

THE ONLY TEN I SEE: WHY CONGRESS SHOULD FOLLOW TENNESSEE'S LEAD AND PASS NIL LEGISLATION ALLOWING COLLECTIVES TO WORK DIRECTLY WITH SCHOOLS

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I. INTRODUCTION

For much of the National Collegiate Athletic Association's (NCAA) existence, college athletes had no right to profit from their name, image, or likeness (NIL).¹ NCAA regulations strictly prohibited college athletes from using their position to make money, insisting upon the amateurism of these athletes.² The public largely supported this stance. As recently as 2014, nearly 70 percent of the public opposed paying student-athletes.³ In the past several years, however, a series of court decisions and state legislative actions has led to a complete reversal. The NCAA now openly allows student-athletes to profit off their NIL.⁴ Public sentiment has swung in favor of allowing student-athletes to make money from use of their NIL as well, as 74 percent of Americans support college athletes' right to profit off their NIL.⁵

Numerous companies and entities have emerged to fill the robust college athlete NIL market, which has blossomed over the past several

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¹ See *NCAA v. Alston*, 141 S. Ct. 2141, 2148–51 (2021).

² See *id.*

³ Andrew Weiss, Note, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L. REV. 259, 270 (2020).

⁴ NCAA, INTERIM NIL POLICY 1 (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [hereinafter NCAA INTERIM POLICY].

⁵ Daniel Libit & Lev Akabas, *67% of Americans Favor Paying College Athletes: Sportico/Harris Poll*, SPORTICO (Aug. 17, 2023 12:01 AM), <https://www.sportico.com/leagues/college-sports/2023/americans-favor-college-athletes-pay-harris-poll-1234734402>.

years. This seismic shift has caused myriad legal issues to arise, turning the collegiate sports landscape into an ever-evolving quagmire. One issue seems to reach every corner of the fray: the NIL collective.

At its core, a collective is simply “a cooperative enterprise.”⁶ In the collegiate NIL context, collectives are most often comprised of donors with ties to specific universities who pool their money together to “help facilitate NIL deals for athletes and also create their own ways for athletes to monetize their brands.”⁷ These entities, unheard of even two or three years ago, have spread like wildfire, with virtually every major collegiate athletics program having at least one collective.⁸

Collectives’ proliferation presents many potential legal issues. One main issue arises in the recruiting context. Collectives are comprised of donors loyal to a specific school, so they fit the NCAA’s definition of “boosters.”⁹ Since NCAA rules prohibit boosters from influencing recruiting efforts, those rules prohibit collectives from influencing recruitment as well. This means collectives may not interact with prospective student-athletes or broker deals contingent upon membership on a specific team or enrollment at a specific school.¹⁰ But this has done little to curtail the influence of collectives on recruiting.¹¹

While recruiting issues have taken the spotlight, NIL collectives clash with more than just the NCAA’s own rules. Importantly, collectives implicate Title IX. Title IX mandates equality among the sexes in federally funded education programs and activities.¹²

⁶ Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3: NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate>.

⁷ *Id.*

⁸ *Id.* (stating that over 90 percent of colleges in the five biggest NCAA Division I conferences have or are forming a collective, with experts predicting that proportion to soon reach 100 percent).

⁹ NCAA, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT 1 (2022), [hereinafter NCAA MAY GUIDANCE], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf.

¹⁰ *Id.*

¹¹ See Stewart Mandel, *A 3-Star DT Worth \$500k, a 4-Star WR \$1 Million: The Sticker Shock of College Football Recruiting Beyond 2022*, THE ATHLETIC (Apr. 19, 2022), <https://theathletic.com/3256808/2022/04/19/college-football-recruiting-nil> (“Many [programs] have lost recruits simply because another school’s collective offered an NIL package it could not match.” (alteration in original)).

¹² 20 U.S.C. § 1681(a)–(b) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

Therefore, Title IX requires colleges to allocate athletic scholarship funds equally between male and female athletes.¹³ Additionally, schools “must treat female athletes similarly to male athletes and provide them with comparable benefits and access to services.”¹⁴ If NIL deals could be viewed as benefits and services under Title IX, a school may find itself liable for Title IX violations if significant disparities arise between the NIL earnings or opportunities of a school’s male athletes compared with those of the school’s female athletes. If such disparities arise as a result of NIL deals brokered through collectives with clear ties to the university, that institution’s liability becomes even clearer.

Moreover, some collectives have organized themselves as charitable organizations under section 501(c)(3) of the Internal Revenue Code (“501(c)(3)”), thereby claiming tax exemption as nonprofit organizations.¹⁵ Under this model, the collective compensates athletes for rendering services to charities of each athlete’s choice.¹⁶ The Internal Revenue Service (IRS) has recently cast serious doubt on the legitimacy of the charitable purpose of such collectives, and thus the legitimacy of their tax exemptions.¹⁷

Lack of universal regulation in this market has further fueled the legal fire. NIL has taken off largely thanks to recent court rulings regarding antitrust challenges to the NCAA, which emboldened state lawmakers to pass NIL laws.¹⁸ This has led to “a business and regulatory nightmare,” as states have continued to pass their own laws regulating NIL in collegiate athletics.¹⁹ The variance in standards from one state to the next “has led to confusion among states, limited oversight[,] and questionable practices.”²⁰ Despite the confusion, the threat of further antitrust litigation has made the NCAA loath to challenge states on

discrimination under any education program or activity receiving [f]ederal financial assistance.”).

¹³ *Title IX and College Sports*, JUSTIA, <https://www.justia.com/sports-law/title-ix-and-college-sports> (July 2023).

¹⁴ *Id.*

¹⁵ See Nakos, *supra* note 6.

¹⁶ *Id.*

¹⁷ I.R.S. Chief Couns. Mem. AM2023-004 (June 9, 2023) (concluding that “in many cases,” such collectives will not qualify for exemption under section 501(c)(3)).

¹⁸ See Weiss, *supra* note 3, at 270–71.

¹⁹ *Id.* at 275.

²⁰ James L. Johnston & Andrew Richman, *NCAA Takes Aim at Booster-Backed Collectives and Their NIL Deals*, MONDAQ (June 23, 2022), <https://www.mondaq.com/unitedstates/sport/1205026/ncaa-takes-aim-at-booster-backed-collectives-and-their-nil-deals>.

their NIL laws.²¹ Instead, the NCAA has “call[ed] for Congress to pass federal legislation that would provide comprehensive national guidance.”²² While a comprehensive national law regulating NIL in collegiate athletics would help alleviate many of the problems currently festering as a result of the state-by-state approach, such federal legislation will prove inadequate if it fails to specifically address NIL collectives.

With so many collectives already established, an outright ban seems naïve and impractical. Rather, this Comment argues that the most effective strategy is to embrace collectives by crafting a national law which includes provisions allowing collectives to work directly with universities. Such an arrangement, as illustrated by Tennessee’s law, will serve to make regulation of NIL deals easier and more effective while also helping to limit the potential for costly litigation.

Part II of this Comment provides a history of NIL in collegiate athletics. Part III looks more specifically at the brief history of NIL collectives. In Part IV, this Comment provides an overview of current state NIL laws and the legal issues confronting the collegiate NIL market. Finally, Part V of this Comment argues that the adoption of federal NIL legislation allowing for open interaction between NIL collectives and universities will help promote better outcomes for all involved in collegiate athletics. Part VI briefly concludes.

II. FROM AMATEURISM TO NIL: A BRIEF HISTORY OF COLLEGIATE ATHLETE COMPENSATION

The Supreme Court noted in the landmark case *NCAA v. Alston* that “American colleges and universities have had a complicated relationship with sports and money.”²³ The NCAA has been diametrically opposed to compensating college athletes from the organization’s inception in the early twentieth century.²⁴ This staunch position of insisting upon college athletes’ amateurism persists today. The NCAA’s bylaws classify student-athletes as amateurs, which entails various prohibitions on activities such as contracting with an agent and profiting “above their actual and necessary expenses.”²⁵ This amateurism model supposedly protects student-athletes by

²¹ *See id.*

²² *Id.*

²³ *NCAA v. Alston*, 141 S. Ct. 2141, 2148 (2021).

²⁴ *See id.*

²⁵ Weiss, *supra* note 3, at 260.

“establishing a ‘line of demarcation’ between college athletes and professional athletes.”²⁶ Over the decades, there have been numerous challenges to the NCAA’s amateurism model, often taking the form of antitrust suits claiming that the NCAA prevented college athletes from being fairly compensated for their labor.²⁷ Not until 2015 did the student-athletes score a major victory. This Part tracks the legal developments, since the 2015 watershed case of *O’Bannon v. NCAA*, that have shaped today’s collegiate NIL landscape. First, Section A discusses *O’Bannon*, which ruled against the NCAA on an antitrust claim rooted in athlete NIL rights. Section B covers California’s Fair Pay to Play Act, the first state-level legislation to open the door to collegiate NIL rights. Section C then examines the 2021 Supreme Court ruling in *NCAA v. Alston*, perhaps the most significant step on the road to NIL. Lastly, this Part concludes with Section D’s discussion of the NCAA’s Interim NIL Policy in which the NCAA officially allowed its athletes to engage in NIL activities.

A. *The O’Bannon Decision*

The *O’Bannon* case involved the use of a college basketball player’s NIL in a video game.²⁸ The player, University of California-Los Angeles All-American Ed O’Bannon, sued because he had neither consented to the use of his NIL nor been compensated for it.²⁹ O’Bannon argued that by preventing student-athletes from being compensated for use of their NILs, the NCAA’s amateurism rules served as an illegal restraint of trade under section 1 of the Sherman Antitrust Act.³⁰

The district court ruled for O’Bannon, finding that “the NCAA’s challenged rules unreasonably restrain trade in violation of section 1 of the Sherman Act.”³¹ The court also increased the compensation available to college athletes through a permanent injunction, which enjoined the NCAA from “prohibiting its member schools from giving student-athletes scholarships up to the full cost of attendance at their

²⁶ *Id.*

²⁷ *See, e.g.*, *White v. NCAA*, No. 06-999, 2006 U.S. Dist. LEXIS 101366, *1 (C.D. Cal. Sept. 20, 2006); *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015); *Alston*, 141 S. Ct. at 2147; *see also* *NCAA v. Board of Regents*, 468 U.S. 85, 88 (1984) (holding that the NCAA violated the Sherman Act in its televising of college football games).

²⁸ *O’Bannon*, 802 F.3d at 1055.

²⁹ *Id.*

³⁰ *Id.*; 15 U.S.C. § 1.

³¹ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014) (alteration in original).

respective schools and up to \$5,000 per year in deferred compensation.”³² The court declared that the deferred compensation of up to \$5,000 per year would be held in trust, only “payable when [the athletes] leave school or their eligibility expires.”³³

On appeal, the Ninth Circuit remarked that “the [lower] court’s decision [was] the first by any federal court to hold that any aspect of the NCAA’s amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.”³⁴ The Ninth Circuit upheld the lower court’s finding that the NCAA’s amateurism rules violated federal antitrust law, but rejected the deferred compensation plan that the district court proposed.³⁵ The Ninth Circuit determined that compliance with antitrust law required that schools compensate athletes up to the cost of attendance but did not require further compensation.³⁶

O’Bannon garnered “enormous” publicity as the “first case involving NCAA athletes to gain momentum in the courts.”³⁷ The opinion signaled that such momentum would continue in later litigation by proclaiming that “courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act’s rules.”³⁸ The case also coincided with, and perhaps influenced, a seismic shift in public opinion regarding the compensation of college athletes. During the *O’Bannon* trial in 2014, 69 percent of the public opposed paying college athletes.³⁹ In 2017, roughly eighteen months after the *O’Bannon* decision, only 45 percent of Americans opposed paying college athletes.⁴⁰ Furthermore, the same 2017 poll found 40 percent of Americans believed the NCAA was exploiting college athletes.⁴¹ By the fall of 2023, a poll showed 74 percent of Americans supported compensating college athletes specifically for use of their NIL.⁴²

³² Weiss, *supra* note 3, at 268 (quoting *O’Bannon*, 802 F.3d at 1053); *see also O’Bannon*, 7 F. Supp. 3d at 1007–08 (containing the district court’s original language imposing the injunction).

³³ *O’Bannon*, 7 F. Supp. 3d at 1008.

³⁴ *O’Bannon*, 802 F.3d at 1053.

³⁵ *Id.* at 1079.

³⁶ *Id.*

³⁷ Weiss, *supra* note 3, at 269–70.

³⁸ *O’Bannon*, 802 F.3d at 1079.

³⁹ Weiss, *supra* note 3, at 270.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Libit & Akabas, *supra* note 5.

B. *California's Fair Pay to Play Act Marks a Legislative Shift*

Perhaps spurred by the *O'Bannon* ruling and the shifting public sentiment, "lawmakers on a national level began to feel emboldened to act on the issue of NIL compensation for student-athletes."⁴³ In March 2019, House Bill 1804 marked the first legislative act addressing NIL compensation.⁴⁴ That bill proposed amending the tax code to remove from the definition of a qualified amateur sports organization the prohibition on student-athletes profiting from use of their NIL.⁴⁵

The first big legislative breakthrough for collegiate NIL, however, came from California. California became the first state to pass a law codifying the rights of college athletes to profit off their NIL when "Governor Gavin Newsom signed the California Fair Pay to Play Act . . . on September 30, 2019."⁴⁶ The Fair Pay to Play Act surpassed *O'Bannon* by allowing student-athletes "to profit above and beyond their scholarships," while also permitting college athletes to retain professional representation.⁴⁷

The Fair Pay to Play Act broke the legislative ice for state action on collegiate NIL. Within a year of the passing of the California act, four other states passed NIL compensation laws: Colorado, Florida, Nebraska, and New Jersey.⁴⁸ While California passed its law first, Florida set the earliest effective date of any state NIL law: July 1, 2021.⁴⁹ Thirteen others joined Florida, setting the stage for fourteen state laws to collide with the NCAA rules on July 1, 2021.⁵⁰

⁴³ Weiss, *supra* note 3, at 271.

⁴⁴ Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019); *see also* Weiss, *supra* note 3, at 271 (explaining that this bill was the first such bill addressing NIL compensation).

⁴⁵ Weiss, *supra* note 3, at 271.

⁴⁶ *Id.* at 271–72; *see* CAL. EDUC. CODE § 67456 (Deering 2021).

⁴⁷ Weiss, *supra* note 3, at 272–73; *see* CAL. EDUC. CODE § 67456(a)(1), (d) (Deering 2021).

⁴⁸ Weiss, *supra* note 3, at 273–74.

⁴⁹ Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, THE ATLANTA J.-CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHHK5DKMAF6STQ6KZ4> (explaining that California's law, though passed in 2019, was not set to take effect until 2023 before the legislature accelerated the timeline to September 2021).

⁵⁰ *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state> (July 28, 2023) (indicating July 1, 2021, as the effective dates for the following states' NIL laws: Alabama (repealed as of February 3, 2022), Colorado, Florida,

C. *The Alston Case*

Less than two weeks before the effective date of Florida's NIL law, the Supreme Court dealt perhaps the most significant judicial blow to the NCAA's amateurism model with its June 21, 2021, ruling in *NCAA v. Alston*. In *Alston*, a group of student-athletes filed suit alleging antitrust violations on account of the NCAA and member institutions "agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams."⁵¹ While upholding the NCAA restrictions on compensation for athletic performance, the district court "struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships."⁵² The Supreme Court upheld the injunctions imposed by the district court, which "permit[ted] colleges and universities to offer enhanced education-related benefits" to student-athletes by blocking the NCAA's previous restrictions on such benefits.⁵³

Because "the student-athletes [did] not renew their across-the-board challenge to the NCAA's compensation restrictions," the Supreme Court did "not pass on the rules that remain in place or the district court's judgment upholding them," instead only passing judgment on the NCAA's rules restricting education-related benefits.⁵⁴ This explicitly narrow holding announced by the unanimous Court makes *Alston* appear somewhat insignificant to NIL—until one reads Justice Brett Kavanaugh's concurrence.

While acknowledging the Court's holding to be restricted to education-related benefits, Justice Kavanaugh sought "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."⁵⁵ Justice Kavanaugh explained that all the NCAA compensation rules "should receive ordinary 'rule of reason' scrutiny under the antitrust laws," not just the education-related compensation rules at issue in *Alston*.⁵⁶ Then Justice Kavanaugh went even further by indicating that he would likely find the NCAA's rules illegal:

Georgia, Illinois, Iowa, Kentucky, Louisiana, Mississippi, New Mexico, Ohio, Oregon, South Carolina, and Texas).

⁵¹ *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021).

⁵² *Id.*

⁵³ *Id.* at 2166.

⁵⁴ *Id.* at 2154.

⁵⁵ *Id.* at 2166–67 (Kavanaugh, J., concurring).

⁵⁶ *Id.* at 2167.

[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification. . . . Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why [collegiate] sports should be any different.⁵⁷

Justice Kavanaugh's powerfully worded concurrence, coupled with the fact that even an often divided Court voted unanimously on the majority opinion, signaled strong judicial support for allowing college athletes to earn compensation. Justice Kavanaugh's concurrence concluded with the ominous declaration that the "NCAA is not above the law."⁵⁸

D. *The NCAA's Interim NIL Policy*

Just nine days after the *Alston* ruling came down, with several state NIL laws set to take effect the next day, the NCAA suspended its long-held NIL rules and announced an interim policy on June 30, 2021 ("Interim NIL Policy" or the "Policy").⁵⁹ The Interim NIL Policy stated that eligibility would not be impacted "if an individual elects to engage in an NIL activity."⁶⁰ The Policy also allowed for athletes to hire agents.⁶¹ Despite the seismic shift in stance, the NCAA insisted that it would "continue its normal regulatory operations" with the caveat that the organization would "not monitor for compliance with state law."⁶² The Interim NIL Policy also reinforced a commitment to "the NCAA's foundational prohibitions on pay-for-play and impermissible recruiting inducements, which remain essential to collegiate athletics."⁶³ The new Policy was deemed "[i]nterim" in nature because

⁵⁷ *Alston*, 141 S. Ct. at 2167, 2169 (Kavanaugh, J., concurring).

⁵⁸ *Id.* at 2169.

⁵⁹ Tucker, *supra* note 49; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

⁶⁰ NCAA INTERIM POLICY, *supra* note 4, at 1.

⁶¹ *See id.*

⁶² *Id.*

⁶³ *Id.*

the NCAA saw it as a “necessary . . . short-term action . . . until such time that either federal legislation or new NCAA rules are adopted.”⁶⁴ The NCAA’s holding pattern did not stop the NIL industry from moving forward without the guidance of federal legislation or new NCAA rules.

III. THE RISE OF NIL COLLECTIVES

The shift in NIL policy by both the NCAA and many states has opened the door to a massive NIL market. Suddenly, thousands of young athletes have found themselves in a position to earn an income through the use of their name, image, and likeness. Especially in the day of social media, these young athletes very quickly amass earning potential. But someone must broker the deals and navigate the varying regulatory waters. Although colleges themselves may seem the likely candidate to fill this need, “[m]any states’ NIL laws . . . prohibit schools from directly brokering [NIL] deals.”⁶⁵ This landscape creates an opening for third parties to fill the brokering need.⁶⁶ This Part surveys the NIL landscape by first providing an overview of non-collective third-party NIL brokers in Section A. Section B then discusses the defining characteristics of collectives and how these entities fit into the landscape. This Part concludes in Section C by introducing some of the main risks created by collectives.

A. *Initial Third-Party Groups in the NIL Space*

The premier third-party player in this area is Opendorse. Opendorse engages in the full “lifecycle of supporting athletes” to help them “understand, build, protect, and monetize their brand value.”⁶⁷ On its homepage, Opendorse bills itself as “the world’s leading athlete influencer platform,” providing a marketplace for “[f]ans, brands, sponsors[,] and donors . . . to find athletes, pitch deals[,] and complete payments.”⁶⁸ As early as July 13, 2021, merely two weeks after the NCAA announced its Interim NIL Policy, Opendorse entered into an agreement with the University of Connecticut’s athletics

⁶⁴ *Id.*

⁶⁵ Mandel, *supra* note 11.

⁶⁶ *Id.*

⁶⁷ *About*, OPENDORSE, <https://opendorse.com/about> (last visited Nov. 28, 2023).

⁶⁸ OPENDORSE (alteration in original), <https://biz.opendorse.com> (last visited Nov. 28, 2023).

department “to provide its student-athletes with resources, education[,] and marketing tools around potential NIL deals.”⁶⁹

A different model has emerged in INFLCR. INFLCR is an “athlete brand-building and NIL business management app.”⁷⁰ The app includes compliance features to help broker deals within the confines of applicable laws and regulations.⁷¹

Another major player in this space is Altius Sports Partners, which seeks to “[p]rovid[e] all stakeholders—athletics departments, coaches, and college athletes—with resources they need to thrive in the new age of colleg[iate] athletics.”⁷² The group provides “consulting, strategic planning, compliance support[,] and education” to help clients navigate the new NIL environment.⁷³

B. *The Collective Difference*

While third parties such as Opendorse, INFLCR, and Altius have engaged directly with some schools, these groups still leave boosters and fans removed from the NIL process. NIL collectives arose chiefly to fill this gap. A collective is “a cooperative enterprise,” which functions “independent of a university” and “can serve a variety of purposes.”⁷⁴ These organizations “pool fan and booster donations in order to compensate a specific school’s athletes.”⁷⁵ Collectives serve essentially the same functions as the third-party companies mentioned above but with the key distinction of being fueled by boosters with clear priorities of helping their respective schools’ programs thrive.

These collectives “burst onto the scene” and “quickly became recognized as the fastest and most efficient way to help college athletes make money off their [NIL].”⁷⁶ The first collective created, the Gator

⁶⁹ Nick DePaula, *UConn’s Paige Bueckers Has Name, Image, Likeness Deal*, ESPN (Nov. 10, 2021, 12:14 PM), https://www.espn.com/womens-college-basketball/story/_/id/32598842/uconn-paige-bueckers-name-image-likeness-deal.

⁷⁰ INFLCR, TEAMWORKS, <https://www.teamworks.com/inflcr> (last visited Nov. 28, 2023).

⁷¹ See *id.*

⁷² *Altius Sports Teams with NFL & NFLPA to Educate College Football Players on Transitioning to Professional Careers*, ALTIUS SPORTS PARTNERS (Jan. 24, 2023), <https://altius sportspartners.com/nfl-nflpa-announcement>.

⁷³ *Id.*

⁷⁴ Nakos, *supra* note 6.

⁷⁵ Mandel, *supra* note 11.

⁷⁶ Michael Smith, *For Members Only: New Collective Membership Models Will Provide More Guaranteed NIL Money to College Athletes*, SPORTS BUS. J. (Mar. 28, 2022),

Collective formed to support the University of Florida Gators, typifies the predominant collective business model of “pool[ing] together cash from boosters to provide opportunities for student-athletes.”⁷⁷

The method through which boosters fund the collective varies from one-time payments to recurring subscription models.⁷⁸ Collectives at both Auburn University and Pennsylvania State University have adopted the membership subscription model, offering fans special insider access to a “unique set of high-end experiences in exchange for monthly or annual fees.”⁷⁹ Proponents laud the subscription model as “the easiest and quickest way to build up significant dollars in a collective” while also “send[ing] a strong message of support by the collective and the community.”⁸⁰

Many collectives are explicitly for-profit organizations, typically structured as limited liability corporations (LLCs).⁸¹ In contrast, some collectives are categorized as nonprofit entities, claiming tax exemption as 501(c)(3) charitable organizations.⁸² The “go-to format” for these nonprofit collectives involves student-athletes picking a charity to which they provide their services in exchange for NIL payment from the collective.⁸³ These collectives raise a host of legal issues concerning the legitimacy of their nonprofit status.

Collectives generally fit within three main classes: (1) marketplace collectives, (2) donor-driven collectives, and (3) dual collectives.⁸⁴ Marketplace collectives “set[] out to create a meeting place for athletes and businesses to connect and create opportunities.”⁸⁵ These collectives can sometimes “serve as the agent representative for the athlete.”⁸⁶ Under this model, the funds from boosters typically help support logistics of facilitating NIL deals for athletes, as opposed to funding the deals themselves.⁸⁷

<https://www.sportsbusinessjournal.com/Journal/Issues/2022/03/28/Upfront/Nam-e-Image-Likeness.aspx>.

⁷⁷ Nakos, *supra* note 6.

⁷⁸ *Id.*

⁷⁹ Smith, *supra* note 76.

⁸⁰ *Id.*

⁸¹ Nakos, *supra* note 6.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Nakos, *supra* note 6.

Donor-driven collectives serve as the standard, most common format for NIL collectives.⁸⁸ This setup involves collectives “pooling together booster and supporter funds” to create NIL opportunities for athletes for which the collective pays them.⁸⁹ Some criticize this structure as merely a way to “wash the donor money, paying these players in an NCAA-compliant manner.”⁹⁰

The last major format, dual collectives, are the hybrid model featuring both a marketplace and a place for supporters to donate directly.⁹¹ Some alternative collectives, powered by students rather than boosters, have also arisen at several schools.⁹²

Even though the NCAA’s Interim NIL Policy has only been in effect since July 2021, NIL collectives have already become nearly ubiquitous. By early April 2022, nearly thirty-five schools were working with at least one collective.⁹³ By July 1, 2022, the number of collectives in existence or formation had grown to over 120.⁹⁴ Currently, one directory lists over 250 active collectives throughout collegiate sports.⁹⁵ Virtually all major collegiate sports programs have affiliated with one of these groups.⁹⁶

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Smith, *supra* note 76.

⁹⁴ Nakos, *supra* note 6.

⁹⁵ *NIL Collectives*, ON3: NIL, <https://www.on3.com/nil/collectives> (last visited Dec. 19, 2023) (displaying ten pages with twenty-five collectives on each plus an eleventh page with three listed).

⁹⁶ Nakos, *supra* note 6 (stating that over 90 percent of colleges in the five biggest NCAA Division I conferences have or are forming a collective with experts predicting that proportion to soon reach 100 percent).

C. *Institutional Risks of Collectives*

Collectives' meteoric rise has precipitated many legal and regulatory issues. Of the numerous aspects of the NIL landscape, the development of collectives has been "[o]ne of the haziest."⁹⁷ Some "bad collectives" pose substantial problems by engaging in nefarious behaviors, such as claiming tax exempt 501(c)(3) status without clear charitable purposes or "predatorily strip[ping] players of their NIL rights through exclusive contracts."⁹⁸ Even collectives which do not veer into nefarious territory still present major legal complications. For higher education institutions, "navigating the exploding area of collectives requires maintaining a critical perspective" while juggling various state laws, the NCAA rules, and overarching federal legislation aimed to ensure equity in federally funded programs.⁹⁹ Violations of Title IX and recruiting regulations present two of the biggest risks to institutions and are therefore discussed in subparts 1 and 2, respectively.

1. Title IX—Gender Equity

Title IX refers to 20 U.S.C. § 1681, the federal statute mandating that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."¹⁰⁰ Title IX requires schools to furnish equal access to financial aid to male and female students.¹⁰¹ Therefore, schools' allocation of athletic scholarships must be proportional among male and female athletes.¹⁰² Additionally, "a university must treat female athletes similarly to male athletes and provide them with comparable benefits and access to services."¹⁰³ If

⁹⁷ Bennett H. Speyer & Robert A. Boland, *Collective Wisdom: How to Avoid the Many Potential Pitfalls and Find Sustainably Positive Outcomes in Working with NIL Collectives*, in NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT 9, 9 (Bart Lambergman ed., 2022) [hereinafter Speyer & Boland, *NIL Collectives*], <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:b0d00411-7195-428c-be7e-d4ad75d1a643?viewer%21megaVerb=group-discover>.

⁹⁸ Robert A. Boland & Bennett Speyer, *What Every Institution Needs to Know About its Collective & Not Be Afraid to Ask*, NACDA, Sept. 8, 2022, at 39 [hereinafter Boland & Speyer, *What Every Institution Needs to Know*].

⁹⁹ *Id.*

¹⁰⁰ 20 U.S.C. § 1681(a).

¹⁰¹ *Title IX and College Sports*, *supra* note 13.

¹⁰² *Id.*

¹⁰³ *Id.*

NIL deals are viewed as benefits and services under Title IX, a school may find itself liable for Title IX violations if significant disparities arise between the NIL earnings of that school's male athletes compared with its female athletes.¹⁰⁴ Institutions may face similar liability under other equality legislation, such as Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination.¹⁰⁵

2. Recruiting

While collectives may generate significant equity issues under Title IX, controversy regarding collectives has emphasized their role in “inducements and pay-to-play in recruiting and the [t]ransfer [p]ortal,” the system through which athletes transfer from one school to another.¹⁰⁶ Collectives have attempted to sidestep potential recruitment violations by stipulating in their NIL deals that the agreements “are not . . . inducement[s] to attend a specific school.”¹⁰⁷ While such language insulates collectives to some degree, “[it is] no secret which collectives support which college teams.”¹⁰⁸

Amidst the onslaught of collectives, many coaches and administrators “fear their programs [are] getting left behind.”¹⁰⁹ NCAA rules technically prohibit collegiate athletic programs from offering recruits money, but collectives have effectively hollowed out this prohibition.¹¹⁰ Many schools have lost recruits because “another school's collective offered an NIL package it [could not] match.”¹¹¹

¹⁰⁴ Boland & Speyer, *What Every Institution Needs to Know*, *supra* note 98, at 39; *see also* Speyer & Boland, *NIL Collectives*, *supra* note 97, at 10 (citing Karen Weaver, *Already on an Untenable Financial Path, NCAA Schools Are Inviting More Legal Trouble if They Oversee NIL*, FORBES (June 30, 2022, 9:25 AM), <https://www.forbes.com/sites/karenweaver/2022/06/30/already-on-an-untenable-financial-path-ncaa-schools-are-inviting-more-legal-trouble-if-they-oversee-nil/?sh=f2d036e1bef2>) (explaining institutions' potential liability under Title IX).

¹⁰⁵ Speyer & Boland, *NIL Collectives*, *supra* note 97, at 10.

¹⁰⁶ Nakos, *supra* note 6.

¹⁰⁷ Mandel, *supra* note 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See* Nakos, *supra* note 6 (“Just about every transfer [he had] talked to was being offered money (from other schools) . . .” (quoting Simon Gibbs, *UNC Football: Mack Brown Calls for Change, Shames NIL Cheaters*, ON3: N.C. TAR HEELS (Feb. 22, 2022), <https://www.on3.com/college/north-carolina-tar-heels/news/unc-north-carolina-tar-heels-head-coach-mack-brown-calls-for-change-shames-nil-cheaters-name-image-likeness-ncaa>)).

¹¹¹ Mandel, *supra* note 11. For example, one college football coach said that a recruit's mother told him the recruit was committing to the school, but within two

Schools across the country are considering whether they need to embrace collectives in order to compete in recruiting.¹¹²

While the NCAA itself has concerns over collectives' impact on recruiting, collegiate athletics administrators and coaches have also expressed concern.¹¹³ One survey showed that 90 percent of athletic directors are concerned about the role of collectives, with 73 percent feeling "extremely concerned."¹¹⁴ Furthermore, in a survey of eighty of the one hundred thirty athletic directors in the Football Bowl Subdivision, 77 percent reported believing that "an unregulated NIL market will lead to more scandals."¹¹⁵

IV. CURRENT REGULATION OF NIL COLLECTIVES AND ITS SHORTCOMINGS

Although not wholly unregulated, the NIL collective regime remains exceedingly muddled as the current regulations have done little to ameliorate the risks. Current regulation of NIL collectives consists only of rules and proclamations from the NCAA and individual state laws. The disjointed interplay between the NCAA rules and state laws promotes further confusion. This Part summarizes the regulatory landscape. Section A analyzes the NCAA's May 2022 NIL guidance, while Section B addresses the NCAA's October 2022 NIL guidance. Section C concludes with a look at the varying state NIL laws.

A. *The NCAA's May 2022 Guidance on Collective Involvement in Recruiting*

In an effort "to reinforce key principles of fairness and integrity across the NCAA and maintain rules prohibiting improper recruiting inducements and pay-for-play," the NCAA promulgated the "Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement" in May of 2022 ("May Guidance").¹¹⁶ The May Guidance seeks to clarify how the NCAA rules apply to the involvement of NIL collectives in the recruiting process.¹¹⁷

hours told the coach they were going elsewhere because another school's collective had offered them \$300,000. *Id.*

¹¹² Nakos, *supra* note 6.

¹¹³ *Id.* ("A majority of athletic directors expressed concern that collectives are using NIL payments as pay-to-play recruiting inducements . . .").

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ NCAA MAY GUIDANCE, *supra* note 9, at 1.

¹¹⁷ *Id.*

The May Guidance initially reiterates the organization's verbose definition of a booster:

[A]n individual, independent agency, corporate entity . . . or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program or to assist or to have assisted in providing benefits to enrolled student-athletes or their family members.¹¹⁸

Collectives fit this definition, a fact the guidance made explicit.¹¹⁹ Because collectives qualify as boosters, all NCAA restrictions on booster activities apply to collectives as well. These restrictions include prohibitions on engagement in recruiting activities on a school's behalf and on the furnishing of benefits to prospective student-athletes ("PSAs").¹²⁰ Likewise, staff members of an institution may not have any involvement "with the provision of benefits to a PSA."¹²¹

In relation to PSAs, the May Guidance explicitly states that "recruiting conversations between [NIL collectives] and a PSA are not permissible," although the guidance does not provide an explicit definition of the term "recruiting conversations."¹²² Additionally, "[NIL collectives] may not communicate . . . with a PSA [or their family or others affiliated with them] for a recruiting purpose or to encourage the PSA's enrollment at a particular institution."¹²³

The May Guidance also directly comments on acceptable parameters of NIL contracts under NCAA rules, emphasizing that a college athlete's NIL deal "may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution."¹²⁴ Rather, all "NIL [a]greements must be based on an independent, case-by-case analysis" of each athlete's value.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.* ("It appears that the overall mission of many, if not all, of the above-referenced third-party entities [i.e., NIL collectives] is to promote and support a specific NCAA institution by making available NIL opportunities to prospective student-athletes (PSA) and student-athletes (SAs) of a particular institution, thereby triggering the definition of a booster." (emphasis omitted)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² NCAA MAY GUIDANCE, *supra* note 9, at 1.

¹²³ *Id.* at 2 (emphasis omitted).

¹²⁴ *Id.* (emphasis omitted).

¹²⁵ *Id.* (emphasis omitted).

Additionally, NIL deals may not provide any compensation or incentives based on an athlete's enrollment, spot on the roster, athletic performance, or achievement.¹²⁶ The May Guidance also provides that coaches and other institutional personnel may not "organize, facilitate[,] or arrange" meetings between PSAs and collectives, nor may such personnel communicate with PSAs on behalf of a collective.¹²⁷ Importantly, the May Guidance limited these final prohibitions to *prospective* student-athletes, leaving unclear the role of institutions in the NIL activities of current student-athletes.

B. *The NCAA's October 2022 Guidance on Institutional Involvement in NIL*

Five months later, the NCAA issued updated guidance in October 2022, "Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities" ("October Guidance"), on how the NCAA rules apply to institutional involvement with the NIL activities of *currently enrolled* student-athletes.¹²⁸ The October Guidance clarifies that institutions may monitor NIL activities of their students and educate both students and collectives on NIL-related matters with little restriction.¹²⁹ The NCAA imposes more nuanced restrictions, however, on direct institutional involvement with NIL activities. The October Guidance lays out a "nonexhaustive" list of what institutions may and may not do regarding enrolled students' NIL activities.¹³⁰

The permissible institutional conduct to support student-athletes in connection with collectives essentially relegates the school to playing matchmaker through actions such as providing collectives with athletes' contact information and arranging for space on campus for meetings.¹³¹ More hands-on actions such as "proactively assist[ing]" in developing an NIL activity or providing services and access to equipment to support the NIL activity are impermissible "unless the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ NCAA, NCAA DIVISION I INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES, at 1 (2022) [hereinafter NCAA OCTOBER GUIDANCE], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 4.

¹³¹ *Id.* at 3.

same benefit is *generally available* to the institution's students."¹³² But the October Guidance does not clarify the scope of "generally available." Regardless of what level of access constitutes "generally available," many nonathlete students will likely not have much use for these benefits since the value of an average college student's NIL is unlikely to garner sponsorship deals. Furthermore, a school could face liability if it favors one collective over another.¹³³

While those prohibitions may prove unsteady as a result of the "generally available" caveat, the NCAA rules still attempt to keep institutions at arm's length from NIL activities by prohibiting schools from allowing their athletes to "promote their NIL activity while on call for required athletically related activities" such as practices, press conferences, and pre- and postgame activities.¹³⁴ Vagueness shrouds this prohibition as well, leaving immense blind spots as to when a violation will have taken place.¹³⁵

The NCAA rules on institutional support for collectives themselves present similarly problematic ambiguities as the NCAA purports to keep schools distanced from collectives. The rules prohibit institutions from subscribing to or donating cash to collectives.¹³⁶ Staff in a school's athletics department may not be simultaneously employed by a collective.¹³⁷ Despite these restrictions, institutions may help raise money for collectives by facilitating meetings between donors and collectives and even requesting that donors donate to a collective "without directing funds be used for a specific sport or [student-athlete]."¹³⁸ Despite this language, tacit understandings of where donors intend their funds to go seem inevitable. For example,

¹³² *Id.* (emphasis added).

¹³³ Boland & Speyer, *What Every Institution Needs to Know*, *supra* note 98, at 39.

¹³⁴ NCAA OCTOBER GUIDANCE, *supra* note 128, at 3.

¹³⁵ For NIL deals linked to social media, followers and interaction on posts could heavily influence the value of the deal. If an athlete posts on their social media during a press conference or postgame activity and that post, though not discussing their NIL activity specifically, boosts their profile and thus the value of their NIL activities, would that qualify as promoting their NIL activity? What if the content of the video or picture does not reference an NIL activity but later, when the athlete is not on call for a required athletically related activity, the athlete adds a caption and hashtag promoting their NIL activity. Is this a violation? Or say that an athlete has an NIL deal with a hat company. Does merely wearing the hat during a postgame interview violate the rule? The NCAA gives few clear answers.

¹³⁶ NCAA OCTOBER GUIDANCE, *supra* note 128, at 4.

¹³⁷ *Id.*

¹³⁸ *Id.*

if a basketball staff member solicits a donation from an alumnus of the basketball team to a collective, the collective need not do much hypothesizing as to which team the donor wants the money to benefit.

Additionally, an institution may provide assets such as tickets to collectives, so long as the institution makes such access available to other sponsors on the same terms.¹³⁹ Institutions may not, however, provide those same assets “to a donor as an incentive for providing funds” to the collective.¹⁴⁰ These two provisions create a distinction without a difference: a school may give tickets to a collective which in turn gives those tickets to donors as an incentive to donate to the collective, but the school itself cannot give tickets directly to the donors for the same purpose. This construction typifies the illusion of separation between school and collective to which the NCAA clings.

The May Guidance served as the NCAA’s first real attempt to impose some oversight on NIL since promulgating its Interim NIL Policy. The October Guidance attempts to fill gaps left by the earlier guidance but instead continues to deepen ambiguity. While the NCAA’s guidance may hold some benefits for regulation of NIL, the NCAA’s efforts remain vitally limited. Both the May and October Guidance include disclaimers that they are subject to state legislation and executive actions “with the force of law in effect.”¹⁴¹ Regulation of collectives remains at the mercy of state NIL laws,¹⁴² and those laws remain far from uniform.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ NCAA MAY GUIDANCE, *supra* note 9, at 3; NCAA OCTOBER GUIDANCE, *supra* note 128, at 1.

¹⁴² The NCAA attempted to assert its control over NIL regulation through a June 27, 2023, letter sent to member schools. Steve Berkowitz & Paul Myerberg, *NCAA Sets up Confrontation with State Lawmakers Concerning NIL Guidelines*, USA TODAY, <https://www.usatoday.com/story/sports/college/2023/06/27/ncaa-nil-lawmakers-guidelines-confrontation/70360959007> (June 27, 2023, 6:55 PM). The letter informed schools that they must comply with NCAA rules and regulations even when such rules conflict with state laws. *Id.* It remains to be seen whether the NCAA will follow through on penalizing schools that violate the NCAA rules while acting within the bounds of their states’ laws. *Id.* Such enforcement efforts risk litigation which could result in legal precedent that the NCAA rules must yield to state law. *Id.*

C. *State Laws*

Since California enacted its landmark Fair Pay to Play Act in 2019, “a legislative slew involving nearly every other state in the country” has ensued.¹⁴³ As of May 25, 2023, NIL legislation had been enacted in twenty-nine states with proposed legislation in eleven others.¹⁴⁴ Meanwhile, Alabama, Georgia, and South Carolina each repealed their NIL laws, leaving only seven states with no known activity regarding NIL legislation.¹⁴⁵ By July 2022, one year after the official dawn of NIL, “the landscape [remained] far from a clear picture.”¹⁴⁶ The landscape continued to change on a seemingly daily basis, with some states amending or repealing their laws “making them less restrictive to suit the collective-driven world of NIL.”¹⁴⁷

States will likely continue amending or repealing their NIL laws to make them less restrictive “as the NIL marketplace keeps evolving.”¹⁴⁸ State revisions of their NIL laws have become “a popular recent trend,” as many states realize that the laws they enacted “were more restrictive than the bare-bones NCAA policy.”¹⁴⁹

Tennessee provides a prominent example of a significant revision to state NIL law regarding collectives. Originally, Tennessee’s NIL law prohibited schools from being involved with an athlete’s NIL deals or with any collective or other organization facilitating such deals.¹⁵⁰ The recent amendment opens the door for institutional involvement with NIL activities provided the school does not “coerce, compel, or interfere with an intercollegiate athlete’s decision to earn

¹⁴³ Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE, <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation> (May 25, 2023).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (listing Alaska, Idaho, Indiana, North Dakota, South Dakota, Utah, and Wyoming as having no known activity).

¹⁴⁶ Pete Nakos, *How NIL Legislation Varies on a State-by-State Basis*, ON3: NIL (July 8, 2022), <https://www.on3.com/nil/news/how-nil-legislation-varies-on-a-state-by-state-basis>.

¹⁴⁷ *Id.*

¹⁴⁸ Jeremy Crabtree, *States in SEC Footprint Alter Laws to Empower Collectives’ Impact on NIL, Recruiting*, ON3: NIL (Apr. 26, 2022), <https://www.on3.com/nil/news/states-in-sec-footprint-alter-laws-to-empower-collectives-impact-on-nil-recruiting>.

¹⁴⁹ *Id.*

¹⁵⁰ See Adam Sparks, *How New Tennessee Law Allows Colleges to Facilitate NIL Payments to Players*, KNOX NEWS, <https://www.knoxnews.com/story/sports/college/university-of-tennessee/2022/04/26/tennessee-nil-law-allows-colleges-facilitate-payments-vols-vanderbilt-memphis/7423300001> (Apr. 26, 2022, 3:49 PM).

compensation from or obtain representation in connection” with use of their NIL.¹⁵¹ The amendment “permits universities to have direct and public relationships” with collectives.¹⁵² In tearing down the walls between schools and collectives, the law enables “Tennessee universities [to] facilitate NIL deals by working with collectives.”¹⁵³

The co-founder and chief executive officer (CEO) of Spyre Sports Group, a collective engaged with many of the University of Tennessee’s athletes, celebrated the amendment, saying “more than anything, [it] benefit[s] the student-athletes.”¹⁵⁴ The amendment allows collectives to engage more freely in the recruiting process in the state, including “co-host[ing] events with athletic[s] department[s] and even be[ing] endorsed by athletic officials, including coaches.”¹⁵⁵

Other states have also adopted this model of facilitating interaction between collectives and institutions. Illinois has instituted similar changes to its NIL law.¹⁵⁶ Other states, including Florida, Kentucky, and Virginia, aim to follow suit, while Alabama has allowed its universities free range on relationships with collectives by completely repealing its NIL law.¹⁵⁷ According to Tom McMillen, former congressman and current CEO of Lead1, “the right NIL solution all along would have been to let athletics departments oversee student-athlete NIL activities.”¹⁵⁸ While states like Tennessee, Illinois, and Alabama have moved in this direction, McMillen advocates for the NCAA to take action “to encourage more states to harmonize their laws so that all schools can be involved with NIL transactions.”¹⁵⁹ Institutional involvement with NIL undoubtedly offers the best way forward, but effectively harmonizing the laws of fifty states presents a virtually impossible task. Therefore, the only viable option lies in national legislation.

¹⁵¹ *Id.* (quoting TENN. CODE. ANN. § 49-7-2802(b)(2) (2022)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Kristi Dosh, *State of Tennessee Amends NIL Law to Further Empower Institutions and Collectives*, BUS. OF COLL. SPORTS (Apr. 23, 2022), <https://businessofcollegesports.com/name-image-likeness/state-of-tennessee-amends-nil-law-to-further-empower-athletic-departments-and-collectives>.

¹⁵⁶ Tom McMillen, *The Tom McMillen Federal NIL Scoop*, in NAME, IMAGE, AND LIKENESS (“NIL”) INSTITUTIONAL REPORT, *supra* note 97, at 2, 2.

¹⁵⁷ Sparks, *supra* note 150.

¹⁵⁸ McMillen, *supra* note 156, at 2.

¹⁵⁹ *Id.*

V. CONGRESS SHOULD ENACT A NATIONAL NIL LAW ALLOWING COLLECTIVES TO WORK DIRECTLY WITH COLLEGE INSTITUTIONS

The NCAA needs a federal NIL law because the NCAA simply lacks the ability to effectively regulate NIL. First and foremost, the NCAA has no power to preempt state laws.¹⁶⁰ Additionally, recent legal losses and the prospect of more litigation has effectively neutered the NCAA's ability to enact and enforce meaningful regulation. The limited scope of the NCAA's restrictions on NIL speaks to the organization's inability to set many rules "[a]fter suffering losses in legal battles."¹⁶¹ The rise of NIL collectives "and the specter of *Alston*" indicates that efforts to increase enforcement by the NCAA will raise "the prospect of a new round of litigation."¹⁶²

The apparent widespread disregard for the NCAA rules regarding NIL indicates the incapability of the NCAA to control the NIL landscape without stronger law behind it.¹⁶³ States such as Tennessee and Mississippi have "enacted laws opening up the possibility for coaching staffs to directly talk with collectives" despite NCAA rules and guidance specifically prohibiting collective involvement in recruiting or the transfer portal.¹⁶⁴ Despite the NCAA's rules, people within the industry report that collective involvement in recruiting "is happening across the country."¹⁶⁵

This noncompliance speaks to the fact that NIL will naturally serve as an incentive for enrollment decisions because of the inherent affiliation between collectives and specific programs. Since boosters loyal to specific programs fuel collectives, the affiliation will persist no matter what the NIL contracts contain. At this point, banning the over 250 collectives that have already entrenched themselves in the NIL framework is neither feasible nor advisable. Uniformly regulating

¹⁶⁰ See NCAA MAY GUIDANCE, *supra* note 9, at 3 ("This guidance is subject to state NIL laws or executive actions with the force of law in effect."); Weiss, *supra* note 3, at 274 ("[S]tate law trumps the internal rules of the NCAA, meaning colleges and universities in states where laws have been signed must adhere to their state law.").

¹⁶¹ Sparks, *supra* note 150.

¹⁶² Johnston & Richman, *supra* note 20.

¹⁶³ See Tom McMillen, *Athletics Departments Should Take Charge of Name, Image and Likeness*, SPORTICO (June 28, 2022, 5:55 AM) [hereinafter McMillen, *Athletics Departments and NIL*], <https://www.sportico.com/leagues/college-sports/2022/college-athletic-departments-should-manage-nil-1234679445> ("[T]he NCAA's Interim NIL [P]olicy is like a jaywalking law, a policy on the books that is not being enforced." (alteration in original)).

¹⁶⁴ Nakos, *supra* note 6.

¹⁶⁵ *Id.*

collectives and their interactions with athletics departments offers the only practical option.

The NCAA, loath to provide uniform regulation, has seemingly “throw[n] up its hands, perhaps too rattled from the *Alston* decision to enact any policy restricting college athletes.”¹⁶⁶ The rules and guidance it has issued have proven ambiguous and problematic. No matter how effective the NCAA policies may appear, the preeminence of state law and the prospect of further litigation renders the NCAA both unable and unwilling to enforce its rules. By uniting the states under one rule, a federal NIL law would cure the ills caused by “the lack of uniformity issue inherent in a state-by-state approach.”¹⁶⁷ Additionally, bipartisan support for NIL reform indicates that a federal NIL bill will likely pass.¹⁶⁸ In fact, Congress has put forth multiple bipartisan NIL bills.¹⁶⁹

Leaving NIL legislation to the states presents many issues. For one, state legislatures simply lack the expertise of the federal government, a fact painfully apparent in New York’s shoddy attempt to ban collectives based on the legislators’ misconception of both NCAA guidance and the function of collectives themselves.¹⁷⁰ The most problematic feature of a state-by-state approach, however, is inconsistency. Intercollegiate athletics require cohesion and coordination to function on a national scale.¹⁷¹ The current disorder

¹⁶⁶ Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, SPORTS ILLUSTRATED (June 29, 2021), <https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling>.

¹⁶⁷ Weiss, *supra* note 3, at 296–97.

¹⁶⁸ *Id.* at 297.

¹⁶⁹ See, e.g., Frank N. Darras, *How Federal Legislation Can Effectively Tackle NIL Collectives*, DAILY J. (Aug. 25, 2023), <https://www.dailyjournal.com/mcle/1329-how-federal-legislation-can-effectively-tackle-nil-collectives> (noting that “Senators Cory Booker (D-NJ), Richard Blumenthal (D-CT), and Jerry Moran (R-KS)” introduced the College Athletes Protection and Compensation Act (“CAPCA”) while “Senators Joe Manchin (D-WV) and Tommy Tuberville (R-AL)” introduced the Protecting Athletes, Schools, and Sports (“PASS”) Act).

¹⁷⁰ Jeremy Crabtree, *New York Representatives Say NIL Bill Would Ban Collectives*, ON3: NIL (June 7, 2022), <https://www.on3.com/nfl/news/new-york-representatives-say-nil-bill-would-ban-collectives>. An NIL attorney in observing the New York legislature’s deliberations and drafting of the bill expressed that the legislators “do not understand what a collective is” nor how the NCAA guidance addressed collectives. *Id.* (alteration in original). As a result, the bill legislators touted as banning collectives failed to do so because the law targeted the legislators’ misconception of collectives rather than true collectives. *Id.*

¹⁷¹ Weiss, *supra* note 3, at 282.

among state laws has only fueled confusion, lack of oversight, and dubious practices.¹⁷² The plethora of state laws with all different agendas renders any attempt “to orchestrate a coherent intercollegiate athletics system” utterly futile.¹⁷³ In short, “fifty individual states will likely produce fifty different laws . . . creating a massive regulatory issue.”¹⁷⁴

Furthermore, the current state-by-state model creates an uneven playing field as schools in states with less restrictive laws have an advantage over schools in other states by being able to offer more attractive NIL opportunities.¹⁷⁵ Many conferences span multiple states, meaning inequities will arise between member schools. This will not only frustrate competition but also make regulation nightmarish as officials for each conference will have to juggle multiple standards to ensure compliance. With all the inconsistencies inherent in a patchwork of state regulations, federal legislation provides the best method to ensure a level playing field for athletes in the NIL market.¹⁷⁶

While collectives represent just one of the many facets a federal NIL law must address, no federal legislation will succeed unless it enshrines a working relationship between collectives and institutions. The NCAA’s attempts to extricate institutions from collectives will never truly succeed because “[c]ollectives will always be tied to universities.”¹⁷⁷ Embracing this inevitable relationship will serve the ends of equity, as early developments have shown “that the organization that is in lockstep with an institution’s athletic[s] department will produce the most beneficial results.”¹⁷⁸ Regulating the relationships in a uniform law, rather than vainly attempting to outlaw the relationship, will help ensure clear liability and responsibilities, making compliance and education easier and more effective for all parties. Section A discusses how such a law will further compliance efforts, while Section B explains how it will benefit student-athletes at all levels, not just the elite athletes at the top schools. Section C concludes by detailing how such a law will also benefit the NCAA by

¹⁷² Johnston & Richman, *supra* note 20.

¹⁷³ Weiss, *supra* note 3, at 280.

¹⁷⁴ *Id.* at 281.

¹⁷⁵ See Weiss, *supra* note 3, at 290.

¹⁷⁶ Amanda L. Jones, Note, *The Dawn of a New Era: Antitrust Law vs. the Antiquated NCAA Compensation Model Perpetuating Racial Injustice*, 116 NW. U. L. REV. 1319, 1353 (2021).

¹⁷⁷ Nakos, *supra* note 6.

¹⁷⁸ *Id.*

insulating it from antitrust liability while helping preserve the distinction between professional and collegiate sports.

A. *Collectives Working with Schools Will Aid Compliance Efforts*

While the NCAA and some states have tried to keep institutions removed from NIL, “[t]he right solution all along would have been to let athletics departments, which boast extensive compliance offices, oversee student-athlete NIL activities.”¹⁷⁹ Schools have at their disposal “robust resources to ensure compliance.”¹⁸⁰ These resources will only go to good use if schools can fully engage with collectives.

Tennessee’s amended NIL law, which allows for open interaction between schools and collectives, serves as evidence of the benefits of such a structure. The amendment has been praised for enabling collectives “to have even better communication with [universities’] compliance department[s].”¹⁸¹ This working relationship “adds an extra layer of compliance to protect the school and player from violati[ons].”¹⁸²

While acknowledging the potential benefits, some have expressed fear that allowing schools and collectives to work closely may “open[] up a can of worms that could create even more gray areas and moral issues.”¹⁸³ A state-by-state approach legitimizes this concern because the varying state laws enhance the gray areas. Detecting and enforcing violations becomes exponentially more difficult when juggling fifty different standards. Overarching federal regulation, however, will limit the gray areas by setting clear, universal standards as to permissible interactions between collectives and athletics departments. Transparent communication between athletics departments and collectives under the aegis of a federal law will help secure benefits while keeping the can of worms firmly sealed.

¹⁷⁹ McMillen, *Athletics Departments and NIL*, *supra* note 163.

¹⁸⁰ *Id.*

¹⁸¹ Sparks, *supra* note 150.

¹⁸² *Id.*

¹⁸³ Crabtree, *supra* note 148.

B. *Collectives Working with Schools Will Benefit Athletes at All Levels*

Beyond aiding compliance, allowing schools to interact with collectives and athletes directly within the confines of explicit, universal rules will help allow those institutions to protect the interests of their athletes. After Tennessee amended its NIL law, the University of Memphis issued a statement praising the amendment because it “allows [the university] to be more hands-on in terms of education and guidance.”¹⁸⁴

Granting institutions an active role in NIL will make for a more equitable NIL environment in which athletes at all schools, regardless of size, can fully exercise their NIL rights. In Tennessee, smaller schools had to “helplessly” wait for third parties to initiate NIL deals under the old state law.¹⁸⁵ After the state passed the amendment allowing for institutional involvement, those same schools could actively seek out deals.¹⁸⁶ The amendment helped Middle Tennessee State University particularly in acquiring “smaller deals and group licensing.”¹⁸⁷ For example, the school’s athletic director remarked that the school could now “go to a manicure place where our women’s basketball team gets manicures and set up something for them.”¹⁸⁸

Whether at a NCAA Division III or “Power Five”¹⁸⁹ school, institutional involvement with NIL and coordination with collectives will help protect the interests of all athletes. While the new NCAA rules allow athletes to have professional representation, many deals do not generate enough money to make such personal representation feasible.¹⁹⁰ Roughly 90 percent of college athletes do not have agents or professional representation for NIL agreements.¹⁹¹ This has led to many athletes signing deals with no professional representation, often

¹⁸⁴ Sparks, *supra* note 150.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ “Power Five” refers to the top five conferences in NCAA Division I athletics: the Atlantic Coast Conference (ACC), the Pacific-12 Conference (Pac-12), Southeastern Conference (SEC), Big 10, and Big 12. See *High Major vs Mid Major vs Low Major Conferences*, TORCH COLL. RECRUITING, https://torchcollegerecruiting.com/z_a3_high_mid_low_majors/1641907452726x394612841469246460.

¹⁹⁰ *The 2022 Jeffrey S. Moorad Symposium: The Age of the Empowered Athlete*, 29 JEFFREY S. MOORAD SPORTS L.J. 189, 211 (2022) [hereinafter *The 2022 Jeffrey S. Moorad Symposium*].

¹⁹¹ McMillen, *Athletics Departments and NIL*, *supra* note 163.

without a licensed attorney ever laying eyes on the contract.¹⁹² This system exposes thousands of athletes to exploitation, including the predatory practice of including exclusivity terms in NIL contracts, which effectively strips unwitting student-athletes of their NIL rights.¹⁹³ Allowing schools to provide guidance to athletes in navigating NIL deals will help allow those institutions to protect the interests of the athletes and ensure propriety in agreements. The education allowed under the NCAA's October Guidance allows insufficient protection in this context because no matter how much education on best practices in NIL a school provides, an athlete who cannot afford an attorney will remain vulnerable. NIL expert and attorney, Dan Greene, has said that "[i]t is important that there is at least a working relationship between the athletics department and the collective."¹⁹⁴ Greene also expressed that "schools prefer this so they can keep tabs on outside actors making a material impact on their athletes and teams."¹⁹⁵

Some may suspect schools themselves will not adequately look after the best interests of athletes. While institutions likely will not serve athletes' interests as well as an attorney in a representative capacity would, the schools will still have incentives to make their best effort. Recruits and transfers looking at schools will value programs that have strong education, regulation, and good faith in securing quality NIL opportunities for their athletes. Also, allowing collectives and schools to work together, but not mandating deals be done exclusively through schools, empowers athletes to advocate for themselves while also providing support for athletes who are less able to expend time and money to procure NIL deals. Additionally, this model "would allow the NCAA to provide every athletics department with fairness opinions to help guide student-athletes who are considering high-compensation NIL deals."¹⁹⁶

And while the NCAA seems to fear the role of NIL in recruiting more than anything, allowing collectives and schools to work together will make the inevitable influence of NIL on recruiting a good thing not just for athletes, schools, and collectives, but for the NCAA itself.

¹⁹² *The 2022 Jeffrey S. Moorad Symposium*, *supra* note 190, at 211.

¹⁹³ Boland & Speyer, *What Every Institution Needs to Know*, *supra* note 98, at 39.

¹⁹⁴ Crabtree, *supra* note 148.

¹⁹⁵ *Id.*

¹⁹⁶ McMillen, *supra* note 156, at 2.

C. *Collectives Working with Schools Will Benefit the NCAA*

The recruiting market for collegiate athletic labor is already “ultra-competitive.”¹⁹⁷ The inability of colleges to compensate athletes beyond educational related perks and expenses, however, restrains this competition.¹⁹⁸ NIL has begun to loosen the restraints by becoming “part of the calculus today that athletes are considering” in making their college selections.¹⁹⁹ One college recruiter stated that “three out of four recruits his school is targeting have NIL at [number one] on their list of things influencing their decision.”²⁰⁰ If colleges and their supporters “are not at least talking about the concept, [they are] going to be behind.”²⁰¹

NIL rights in collegiate sports will inevitably influence recruitment. No law can prevent athletes from valuing NIL opportunities in making their enrollment decisions. Partitioning off collectives and other NIL groups from interacting with schools directly will only force young athletes to make these decisions under the table with fewer safeguards. Any sound NIL policy must embrace this reality by allowing collectives and institutions to work in tandem rather than naïvely attempting an impossible prohibition.

Allowing NIL collectives and schools to work together will openly acknowledge the reality of NIL’s role in recruiting. The NCAA, despite its visceral aversion to the role of NIL in recruiting, would in fact benefit from making this role more explicit for two reasons. First, doing so would help limit the NCAA’s antitrust liability by loosening the restraints on the benefits available to college athletes. Second, Title IX liability will naturally curb the upper limit of the college athlete labor market, thereby maintaining the NCAA’s prized “line of demarcation” between college and professional sports.²⁰² Subsection 1 discusses the effect on antitrust liability while Subsection 2 covers Title IX’s market-limiting effect.

¹⁹⁷ Nakos, *supra* note 6.

¹⁹⁸ *Grant House v. NCAA*, 545 F. Supp. 3d. 804, 809 (N.D. Cal. June 24, 2021) (describing how compensation has been limited to goods and services including tuition, tutoring, academic support, athletic training facilities, etc.).

¹⁹⁹ Smith, *supra* note 76.

²⁰⁰ Crabtree, *supra* note 148.

²⁰¹ Smith, *supra* note 76.

²⁰² Weiss, *supra* note 3, at 260.

1. Limiting the NCAA's Antitrust Liability

Antitrust challenges to the NCAA largely hinge on the NCAA's role in stunting competition among schools for recruits.²⁰³ The landmark *Alston* case illustrated as much. In *Alston*, the court noted that despite colleges competing "fiercely in recruiting," the NCAA wields "monopsony power to 'cap artificially the compensation offered to recruits.'"²⁰⁴ The lower court in *Alston* found that without the NCAA's restraints, "competition among schools would increase in terms of the compensation they would offer to recruits" and as a result "[s]tudent-athletes would receive offers that would more closely match the value of their athletic services."²⁰⁵ Allowing NIL collectives and schools to work together will foster this competition. Thus, NIL collectives inducing athletes to choose one school over another is not just an inevitable side effect of NIL but is exactly what the Court contemplated in *Alston*.

The recent case of *Grant House v. NCAA* illustrates how restrictions on NIL compensation in the recruiting context enhances the NCAA's antitrust liability.²⁰⁶ Similarly to *Alston*, *Grant House* dealt with an antitrust challenge based on the NCAA's restrictions on competition in the market for athlete labor, i.e., the collegiate sports recruiting market.²⁰⁷ The athletes compete in this market "for roster spots on Division I athletic teams."²⁰⁸ The schools, in turn, compete for the best players "by offering unique bundles of goods and services."²⁰⁹ Those goods and services include "scholarships to cover the cost of attendance, tutoring, and academic support services, as well as access to state-of-the-art athletic training facilities, premier coaching, medical treatment, and opportunities to compete at the highest level of

²⁰³ See, e.g., *NCAA v. Alston*, 141 S. Ct. 2141, 2141 (2021); *Grant House v. NCAA*, 545 F. Supp. 3d 804, 804 (N.D. Cal. June 24, 2021).

²⁰⁴ *Alston*, 141 S. Ct. at 2149 (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019)).

²⁰⁵ *Id.* (quoting *In re NCAA*, 375 F. Supp. 3d at 1068).

²⁰⁶ 545 F. Supp. 3d at 808, 815–17 (denying the motion to dismiss because, in part, the allegations were sufficient to claim an injury in fact under the Clayton Act where the plaintiffs alleged that, absent the challenged NCAA rules, schools would compete amongst each other by allowing their athletes to share in the commercial benefits received from exploiting student athletes' NIL).

²⁰⁷ *Id.* at 809.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

collegiate sports, often in front of large crowds and television audiences.”²¹⁰

The NCAA wields “the power to exclude from this market any member who is found to violate its rules.”²¹¹ Without the NCAA’s restrictions, the court noted that competition amongst schools and conferences would increase as they “redirect[] money that they currently spend on extravagant facilities and coaching salaries to marketing programs and educational resources designed to help their student-athletes develop and grow their personal brand value.”²¹² While the NCAA’s October Guidance allows for some educational involvement by institutions, full realization of the role contemplated by the court in *Grant House* necessitates a truly open working relationship between schools and collectives. Allowing institutions to embrace their role as educators of athletes by fostering their ability to educate and guide their athletes on NIL and brand management matters will serve to protect and enhance student-athletes’ amateurism status. Such efforts, however, will prove futile if the institutions remain handcuffed in their relationships with collectives.

The *Grant House* court found that the “[p]laintiffs ha[d] adequately pleaded a relevant market, as well as injury to competition in that market.”²¹³ The court defined this injury as “the artificial suppression of the price of the bundle of goods and services that student-athletes can receive in exchange for their labor and the right to use their NIL within the nationwide labor market [of collegiate athletic recruiting].”²¹⁴ The court found this injury “cognizable and sufficient to survive [a] motion to dismiss.”²¹⁵

The NCAA does not want to promote such competition in the recruiting context because it fears that college athletes’ ability to earn significant money will destroy the distinction between professional athletes and college athletes, thereby destroying the collegiate sports product.²¹⁶ Despite its devotion to the idea of amateurism, the NCAA “nowhere define[s] the nature of the amateurism they claim

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Grant House*, 545 F. Supp. 3d at 809.

²¹³ *Id.* at 817.

²¹⁴ *Id.* at 818.

²¹⁵ *Id.*

²¹⁶ *See Weiss*, *supra* note 3, at 296.

consumers insist upon.”²¹⁷ The lower court in *Alston* struggled to pin down “any coherent definition” of amateurism, “noting the testimony of a former SEC commissioner that he’s ‘never been clear on . . . what is really meant by amateurism.’”²¹⁸

From an antitrust perspective, such an argument does not matter.²¹⁹ The Supreme Court has explicitly said as much regarding the NCAA’s suppression of competition, proclaiming that the NCAA’s “social justifications” for its “restraint of trade . . . do not make it any less unlawful.”²²⁰ No matter the role of amateurism, suppression of competition makes the NCAA liable in antitrust. If the NCAA truly wants to limit that liability, it must give ground in allowing NIL to promote competition in recruiting. Luckily for the NCAA, and anyone else with an affinity for the amateurism distinction between college and professional athletes, doing so will not necessarily lead to runaway compensation thanks to an organic limit within the market.

2. Title IX Will Limit the Upper End of the NIL Market

Major antitrust issues would arise if the NCAA sought to directly restrict maximum NIL earnings of athletes. Allowing collectives to be tied explicitly to schools would invoke Title IX, thereby mandating equity among athletes’ NIL deals regardless of sex. This limit will organically restrict the size of NIL deals through collectives while not serving as a direct limit on competition. Additionally, this framework would incentivize schools to devote more publicity and resources to their women’s athletics programs.²²¹

Collectives offering NIL deals to college athletes would likely not inherently violate Title IX because collectives are “not a federally funded educational setting” as would fall within the bounds of the

²¹⁷ *NCAA v. Alston*, 141 S. Ct. 2141, 2152 (2021) (alteration in original) (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

²¹⁸ *Id.* (quoting *In re NCAA*, 375 F. Supp. 3d at 1070–71, 1074).

²¹⁹ *Alston*, 141 S. Ct. at 2159 (“The ‘statutory policy’ of the [Sherman] Act is one of competition and it ‘precludes inquiry into the question of whether competition is good or bad.’” (quoting *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978))).

²²⁰ *Id.* (quoting *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 424 (1990)).

²²¹ See Jackson Field, Comment, *Punt and Pass: Why Congress Should Punt on an Antitrust Exemption and Pass on Express Preemption When Regulating Student-Athlete Name, Image, and Likeness*, 53 TEX. TECH. L. REV. 743, 765 (2021), <https://doi.org/10.2139/ssrn.3797188>.

statute.²²² But there is “precedent of Title IX being successfully invoked when resources provided by boosters were inequitably distributed among men’s and women’s programs.”²²³ This precedent would likely apply to the collective context because the NCAA classifies collectives as boosters.²²⁴ Therefore, “if an intercollegiate athlete could point to an athletics department as being a conduit to the booster-intercollegiate athlete relationship and funneling boosters in the direction of one gender of intercollegiate athletes over another, Title IX scrutiny could emerge.”²²⁵

Furthermore, the actions of collectives have the clear potential to disadvantage female athletes while benefitting male athletes as collectives pour resources into NIL deals for prominent football and men’s basketball players.²²⁶ Even as the law stands now, institutions likely carry “an obligation to maintain at least third-party compliance over collectives,” implicating Title IX.²²⁷ Additionally, Title VI of the Civil Rights Act of 1964 functions much the same as Title IX only in regard to discrimination on the basis of race, color, and national origin, thus raising similar liability issues as to equality in NIL deals among athletes of varying races.²²⁸

²²² Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes*, 31 J. LEGAL ASPECTS OF SPORT 253, 272 (2021), <https://doi.org/10.18060/25602>.

²²³ *Id.*

²²⁴ NCAA MAY GUIDANCE, *supra* note 9, at 1.

²²⁵ See Jessop & Sabin, *supra* note 222, at 272.

²²⁶ See Dan Cohen et al., *Avoiding Imputed Liability Under Title IX for NIL Collectives’ Football Favoritism*, in NAME, IMAGE, AND LIKENESS (“NIL”) INSTITUTIONAL REPORT 7, 7 (Bart Lambergman ed., 2023), <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:bd4fcd7-3768-4784-b584-3323fa02962f?viewer%21megaVerb=group-discover> (“[Collectives] will largely take actions based on actual or assumed market forces. . . . [which could mean] direct[ing] most of [their] resources and efforts towards the most popular collegiate sports—football and men’s basketball.”).

²²⁷ Boland & Speyer, *What Every Institution Needs to Know*, *supra* note 98, at 39; see also Cohen et al., *supra* note 226, at 7 (explaining third-party liability under Title XI and the likelihood of its applicability the institution-collective relationship).

²²⁸ See Bennett Speyer et al., *Amend It or End It: Should Institutions Favor, Repeal or Amend State NIL Laws?*, in NAME, IMAGE, AND LIKENESS (“NIL”) INSTITUTIONAL REPORT 4, 4 (Bart Lambergman ed., 2022), <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:3d622199-8223-412b-a162-d53e21f042e8>.

Directly linking collectives with their affiliated schools would make Title IX and Title VI liability virtually unquestionable, thus forcing schools and collectives to preemptively consider such liability. With clear Title IX obligations, schools and collectives would have to work proactively to provide equitable NIL opportunities for male and female athletes. This would benefit all athletes and naturally curb the upper limit of the NIL market, thereby protecting the distinction between college and professional athletes.

VI. CONCLUSION

The current state-by-state approach to collegiate NIL has created an untenable situation characterized by inconsistency and impropriety. Federal legislation presents the best way to ensure effective and equitable regulation of collegiate NIL. The optimal version of this legislation would include provisions allowing for collectives and institutions to work in tandem. Collectives are here to stay, whether the NCAA likes it or not. Linking collectives explicitly with college institutions under clear, uniform rules will vastly improve regulatory oversight while enabling schools and collectives to better serve the needs of all athletes. A federal law of this sort will also protect the NCAA from antitrust liability while providing an upper limit on the NIL market, thereby protecting the distinction between professional and college athletes. So long as college athletes can profit from their NIL, there will be boosters and collectives using their resources to fund deals. NIL can only succeed if the NCAA and Congress embrace this reality through a federal NIL law explicitly linking collectives with universities.