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The Current State of Student-Athlete NIL Rights: How Congress Should Respond to the Rapidly Changing Landscape of Inter-Collegiate Sports

Kyle Aronson

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The Current State of Student-Athlete NIL Rights: How Congress Should Respond to the Rapidly Changing Landscape of Inter-Collegiate Sports

Kyle Aronson

ABSTRACT

Collegiate student-athletes began signing sponsorship deals that compensate them for their name, image and likeness beginning in July 2021. Since its inception, the NCAA has prohibited student-athletes from receiving any outside monetary compensation to preserve traditional notions of amateurism. States have begun to pass legislation that allow for student-athlete compensation following recent decisions by the Supreme Court and Ninth Circuit suggesting that the NCAA's historic practice may run afoul of antitrust law. This Comment analyzes issues with the current state-by-state patchwork of laws that formulate the current landscape of collegiate sports. Finally, this Comment will show why centralized, federal regulation is essential for maintaining the competitive integrity of collegiate sports as well as providing a logistical roadmap of how to form that regulation.

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I. INTRODUCTION

The definition of an amateur in the American context is one who “engages in study, sport, or other activity for pleasure rather than for financial benefit or professional reasons,” and an amateur is “an athlete who has never competed for payment or for monetary prize.”¹ In the late nineteenth century, colleges began using the concept of amateurism to promote the school’s educational integrity and standing while simultaneously not having to pay their athletes.²

For many years, amateurism prevented collegiate student-athletes from receiving any monetary compensation. Recent landmark decisions from the Supreme Court and California Supreme Court initiated a new wave of legislation that changed the collegiate athletic landscape forever. While student-athletes can now benefit monetarily from their name, image, and likeness (NIL), the current state legislation is flawed and could have catastrophic repercussions in the long term. Federal response is sorely needed, but Congress is currently divided on how to address this issue. Part II of this article explores the history and judicial decisions that led to a new era of student-athlete rights in collegiate sports. Part III addresses how states responded to recent judicial decisions, and Part IV explores what Congress has done. Finally, in Part V, I predict what should, and what will most likely be Congress’s approach regarding the NIL rights of student-athletes.

¹ *Amateur*, DICTIONARY.COM, <https://www.dictionary.com/browse/amateur> (last visited Nov. 26, 2022).

² Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, THE SPORT JOURNAL (Jan. 3, 2012), thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/.

II. A BRIEF HISTORY

In 1905, the National Collegiate Athletics Association (NCAA) formed to create bylaws dictating and structuring the shape of modern-day intercollegiate sports.³ While establishing its bylaws, the NCAA hoped to maintain amateurism by “maintaining a clear line of demarcation between college athletics and professional sports.”⁴ To further bolster amateurism, the NCAA emphasized that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived” and “student-athletes should be protected from exploitation by professional and commercial enterprises.”⁵ To protect student-athletes from commercial exploitation, the NCAA established rules that govern issues such as student-athlete eligibility, financial aid, and scholarships and limited to how an athlete may earn money through NIL.⁶ Specifically, section 12.5 of the NCAA Division 1 Manual limits how an athlete can earn money through NIL compensation stating:

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

- (a) Accepts 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
- (b) Receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.⁷

³ See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

⁴ NAT’L COLLEGIATE ATHLETIC ASS’N, 2021-22 NCAA DIVISION I MANUAL § 12.01.2 (2021).

⁵ *Id.* at § 2.9.

⁶ Whitney K. Novak, *Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress*, CONGRESSIONAL RESEARCH SERVICE, (Jul. 1, 2021) at 1.

⁷ NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 4, at § 12.5.2.1.

For over one hundred years, the NCAA justified restricting student-athletes' rights to monetary compensation as a way of preserving and maintaining traditional ideas of intercollegiate amateurism.⁸ In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 95 (1984), Justice John Paul Stevens, in the majority opinion, wrote that the NCAA has a very critical role in maintaining amateurism in college sports, and it needs "ample latitude" to continue to play that role.⁹ While the NCAA's pursuit to maintain strict amateurism principles may have been more pragmatic one hundred years ago, the collegiate sports landscape, particularly in Men's Division I Football and Basketball, has changed drastically over time.¹⁰ With the evolution of television networks, advertising, and video games, the college sports industry now generates billions of dollars in revenue each year.¹¹

A. O'BANNON V. NCAA'S IMPACT

In *O'Bannon v. National Collegiate Athletic Association*, 802 F.3d 1049 (2015) former UCLA basketball player Ed O'Bannon and other former Division I student-athletes brought a lawsuit against the NCAA claiming that the NCAA's rules requiring amateur status of its collegiate athletes, violated the Sherman Antitrust Act.¹² O'Bannon discovered his image and likeness used

⁸ Novak, *supra* note 6, page 1.

⁹ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984). While the Supreme Court found that the NCAA's amateurism bylaws did not violate the Sherman Act and restrict free trade, the Court held that the NCAA's control of collegiate football television rights did violate the Sherman Act. *Id.*

¹⁰ See Allen Barra, *Bigger, Stronger, More Complex: College Football, Then and Now*, THE ATLANTIC (Oct. 4, 2012), <https://www.theatlantic.com/entertainment/archive/2012/10/bigger-stronger-more-complex-college-football-then-and-now/263200/>.

¹¹ *Id.*

¹² *O'Bannon*, 802 F.3d at 3, at 1055. Section 1 of the Sherman Antitrust act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

in an EA Sports video game, and per NCAA rules¹³ he could not receive compensation for the use of his NIL even though he had already graduated and was playing professionally when the video game was released.¹⁴ O’Bannon argued that the NCAA’s restrictive bylaws prohibiting college-athletes from profiting off their NIL were unreasonable restraints on free trade.¹⁵ In return, the NCAA argued that its compensation restrictions were justifiable because they were necessary to preserve amateurism.¹⁶ Ultimately, the Ninth Circuit affirmed the district court’s ruling that the NCAA’s restrictive NIL rules were unreasonable restraints on trade that outweighed the need for preserving amateurism.¹⁷ The court stated that the NCAA was “not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules.”¹⁸

In September 2019, following the *O’Bannon* decision, the California State Legislature made the landmark decision to pass the Fair Pay to Play Act, allowing California college athletes

¹³STUDENT-ATHLETE STATEMENT DIVISION I Form 08-03a §4 <https://web3.ncaa.org/lstdbi/reports/getReport/90008>. To maintain amateur eligibility in the NCAA, student-athletes are required to sign form 08-03a, which under part IV: Promotion of NCAA Championships, Events, Activities or Programs, authorizes “[t]he NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] [to] use [your] name or picture . . . to generally promote NCAA championships or other NCAA events, activities or programs.” *Id.* at 53–54.

¹⁴ *O’Bannon*, 802 F.3d at 1055.

¹⁵ *Id.*

¹⁶ *Id.* at 1058.

¹⁷ *Id.* at 1079.

¹⁸ *Id.*

to be compensated for their NIL.¹⁹ Governor Gavin Newsom officially signed the Fair Pay to Play Act in a barbershop with O'Bannon and NBA star LeBron James on James' HBO show *The Shop: Interrupted* (HBO television broadcast Sep. 27, 2019).²⁰ The Fair Pay to Play Act, among other things, allows student-athletes to contract with third parties to sign endorsement deals with apparel companies, sports beverages, trading cards, or other companies that would pay for the approval of a student-athlete.²¹ A student-athlete like O'Bannon would also be able to profit off his NIL after college graduation if a company put his avatar in a video game.²² While California colleges are unable to deny student-athletes from receiving compensation from third parties, the colleges are still prohibited from directly compensating student-athletes (besides providing them with grant-in-aids such as scholarships or financial aid for room and board, books, etc.).²³

Some issues arise with California's new legislation. If no other states respond to California's Fair Pay to Play Act, then California colleges would suddenly get an unfair recruiting advantage because the chance to profit from NIL compensation would be appealing to prospective student-athletes. Another issue would be that if nothing changes when the law goes into effect in January 2023, then California colleges would be put in a tough spot because if they comply with the California law and allow their student-athletes to sign endorsement deals, then they are breaching their NCAA membership requirements by violating amateurism bylaws.²⁴ Such a breach

¹⁹ Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sep. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.

²⁰ *Id.*

²¹ S.B. 206, Reg. Sess. (Cal. 2019).

²² *Id.*

²³ *Id.*

²⁴ *See* McCann, *supra* note 19.

would result in California institutions becoming ineligible to participate in national championships or any other NCAA-sponsored events.²⁵ If top Division I programs like UCLA or USC could no longer compete against other NCAA programs, schools and the NCAA would lose revenue. To avoid these potentially devastating legal fallouts, the NCAA would have to change its bylaws or there would have to be a change in federal law before California implemented its Fair Pay to Play Act.

B. NO TURNING BACK AFTER NCAA V. ALSTON

The potential for even more pro-NIL legislation arose after former Division I Football student-athlete Shawne Alston brought a class action lawsuit against the NCAA in *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021) again alleging NCAA Sherman Act, Section 1 violations.²⁶ While the NCAA pointed to the Supreme Court’s prior ruling in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) that “ample latitude”²⁷ is necessary to protect traditional ideals of amateurism, the Court clarified that the *Regents of Oklahoma* decision did not involve the issue of student-athlete compensation, and “ample latitude” does not mean a court should automatically reject all challenges to the NCAA’s compensation restriction.²⁸ The Court rejected the idea that the NCAA’s student-athletes’ compensation restriction should be viewed with less scrutiny²⁹ under antitrust

²⁵ *Id.*

²⁶ Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2144 (2021).

²⁷ *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120.

²⁸ *See Alston*, 141 S. Ct. at 2166.

²⁹ When analyzing whether behavior violates the Sherman Antitrust Act, the key issue is if the price-fixing behavior is an *unreasonable* restraint of free trade. To determine reasonableness, the Court applies the “rule of reason” which is “a fact-specific assessment of ‘market power and market structure’” to assess a challenged restraint’s “‘actual effect’ on competition.” *Ohio v. Am. Express Co.*,

law because essentially the NCAA sought a “sort of judicially ordained immunity.”³⁰ Further, the court rejected the NCAA’s argument that relaxing compensation restrictions would ‘micromanage’ the organization’s business, and instead, the Court barred the NCAA from imposing restraints on benefits related to education.³¹

In his concurring opinion, Justice Brett Kavanaugh wrote that while *Alston*’s scope was limited to the NCAA’s compensation rules regarding education-related benefits, all remaining restrictive compensation rules (such as NIL compensation) would likely not be sustained under “rule of reason” scrutiny.³² Kavanaugh added that

[t]he NCAA’s business model would be flatly illegal in almost any other industry in America . . . [because] [p]rice-fixing labor is price fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.³³

While the Supreme Court was deciding *Alston*, Florida passed its own NIL compensation law that is very similar to California’s Fair Pay to Play Act.³⁴ Like California’s legislation, Florida’s law prohibits schools from denying their student-athletes compensation for their NIL,

138 S. Ct. 2274, 2284 (2018). The goal is to “distinguish[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” *Id.* (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 866 (2007)).

³⁰ *See, Alston*, 141 S. Ct. at 2159.

³¹ *Id.* at 2160.

³² *Id.* at 2167.

³³ *Id.* at 2167–68. With respect to NIL compensation, the NCAA engaged in anticompetitive behavior because by not allowing student-athletes to receive compensation from third-party sponsors, they essentially set the student-athletes NIL value at \$0, which is textbook antitrust price-fixing behavior according to Justice Kavanaugh. *Id.*

³⁴ Madeline Coleman, *Florida Changes Course Again, Passes Amendment to Make NIL Law Effective July 1*, SPORTS ILLUSTRATED (Apr. 30, 2021) <https://www.si.com/college/2021/04/30/florida-nil-law-effective-july-2021-ncaa-athletes>; see S.B. 646, Reg. Sess. (Fl. 2020).

allows student-athletes to hire agents, and requires that students disclose endorsement deals to the schools.³⁵ Florida's law also does not allow student-athletes to endorse products that directly conflict with school sponsorships.³⁶ Unlike California's Fair Pay to Play Act, which becomes effective in 2023, Florida's law began on July 1, 2021.³⁷ A similar problem will follow the Florida law: Florida schools could be in violation of amateurism bylaws and breach their membership requirements with the NCAA.³⁸ If Florida allowed their student-athletes to receive compensation for their NIL, they could forfeit participation in NCAA-sponsored events.³⁹ The impending legal ramifications of Florida's new NIL law along with the Supreme Court's decision in *Alston* demand the NCAA to change its laws.

In October 2019, the NCAA Board of Governors voted that "NCAA member schools may permit students participating in athletics the opportunity to benefit from the use of their name, image and/or likeness in a manner consistent with the values and beliefs of intercollegiate athletics."⁴⁰ The NCAA Division I Council agreed and one year later approved an updated draft of the proposed changes in NIL bylaws.⁴¹ The bylaws, if adopted would:

³⁵ Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa>.

³⁶ *Id.*

³⁷ *See* Coleman, *supra* note 34.

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ NAT'L COLLEGIATE ATHLETIC ASS'N, REPORT OF THE NCAA BOARD OF GOVERNORS, at 3 (Oct. 29, 2019).

⁴¹ *DI Council introduces name, image and likeness concepts into legislative cycle*, NCAA (Oct. 14, 2020, 3:05 PM PT), <https://www.ncaa.org/news/2020/10/14/di-council-introduces-name-image-and-likeness-concepts-into-legislative-cycle.aspx>.

Allow student-athletes to use their name, image and likeness to promote camps and clinics, private lessons, their own products and services, and commercial products or services . . . [a]llow student-athletes to be paid for their autographs and personal appearances . . . [a]llow student-athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance . . . [a]llow student-athletes the opportunity to use professional advice and marketing assistance regarding name, image and likeness activities, as well as professional representation in contract negotiations related to name, image and likeness activities, with some restrictions . . . [p]rohibit schools from being involved in the development, operation or promotion of a student-athlete’s business activity, unless the activity is developed as part of a student’s coursework or academic program . . . [p]rohibit schools from arranging or securing endorsement opportunities for student-athletes.⁴²

While these proposed bylaws offer student-athletes more freedom and flexibility in their ability to profit off their NIL, there are still some restrictions like prohibiting sports betting and product endorsements that conflict with existing institutional sponsorship arrangements that reduce student-athletes’ freedom.⁴³

The Division I Council postponed their vote to approve these bylaw amendments after NCAA President Mark Emmert received a letter from the Department of Justice’s (DOJ) Antitrust Division suggesting that the DOJ would object to the NIL rules on antitrust grounds.⁴⁴ Assistant Attorney General Makan Delrahim expressed that the NCAA’s new rules “may raise concerns under the antitrust laws [because] . . . [u]ltimately, the antitrust laws demand that college athletes, like everyone else in our free market economy, benefit appropriately from competition.”⁴⁵

⁴² *Id.*

⁴³ Alan Blinder, *N.C.A.A. President Seeks Delay on Vote to Let Students Profit From Fame*, N.Y. TIMES, (Feb. 26, 2021), <https://www.nytimes.com/2021/01/09/sports/ncaabasketball/ncaa-delays-vote-athlete-endorsements.html>.

⁴⁴ *Id.*

⁴⁵ Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA Over Transfer and Name, Image, Likeness rules*, USA TODAY (Jan. 8, 2021, 4:00 PM ET), <https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/>.

Specifically, Delarhim took issue with the NCAA’s rules regarding transfer eligibility and NIL.⁴⁶ The DOJ was also concerned about student-athletes disclosing their NIL activities to “an independent third-party administrator.”⁴⁷ While the NCAA argues that disclosure is necessary to “ensure [the] integrity of the recruiting process” and “evaluate NIL activities for possible malfeasance,” the DOJ was concerned about the vagueness of the term “independent third-party administrator.”⁴⁸ A third-party could restrict competition among athletes and colleges by enforcing a rule that the NCAA determines to be “fair” market value of a student-athletes’ NIL, when realistically that fair market value could be exceedingly higher.⁴⁹ While Emmert claims that the NCAA’s “current amateurism and other rules are indeed fully compliant” with federal antitrust law, the Division I Council nevertheless postponed their vote.⁵⁰

After postponing the NIL amendment vote, the Division I Council recommended the Division I Board of Directors adopt an “interim” policy to suspend any amateurism rules related to NIL compensation.⁵¹ The temporary policy allows student-athletes to engage in NIL activities that are consistent with state law.⁵² If a student-athlete is in a state with no NIL laws, that student-

⁴⁶ *Id.* The DOJ felt that the NCAA’s transfer rules contained “unnecessary anticompetitive barriers that stand in the way of college athletes transferring between schools.” For example, student-athletes must notify their school before contacting or being contacted by another school. Once notice is given, schools, per NCAA rules, can reduce a student-athlete’s scholarship for the following year even if that student-athlete decides not to transfer. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Binder, *supra* note 43.

⁵¹ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, NCAA (Jun. 28, 2021), <https://www.ncaa.org/about/resources/media-center/news/di-council-recommends-di-board-adopt-name-image-andlikeness-policy>.

⁵² *Id.*

athlete can still engage in NIL-related activity without violating NCAA rules.⁵³ Student-athletes may also hire professional services to help with NIL-related activity without jeopardizing their amateur eligibility.⁵⁴ Moreover, the temporary policy would protect colleges from future legal objections to complying with state NIL laws and allow colleges to remain in the NCAA.⁵⁵

Due to current student-athletes' NIL rights, Emmert implored Congress to pass federal NIL compensation legislation.⁵⁶ Because the DOJ essentially blocked the NCAA from amending its bylaws, there are only two ways student-athletes can be compensated for their NIL rights moving forward: (1) States can regulate student-athlete NIL rights according to state laws or (2) Congress can pass a law regulating student-athlete NIL rights at a federal level that can work in conjunction with state law or preempt it.

III. THE STATE APPROACH

With no federal NIL legislation bills passed, states have taken it upon themselves to pass laws allowing student-athletes to receive NIL compensation.⁵⁷ Initially, six states passed NIL legislation, eighteen states introduced bills in 2020, and thirteen states introduced bills in 2021.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Emily Giambalvo, *As the NCAA asks Congress for Help on NIL legislation, Lawmakers Want More Rights for College Athletes*, WASHINGTON POST (Jul. 23, 2020), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/>.

⁵⁷ *Id.*

⁵⁸ Dellenger, *supra* note 35. The six states with current bills are: California (January 2023), Colorado (January 2023), Florida (July 2021), Michigan (December 2022), Nebraska (July 2023), New Jersey (2025). *Id.* The eighteen states with bills introduced in 2020 are: Arizona, Connecticut, Georgia, Hawaii, Illinois, Louisiana, Minnesota, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, Washington. *Id.* The thirteen states with

Most state bills have the same four basic provisions: (1) student-athletes' NIL rights cannot be restricted by schools and by conferences; (2) athletes can hire agents; (3) endorsement deals must be disclosed to the school; and (4) no prospective athlete can sign an NIL endorsement deal as a recruiting inducement.⁵⁹

While most NIL state laws are student-athlete friendly, some are more restrictive. For example, Mississippi's law places a limit on the date and time a student-athlete can engage in NIL-related activities.⁶⁰ Iowa's bill places a cap on how many hours a student-athlete can participate.⁶¹ New Mexico's bill prohibits a school from denying a student-athlete enrollment if he or she had received NIL compensation as a recruit (most bills do not allow enrollment if NIL deals were signed as an inducement in the recruitment process).⁶²

Some bills are too pro-student-athlete and push the limits on how a student-athlete can be paid by going beyond what the Supreme Court has said is legal.⁶³ For example, South Carolina's bill requires colleges to put \$5,000 into a trust each year for every Division I Football and Basketball student-athlete that will be dispersed among the student-athletes following graduation.⁶⁴ New York's bill requires college athletic departments to put aside 15% of their

bills introduced in 2021 are Alabama (2021), Iowa (July 2021), Kansas (January 2022), Kentucky (July 2023), Maryland (July 2021), Massachusetts (January 2022), Mississippi (July 2021), Montana (June 2023), New Mexico (July 2021), New York (2021), Tennessee (July 2023), Texas (July 2023), West Virginia (none given). *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*; see S.B. 2313, Reg. Sess. (Miss. 2021).

⁶¹ Dellenger, *supra* note 35; see S.B. 245, 89th Gen. Assemb. (Iowa 2021).

⁶² Dellenger, *supra* note 35; see S.B. 94, Reg. Sess. (N.M. 2021).

⁶³ See generally *Alston*, 141 S. Ct. at 2144.

⁶⁴ Dellenger, *supra* note 35.

revenue into a wage fund to be distributed to the student-athletes each year.⁶⁵ Alabama’s bill gives student-athletes the option to either participate in NIL related activities or to accept \$10,000 that the school would directly pay.⁶⁶

South Carolina, New York, and Alabama State Bills allow student-athletes to be compensated for more than just their NIL, namely, these bills direct colleges to pay money to the student-athletes.⁶⁷ Previously, the Ninth Circuit and the Supreme Court in cases like *O’Bannon* and *Alston* only considered the NCAA’s anticompetitive behavior when restricting how a student-athlete can be *indirectly* compensated by an independent third-party.⁶⁸ Courts have not considered whether the NCAA prohibiting institutions from compensating student-athletes directly is an unreasonable restraint on free trade under Section 1 of the Sherman Antitrust Act. Paying a student-athlete directly for his or her services gets closer to crossing the line of demarcation between amateurism and professionalism. The NCAA has a stronger argument under the “rule of reason” test to restrict direct payment. There is also nothing in the NCAA’s interim NIL policy allowing institutions to directly compensate a student-athlete. Therefore, if schools are forced to comply with laws such as those in South Carolina, New York, or Alabama, then it is possible that the NCAA could challenge the school’s compliance as breaching membership duties under existing NCAA bylaws. Such a breach could result in the NCAA removing those schools from their organization.⁶⁹

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See generally Alston*, 141 S. Ct. at 2144; *O’Bannon*, 802 F.3d at 1055.

⁶⁹ *Cf.* H.B 617, Reg. Sess. (Ga. 2021). Georgia’s NIL Bill requires student-athletes, who sign NIL deals, to put some of that money into a pool to later be distributed to all students. *Id.* This law reaches the same

Beyond potential legal challenges, another issue with relegating NIL compensation laws to the state level is that state laws vary so much in detail that a student-athlete may struggle to understand their rights during the recruitment process. A student-athlete could receive “food, shelter, medical expenses or insurance from a third party” during the recruitment process and not be disqualified from potential enrollment from a New Mexico college, but a student could lose enrollment eligibility in another state like California or Iowa.⁷⁰ Even if the laws are not challenged, by having different NIL laws in each state, the schools in states with more student-athlete friendly provisions will gain an unfair recruiting advantage against schools in states with more restrictive NIL legislation. For example, a student-athlete may choose to play at a school in California over a school in Iowa because they can sign the same endorsement deal in both states, but in California they could also get a percentage of the school’s athletic department’s revenue⁷¹.

Despite NIL state law’s potential legal issues, some experts, such as Rod Gilmore, argue that a state model approach to addressing student-athletes’ NIL rights is ideal.⁷² In a short period of time, the states created a market that enables student-athletes to make informed decisions about which NIL laws work best for them.⁷³ Unlike a federal approach, the States recognize that NIL

end goal as South Carolina, Alabama, and New York laws but does so without violating NCAA amateurism bylaws. *Id.*

⁷⁰ S.B. 94, 2021 Reg. Sess. (N.M. 2021).

⁷¹ *See generally* The College Athlete Protection Act, A.B. 252, Reg. Sess. (2023), S.B. 245, 89th Gen. Assemb. (Iowa 2021).

⁷² *See Hearing Before the S. Comm. On Commerce, Science, and Transportation*, 117th Cong. (2021) (Statement of Rod Gilmore).

⁷³ *Id.*

compensation is a pressing issue and passed laws at a swifter pace than Congress—only nine states have not addressed NIL legislation.⁷⁴

If NIL rights legislation is left exclusively to the states, the NCAA argues it would destroy a competitive balance within NCAA member schools, as the best student-athletes would choose to sign with institutions with the most favorable state NIL laws.⁷⁵ Experts respond by claiming that currently, there is no competitive balance between NCAA member schools.⁷⁶ While Gilmore is correct that traditional blue-blood programs like Alabama or Clemson consistently do well in the playoffs each year, that lack of diversity is primarily a problem in Men’s Division I football.⁷⁷ This argument is not compelling as NIL legislation will affect all intercollegiate sports, not just men’s Division I football. Even if there was a lack of competitive balance, that does not mean it would be right to compound the problem by allowing states to enact potentially problematic and wildly different NIL laws.

Because of the many potential problems associated with a state-by-state approach to NIL legislation, NCAA action is imperative while waiting for Congressional support. True to Emmert’s

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* Gilmore, in his statement, evaluates the current four team college football playoff in Men’s division I football’s history as evidence there is no competitive balance. *Id.* In the last seven years, only eleven out of 130 potential schools participated in the tournament. *Id.* Out of all the potential playoff spots since the inception of the Football Subdivision playoff, only five schools occupied roughly 80% of those spots: Alabama, Clemson, Ohio State, Oklahoma, and Notre Dame. *Id.*

⁷⁷ In men’s basketball, thirty-four different schools won a national title while fifty-two have made a Final Four appearance. See Dan Bernstein, NCAA Tournament Wins by School: Most National Championships in March Madness History, SPORTING NEWS (Mar. 16, 2019), <https://www.sportingnews.com/us/ncaa-basketball/news/ncaa-tournament-wins-by-school-most-national-championships-in-march-madness-history/1eph1ns8p43bg1kr62qb9z7m50>. In the forty years that Women’s Division I basketball tournament has existed, eighteen different schools have won a national title. *Women’s Basketball Championship History*, NCAA, <https://www.ncaa.com/history/basketball-women/d1> (last visited “date”).

word,⁷⁸ the NCAA passed an interim policy amending student-athlete NIL rules.⁷⁹ The new interim policy generally allows for student-athletes to receive compensation for a commercial, nonprofit, or charitable entity's use of their NIL.⁸⁰ According to the new policy, the measures will allow individuals to participate in NIL activities "consistent with the law of the state where the school is located."⁸¹ Athletes enrolled in schools in a state without an NIL law may partake in such endeavors "without violating NCAA rules relating to name, image, and likeness."⁸² In addition, individuals may use a "professional services provider for NIL activities."⁸³

While the interim policy generally facilitates student-athletes profiting off their NIL, it also includes several restrictions. For example, NIL compensation cannot be contingent on an athlete's "enrollment at a particular institution," athletes cannot receive "compensation for athletic participation or achievement," or receive compensation for uncompleted work.⁸⁴ Student-athletes must also abide by the rules of their respective institutions and athletic conferences.⁸⁵ The new

⁷⁸ Steve Berkowitz, *NCAA President Mark Emmert to Meet with Lawmakers as Some States Push to Pay College Athletes*, USA TODAY (May 8, 2021), <https://www.usatoday.com/story/sports/2021/05/08/mark-emmert-meetlawmakers-amid-pay-college-athletes/5007533001/>.

⁷⁹ *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

⁸⁰ *Id.* "Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school." *Id.* The NCAA recognizes that "[c]olleges and universities may be a resource for state law questions." *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *New Interim Policy Key Takeaways*, NCAA (Jun. 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf.

⁸⁵ *Id.*

NIL interim policy remains in effect until either permanent NCAA rules are introduced, or Congress passes federal NIL legislation.⁸⁶

A. NIL POLICY IN ACTION

At first glance, the NCAA's NIL interim policy seems like a big win for student-athletes looking to capitalize on their image and likeness. On the very first day that the NCAA's interim policy came into effect, Fresno State's women's basketball players Haley and Hanna Cavinder signed the nation's first NIL contract with Boost Mobile and Six Star Pro Nutrition.⁸⁷ While both Haley and Hanna post respectable numbers,⁸⁸ they are both undersized at five-foot-six and do not play in one of the more competitive athletic conferences.⁸⁹ As such, they are unlikely to play professionally in the WNBA and experts currently predict neither player will be drafted this year or the next.⁹⁰ Despite their apparent lack of professional prospects, the new policy allows the Cavinder sisters to combine their massive social media presence⁹¹ with their status as athletes to

⁸⁶ Joseph Salvador, *NCAA Approves Interim NIL Policy, Change Will Take Effect Thursday*, SPORTS ILLUSTRATED (Jun. 30, 2021), <https://www.si.com/college/2021/06/30/nil-interim-policy-approved-starting-thursday>. The policy is unlikely to end from a change by a new NCAA rule because of a warning of possible antitrust issues by the DOJ. See Blinder, *supra* note 43.

⁸⁷ Faith Karimi, *These Twin Sisters are College Basketball Stars and Have 3 Million TikTok Followers. Now they're Cashing in*, CNN, (Jul. 11, 2021), <https://www.cnn.com/2021/07/11/us/hanna-haley-cavinder-nil-trnd/index.html>.

⁸⁸ See *Hanna Cavinder: 2021-22 Women's Basketball Roster*, BULLDOGS, <https://gobulldogs.com/sports/womens-basketball/roster/hanna-cavinder/10640> (last visited Sep. 29, 2022); *Haley Cavinder: 2021-22 Women's Basketball Roster*, BULLDOGS, <https://gobulldogs.com/sports/womens-basketball/roster/haley-cavinder/10639> (last visited Sep. 29, 2022) (Haley and Hanna averaged 19.8 and 17 points per game last season, respectively, with Haley being named Mountain West conference player of the year and both players named all-conference players).

⁸⁹ *Id.*

⁹⁰ *2023 WNBA Mock Draft*, LINES, (Aug. 27, 2022), <https://www.lines.com/wnba/drafts/2023>.

⁹¹ As of November 2021, the sisters have 3.7 million followers on TikTok. Haley and Hanna Cavinder (@Cavindertwins), TIKTOK (<https://www.tiktok.com/@cavindertwins?lang=en> (last visited Nov. 21, 2021, 10:45 AM)).

capitalize on NIL endorsements—earning a potential of \$600,000 per year.⁹² Because California’s Fair Pay to Play Act does not go into effect until 2023, the Cavinder sisters can currently only earn profits through NCAA’s interim policy.⁹³ Paige Buckers, a University of Connecticut’s women’s basketball team member, also capitalized on her NIL, signing a multiyear endorsement deal with the footwear and apparel marketplace platform StockX.⁹⁴ Bueckers, unlike the Cavinder sisters, is a top college athlete: winning the 2021 John Wooden Award, playing for a blue-blood program in an elite athletic conference, and placing as a projected top 3 WNBA draft pick.⁹⁵ While Bueckers has less than a third of the Cavinder sister’s social media presence, her NIL is valued at \$382,000 per year due to her on-court success.⁹⁶

While most NIL debate centers around Men’s Division I basketball and football athletes, who generate the highest revenue in college sports, female athletes also stand to profit significantly from NIL legislation. It is not just Division I football and basketball athletes that are profiting off

⁹² Robert Kuwada, *Fresno State Twins Cash in on TikTok Fame – and Could Earn More than College President*, THE FRESNO BEE, (Jul. 1, 2021), <https://www.fresnobee.com/article252490978.html>.

⁹³ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, *supra* note 51.

⁹⁴ Nick DePaula, *UConn’s Paige Bueckers has Name, Image, Likeness Deal*, ESPN, (Nov. 10, 2021), https://www.espn.com/womens-college-basketball/story/_/id/32598842/uconn-paige-bueckers-name-image-likeness-deal. Unlike the Cavinder sister’s NIL deal made possible by the NCAA’s NIL interim policy, Connecticut passed legislation regulating NIL deals, including Bueckers. *See* H.B. 6402, Reg Sess. (Conn 2021).

⁹⁵ *See 2023 WNBA Mock Draft*, *supra* note 90.

⁹⁶ *See* DePaula, *supra* note 94.

their NIL;⁹⁷ baseball athletes such as Drew Gilbert, University of Tennessee center fielder, profited off his NIL by signing an endorsement deal with sports merchandising company BreakingT.⁹⁸

While the NCAA's interim policy previously benefitted star athletes and internet sensation, less impactful student-athletes have also reaped the new policy's benefits.⁹⁹ For example, the Brigham Young University athletic department brokered a deal between its men's football team and Built Brands that will allow all thirty-six walk-on players to receive funds to cover their tuition costs.¹⁰⁰ Scholarship players will also benefit from the deal by receiving \$1,000.¹⁰¹

Georgia Tech's athletic department negotiated a deal between its men's football team and TiVo that gave the players silk pajamas and a prepaid debit card worth \$404.¹⁰² TiVo also partnered with the school and upgraded their audio and visual equipment for an estimated value at over \$100,000.¹⁰³

⁹⁷ See *NCAA Name, Image, and Likeness News and Data*, NIL COLLEGE ATHLETES, (Nov. 3, 2021), <https://nilcollegeathletes.com/> (notable athletes who have signed endorsement NIL deals include: Graham Mertz (Wisconsin), Jordan Bohannon (Iowa), McKenzie Milton (Florida State), Bo Nix (Auburn), , Will Ulmer (Marshall University), Dontaie Allen (Kentucky), Spencer Rattler (Oklahoma), Evan Neal (Alabama), Buddy Boeheim, (Syracuse),).

⁹⁸ Jack Foster, *Drew Gilbert, Breaking Debut Epic Tennessee Bat Flip T-Shirt After NIL Changes*, SPORTS ILLUSTRATED, (Jul. 2, 2021), <https://www.si.com/college/tennessee/baseball/drew-gilbert-breakingt-debut-epic-tennessee-bat-flip-t-shirt-after-nil-changes>.

⁹⁹ *Id.*

¹⁰⁰ Dan Murphy, *BYU Cougars Sponsor Offers to Cover Tuition for Walk-On Members of Football Team*, ESPN, (Aug. 12 2021), https://www.espn.com/college-football/story/_/id/32010626/byu-cougars-sponsor-offers-cover-tuition-walk-members-football-team.

¹⁰¹ *Id.*

¹⁰² Dan Murphy, *Everything you Need to Know about the NCAA's NIL Debate*, ESPN, (Sep. 1 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

¹⁰³ *Id.*

Nevertheless, while some elite student-athletes or social media giants may profit significantly from athlete-friendly state bills, the state-by-state patchwork approach is detrimental to the collegiate amateur sports landscape. Schools located in more athlete-friendly states will gain a competitive recruiting advantage over those in states with more restrictive NIL laws, subsequently resulting in regional equities of top-tier talent.¹⁰⁴

States with more restrictive NIL laws not only limit recruiting opportunities for local universities, but risk exposure to antitrust liability.¹⁰⁵ Illinois and Mississippi legislation, for example, risk liability because their laws permit schools to be paid market value as a condition for approving an athlete's use of school marks and logos, as well as prevent student-athletes from suing schools for unfair competition and business torts in NIL-related deals.¹⁰⁶ Such authorizations could be construed as price-fixing and therefore violating the Sherman Act.

Additionally, the wide variety of state NIL laws, in terms of both scope and substance, makes it very difficult for student-athletes, agents, schools, and conferences to follow proper guidelines. It may be even more difficult for the NCAA to regulate proper compliance with the rules. Some states, such as Nebraska, have an opt-in provision for its NIL state law allowing some schools to abide by the provision until the law comes into full effect in 2023.¹⁰⁷ Consequentially,

¹⁰⁴ See Josh Moody, *States Rethink Restrictive NIL Laws*, INSIDE HIGHER ED, (Feb. 11, 2022), <https://www.insidehighered.com/news/2022/02/11/states-rethink-restrictive-nil-laws> (discussing how states such as Alabama and Florida that were proactive in passing NIL legislation early following the *Alston* decision actually are harming student-athletes as their laws are more restrictive than the current NCAA NIL interim policy). As attorney Darren Heitner notes, “[n]ow states that were proactive and led the charge are at a potential disadvantage because their restrictions are heavier than those that have been implemented by the NCAA. States that don’t have any laws have a potential advantage.” *Id.*

¹⁰⁵ See Michael H. Leroy, *With System Out of Balance, It’s Time to Revisit College NIL Laws*, SPORTICO, (Feb. 16, 2022) <https://www.sportico.com/leagues/college-sports/2022/state-nil-laws-revision-1234661547/>.

¹⁰⁶ *Id.* See generally 102-0042, 2021 Ill. Laws 14260 14260 and Miss. Code Ann. § 37-97-107 (2021).

¹⁰⁷ Nebraska Fair Pay to Play Act, Pub. Act 48-2610, 2020 Neb. Laws 962.

some institutions within the same state will follow different rules, adding to the confusion and making regulatory compliance almost impossible.

Finally, there is the question of what will happen to existing NIL-related deals once, or if ever, Congress passes a federal NIL law. Because different rules structure so many current existing deals, what would happen to those deals once Congress enacts a federal law? For example, if Congress enacts a federal bill prohibiting group licensing agreements, what would happen to Georgia Tech's Division I Football contract with TiVo?¹⁰⁸ Some institutions have been directly involved with facilitating student-athlete NIL deals, but a federal law could prohibit schools from such behavior. Would the federal law preempt state law? Would there be grandfather exceptions? The longer state-by-state patchwork design of current NIL laws exists, the more complications will arise when, or if ever, Congress passes a NIL law.

IV. THE FEDERAL APPROACH

A. A LIBERAL APPROACH

When passing blanket legislation regarding NIL rights for all student-athletes, Congress must determine how restrictive the laws should be. The College Athletes Bill of Rights (CABR) is one of the least restrictive NIL bills.¹⁰⁹ Democratic senator, Cory Booker, first introduced this bill, which¹¹⁰ gives student-athletes the ability to profit off their NIL rights both individually and collectively as a group, and provides them with the right to hire representation for NIL compensation matters.¹¹¹ This bill enables student-athletes to wear the footwear of their choice

¹⁰⁸ See Murphy, *supra* note 102.

¹⁰⁹ Novak, *supra* note 6, at 19.

¹¹⁰ College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

¹¹¹ S. 5062 at §3.

during both mandatory and non-mandatory team activities by prohibiting universities from dictating athletes' footwear.¹¹² Presumably, a student-athlete would be free to contract with a footwear apparel company, like Adidas, which might require the student-athlete to wear Adidas footwear during a game, even if that school is sponsored by a competing brand such as Nike. A school could not restrict that student-athlete from honoring their contract. Until now, institutions required players to wear footwear conforming with their sponsor.¹¹³ Under the College Athletes Bill of Rights, institutions may only prohibit shoes with "lights, reflective fabric, or [that] pose a risk to the college athlete."¹¹⁴ The bill protects student-athletes by differentiating NIL compensation from financial aid, meaning a student's financial aid status would not be affected by third-party NIL contract revenue.¹¹⁵

Perhaps the most aggressive provision of Booker's CABR is the section regarding revenue sharing.¹¹⁶ Higher institutions are required to share profits from revenue-generating sports with the student-athletes playing those sports, after deducting scholarship costs.¹¹⁷ This revenue-sharing provision, like some current NIL state bills,¹¹⁸ ensures every student-athlete receives some sort of compensation by virtue of their team membership. For sports where revenues exceed the total cost of scholarships (football, women's basketball, and baseball), the scholarship players would share

¹¹² *Id.* at §3(a)(5)(B)(ii).

¹¹³ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, at § 12.5.2.

¹¹⁴ S.5062 at §3(a)(5)(B)(ii).

¹¹⁵ *Id.* at §3(a)(6).

¹¹⁶ *Id.* at §5.

¹¹⁷ *Id.*

¹¹⁸ *See* H.B. 8, 2022 Reg. Sess. (Ga. 2021); H.B. 4047, 2022 Reg. Sess. (Mass. 2022).

profits generated in each sport.¹¹⁹Therefore, under the bill’s current model, football players would receive \$173,000, men’s basketball players would receive \$115,600, women’s basketball, would receive, \$19,050, and baseball players would receive \$8,670 in addition to their full scholarships.¹²⁰ If the bill seems heavily pro-student-athlete, that is because Booker says, “it is the only bill so far to be crafted from the athletes’ perspective.”¹²¹

Beyond just addressing student-athletes’ NIL rights, the CABR also provides health care, education, and transfer eligibility protections.¹²² The bill requires the U.S. Department of Health and Human Services to create standards of care related to health, wellness, and safety; addressing, among other things, issues such as concussion protocols, sexual assault, mental health, illegal performance enhancers, and long-term injuries.¹²³ Schools are also required to contribute annually to a medical trust fund covering student-athletes’ out-of-pocket expenses for sports-related injuries for up to five years after their graduation.¹²⁴ In terms of educational protections, the bill prevents institutions from revoking a student-athlete’s scholarship if that student-athlete no longer chooses to participate in intercollegiate sports (or if they were unable to participate as a result of injury).¹²⁵

¹¹⁹ Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES, (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaaf-football/college-athlete-bill-of-rights.html>.

¹²⁰ *Id.* In the sports that generate more revenue than the total amount of money spent on scholarships, athletes would be entitled to 50% of the money left over after the scholarships are paid. *Id.* The amount of money for football players is calculated by adding all money generated by the 130 college football teams, subtracting the scholarships money, and then dispersing half of that remaining amount equally among all the student-athletes. *Id.*

¹²¹ *Id.*

¹²² Novak, *supra* note 6, at 19

¹²³ S. 5062 at §6.

¹²⁴ *Id.* at §6.

¹²⁵ *Id.* at §8.

The bill further requires institutions to provide a scholarship for as many years as it would take that student-athlete to complete a degree.¹²⁶ A student-athlete would have course enrollment freedom, as the bill sets forth strict penalties for an institution's athletic department attempting to interfere with a student-athlete's choice of major, coursework, or extracurricular activities.¹²⁷ In terms of transfer eligibility, student-athletes may transfer schools without penalty as long as they transfer outside of their sport's season and more than forty-five days before the season.¹²⁸ Student-athletes also may enter professional drafts without jeopardizing their future collegiate sports eligibility if they chose to drop out of the draft or were not selected by any professional teams.¹²⁹

Enforcing the bill's provisions requires a federally chartered commission to establish student-athlete NIL contracts, educational requirements, and health and safety standards.¹³⁰ The commission would resolve any disputes involving student-athlete contracts, investigate any Title IX claims,¹³¹ and conduct audits and investigations regarding compliance with the CABR's provisions.¹³² The commission would comprise of nine individuals serving seven-year terms.¹³³

¹²⁶ *Id.*

¹²⁷ *Id.* Students that transfer can lose their eligibility status to play the following season, *see* NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 4, at §12.8.1.7.1.2.

¹²⁸ *Id.* at §3(d)(2)(B).

¹²⁹ *Id.* at §3(e).

¹³⁰ *Id.* at §10(a).

¹³¹ Title IX violations would include any kind of sexual discrimination in any education program receiving federal funding. 65 Fed. Reg. 52872 at §10.450(a).

¹³² S.5062, 116th Cong. §10 (2020).

¹³³ *Id.*

Of the nine members, at least five must be former athletes, and none may be university or athletic department administrators.¹³⁴

In terms of potential NIL legislation already existing at the state level, the CABR is one of the least restrictive bills when it comes to a student-athlete's NIL rights. This bill's greatest restriction prohibits student-athletes from endorsing certain types of products, allowing institutions to require student-athletes wear certain apparel during team mandatory activities.¹³⁵ Beyond these restrictions, the bill does not do much more to restrict free trade, which may be why there is no provision in the bill for an antitrust preemption or exemption, compared to more conservative bills.¹³⁶ While a more liberal approach is ideal when balancing student-athlete compensation interests with anticompetitive restrictions on free trade and traditions of amateurism, this approach goes a bit too far— particularly with its group licensing provisions.¹³⁷ The problem with paying every player on a team equally, regardless of position or rank, and simply based on the virtue of their inclusion on the team aligns more closely with the definition of an “employee” rather than an amateur athlete. It also seems unfair that under the bill's revenue sharing model that a third-string defensive tackle on a college football team that hardly receives any important playing time could be paid more than twice as much as a female basketball player who is the star on her team and plays meaningful minutes that impact the game.¹³⁸ The bill's revenue-sharing provision does

¹³⁴ *Id.*

¹³⁵ *Id.* at §3. Some restrictions include allowing the state to block any student-athlete contract that it if it would also prevent that athlete's institution from contracting with the same party. *Id.* Another mandates that student-athletes must wear school sponsored footwear during official school activities. *Id.*

¹³⁶ *See* S. 238, 177th Cong. (2021) *infra* note 145.

¹³⁷ *Id.*

¹³⁸ S.5062 at §5(2)(a)(2)(A)

nothing to defeat antitrust behavior as it does not further limit free trade restrictions and the same revenue is generated regardless of any sharing provision.¹³⁹ The only thing the provision does is reallocate where those generated funds are deposited.¹⁴⁰ In that scenario, it is also the student-athlete's institution that is paying them directly for their services as an athlete.¹⁴¹ That concept is very much akin to a professional employee-athlete who is paid directly by their team and is too much like the "pay for play" model that the NCAA tried to avoid in the past because it defeats the traditional notions of amateurism.

An effective NIL bill should not restrict what a student-athlete could receive for his or her NIL in a free market, but it also should not allow payments that resemble a salary. Congress needs to pass legislation that essentially puts a student-athlete on the same level playing field as any other scholarship student on campus. Imagine if Facebook founder Mark Zuckerberg would have had to give up his scholarship from Harvard after accepting an offer from Microsoft to develop his Synapse App.¹⁴² Why should the NCAA be allowed to restrict a student-athlete from contracting with a third party when any other student, such as a coding expert like Zuckerberg, would not face any restrictions under similar circumstances?

Any bill introduced by Congress also needs to be more balanced when it comes to liberal or conservative values regarding NIL compensation. Because Senator Booker's CABR was too liberal in its approach, it did not pass through the Senate, as support was limited to Democratic

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Karissa Giuliano, *Why Mark Zuckerberg Wore a Tie for an Entire Year*, CNBC, (May 14, 2015), <https://www.cnbc.com/2015/05/14/mark-zuckerbergs-birthday-11-things-you-didnt-know.html>.

Senators.¹⁴³ Because the House only slightly favors one side,¹⁴⁴ it is crucial that any NIL bill introduced into the senate be more balanced with its liberal and conservative ideas in order to garner bipartisan support.

It is also important that the bill is not as ambitious as Booker's bill. While it is admirable that Booker, a former college athlete himself, wants to provide both medical and health benefits and protections for student-athletes, those extra protections may wind up jamming up any potential bipartisan agreement over the bill.¹⁴⁵ The College Athlete's Bill of Rights covered too many issues and different senators disagreed.¹⁴⁶ Right now, Congress should look to pass a bill that solely focuses on NIL rights of student-athletes so that it may pass quicker. More issues will accumulate as time passes where NIL rules are dictated by state and local law.

Other federal bills, such as the College Athlete Economic Freedom Act (CAEF), which some commentators have said "goes well beyond [the] existing proposed legislation proposed legislation at the federal and state level—and the proposed new NCAA rules—in giving athletes broad rights, including virtually unrestricted access to earning NIL income in individual and group agreements."¹⁴⁷ While offering student-athletes the ability to profit off their NIL rights, this bill

¹⁴³ Dan Murphy, *Congressional Proposal Would Overhaul College Sports, Require Revenue Sharing, Cover Athletes' Medical Costs*, (Dec. 17, 2020), https://www.espn.com/college-sports/story/_/id/30533536/congressional-proposal-overhaul-college-sports.

¹⁴⁴ *Party Division*, U.S SENATE, (Nov. 13, 2021), <https://www.senate.gov/history/partydiv.htm>.

¹⁴⁵ *Id.*

¹⁴⁶ No other federal bill analyzed in this paper, liberal or conservative, touched on student-athlete health care reform or grant-in-aid adjustments.

¹⁴⁷ Andrew Zimbalist, *The College Athlete Economic Freedom Act Proposed in Congress is a Step Forward on NIL Rights*, FORBES (Feb. 7, 2021), <https://www.forbes.com/sites/andrewzimbalist/2021/02/07/the-college-athleteeconomic-freedom-act-proposed-by-senator-chris-murphy-d-ct-and-congresswoman-lori-trahan-d-ma-is-a-stepforward/?sh=57266ced2bbd>.

offers far fewer restrictions than the CABR by preventing institutions or intercollegiate athletic conferences from enacting or enforcing any rules that would prevent both prospective and current student-athletes, either individually, or as a group, from profiting off of their NIL.¹⁴⁸ The Act would also prevent institutions from colluding with other institutions to possibly limit the market cap of a student-athlete’s NIL.¹⁴⁹ Further, institutions or intercollegiate athletic conferences would be prohibited from enacting rules which would prohibit student-athletes from forming together and recognizing a representative to facilitate group licensing agreements.¹⁵⁰

B. A CONSERVATIVE APPROACH

While the Democrats introduced NIL bills that are both broad in scope and permissive in concept, Republican senators, such as Marco Rubio, introduced bills, such as the Fairness in Collegiate Athletics Act (FCA), that are on the other end of the spectrum—narrow in scope and restrictive in concept.¹⁵¹ The FCA at a minimum, like the more liberal Acts introduced into Congress, allows for student-athletes to be compensated for their NIL by third parties.¹⁵² However, under the FCA, the NCAA can establish the rules by which a student-athlete could be compensated by such third parties.¹⁵³ Inherent in such authority lies discretionary power by the NCAA to implement restrictive rules as it sees fit to regulate third-party contracts. Specifically, the Act would give the NCAA a wide latitude to create rules that it would deem “necessary to . . . preserve

¹⁴⁸ S. 238 §3 117th Cong. (2021).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ S. 4004, 116th Cong. (2020).

¹⁵² *Id.* at § 3.

¹⁵³ *Id.*

the amateur status of student athletes.”¹⁵⁴ The bill also provides a safe harbor for the NCAA as it provides that “no cause of action shall lie or be maintained in any court” for any rules the NCAA adopts under the FCA.¹⁵⁵ The Federal Trade Commission would be granted authority to enforce any provision promulgated under the FCA.¹⁵⁶ The FCA also contains a preemption clause that expressly prohibits any state from creating laws that allow student-athletes to receive compensation for their athletic performance and participation in college sports.¹⁵⁷ While student-athletes would be able to receive compensation for their NIL, because of the discretion afforded to the NCAA in adopting rules¹⁵⁸, it is hard to predict who would be eligible for such compensation and the compensation’s scope. Whatever the case, student-athletes would be able to obtain professional representation in creating NIL deals and they would be required to report any such compensation to their school and the NCAA.¹⁵⁹

Another Republican-backed NIL bill, the Collegiate Athlete Compensation Rights Act (CACRA) introduced by Senator Roger Wicker is also narrow in scope and restrictive in

¹⁵⁴ *Id.* The Act also would give the NCAA power to create rules that would “ensure [the] appropriate recruitment of prospective student athletes” and “prevent illegitimate activity with respect to any third party seeking to recruit or retain student athletes” including any third party that has “a prior or existing association, either formally or informally” with a school or that has “a prior or existing financial involvement with respect to” college sports. *Id.* Senator Rubio went on to say that the latter provision would be used as a way to prevent “boosters from using [NIL compensation] as a way to recruit or retain [athletes].” See Steve Burkowitz, *Sen. Rubio Introduces Bill Allowing NCAA Athletes to Cash in on Name, Image, Likeness*, USA TODAY (Jun. 18, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/06/18/sen-marco-rubio-introduce-bill-addressing-name-image-likeness/3210488001/>.

¹⁵⁵ S. 4004, 116th Cong. § 4 (2020).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at § 5.

¹⁵⁸ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy supra* note 51.

¹⁵⁹ *Id.* at § 3.

concept.¹⁶⁰ Wicker’s bill restricts student-athletes’ NIL rights because it allows the NCAA, athletic conferences, and schools to permit NIL compensation deals that it deems “commensurate with market value.”¹⁶¹ Such a provision could give the NCAA and the schools great discretion to approve or disapprove certain NIL deals based on the deal’s cash value. Furthermore, the bill only allows student-athletes who have completed 12% of their college credits required for graduation to be eligible to sign NIL deals.¹⁶² This provision would essentially prohibit any student-athletes coming fresh out of high school to benefit from NIL compensation. The bill further restricts student-athletes’ potential NIL compensation by allowing schools to prohibit any deal with a sponsor that may be “reasonably considered to be inconsistent with the values of an institution.”¹⁶³ Like other Republican-backed bills, there is also a disclosure requirement for all student-athletes to report their NIL compensation to the NCAA.¹⁶⁴ The power to regulate NIL compensation would be delegated to the FTC¹⁶⁵ as well as providing both the NCAA and schools a broad exemption from antitrust liability.¹⁶⁶

Republican Senator Jerry Moran presented a less restrictive conservative bill than other Republicans before him with the Amateur Athletes Protection and Compensation Act (AAPCA).¹⁶⁷ Moran’s bill allows student-athlete NIL compensation as long as the deals do not

¹⁶⁰ S. 5003, 116th Cong. (2020).

¹⁶¹ *Id.* at § 3.

¹⁶² *Id.* at § 2.

¹⁶³ *Id.* at § 5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at § 7.

¹⁶⁶ *Id.* at § 9.

¹⁶⁷ S. 414, 117th Cong. (2021).

violate the student-athlete's school's code of conduct as well as allow for prospective high school athletes to sign NIL deals.¹⁶⁸ Moran's bill is the first Republican bill introduced to Congress that allowed for student-athlete recruits to benefit from NIL compensation.¹⁶⁹ Unlike other Republican-backed bills, Moran's bill does not provide the NCAA with antitrust protection from potential lawsuits related to NIL deals.¹⁷⁰ The bill would establish the Amateur Intercollegiate Athletics Corporation (AIAC) that would enforce the act in conjunction with the FTC.¹⁷¹ The bill does not provide any framework for group-licensing deals but grants the AIAC the power to create such rules.¹⁷²

C. A MODERATE APPROACH

Perhaps the biggest step towards a comparable middle-ground would be the Student Athlete Level Playing Field Act (SALPFA): a bill created in a bipartisan effort between Republican Senator Anthony Gonzalez and Democratic Senator Emanuel Cleaver.¹⁷³ The bill was first introduced in 2020 by Gonzalez but has since been amended and reintroduced to be less restrictive in content.¹⁷⁴ While the bill does provide eligibility to all student-athletes to conduct NIL-related deals, they are prohibited from engaging in deals related to certain activities such as

¹⁶⁸ *Id.* at § 3.

¹⁶⁹ Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24 2021), <https://www.si.com/college/2021/02/24/ncaa-athlete-rights-compensation-congress-jerry-moran>.

¹⁷⁰ *Id.*

¹⁷¹ S. 414, 117th Cong. § 8 (2021).

¹⁷² *Id.* at § 10.

¹⁷³ H.R. 2841, 117th Cong. (2021).

¹⁷⁴ H.R. 8382, 116th Cong. (2020).

tobacco, alcohol, controlled substances, adult entertainment, and gambling.¹⁷⁵ The bill further allows for institutions to prohibit student-athletes as part of a sponsorship deal from wearing any clothing insignia during athletic competitions that they deem improper.¹⁷⁶ The bill does, however, contain a reciprocity clause that would prohibit an institution from engaging in an endorsement deal with any third party that it had already prohibited its student-athletes from engaging in.¹⁷⁷ The bill would establish the Covered Athletic Organization Commission to make recommendations to Congress about how to create and implement rules to regulate NIL deals and create an independent dispute resolution process to handle any claims that may arise from NIL contracts.¹⁷⁸ Like many bills before it, the bill would give the FTC the power to enforce any rules adopted by the bill.¹⁷⁹ The bill also preempts state law from either further restricting or permitting NIL rules that would be adopted by the bill.¹⁸⁰ The bill finally provides an antitrust exemption for any Sherman Act violation that may arise as a result of the Act.¹⁸¹ Unique to this bill, the Act recommends, but does not require, institutions to create financial responsibility classes that would help educate student-athletes.¹⁸²

¹⁷⁵ H.R. 2841, 117th Cong. § 2 (2021).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at § 4.

¹⁷⁹ *Id.* at §3.

¹⁸⁰ *Id.* at §7.

¹⁸¹ *Id.* at §8.

¹⁸² *Id.* at §6.

While a bipartisan effort is a major step forward to finally enacting federal NIL legislation, the SALPFA still may be too conservative to pass through the House of Representatives. For one thing, it still is very restrictive in what student-athletes may endorse, such as gambling or tobacco, and provides an antitrust exemption for any Sherman Act violation.¹⁸³ The problem with such a broad exemption is that AIAC could theoretically enact very restrictive rules regarding student-athletes' NIL rights. No matter how restrictive the rules are, there would be no check on the AIAC's regulatory power as it could be exempt from any actions that may appear to be anti-competitive and restrict the free market. Broad exemptions are NCAA-friendly and could harm student-athletes' ability to trade in a free and open market in the long term.

V. HOW NIL WILL RESOLVE

This begs the question, what should be done regarding the current situation of student-athlete NIL rights in this country? As it currently stands, the NCAA put in place a temporary policy that will default to state rules when it comes to NIL rights.¹⁸⁴ For those states that have not enacted any NIL legislation, the NCAA provided very broad rules regulating NIL rights.¹⁸⁵ The NCAA does not plan on making any moves following antitrust concerns from the DOJ, and is waiting for Congress to act following the *Alston* case.¹⁸⁶ The current patchwork setup of various state laws is untenable in the long-term.¹⁸⁷ Therefore, the best response following *Alston* would be a response from Congress in the form of federal legislation.

¹⁸³ *Id.* at §8

¹⁸⁴ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, *supra* note 51.

¹⁸⁵ *Id.*

¹⁸⁶ *See Blinder supra* note 41.

¹⁸⁷ *See supra* Part IV.

When deciding what that legislation would look like, this article is more concerned with compromise than what is fair for student-athletes. An ideal collegiate market would provide a broad scope of regulation for student-athletes to conduct NIL deals. However, the legislative history explored in the section above highlights that a bill that is too broad or too permissive in content would never pass through the House, even if it is what is most fair. Since 2019, dozens of federal NIL-related bills have been introduced into Congress and none of them have made it very far¹⁸⁸. Part III provides a glimpse of what Congress is looking at when trying to enact an NIL bill. The reason that nothing has passed is that a divided Congress cannot agree on what an NIL bill should look like.¹⁸⁹ Democrats seem to favor student-athletes' rights more and pushed for NIL legislation that is very broad in scope and permissive in content.¹⁹⁰ Alternatively, Republicans favor the NCAA and pushed for NIL legislation that is narrow in scope and restrictive in content. For an NIL bill to ever pass through the House, there will most likely need to be some sort of compromise. The most moderate bill will be the most likely to pass through the House as it will require key concessions on both sides but retain enough of what both sides find valuable to be deemed acceptable. Here is what I think the Goldilocks bill would look like, and if Congress ever does pass a bill, it would probably look most like this.

A. THE 'GOLDILOCKS' BILL

The first issue that both Democrats and Republicans most likely agree with, and what all NIL bills introduced into Congress have had in common, is that student-athletes should be able to

¹⁸⁸ Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), <https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa>.

¹⁸⁹ See Berkowitz *supra* note 78.

¹⁹⁰ *Id.*

profit off their NIL. So, the Goldilocks Bill would begin by prohibiting the NCAA, athletic conferences, or institutions from preventing student-athletes from engaging in third-party sponsorship deals regarding their NIL.

Beyond that first provision, Democrats and Republicans do not agree on much else for NIL legislation.¹⁹¹ The next issue is, how restrictive should the NIL deals be? Republicans would like to give institutions and athletic conferences the discretionary power to prohibit sponsorship deals that do not align with their core values while Democrats essentially want no restrictions.¹⁹² A fair middle ground between both parties, like what was presented in the SALFPA¹⁹³, is one where student-athletes would be restricted from contracting with companies regarding adult entertainment, tobacco, gambling, etc. From a rational standpoint, it does not make sense to impose these kinds of restrictions on student-athletes. The Supreme Court already implied that restricting a student-athlete's right to free trade may be acceptable under the rational basis of preserving the concept of amateurism but preventing a student-athlete from endorsing something like tobacco has nothing to do with preserving amateurism.¹⁹⁴ If a student-athlete is eighteen-years-old or over, then there is nothing illegal about promoting tobacco. Instead, preventing a student-athlete from contracting with a tobacco company would preserve some traditional morality of old-fashioned American values. Such a concept may not be enough for the courts to concede that it is a rational means for restricting free trade and very well may bring up antitrust issues, but I will address that

¹⁹¹ See Ross Dellenger, *As July 1 Nears, Congress Making Critical Progress on NIL and College Athletes' Rights*, SPORTS ILLUSTRATED, (May 18, 2021), <https://www.si.com/college/2021/05/18/ncaa-athletes-rights-profit-congress-nil-bill>.

¹⁹² *Id.*

¹⁹³ H.R. 2841, 117th Cong. (2021).

¹⁹⁴ See *Alston*, 141 S. Ct. at 2166.

later. For now, to appease Republicans, there needs to be some sort of restriction, and choosing tobacco, gambling, and adult entertainment may be an acceptable concession on both sides.

The Goldilocks Bill should also contain a reciprocity clause that prohibits athletic conferences and institutions from engaging in endorsement deals with companies that they prohibited their student-athletes from dealing with. If a school prohibits a student-athlete from contracting an endorsement deal with a gambling site like Draft Kings, then the school cannot sign a separate deal with Draft Kings. This kind of reciprocity will prevent the appearance of hypocrisy and unfairness when denying student-athletes full, unrestricted trade in a free market.

Another provision that essentially all NIL bills have in common is that they would provide the FTC with enforcement powers over the Bill.¹⁹⁵ Any violation of the first section of this bill would 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.¹⁹⁶ No provision in this bill should be construed to limit the FTC's authority.

Next, the Bill will have to establish a commission that would aid Congress in implementing and regulating federal NIL legislation. That commission would also oversee providing alternative dispute resolution options when conflict arises between student-athletes and the schools or contracting parties regarding their NIL rights. Such assistance would help prevent a logjam of the courts from the inevitable large amount of litigation that would follow any NIL bill. The construction of the commission varies from NIL bills, but generally, the members consist of some combination of former athletes, policy experts, academics, and administrative officials.¹⁹⁷

¹⁹⁵ H.R. 2841, 117th Cong. § 3 (2021), S.5062, 116th Cong. §12 (2020).

¹⁹⁶ 15 U.S.C. § 57(a)(1)(B).

¹⁹⁷ *See generally*, H.R. 2841, 117th Cong. § 4 (2021), S.5062, 116th Cong. § 11 (2020).

The next issue to address is the potential for unfair recruiting practices based on the activity of boosters. All NIL bills are on the same page as to preventing boosters from using NIL deals as a recruiting incentive to get athletes to join their institution.¹⁹⁸ Some bills have tried to prevent this by restricting incoming freshman student-athletes from participating in NIL deals.¹⁹⁹ Such a practice is overly restrictive to prevent what could be a minor issue with NIL legislation. Instead, the Bill should amend the Sports Agent Responsibility and Trust Act²⁰⁰ to define what a “booster” is and prohibit them from conducting NIL deals with prospective student-athletes as a recruiting incentive. Ultimately, it will be very difficult to realistically enforce such a provision, but there is no other way to prevent such conduct without completely barring freshman recruits from participating in NIL deals.

The next issue the Goldilocks Bill should cover is what sort of preemption should be put in place. By the time that Congress ever does pass a federal NIL law, most, if not all, states will have enacted some sort of NIL law.²⁰¹ Should the Bill expressly preempt any existing state law? This might become problematic if there are NIL deals that were created under more permissive state laws. For example, what if a student-athlete has signed a NIL contract with Draft Kings before this Bill comes into effect? Would that deal become void as a result of impracticability due to the

¹⁹⁸ H.R. 2841, 117th Cong. § 6 (2021), S.5062, 116th Cong. § 10(A) (2020), S. 5003, 116 Cong. § 4 (2020).

¹⁹⁹ *See* S. 5003, 116 Cong. (2020).

²⁰⁰ 15. U.S.C. §§ 7801–07.

²⁰¹ *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE, (Mar. 11, 2022), <https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/>. As of March 20, 2022, twenty-four states have enacted NIL laws. *Id.* Three more states have passed laws that will become effective in 2023. *Id.* New Jersey’s NIL law will become effective in 2025. *Id.* Many other states currently have proposed bills in the House and Senate. *Id.* Only eight states currently have no known activity regarding a NIL bill. *Id.* Alabama recently repealed its NIL law opting for the more permissive structure of the NCAA interim policy. *Id.*

law? Would that result be fair? However, at the same time, if the bill proscribes no preemption to state law, then the multiple issues discussed in Part III will still linger and effectively nullify the purpose of federal legislation. Therefore, whatever bill Congress passes must contain an express preemption clause that would supersede any state law. All existing contracts that conflict with federal NIL law would become void as a matter of law.²⁰² While that result may seem unfair, student-athletes would still be able to renegotiate with companies to amend the terms of their prior deal so that it could comply with federal law.

The Goldilocks Bill needs to provide some sort of antitrust exemption, but that exemption should be construed very narrowly. It seems as if Democrats want no exemption whatsoever, while Republicans prefer a very broad exemption. A narrow exemption would be a middle-ground compromise for both sides. Republicans seem to be worried that any new NIL bill will lead to a litany of lawsuits filed on behalf of student-athletes who have somehow been restricted in what kind of deal they can sign. Such lawsuits will logjam the courts, and by the time student-athletes can receive any judicial relief, they will have already graduated from school, making the issue moot. The Democrats, however, probably fear that an antitrust exemption would provide too much protection for whichever governing bodies ultimately are entrenched with the responsibility to adopt rules under the act. If there is a blanket exemption, then there will be no consequences for the governing body to adopt as restrictive rules as it sees fit. Conversely, student-athletes will have recourse to obtain judicial relief if they feel the rules are too restrictive. Therefore, while there

²⁰² See RANDY E. BARNETT, *CONTRACTS CASES AND DOCTRINES* 1085 (Vicki Been et al. eds., 5th ed. 2012). See also *Bush v. Protravel Int'l, Inc.*, 746 N.Y.S.2d 790 (N.Y. Civ. Ct. 2002) (holding that certain performances under contract may be excused when a party encounters unforeseen circumstances that make it objectively impossible to perform the terms of the agreement). Federal legislation that preempts state law could give certain companies involved in NIL deals to suspend performance or void the contract altogether.

should be an antitrust exemption, it should be very narrowly defined. The exemption should be applied only to claims that arise out of the bill itself. Any other rules that are further adopted should not be held exempt from potential antitrust liability.

Another issue the bill should consider is how broad the scope will be. Democrats would like to add other issues to the bill besides fair and equitable NIL compensation.²⁰³ Broad Democratic bills, such as Booker's CABR, also encompassed guaranteed health benefits to all student-athletes.²⁰⁴ Some Democrats would like to ensure that student-athletes possess a comprehensive health insurance plan that would cover all medical-related injuries that athletes might endure throughout their collegiate tenure.²⁰⁵ This comprehensive coverage would not be limited to medical issues that arise as a result of athletic participation but to anything that happens to student-athletes. As mentioned earlier, such a broad expansion of NIL legislation to include medical benefits seems like it would never pass through the House. Republicans want to focus on the narrow subject of NIL rights, and the medical rights of a student-athlete are a separate issue.²⁰⁶ Also, while NIL rights will be available to all student-athletes, not all student-athletes will be able to capitalize on their NIL, whereas all athletes will be able to benefit from universal benefits. That is not to say that student-athlete health is not a serious issue and one that should be addressed, but that is not something that needs to be addressed in a NIL bill for the sake of expediency and compromise. Not all student-athletes are left without recourse as many institutions offer affordable

²⁰³ *See generally* College Athletes Bill of Rights, S. 5062, 116th Cong. (2020).

²⁰⁴ *Id.*

²⁰⁵ *See* S. 5062, 116 Cong. (2020).

²⁰⁶ *See generally* Amateur Athletes Protection and Compensation Act S. 414, 117th Cong. (2021), Collegiate Athletes Compensation Rights Act S. 5003, 116th Cong. (2020).

health insurance plans, there are state-sponsored insurance plans, and students may be eligible to be on their parent's insurance plan. For the sake of reaching a compromise, the scope of the NIL bill should be narrowed to addressing student-athlete NIL rights.

Another issue to consider is the potential penalties involved with student-athletes who want to transfer between schools. Democrats would like there to be no penalties associated with transfer status, while Republicans would like to leave that to state law or school rules (which generally impose some sort of penalty).²⁰⁷ The rationale behind the penalty is to prevent student-athletes from using the NIL market as a means to leave one school for another. For example, if a student-athlete is not heavily recruited out of high school and signs with a small program but then performs very well in their first or second year in college, they may then be more inclined to transfer to a school in a bigger market where more lucrative NIL deals could potentially be reached. There is also the same concern with boosters illegally incentivizing transfer students to sign with their program.²⁰⁸ Schools in lower divisions and smaller markets will be negatively impacted by students who are looking to fully capitalize on their NIL worth. The other side of this is the student-athletes' interests to be able to participate openly in a free market without arbitrary restrictions preventing them from moving. The ultimate deciding factor will be to see how much NIL laws in the past year have influenced the college athlete transfer rate among schools.²⁰⁹ Whatever the case may be, in terms of compromise, if the Democrats are willing to compromise on the scope of the

²⁰⁷ See Dellenger, *supra* note 169.

²⁰⁸ *Id.*

²⁰⁹ Dean Golembeski, *Here's How the NCAA Transfer Portal Changed College Athletics in 2021*, BEST COLLEGES, (Sep. 23, 2022), <https://www.bestcolleges.com/news/2021/12/22/ncaa-transfer-portal-nil-college-football-playoff/>. Following the passage of NIL legislation, 15,000 student-athletes across all three divisions entered their names in the transfer portal. *Id.* For reference, 1,700 of those athletes were Men's Division I Basketball players, up more than 300% from those who transferred a decade ago. *Id.*

bill, then Republicans should respond in kind on transfer penalties. If the transfer rates become more of a problem in the future, the governing commission could always adopt rules that would limit student-athletes' ability to transfer, but for the time being, the bill should allow for no transfer-related penalties.

Another issue to consider is whether the bill should include a provision for revenue-sharing or group-licensing deals. Most federal bills introduced were silent on the issue with the idea that such decision-making could be made later on.²¹⁰ Some state laws were explicit when it comes to revenue-sharing models or group-licensing deals.²¹¹ Whether such a provision should be expressed depends on the antitrust exemption's scope that a bill would, if any, provide.²¹² Here, assuming the Goldilocks Bill provides a narrow exemption, then revenue sharing would have to be an express provision within the bill mimicking state law. The concern is that if a federal bill approves of a revenue-sharing model later on but the model is not protected by an antitrust exemption, then the NCAA, athletic conferences, or other institutions could challenge such a model as conflicting with traditional notions of amateurism. Indeed, the concept of a student not actively participating in NIL representation but still receiving compensation from some sort of revenue-sharing model would arguably resemble more of a salary. This stretches the bounds of NIL rights a little too far to the point that it seems as if the traditional notions of amateurism would be lost in college sports.

²¹⁰ Murphy *supra* note 102.

²¹¹ See Murphy, *supra* note 102 (showing group-licensing deals for student-athletes). See S.B. S5891C, 2021 Reg. Sess. (N.Y. 2021) (showing New York's NIL Bill as example of revenue sharing).

²¹² See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 30 (2017), <https://www.justice.gov/atr/IPguidelines/download>, for potential antitrust issues related to group-licensing (stating that "[c]ross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. For example . . . pooling arrangements . . . may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants"). *Id.*

Compensating a student-athlete through a group licensing deal is not as damaging to the tradition of amateurism as a revenue-sharing model would be, even if an athlete is only receiving payment for being a member of a team. There is at least, an important difference in that a student-athlete would still be endorsing another product, such as Georgia Tech football players wearing TiVo pajamas.²¹³ It is possible that such a practice would still pass a rational basis test if such a concept was ever challenged in court.²¹⁴ For that reason, group licensing is not something that needs to be addressed in the bill and, rather, that could be up for debate at a future time. Revenue sharing, on the other hand, because there is a possibility of strong litigation following any such implementation²¹⁵, should be expressly prohibited in the bill to avoid any such problem.

VI. CONCLUSION

The NCAA has a lauded tradition of promoting amateurism as the keystone principle behind preventing student-athletes from receiving any sort of remuneration for the fruits of their labor. For over a century, such a practice by the NCAA of denying student-athletes compensation while simultaneously profiting off their hard work was never seriously threatened until recent judicial decisions suggesting that the NCAA was essentially price-fixing—a key violation of antitrust law²¹⁶. Since then, the NCAA adopted an interim policy allowing student-athletes to benefit monetarily from their NIL, while many states followed suit and passed their own laws regarding NIL.²¹⁷ The laws among the states vary in scope and permissiveness, and the current

²¹³ See Murphy, *supra* note 102.

²¹⁴ See *National Collegiate Athletic Ass'n*, 594 U.S. at 2166.

²¹⁵ The NCAA could take issue with revenue sharing as it resembles the play-for-pay model of professional athletics. For further discussion, see *supra* Part IV (A).

²¹⁶ *Alston*, 141 S. Ct. at 2167–68.

²¹⁷ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, *supra* note 51. See Dellenger, *supra* note 35.

patchwork of state law will have a devastating effect on the landscape of collegiate sports if left unchecked. Despite the NCAA calling for a federal response, Congress has been unable to come close to passing any sort of legislation because Republicans and Democrats cannot find any middle ground.²¹⁸ A progressively moderate law from Congress is most likely what will pass through the Senate and is ultimately what is best for student-athletes and college sports in general.

²¹⁸ See Dellenger, *supra* note 191.