See S. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020).

215. See CAL. EDUC. CODE ANN. § 67456(c)(1) (Deering 2020); FLA. STAT. ANN. § 1006.74(2)(d) (LexisNexis 2020).

216. See S. 935, 123rd Gen. Assemb., Reg. Sess. (S.C. 2020).

217. McCann, *supra* note 134.

Besides the issue of possible federal preemption, from a policy perspective, Indiana should not put itself in a position to go against the NCAA when the NCAA claim's its goal is to promote the well-being and success of student-athletes, while ensuring uniformity and competitive equity within intercollegiate athletics.²¹⁸ For a state, like Indiana, that relies on successful college sports for political goodwill and economic support, the primary goal must be uniformity and equity within intercollegiate athletics. A hodgepodge of state NIL laws is not uniform or equitable when it comes to successful intercollegiate athletics competition as outlined in Section IV.A, *supra*. By implementing its own NIL legislation, Indiana is actively supporting a varied and inequitable approach to NIL legislation.

Further, if Indiana does enact its own NIL legislation, there is no guarantee it will align with the permanent rules the NCAA hopes to implement. Therefore, Indiana would be putting its schools in the position to either violate NCAA rules or state law. Because state law supersedes NCAA legislation, Indiana schools complying with state NIL legislation could lose their NCAA membership eligibility and face retaliation as a result, either from the NCAA or competing institutions. If Indiana schools lose NCAA membership eligibility and cannot partake in NCAA championships, those schools would lose a substantial chunk of their athletic programs' revenue, resulting in a potential slippery slope of negative economic impacts from the school to its surrounding city, and finally to the state itself. While the NCAA's interim policy alleviates this concern presently, the policy is only temporary. A permanent solution is still being sought.

B. Indiana Does Not Enact NIL Legislation

If Indiana does not have its own NIL legislation in place and the NCAA or Congress fails to enact uniform NIL legislation that preempts current state laws, Indiana could find itself at a competitive disadvantage.²¹⁹ Indiana could find itself in the same situation if states successfully challenge federal preemption. Again, the NCAA's interim policy limits this concern for the moment because it allows student-athletes in Indiana to partake in NIL opportunities, to the extent allowed by their schools, without violating NCAA rules.

Further, by not adopting NIL legislation, Indiana recognizes that it is not an expert on intercollegiate athletic rules and rule enforcement, and that Indiana acknowledges that the best path forward is through uniform legislation. Indiana would be respecting the longstanding relationship the state has with the NCAA and would thereby avoid any potential political fallout. Also, Indiana would not be forcing its schools to make the unenviable choice of either following state NIL legislation or losing NCAA membership eligibility. Nor would Indiana be putting its schools in a position to receive retaliation from schools without NIL legislation, in the form of game cancellations. Finally, with the NCAA's interim

218. *What is the NCAA?*, *supra* note 25.

219. Colvin & Jansa, *supra* note 3.

policy, Indiana is currently able to reap the benefits of NIL legislation without compromising its position towards uniformity or its relationship with the NCAA by passing its own NIL laws.

C. Indiana Enacts NIL Legislation with a Caveat

The best option for Indiana is if uniform NIL legislation is passed by either Congress or, preferably, the NCAA.²²⁰ However, until a uniform solution arises, Indiana's legislature may decide to enact its own NIL legislation. If the legislature makes such a decision, this Note suggests a legislative path forward that considers Indiana's unique position, as outlined in Section IV.B, *supra*.

Indiana could take a hybrid approach to adopting state NIL legislation. Indiana could enact its own NIL legislation, like that outlined in Section V.B., *supra*, but explicitly state that any uniform NIL legislation adopted by either the NCAA or federal government will supersede Indiana's statute. Having state NIL legislation would protect Indiana if enactment of proposed NCAA or federal NIL legislation fails. Adopting state NIL legislation with this caveat would also protect Indiana if proposed NCAA or federal legislation is enacted but successfully challenged by other states. Further, by expressly stating that Indiana will ultimately defer to the NCAA's or federal government's NIL rules, this option accounts for Indiana's unique situation, where working with, rather than against, the NCAA towards the betterment of college athletics is preferable. While there could still be some fallout from enacting state NIL legislation, it would likely be mitigated by the inclusion of an express intention to abide by the NCAA's legislation.

The comment section of California's NIL legislation contains a similar passage, which states that California's legislature intends to monitor NCAA action and amend its statute as needed to further California's legislation's purpose.²²¹ California's comment has almost a threatening undertone, implying that the statute will only be revisited if the NCAA's legislation is satisfactory to California's legislative body. While California's language provides a starting point for Indiana's legislation, Indiana should explicitly clarify that it will defer to NCAA legislation without any qualifications. Indiana will follow NCAA NIL legislation once that legislation has been proposed, vetted, and voted on by all NCAA members.

Finally, passing NIL legislation does not completely contradict Indiana's ultimate desire and need for uniformity. As both the *O'Bannon* case and California's Fair Pay to Play act demonstrate, the NCAA and its membership respond, sometimes swiftly, to legislative pressure. In *O'Bannon*, the NCAA amended its legislation to allow cost-of-attendance scholarships before the appellate court even made a final decision.²²² And with California's act passed, the NCAA quickly responded with a stated purpose of adopting amended NIL

220. *See supra* Section IV.

221. S.B. 206, 2019 Reg. Sess. (Cal. 2019).

222. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054-55 (9th Cir. 2015).

legislation. Indiana's passage of NIL legislation, with a preemption caveat, may place some pressure on the NCAA and Congress, reminding each that time is running out and uncertainty remains until a permanent solution is decided on.

CONCLUSION

When Governor Newsom signed California's Fair Pay to Play Act into law on September 30, 2019, he started an NIL legislative race that will fundamentally alter the landscape of intercollegiate athletics.²²³ Many states are proposing or enacting NIL legislation similar to California's Act in hopes of remaining competitive.²²⁴ Rep. Anthony Gonzalez is pushing Congress to pass federal legislation to preempt state NIL laws.²²⁵ The NCAA had implemented an interim policy, but it still hopes to ultimately pass its own NIL legislation.²²⁶ On Oct. 29, 2019, the NCAA conveyed its intention to allow student-athletes to receive NIL compensation.²²⁷ However, the NCAA is still in the process of formulating a workable permanent NIL compensation framework.²²⁸

Indiana lawmakers must now decide whether they want to join the NIL legislative race or continue to watch the competition unfold from the sidelines. On one hand, Indiana could enact its own legislation, risking future preemption. If Indiana lawmakers decide to draft state NIL legislation, it should mirror key features of NIL legislation enacted in other states and NIL legislation federally proposed. On the other hand, Indiana could wait for permanent federal or NCAA legislation to take effect. However, as mentioned earlier, this could put Indiana at a disadvantage compared to states with NIL laws. Before making a final decision, Indiana should consider the important role intercollegiate athletics plays within the state, and the potential political fallout of going against the NCAA, headquartered in Indianapolis, whose stated goal is to promote student-athlete well-being and uniformity among college athletics.²²⁹

The race to pass NIL legislation is well underway amongst states, Congress, and the NCAA. While a clear legislative winner has yet to emerge, an overall winner has: the student-athletes. Regardless of the final form NIL legislation takes, any model will be a step in the right direction for student-athlete well-being and life-long success.

223. McCann, *supra* note 1.

224. Colvin & Jansa, *supra* note 3.

225. *Id.*

226. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, *supra* note 95.

227. *Id.*

228. *Id.*

229. *See Mission and Priorities*, NCAA, <https://www.ncaa.org/mission-and-priorities> [<https://perma.cc/YUV6-FSTB>].