



8-18-2022

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Francesca Casalino

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Recommended Citation

Francesca Casalino, *Call to the Bullpen: Saving High School Student Athlete Name, Image, and Likeness Rights*, 29 Jeffrey S. Moorad Sports L.J. 263 (2022).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol29/iss2/2>

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CALL TO THE BULLPEN: SAVING HIGH SCHOOL STUDENT ATHLETE NAME, IMAGE, AND LIKENESS RIGHTS

FRANCESCA CASALINO*

*While the Supreme Court's decision in *NCAA v. Alston* and the NCAA's suspension of its amateurism rules that prohibited student athletes from monetizing their name, image, and likeness ("NIL") was a huge win for collegiate student athletes, high school student athletes have been overlooked and forgotten. Although the NCAA's interim policies apply to prospective student athletes, it left the ultimate decision of high school eligibility up to the states. This reluctance to provide oversight has resulted in state legislation and high school athletic association regulations explicitly forbidding high school student athletes from capitalizing on their NIL. After exploring the current "patchwork" of regulations and the resulting rush to professionalism movement, this Note examines the arguments for and against giving high school student athletes NIL rights and ultimately proposes congressional legislation, with specific provisions to address several concerns, as the ideal solution to this problem.*

I. INTRODUCTION

Professional sports are filled with stories in which a sport saved an athlete's life: a sports career offered a pathway out of poverty,¹ out of a life not destined for success,² or physically out of an eco-

* J.D. Candidate, Brooklyn Law School, 2023; B.A., Yale University, 2018. As a former Division 1 softball player, this Note is dedicated to all past and present student athletes who give all they have on the field and in the classroom. Their passion and hard work has been overlooked and undervalued for too long. The Name, Image and Likeness revolution among collegiate student athletes is only the beginning. It is my hope that this Note sheds light on a forgotten group of student athletes and helps them in their pursuit to be recognized from the outset. Thank you to my parents, my sister, family and friends for your continuous love and support along this journey. Special appreciation to my professors for their insight and the staff of the Jeffrey S. Moorad Sports Law Journal for your diligence.

1. See *Hoop Dreams* (Steve James dir., 1994) (illustrating stories of Arthur Agee and William Gates: high school student athletes who used basketball to get out of Chicago's inner city); see also Brandi Collins-Dexter, *NCAA's amateurism rule exploits black athletes as slave labor*, UNDEFEATED (Mar. 27, 2018), <https://theundefeated.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/> [<https://perma.cc/LRW9-ZAEP>] (highlighting story of Jimmy Collins: who used basketball as a way out of poverty).

2. See Ashlee Tulloch, *Armed Robber to Ironman: How Sport Saved John McAvoy's Life*, OLYMPICS (May 22, 2019, 7:18 AM), <https://olympics.com/en/news/armed-robber-prison-ironman-triathlete-sport-saved-john-mcavoy-life> [<https://perma.cc/4T66-ATAW>] (noting story of John McAvoy: a British criminal who went on to be-

nomically distressed country.³ But striving for success in athletics comes with great risks: risk of injury,⁴ risk of not making “the pros,” risk of playing “pro ball” for only a short time.⁵ An athlete’s career can end in the “blink of an eye:” one play, one moment that impacts their life forever. Couple this risk with the extremely low odds of making a professional sports league altogether⁶ and the limited window of opportunity to play professional sports,⁷ and the athlete feels immense pressure to capitalize on all that they can from a sport.⁸ This profit incentive unfortunately leads to tales of athletes making decisions solely for monetary reasons so they can

come an ironman triathlete); *see also* *The Blind Side* (John Lee Hancock dir., 2009) (portraying story of Michael Oher, an eventual NFL star who grew up surrounded by drug abuse, gang violence, homelessness).

3. *See* BoxingNews Staff, *The Manny Pacquiao Story*, BOXINGNEWS (Jan. 14, 2017), <https://www.boxingnewsline.net/the-manny-pacquiao-story/> [perma.cc/2MWF-3LNZ] (chronicling story of Manny Pacquiao: a boxing champion who used boxing as a way out of his impoverished childhood in Manila); *see also* *Roberto Clemente’s Story*, ROBERTO CLEMENTE FOUNDATION, <https://www.robertoclementefoundation.com/roberto-clemente-bio/> [https://perma.cc/YV2S-ANRN] (last visited Nov. 6, 2021) (documenting story of Roberto Clemente: a MLB legend who was able to get out of working on sugarcane plantation in Puerto Rico because of his baseball success).

4. *See, e.g.*, Patrick Hruby, *Four Years A Student-Athlete: The Racial Injustice of Big-Time College Sports*, VICE (Apr. 4, 2016, 3:25 PM), <https://www.vice.com/en/article/ezexjp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sport> [https://perma.cc/7XQ2-4UEJ] (describing Cleveland Colter’s phenomenal high school and college athletic career and how he ultimately had to retire from football and miss the NFL draft due to debilitating injury).

5. *See* Collins-Dexter, *supra* note 1 (acknowledging that if black football and basketball athletes do not make the pros or only play for a short time, then they are saddled with debt and struggle to support their families because they are “significantly less likely to graduate with a degree than their white teammates”).

6. *See* Erik Cliburn, *The Equity Debate in College Sports Goes Beyond Financial Compensation*, INSIGHT INTO DIVERSITY (May 17, 2021), <https://www.insightintodiversity.com/the-equity-debate-in-college-sports-goes-beyond-financial-compensation/> [perma.cc/J5HM-CU4Z] (reporting fewer than 2% of all collegiate athletes can go on and play in a professional league).

7. *See* Ronald Black, *The Age of Sports – When Do Athletes Begin to Decline Within Their Sport*, LEGITGAMBLINGSITES.COM (July 9, 2019), <https://www.legitgamblingsites.com/blog/when-doathletes-begin-to-decline-within-their-sport/> [https://perma.cc/KZS4-NXYV] (observing impact of years of playing on one’s body and rapidly shortening average length of professional careers); Hector Cruz-Rodriguez, *NFL Careers Found to be Shortening on Average*, UCONN: JOURNALISM 2001 (Apr. 28, 2021), <https://digitaljournalism.uconn.edu/2001sp21/2021/04/28/nfl-careers-found-to-be-shortening-on-average/> [https://perma.cc/TH7A-M4PH] (“Since 2008, the average career length of a quarterback has dropped from six years to just over three years. . .”).

8. *See* Brief of Amici Curiae African American Antitrust Lawyers in Support of Respondents at 6–19, *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021). This pressure also leads student to prioritize athletics priority over academics, which has a detrimental impact on black student athletes who graduate at alarmingly less rates than their white teammates. *See id.*

support themselves and their families: accepting a “full-ride” to the first college that offers, taking the “highest bidder” scholarship offer, declaring for professional league drafts early, or even foregoing college athletics altogether.⁹ The latter two decisions happen quite frequently, especially before the Supreme Court’s 2021 decision in *National Collegiate Athletic Association v. Alston*,¹⁰ because the opportunities to make money off an athlete’s success were only available to “professional” athletes.¹¹

One of the most prominent demonstrations of this pressure occurs in the National Basketball Association (“NBA”).¹² Before 1971, the NBA’s bylaws had a “minimum age” rule which “prohibited the drafting of an athlete until 4 years after his high school graduation.”¹³ However, following a player’s successful judicial challenge,¹⁴ the NBA amended its draft eligibility by creating a “hardship rule.”¹⁵ This rule allowed any player who was able to show financial necessity, or “hardship,” to apply for early entry into the NBA draft.¹⁶ Although the “hardship rule” was eventually dropped, the concept of allowing high schoolers to rush towards professionalism remained.¹⁷ Many of the all-time NBA greats took

9. See Ray Glier, *Pets, Car Repairs and Mom: How College Football Players Use Their Stipends*, N.Y. TIMES (Jan. 5, 2017), www.nytimes.com/2017/01/05/sports/ncaafootball/pets-car-repairs-and-mom-how-football-players-use-their-stipends.html?mtrref=www.google.com&gwh=0A2416E37722475436AF17047C4EA584&gwt=pay [perma.cc/B3MV-4MQQ] (noting college football players choose college based on largest scholarship to take on less debt and many send their stipends back home to support their families still living in poverty).

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

11. See *NIL Era Could Prompt More Baseball Prospects to Stick With College*, SPORTS BUS. J. (July 12, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/07/12/Marketing-and-Sponsorship/MLB-NIL.aspx?hl=NIL&sc=0> [https://perma.cc/M2LQ-FU72] (acknowledging possibility of NIL compensation at the college level could incentivize college baseball players to stay instead of leaving school early to play in the pros and get paid).

12. See Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539 (1998) (listing players who entered the NBA’s draft as soon as they could instead of playing high school and college ball).

13. *Id.*

14. See *In re Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971) (holding “minimum age” rule was a per se violation of the Sherman Act).

15. See Andrew M. Jones, *Hold the Mayo: An Analysis on the Validity of the NBA’s Stern No Preps to Pros Rule and the Application of the Nonstatutory Exemption*, 26 LOY. L.A. ENT. L. REV. 475, 478 (2006) (“In response to the district court’s holding that the draft eligibility rule violated anti-trust laws, the NBA developed a “hardship” rule, allowing underclassmen to petition for NBA draft eligibility on the basis of financial hardship.”).

16. See Rosner, *supra* note 12 at 553.

17. See *id.* (describing how “hardship rule” was eliminated but NBA draft remained open to any player who had at least graduated high school).

advantage of this opportunity, including LeBron James, Kobe Bryant, Kevin Garnett, Tracy McGrady, Amar'e Stoudamire, and Dwight Howard.¹⁸ LeBron James, in particular, is a prime example of a successful athlete who skipped college entirely seeking the opportunity to make money to support his family.¹⁹ He has previously spoken on the topic, stating “. . .the decision to skip college level, for [him], was strictly of financial matter. . .the only one who would benefit from that decision [to play collegiate basketball] would be the Ohio State University. . . me and my mom didn't have anything and we wouldn't be able to benefit at all from it.”²⁰

In reality, a star athlete's decision to forego their collegiate career creates the potential for earning compensation.²¹ The National Collegiate Athletic Association (“NCAA”), the governance body for intercollegiate athletics in the United States, previously based eligibility status on the concept of “amateurism.”²² If an athlete was found to have violated any principle of “amateurism,” they would forfeit their collegiate athletic eligibility.²³ The NCAA would not consider a student athlete an “amateur” if they, among other things, “received payment” or “promoted or endorsed a commer-

18. See Ryan M. Rodenberg, *The NBA's Latest Three Point Play – Age Eligibility Rules, Antitrust, and Labor Law*, 25 ENT. AND SPORTS LAW. 14, 14 (2008) (listing these NBA players as examples of players who went straight to the NBA after high school).

19. See Will Starjacki, *LeBron James Explains Why He Skipped College and Went Directly to the NBA: “Me and My Mom Wouldn't Be Able to Benefit At All From It,”* BASKETBALL NETWORK (Oct. 1, 2019), <https://www.basketballnetwork.net/lebron-james-explains-why-he-skipped-college-and-went-directly-to-the-nba-me-and-my-mom-wouldnt-be-able-to-benefit-at-all-from-it/> [<https://perma.cc/NT4R-NJLU>] (reporting LeBron James's decision to skip college and go directly to the NBA was strictly for financial purposes).

20. *Id.*

21. See *NIL Era Could Prompt More Baseball Prospects to Stick With College*, SPORTS BUS. J. (July 12, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/07/12/Marketing-and-Sponsorship/MLB-NIL.aspx?hl=NIL&sc=0> [<https://perma.cc/X6VD-35GD>] (acknowledging baseball players joining minor leagues before college graduation for purpose of earning money).

22. See *Amateur*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/amateurism [<https://perma.cc/HU4F-SUXD>] (last visited Nov. 29, 2021) (defining “amateur” as “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.”). Unfortunately, the NCAA's concept of “amateurism” is not clearly defined or explained. The Supreme Court in *Alston* observed this issue when describing how the district court “struggled to ascertain, for itself ‘any coherent definition’ of the term.” *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2152 (2021) (citing to *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Litigation*, 375 F. Supp. 3d 1058, 1074 (N.D. Cal. 2019)); see *Amateurism*, NCAA, <https://www.ncaa.org/amateurism> [<https://perma.cc/BQS3-G4NJ>] (last visited Oct. 13, 2021) (noting NCAA only provides guidelines for how student athletes can maintain their “amateur status.”).

23. See *Amateurism*, *supra* note 22.

cial product or service.”²⁴ The latter of the two restrictions is the more economically detrimental.²⁵ Many professional athletes get paid more money from endorsements than from their salaries or win earnings.²⁶ For example, Tiger Woods makes 97% of his earnings from endorsements, Roger Federer 84% and LeBron James 61%.²⁷ A young soccer “phenom,” Olivia Moultrie, announced, in 2019 her decision to forego NCAA eligibility entirely by accepting a sponsorship deal.²⁸ Moultrie received a scholarship offer from the University of North Carolina at age 11, but, in part due to the previous NCAA amateurism rules, at age 13, she decided instead to “turn pro” and sign an endorsement deal with Nike.²⁹ She recently became the youngest player ever to play in the National Women’s Soccer League, at age 15.³⁰

Given the rush to professionalism rhetoric, it is asinine to argue that athletes at any level should be forbidden from making money off their athletic success, as many must support themselves and their families.³¹ Nevertheless the NCAA, until late June 2020, still maintained their hardline position to protect “amateurism”

24. See *Promoting or Endorsing Commercial Products or Services*, NCAA, http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf [https://web.archive.org/web/20201111235704/http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Promoting_Endorsing_Commercial_Products_Services.pdf] (last visited Nov. 4, 2021).

25. See Nasha Smith, *13 Athletes Who Make More Money Endorsing Products than Playing Sports*, FORBES (June 17, 2019, 1:17 PM), <https://www.businessinsider.com/athletes-endorsements-nba-golf-tennis-2019-6> [perma.cc/S5AZ-9VK3] (describing outrageous amount of money professional athletes make using their name, image, and likeness rights).

26. See *id.* (listing professional athletes who get paid more money from endorsements than from winning earnings).

27. *Id.*

28. See Jeré Longman & Alanis Thames, *Forget Friday Night Lights: High School Stars Seek a Better Deal*, N.Y. TIMES (Aug. 16, 2021), <https://www.nytimes.com/2021/08/13/sports/ncaa-high-school-sports-endorsements.html> [<https://perma.cc/X9WJ-KHF6>].

29. See *id.*

30. See *id.*

31. See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2168 (2021)

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

Id.

and disadvantage student athletes who decided to play college sports.³² This did not change until the Supreme Court in *Alston* struck down the NCAA's restrictions on "education-related benefits" and Justice Kavanaugh, in his concurring opinion, stated "[t]he NCAA is not above the law."³³ Eight days later, "[o]n June 30, 2021, the governance bodies of all three NCAA divisions adopted an interim suspension of the amateurism rules that had prohibited student athletes from profiting from the commercial exploitation of their names, images, and likenesses."³⁴

This was a huge win for student athletes. Unfortunately, this decision has not been as revolutionary as it should have been. Although the NCAA's interim policies apply to prospective student athletes, it left the ultimate decision of high school student athletes' high school eligibility up to the states legislatures and state athletic associations.³⁵ This reluctance to provide oversight has resulted in state legislation and high school athletic association regulations explicitly forbidding high school student athletes from capitalizing on their name, image, and likeness.³⁶ Is history repeating itself? Instead of skipping a few years of college, or college entirely, for the opportunity to monetize their athletic success and NIL, high school student athletes are currently skipping years of high school eligibility, either by graduating early or transferring to private schools, as they "rush towards professionalism."³⁷ Additionally, as opposed to a league-wide or NCAA-wide ban, by leaving these eligibility deci-

32. See *id.* at 2155-59 (outlining NCAA's position before the Supreme Court decided their policy was in violation of federal antitrust laws).

33. Joel Mitnick, Esq., & Ngoc Hulbig, Esq., *A Slam Dunk from the Supreme Court for College Athletes: No Antitrust Immunity for the NCAA*, CADWALADER, WICKERSHAM & TAFT LLP (June 21, 2021), <https://www.cadwalader.com/uploads/books/331468fb48c3b8d6fec880e5b84e87a1.pdf> [<https://perma.cc/C5BF-3EAE>]; *Alston*, 141 S. Ct. at 2169.

34. See Erica L. Han et. al, *NCAA NIL Interim Policy: A Win for Student-Athletes, But Challenges Remain Ahead*, ROPES & GRAY LLP (July 2, 2021), <https://www.ropesgray.com/en/newsroom/alerts/2021/July/NCAA-NIL-Interim-Policy-A-Win-for-Student-Athletes-but-Challenges-Remain-Ahead> [<https://perma.cc/LBJ6-AQVX>].

35. See Darren Heitner, *The Fight for NIL Rights Reaches a New Class: High Schoolers*, OUTKICK (July 25, 2021), <https://www.outkick.com/the-fight-for-nil-rights-reaches-a-new-class-high-schoolers/> [<https://perma.cc/8VKG-TZ3J>] ("The NCAA refused to opine as to whether such NIL activity could separately jeopardize a college athlete's high school eligibility and instead referred high school athletes to consult their high school athletics associations regarding questions about their ability to compete.").

36. For a discussion of state legislation and high school athletic association regulations, see *infra* notes 96-105.

37. See Longman & Thames, *supra* note 28. For a discussion of high school student athletes rushing towards professionalism, see *infra* notes 114-134.

sions to each state, a “patchwork” of legislation is being created, leading to confusion and incentives to leave one state in favor of another.³⁸ But should high school student athletes be granted the ability to monetize off their NIL rights? And if so, what is the best way to accomplish that?

Part II of this Note discusses the background of this argument, considering the history of collegiate athlete compensation. Part III considers *Alston*’s impact (or lack thereof) on high school student athletes. Part IV explores current state statutes and state high school athletic associations’ regulations prohibiting high school student athletes from monetizing their NIL, Part V the continued rush to professionalism trend, and Part VI ongoing litigation brought by high school student athletes challenging the Florida High School Athletic Association’s prohibition against NIL opportunities. Part VII examines the policy arguments for and against giving high school student athletes NIL rights, specifically analyzing the convincing and unconvincing arguments against student athletes. After ultimately finding that convincing arguments can be addressed through regulating legislation, this Note finds that high school student athletes should be given the ability to monetize off their NIL rights. Lastly, Part VIII proposes why congressional legislation is the best solution to this problem, while recommending specific provisions to address several concerns against affording high school student athletes’ NIL rights.

II. HISTORY OF COMPENSATION IN COLLEGIATE ATHLETICS FROM THE 1850s TO POST-ALSTON

The idea of compensating college athletes was first introduced in 1852 at the Harvard-Yale regatta when “competitors [were] offered an all-expenses-paid vacation with lavish prizes” in exchange for their participation.³⁹ By the late 1880s, collegiate athletics started to become big business.⁴⁰ For example, the football games between Yale and Princeton during this time “[were] attracting 40,000 spectators and generating in excess of \$25,000 . . . in gate revenues.”⁴¹ From the 1880s until the early 1900s, it was normal

38. For a discussion of the legislation being created, see *infra* notes 96–105.

39. See Nat’l Collegiate Athletic Ass’n v. *Alston*, 141 S. Ct. 2141, 2148 (2021) (quoting Andrew Zimbalist, *UNPAID PROFESSIONALS* 6–7 (Princeton Univ. Press, 1999)).

40. See *Alston*, 141 S. Ct. at 2148 (discussing evolution of college athletics and how it turned into a profit machine).

41. See *id.* at 2148 (quoting Andrew Zimbalist, *UNPAID PROFESSIONALS* 7 (Princeton Univ. Press, 1999)).

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practice among universities to attract talented student athletes by offering all types of compensation.⁴² Concern over these progressively escalating compensation packages motivated a meeting between Harvard, Yale, and Princeton University, brokered by President Theodore Roosevelt, which led to the creation of an oversight organization, now known as the National Collegiate Athletic Association.^{43,44}

The NCAA's original by-laws targeted the practice of student athlete compensation, stating “[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial concession.”⁴⁵ Further limitations on payment were adopted over the course of the NCAA's reign, including the “Sanity Code” which prohibited “payment” in any form except tuition (including room, board, books, etc.).⁴⁶ However, as restrictions on athlete compensation grew, the “big business” of college athletics continued to grow too.⁴⁷ As of 2021, March Madness is worth \$1.1 million annually, the FBS College Football Playoffs worth \$470 million, the NCAA President earns approximately \$4 million, commissioners of several top Division 1 conferences earn between \$2 million and \$5

42. *See id.* (stating one example is when Yale University “. . . lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games – and a job as a cigarette agent. . .”).

43. *See Overview*, NCAA, <https://www.ncaa.org/overview> (last visited Nov. 30, 2021). The NCAA is a private, member-led organization whose primary purpose is to formulate policies and regulations that govern intercollegiate athletics among its members, in addition to overseeing championships. *See id.* Each of the three divisions has a legislative body, consisting of member institutions, and a group of committees which create and implement rules for its respective division. *See id.* The NCAA's highest governing body is the Board of Governors, comprised of university presidents from each division, whose job it is to resolve Association-wide issues. *See Governance*, NCAA, <https://www.ncaa.org/governance> [<https://perma.cc/J6TB-HX7X>] (last visited Nov. 30, 2021). These regulations are incorporated into the NCAA's Constitution and By-Laws, which are enforced by NCAA staff, led by an executive director (or president). *See* Walter T. Champion, Jr., *FUNDAMENTALS OF SPORTS LAW §12.3 NCAA*, Westlaw (section updated Mar. 22, 2021). However, the NCAA's rules and regulations, like those of other private associations, are not equal to (or above) the force of law. *See* *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021); *Walters v. Fullwood*, 675 F.Supp. 155 (S.D.N.Y. 1987); *Alston*, 141 S. Ct. at 2169.

44. *Alston*, 141 S. Ct. at 2148 (citing *ANDREW ZIMBALIST, UNPAID PROFESSIONALS* 8 (1999)).

45. *See id.* (quoting *Intercollegiate Athletic Association of the United States, CONSTITUTION BY-LAWS*, Art. VII, §3 (1906)).

46. *See id.* at 2149.

47. *See id.* (describing evolution of NCAA's policies over time).

million, and top Division 1 football coaches make around \$11 million.⁴⁸

Starting in 2018, in recognition of the inequality that existed, many states started to propose legislation opposing the NCAA's amateurism regulations.⁴⁹ California was the first mover by passing the "Fair Pay to Play Act," which, among other things, allowed collegiate student athletes to capitalize off their NIL.⁵⁰ The reasoning for passing such monumental and controversial legislation was to allow student athletes the ability to engage with the film and television industries, prominent in California, without risking their eligibility.⁵¹ Nevertheless, student athletes still could not financially benefit since the NCAA restricted student athlete eligibility with its "no compensation" rules.⁵² Regardless, several states followed California's lead, starting a serious conversation within the legal and collegiate athletic community regarding whether the NCAA's policies needed to be amended.⁵³

However, in June 2021, the Supreme Court stepped in and directly addressed the NCAA's policy prohibiting athletes from receiving "education-related benefits," and unanimously ruled that such a policy was against federal antitrust statutes.⁵⁴ As stated by Justice Gorsuch, "[t]he bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. . . [and] [t]hose enormous sums of money flow to seemingly everyone

48. *See id.* at 2150–51.

49. *See* Scott Nover, *In California, Even High School Athletes Can Score Endorsement Deals*, QUARTZ (Aug. 2, 2021), <https://qz.com/2041395/high-schoolers-can-profit-off-their-nil-in-one-state/> [<https://perma.cc/CA92-3K67>] (describing how many state legislatures started to pass new laws in complete contradiction to the NCAA's policies, effectively forcing the NCAA to change its NIL rules).

50. *See* Patrick Hruby, *Four Years A Student-Athlete: The Racial Injustice of Big-Time College Sports*, VICE (Apr. 4, 2016, 3:25 PM), <https://www.vice.com/en/article/ezexjp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sport> [<https://perma.cc/EZK3-H5PN>] (acknowledging this statute does not address high school athletes and breaking down profits that college student athletes make for their universities and how little of that each athlete receives or benefits from); Nover, *supra* note 49 (reporting 2021 statistics of income generated from college sports).

51. *See* Nover, *supra* note 49 (explaining California's legislation as a direct product of student athletes also being involved in the film and television industries).

52. *See id.*

53. *See id.* ("[This] inequity drew the ire of students and activists alike who demanded opportunities to earn money as athletes, something the NCAA has vehemently resisted. The NCAA finally changed its rule about NIL after state legislatures passed new laws that would have forced their hands . . .").

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

except the student athletes.”⁵⁵ A scathing concurring opinion by Justice Kavanaugh warned the NCAA that its other policies could have similar outcomes (i.e., being struck down under antitrust scrutiny) if challenged.⁵⁶ This decision, coupled with the intense pressure by states, led to the NCAA eight days later adopting an interim NIL policy suspending its amateurism rules and allowing college athletes to profit off their NIL (the “Interim NIL Policy”⁵⁷).⁵⁸ However, as Justice Kavanaugh stated, “[t]he NCAA is not above the law.”⁵⁹ Thus, the NCAA’s Interim NIL Policy bows to state government decisions.⁶⁰ The Interim NIL Policy states that for individuals and schools in states with enacted NIL laws or effective executive actions, “NIL activities protected by state law will not impact eligibility.”⁶¹ But for states without enacted NIL laws or effective executive actions, “eligibility will not be impacted by NCAA amateurism and athletic eligibility bylaws.”⁶² Regardless though, all student athletes are still subject to the NCAA’s prohibitions on “pay-for-play” and “improper recruiting inducements.”⁶³

55. *Id.* at 2166–67.

56. *See id.* at 2166–69.

57. *See NCAA Adopts New Constitution and Pursues NIL Violations*, DAVIS & GILBERT (Feb. 7, 2022), <https://www.dglaw.com/ncaa-adopts-new-constitution-and-pursues-nil-violations/#:~:text=NIL%20Deals%20Under%20Review,Alston> [<https://perma.cc/F3CH-YD22>]. It should be noted at the outset that the NCAA’s Constitutional Convention ratified a new constitution on January 10, 2022, that incorporates the Interim NIL Policy into it. *See id.* The new constitution instead defines amateurism broadly and leaves it up to the divisions and conferences to establish more concrete rules to govern future participation. *See id.* But the new constitution does not take effect until August 1, 2022. So, until this effective date, the Interim NIL Policy still governs. *See id.*

58. *See* Nover, *supra* note 49; Erica L. Han, Esq. et. al, *supra* note 34; *see also Interim NIL Policy*, NCAA (July 2021), http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf. (noting, however, NCAA still maintains its “pay-for-play” and “improper recruiting inducement” rules).

59. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2169 (2021).

60. *See Quick Guide to New NCAA Interim Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QuickGuideToNewPolicy.pdf.

61. *Id.*

62. *Id.*

63. *See id.* (stating “Pay-for-play” refers to an athlete being paid to play their sport (i.e., the difference between amateur and professional athletes) and “improper recruiting inducements” restricts gifts which are tied to the athlete choosing a particular school to attend); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [<https://perma.cc/2RWL-K6L7>].

III. WHAT ABOUT COMPENSATION FOR HIGH SCHOOL STUDENT ATHLETES?

While one battle has been won, another is still raging. Although collegiate student athletes gained the right to monetize their NIL, there is a large population of student athletes the *Alston* decision did not address: high school student athletes.⁶⁴ Broadly, each individual owns their rights of publicity, which includes their name, image, and likeness.⁶⁵ They can protect and make money off those rights in any way they choose, including via copyright, trademark, licensing, etc.⁶⁶ Just as *Alston* concluded that college athletes, like all other Americans, should not be limited in their enjoyment of these rights, the same argument should also apply to high school athletes.⁶⁷

The NCAA's Interim NIL Policy specifically addresses the high school student athlete population.⁶⁸ The Interim NIL Policy Q&A document states, “[p]rospective student athletes may engage in the same types of NIL opportunities available to current student athletes under the [I]nterim NIL [P]olicy without impacting their NCAA eligibility.”⁶⁹ This seems to suggest the NCAA believes NIL opportunities should also be available to high school student athletes. Contradictorily, the NCAA then forfeits its oversight responsibility by stating, “[g]iven that rules vary by state, prospective student athletes should consult their state high school athletics association regarding questions pertaining to high school eligibility.”⁷⁰ Unfortunately, leaving this choice up to the states has only proven harmful for high school student athletes.⁷¹ More states than not have either explicitly forbidden these opportunities to high school student athletes or remained silent, causing more confusion and less

64. The Court never considered “high school student athletes,” “prospective student athletes,” or “pre-collegiate student athletes” in their holding. See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

65. See *Publicity*, LEGAL INFORMATION INST., <https://www.law.cornell.edu/wex/publicity> [perma.cc/L3A6-DSJP] (last visited Nov. 29, 2021) (acknowledging rights of publicity are generally protected by either state common law or state statutory law, or both).

66. See Heitner, *supra* note 35.

67. See *id.*

68. See *Name, Image and Likeness Policy: Question and Answer*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf.

69. *Id.*

70. *Id.*

71. See Heitner, *supra* note 35 (describing just how many states have ignored discussing high school student athlete NIL rights and its negative impact on these athletes).

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willingness to engage with NIL opportunities.⁷² Ultimately, the Interim NIL Policy has not ended the problem of student athletes rushing towards professionalism.⁷³ Instead, it only accentuated the issue for high schoolers.⁷⁴

IV. ANALYSIS OF STATE POLICIES ON HIGH SCHOOL STUDENT ATHLETE NIL RIGHTS

The National Federation of State High School Associations (“NFHS”) is “the national leader and advocate for high school athletics” serving approximately 20,000 high schools across 50 states, including D.C. .⁷⁵ The NFHS’s function is to “provide leadership in the field of high school athletics/activities administration, establishes rules and regulations for the sanctioning of high school athletics/activities events,⁷⁶ and formulate model rationales for high school eligibility rules for use by high school athletics/activities administrators.”⁷⁷ Executive Director Dr. Karissa Niehoff recently made the NFHS’s position on high school student athlete NIL rights quite clear by stating “[w]hile it is not our position to debate the merits of current college athletes earning money from their NIL, it should be understood that these changes do not affect current high school student athletes. . . [since] high school student

72. See Braly Keller, *High School NIL: State-By-State Regulations for Name, Image, and Likeness Rights*, OPENDORSE (Mar. 10, 2022), <https://opendorse.com/blog/nil-high-school/> [<https://perma.cc/U2CR-Z724>]. For a discussion of confusion created by the states, see *infra* Part IV, Sections B-C.

73. See *Overtime Elite lands biggest hoops prospect in 16-year-old Lewis*, SPORTS BUS. J. (July 12, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/07/12/Leagues-and-Governing-Bodies/Overtime-Elite.aspx?hl=NIL&sc=0> [<https://perma.cc/7EDP-HU3Z>] (discussing Jalen Lewis, a five-star recruit in the class of 2023, recently forewent his high school athletic career by signing a multiyear contract, worth more than \$1 million a year). For a discussion of high school athletes rushing towards professionalism, see *infra* Part V.

74. See Longman & Thames, *supra* note 28 (explaining the lack of NIL rights impact on high school student athletes).

75. See *About Us*, NAT’L FED’N OF STATE HIGH SCHOOL ASSOC., <https://www.nfhs.org/who-we-are/aboutus> [<https://perma.cc/BRJ2-E6KF>] (last visited Oct. 14, 2021).

76. It is important to point out that NFHS’s decisions are not binding. See *id.* The NFHS is merely an oversight and advisory organization that drafts rules and suggests each state high school athletic association adopt them. See *id.* They are unlike the NCAA as their rules do not hold any influence nor do they hold any power to enforce their position. See Amanda Christovitch, *High School NIL Landscape*, FRONT OFFICE SPORTS (July 28, 2021), <https://frontofficesports.com/high-school-nil-landscape/> [<https://perma.cc/8U75-TPZL>]. For the legal world, an analogous comparison would be the American Law Institute and their “restatements” of law where the “restatements” are suggestions which states can choose to adopt or not adopt.

77. *About Us*, *supra* note 75.

athletes CANNOT earn money as a result of their connection to their high school team.”⁷⁸ Ultimately, many state legislatures and state high school athletic associations have agreed with the NFHS and adopted legislation and/or regulations explicitly forbidding high school student athletes from engaging in NIL opportunities or risk losing their high school eligibility.⁷⁹

A. State Statutes and State Athletic Associations’ Regulations That Explicitly *Grant* High School Student Athlete NIL Rights

At the time of this writing, no states have enacted legislation that explicitly allows high school student athletes the opportunity to profit off their NIL.⁸⁰ However, one state, Maryland, has proposed legislation and seven state high school athletic associations have issued regulations that allow (or are in the process of being amended to allow) high school student athletes the ability to engage in NIL deals without forfeiting high school eligibility.⁸¹ These seven states are Alaska, California, Illinois, Kansas, Nebraska, New Jersey, and New York.⁸²

78. Dr. Karissa Niehoff, *NIL Rulings Do Not Change for High School Student-Athletes*, NAT’L FED’N OF STATE HIGH SCHOOL ASSOC. (July 7, 2021), [https://nfhs.org/articles/nil-rulings-do-not-change-for-high-school-student-athletes/\[perma.cc/BKA8-8A5D\]](https://nfhs.org/articles/nil-rulings-do-not-change-for-high-school-student-athletes/[perma.cc/BKA8-8A5D]).

79. See Keller, *supra* note 72; Heitner, *supra* note 35.

80. See *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS (Mar. 12, 2022), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/>; Lee Green, *Impact of California’s ‘Fair Pay to Play Act’ on High School Athletes*, NAT’L FED’N OF STATE HIGH SCHOOL ASSOC. (Nov. 12, 2019), <https://www.nfhs.org/articles/impact-of-california-s-fair-pay-to-play-act-on-high-school-athletes/> [<https://perma.cc/52KA-9Z3Y>] (recognizing California’s *Fair Pay to Play Act* did not apply to high schoolers).

81. See *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 80; Gregg E. Clifton, *Maryland Introduces Legislation Authorizing High School Student-Athletes to Profit from Name, Image, and Likeness Rights*, JACKSON LEWIS: COLL. & PROF. SPORTS L. BLOG (Feb. 23, 2022), <https://www.collegeandprosportslaw.com/uncategorized/maryland-introduces-legislation-authorizing-high-school-student-athletes-to-profit-from-name-image-and-likeness-rights/> [<https://perma.cc/FLN4-VGPA>].

82. See Keller, *supra* note 72; see generally *Un-Adopted Minutes of the ASAA Board of Directors’ Meeting December 6, 2021*, ALASKA SCHOOL ACTIVITIES ASSOC. 5, <https://asaa.org/wp-content/uploads/board/BOD-December-6-2021-Meeting.pdf> (last visited Jan. 30, 2022); *Constitution, Bylaws & State Championship Regulations 2021-22*, CALL. INTERSCHOLASTIC FED’N 47, https://www.cifstate.org/governance/constitution/Constitution_and_Bylaws.pdf (last visited Nov. 29, 2021); *Handbook*, ILL. HIGH SCHOOL ASSOC. 55, https://www.ihsa.org/documents/forms/current/IHSA_Handbook.pdf (last visited Nov. 29, 2021); *Handbook*, KAN. STATE HIGH SCHOOL ATHLETIC ASSOC. 36, <https://www.kshsaa.org/Publications/Handbook.pdf> (last visited Jan. 30, 2022); Kristi Dosh, *NIL Momentum Increasing For High School Athletes*, FORBES (Dec. 31, 2021, 11:30 AM), <https://www.forbes.com/sites/kristidosh/2021/12/31/nil-momentum-increasing-for-high-school-athletes/?sh=647>

While no states have enacted NIL legislation that explicitly allows high school student athletes to profit off their NIL rights, Maryland is the first to propose such granting of rights.⁸³ The Maryland House Bill 1431, named “Public High Schools-Student Athletes-Compensation for Name, Image, and Likeness” would authorize all high school athletes in public schools to enter into NIL deals without eliminating their eligibility if they meet certain listed conditions.⁸⁴ These restrictions state that “the terms of the contract cannot be in conflict with any high school athletic program contract,” explains that “the student-athlete does not have the legal right to utilize the school’s name, trademarks, logos, or other intellectual property owned by the school in any NIL agreement,” and prohibits “any public school or any groups affiliated with the school from providing compensation to the student-athlete for their NIL rights or from limiting the student-athlete from using their NIL for a commercial purpose when the student-athlete is not involved in official team activities.”⁸⁵ The most intriguing part of the bill though is that it would prevent not only any “State Superintendent, any County Board, or any individual public schools from establishing any rule, requirement, standard of other limitation” inconsistent with bill, but it would also prevent any state athletic association, including the Maryland Public Secondary Schools Athletic Association, from doing the same.⁸⁶ So in effect, this bill would supersede the Maryland Public Secondary Schools Athletic Association’s current prohibition on high school student athletes using their NIL rights (without forfeiting their eligibility) and preclude the organization from mandating this again.⁸⁷

c4c663468 [https://perma.cc/LQP4-9UZ8]; Brian Deakyne, *NIL Rule Officially Passes & Other Key Takeaways From NJSIAA’s Exec. Committee Meeting*, NJ.COM (Nov. 10, 2021, 1:29 PM), <https://www.nj.com/highschoolsports/2021/11/nil-rule-officially-passes-other-key-takeaways-from-njsiaas-exec-committee-meeting.html> [https://perma.cc/R2BQ-2K8Y]; *NYSPHSAA Executive Committee Meeting*, NYSPHSAA 69 (Oct. 20, 2021), https://s3.amazonaws.com/nysphsaa.org/documents/2021/10/1/2021_October_Executive_Committee_Meeting_Packet.pdf. It should also be noted California, Nebraska, and New Jersey have NIL statutes, although none address high school athletes. See *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 80. Alaska, Kansas, and New York do not yet have an NIL statute signed into law. See *id.* Interestingly though, Illinois has an NIL statute that explicitly forbids high school student athletes from capitalizing on their NIL. See *id.*

83. See Clifton, *supra* note 81.

84. See *id.*

85. *Id.*

86. See *id.*

87. See *Handbook of the Maryland Public Secondary Schools Athletic Association*, MPSSAA 28, https://www.mpssaa.org/assets/1/6/Handbook_2021_Online.pdf (last visited Mar. 20, 2022). But see Clifton, *supra* note 81.

Looking at California, Rule 212, “Amateur Status,” of the California Interscholastic Federation’s Constitution allows high school student athletes to profit off of promotional or commercial activity so long as they do not wear a school team uniform or any identifying school insignia while appearing in such endorsement activity (the “School Identifier Limitation”).⁸⁸ While it does not address NIL opportunities specifically, a California Interscholastic Federation spokesperson has confirmed, on various occasions, that high school student athletes can profit off their NIL so long as they follow the School Identifier Limitation.⁸⁹ In confirming this, the spokesperson stated this has always been the California Interscholastic Federation’s approach, partly due to the “sheer number of child actors in the state and the reluctance to in any way render an individual ineligible to participate in high school athletics due to his or her fame.”⁹⁰

New York recently joined the NIL movement for high school student athletes when the New York State Public High School Athletic Association’s Executive Committee approved a revised amateur rule to allow for exploitation of NIL rights.⁹¹ The new amateur rule will now read “[a]n athlete forfeits amateur status in a sport by capitalizing on athletic fame, by receiving money, compensation, endorsements or gifts of monetary value *in affiliation or connection with activities involving the student’s school team, school, Section or NYSPSAA. . .*”⁹² For clarity’s sake, the amendment also includes the following language: “This provision is not intended to restrict the right of any student to participate in a commercial endorsement provided there is no school team, school, Section or NYPHSAA affiliation.”⁹³ Similar to California’s “Amateur” regulation, New York’s rule allows for high school student athletes to monetize off of their NIL, subject to a School Identifier Limitation.⁹⁴ The rationale behind the change, aside from the NCAA changing its

88. See *Constitution, Bylaws & State Championship Regulations 2021-22*, *supra* note 82.

89. See Heitner, *supra* note 35.

90. *Id.*

91. See NYSPHSAA (@NYSPHSAA), TWITTER (Oct. 20, 2021, 11:48 AM), <https://twitter.com/NYSPHSAA/status/1450851497907040268> [<https://perma.cc/BNQ9-BJ2E>] (“The #NYSPHSAA Executive Committee approves revising NYSPHSAA amateur rule. This is related to the name, image, likeness topic for student-athletes.”).

92. *NYSPHSAA Executive Committee Meeting*, *supra* note 82 [emphasis added].

93. *Id.*

94. See *id.* (“The student does not appear in the uniform of the student’s school and does not utilize the marks, logos, etc. of the school, section, or NYSPHSAA as part of the endorsement.”).

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NIL restrictions, is because “[i]t has become increasing more difficult to differentiate between a student capitalizing on their athletic fame and the student being a social media influencer.”⁹⁵

B. State Statutes and State Athletic Associations’ Regulations That Explicitly *Deny* High School Student Athlete NIL Rights

Statutorily, three states have enacted legislation that plainly prohibit high school student athletes from monetizing their NIL: Texas, Mississippi, and Illinois.⁹⁶ Texas’ statute states, “[n]o individual, corporate entity, or other organization may: (1) enter into any arrangement with a prospective student athlete relating to the prospective student athlete’s name, image, or likeness prior to their enrollment in an institution of higher education. . . .”⁹⁷ Similarly, Mississippi’s law prohibits a student athlete from entering into an NIL agreement or receiving compensation related to their NIL prior to the date in which they enrolls at a postsecondary institution.⁹⁸ While the Illinois High School Association allows high school student athletes to profit off their NIL, Illinois state law explicitly disallows the practice, stating “[n]o student athlete shall enter into a publicity rights agreement of receive compensation from a third party licensee relating to the name, image, likeness, or voice of the student athlete before the date on which the student athlete enrolls at a postsecondary educational institution.”⁹⁹ A potential addition to this list may be Virginia, where a politician recently introduced a bill that would prohibit high school student athletes from entering into NIL deals.¹⁰⁰

A majority of state high school athletic associations also prohibit high school student athletes from receiving compensation, of

95. *Id.*

96. TEX. EDUC. §51.9246(j); MISS. §37-97-107(13); 110 ILL. §190/20(h).

97. TEX. EDUC. §51.9246(j).

98. MISS. §37-97-107(13).

99. 110 ILL. §190/20(h) (prohibiting high school student athletes from capitalizing off their NIL). Ultimately, state law trumps private association law anyways; *Handbook*, *supra* note 82.

100. *See* H.B. 1298, 2022 Sess. (Va. 2022) (“The bill prohibits any (i) high school student-athlete who participates in interscholastic athletic competition from entering into any contract to receive compensation in exchange for the use of such student’s name, image, or likeness. . . .”); Darren Heitner (@DarrenHeitner), TWITTER (Jan. 24, 2022, 10:32 AM), <https://twitter.com/DarrenHeitner/status/1485636711937888259> [<https://perma.cc/ARN7-A9NJ>] (“A Virginia politician has introduced a bill to prohibit high school athletes from entering into #NIL deals.”). Regardless of if this bill passes, the Virginia High School League still prohibits high school student athletes from monetizing their NIL. *See* Keller, *supra* note 72.

any sort, in connection with athletics.¹⁰¹ Some state athletic associations, such as Missouri, prohibit student athletes from capitalizing off their athletic fame regardless of the compensation's value.¹⁰² The Missouri State High School Athletic Association declares an athlete to have forfeited their amateur status by “[c]apitalizing on athletic fame by receiving money, gifts of monetary value, or merchandise. . . .”¹⁰³ On the other hand, some organizations, like North Carolina, allow student athletes to capitalize from their athletic fame up to a certain monetary limit.¹⁰⁴ The North Carolina Athletic Association permits student athletes from accepting “a gift, merchandise, and more as a result of athletic ability and/or performance, as long as it does not exceed \$250.00 in value.”¹⁰⁵

C. The Remaining State Statutes and State Athletic Associations’ Regulations are Unclear

Unfortunately, many state statutes, executive actions, and state high school athletic associations’ regulations provide no guidance as to whether high school student athletes can monetize their NIL.¹⁰⁶ Statutorily, apart from those mentioned above, every other state either: (1) has an enacted NIL statute or declared executive order,¹⁰⁷ which does not address high school student athletes;¹⁰⁸ or (2) has yet to pass an NIL statute.¹⁰⁹ This results in uncertainty for high school student athletes who lack guidance from state policy-

101. These states include Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Virginia, Wisconsin, and Wyoming. *See Keller, supra* note 72.

102. *See Heitner, supra* note 35.

103. 2021-22 MSHSAA *Official Handbook*, MSHSAA 59, <https://www.mshsaa.org/resources/pdf/Official%20Handbook.pdf> (last visited Nov. 29, 2021).

104. *See Heitner, supra* note 35.

105. *North Carolina High School Athletic Association Handbook 2021-2022 Edition*, NCHSAA 26, <https://www.nchsaa.org/sites/default/files/NCHSAA%20Handbook%202021-2022%20WEB%2010062021.pdf> (last visited Nov. 29, 2021).

106. *See Keller, supra* note 72 (outlining each state’s statutes’, executive actions’ and athletic associations’ stance on high school NIL).

107. In the aftermath of the NCAA’s announcement allowing NIL for student athletes, state Governors in Kentucky, North Carolina, and Ohio issued executive orders implementing NIL policies for their state. *See Tracker: Name, Image and Likeness Legislation by State, supra* note 80.

108. *See Heitner, supra* note 35 (calling it a “mistake” for states to not have included high school athletes in their NIL statutes).

109. *See Keller, supra* note 72.

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makers.¹¹⁰ As for state high school athletic associations, a large majority have regulations that also require clarification with regards to NIL rights, whether because the policies are unclear or NIL rights are not explicitly mentioned.¹¹¹ Thankfully, several states with unclear NIL policies have confirmed their regulations are under association consideration given the recent NIL liberation movement.¹¹²

Ultimately, without guidance from either the state government or state athletic association, many high school student athletes are less willing to engage with their NIL rights out of fear of inadvertently and unknowingly losing their eligibility.¹¹³

V. EFFECTS ON HIGH SCHOOL STUDENT ATHLETES - CONTINUED RUSH TOWARDS PROFESSIONALISM

Many states that have not explicitly granted high school student athletes NIL rights. The effect of such policies is clear: top high school student athletes are rushing towards their collegiate careers to capitalize off their NIL.¹¹⁴ Three prime examples are Quinn Ewers, Mikey Williams, and Jada Williams.

Quinn Ewers is a top quarterback prospect in the 2022 class, originally from Southlake, Texas and committed to play football at Ohio State.¹¹⁵ In August 2021, Ewers announced he would skip his senior season and senior year entirely at Southlake Carroll High School to instead enroll in Ohio State a year early.¹¹⁶ His tweet

110. See Mark Emmert, *Hearing Before the United States House of Representatives Subcommittee on Consumer Protection and Commerce*, H.R. COMM. ON ENERGY & COMMERCE (Sept. 30, 2021), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Emmert_CPC_2021.09.30.pdf (describing how college student athletes face the same confusion and inequity based on different state laws).

111. These include Arizona, Colorado, District of Columbia, Hawaii, Iowa, Louisiana, Maine, Minnesota, New Hampshire, Rhode Island, South Carolina, Washington, Utah, Vermont, Washington, and West Virginia. See Keller, *supra* note 72.

112. See *id.* (citing Idaho, Michigan, North Dakota, Ohio, Oregon, South Dakota, and Tennessee).

113. See Emmert, *supra* note 110 (“many are apprehen[sive] of taking advantage of these new [NIL] opportunities without clear guidance”).

114. See Longman & Thames, *supra* note 28 (detailing several examples of high school student athletes who are leaving high school early or changing high schools solely for the reason of having the ability to capitalize on their NIL rights).

115. See Dosh, *supra* note 82; Longman & Thames, *supra* note 28.

116. Quinn Ewers (@QuinnEwers), TWITTER (Aug. 2, 2021, 12:48 PM), <https://twitter.com/QuinnEwers/status/1422237898989088768> [<https://perma.cc/5RTL-H23S>]

Over the past few weeks, following Texas’ UIL informing me I would be prohibited from profiting off my own name, image and likeness, I’ve taken time to think about what lies ahead of me, both in the short- and

announcing his decision explains that part of his reasoning is due to the Texas statute that explicitly forbids him, along with every other high school student athlete, from capitalizing on his NIL without giving up high school eligibility.¹¹⁷ His decision has already led him to receive several sponsorship offers from both local and national companies, with one allegedly being “six figures.”¹¹⁸

Mikey Williams, from North Carolina, is the number seven basketball prospect according to ESPN’s list of top 100 players for the class of 2023.¹¹⁹ Due to the North Carolina High School Athletic Association’s rule that student athletes are not allowed to sign NIL deals,¹²⁰ Williams decided to stop playing for his public school, which is subject to the state athletic association’s rules, in order to capitalize on his NIL.¹²¹ Instead, Williams will play for Vertical Academy, a private high school not subject to the athletic association’s rules.¹²² Williams became the first high school basketball player to sign an NIL deal and has since signed with Excel Sports Management, a top sports agency, “[which] predicts he could make millions.”¹²³ As it currently stands, Williams has signed five NIL deals, including a multi-year deal with Puma in which he will be featured in its ads, events, and social media.¹²⁴ He currently has

long-term. It’s unfortunate I’ve found myself in this situation, as my preference would have been to complete my senior season at Southlake Carroll along with the teammates and friends I’ve taken the field alongside for the past three years. However, following conversations with my family and those I know have my best interests in mind, I’ve decided it’s time for me to enroll at Ohio State and begin my career as a Buckeye. This is not just a financial decision; this is about what is best for my football career. At 18, and with one final class about to be completed to earn my high-school degree, I feel it’s time to get the jump on my college career that is available to me.

Id.

117. *See id.*

118. *See Dosh, supra* note 82; *see Longman & Thames, supra* note 28. In a rather interesting turn of events, Quinn Ewers transferred from Ohio State to Texas, as announced in December 2021. *See* Deaniel Seahorn & Gerald Goodridge, *Ohio State Transfer QB Quinn Ewers Is Officially A Longhorn*, SBATION: BURNT ORANGE NATION (Dec. 15, 2021, 7:04 AM), <https://www.burntorangenation.com/2021/12/12/22830131/quinn-ewers-commits-texas-longhorns-transfer-2022-recruiting-steve-sarkisian> [<https://perma.cc/JA69-BTTR>].

119. *See Longman & Thames, supra* note 28.

120. *See North Carolina High School Athletic Association Handbook 2021-2022 Edition, supra* note 105.

121. *See Longman & Thames, supra* note 28.

122. *See id.*

123. *See id.*

124. *See Mikey Williams Shows Amateur Stars Can Cash In On NIL*, SPORTS BUS. J. (Oct. 27, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/10/28/Marketing-and-Sponsorship/Mikey-Williams.aspx?hl=NIL&sc=0>; *HS hoops star Mikey Williams signs with Puma*, SPORTS BUS. J. (Oct. 28, 2021), <https://www.sports>

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approximately 60,000 followers on Twitter and more than 3.3 million on Instagram, leading one commentator to describe him as “a model of what the amateur basketball player could look like in the future [with regards to NIL].”¹²⁵

Although Ewers and Williams are not the first high school student athletes to grow impatient with “amateurism” policies, they are just two of the first in this new post-*Alston* era.¹²⁶ A recent addition to their ranks is Jada Williams, a 2023 UCLA basketball commit and number 21 ranked recruit in the country, according to ESPN.¹²⁷ Her skills and fame have amassed her over 12,000 followers on Twitter and 300,000 followers on Instagram.¹²⁸ In August 2021, Williams announced she would be leaving her public high school, Blue Springs High School in Missouri, and transferring to La Jolla Country Day in California.¹²⁹ While her reasoning is unknown, it should be noted that although Missouri’s NIL law does not discuss high school NIL opportunities, the Missouri State High School Activities Association explicitly forbids it.¹³⁰ Thus, if Williams had continued to play basketball at her Missouri public high school, she would not be able to sign NIL deals without forfeiting her high school eligibility.¹³¹ Since California’s Interscholastic Federation allows high schoolers to compensate off their NIL, she would be able to capitalize on her publicity rights without forfeiting eligibility.¹³² Shortly after Williams transferred to La Jolla Country Day, in October 2021, she signed her first NIL deal with Spalding’s Ambassador Program,

businessjournal.com/Daily/Closing-Bell/2021/10/28/Williams-Puma.aspx?hl=NIL&sc=0 [<https://perma.cc/5U6B-MWFL>].

125. *See id.*

126. *See* Longman & Thames, *supra* note 28 (describing story of Olivia Moultrie who forfeited her collegiate eligibility based on pre-*Alston* NCAA policies by signing an endorsement deal with Nike).

127. *See* Christovitch, *supra* note 76.

128. *See id.*

129. The Examiner Staff, *UCLA Basketball Commit Jada Williams Leaving Blue Springs High School for California*, EXAMINER (Aug. 13, 2021 2:09PM), <https://web.archive.org/web/20211013130019/https://www.examiner.net/story/sports/high-school/basketball/2021/08/13/jada-williams-leaving-blue-springs-basketball-missouri-la-jolla-california-ucla/8125963002/> [<https://perma.cc/93DK-6EZ6>].

130. *See* 2021-22 MSHSAA *Official Handbook*, *supra* note 103 (stating an athlete must be an amateur to compete and a student athlete forfeits such amateur status when they are compensated or capitalize on their athletic fame).

131. *See id.*

132. *See* *Constitution, Bylaws & State Championship Regulations 2021-22*, *supra* note 82.

joining other famous professional basketball players in the marketing enterprise.¹³³

These three examples indicate that student athletes are circumventing states' and state high school athletic associations' restrictions on NIL rights, by moving to states or institutions that allow NIL opportunities, to support themselves and their families. The rush to professionalism remains, albeit imposed unjustly by state actors. But what about those high school student athletes who cannot afford to move states, pay for private school education, or need to stay a few more years in high school to support their family for longer? They are losing out on the ability to make a lot of money, just look at the five-star 2023 recruit who just signed an NIL deal that would pay him \$350,000 on the spot and could pay him more than \$8 million by the end of his college junior year.¹³⁴

VI. CURRENT LITIGATION: FLORIDA HIGH SCHOOL STUDENT ATHLETES V. FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION

Under its Bylaws, the Florida High School Athletic Association (“FHSAA”) currently prohibits high school student athletes from capitalizing on their NIL.¹³⁵ Specifically, provision 9.9, “Amateurism,” explicitly forbids a student athlete from “capitalizing on athletic fame by receiving money or gifts of a monetary value” or else they lose their high school eligibility.¹³⁶ But given the recent NIL liberation, high school student athletes brought suit against the FHSAA and the NFHS challenging such prohibition.¹³⁷

133. See Amanda Christovitch, *High Schoolers Already Profiting*, FRONT OFFICE SPORTS (October 8, 2021), <https://frontofficesports.com/high-schoolers-already-profiting/> [perma.cc/K242-B49R] (acknowledging Williams would not have been able to sign this deal previously if she remained at Blue Springs High School in Missouri, due to Missouri’s ban).

134. See Stewart Mandel, *Five-Star Recruit in Class of 2023 Signs Agreement With Collective That Could Pay More Than \$8 Million*, ATHLETIC (Mar. 11, 2022), <https://theathletic.com/3178558/2022/03/11/five-star-recruit-in-class-of-2023-signs-agreement-with-collective-that-could-pay-him-more-than-8-million/?redirected=1> [https://perma.cc/F4QB-BTBM].

135. See *Bylaws of the Florida High School Athletic Association*, FHSAA 32, https://s3.amazonaws.com/fhsaa.org/documents/2021/6/29/2122_handbook_web.pdf (last visited Jan. 30, 2022).

136. See *id.*

137. Complaint, *Stewart v. Fla. High School Athletic Assoc., Inc.*, No. 22-427-ca-01 (Fla. 11th Cir. Ct. Jan. 10, 2022) (bringing claims against the FHSAA, NFHS, and NCAA and seeking to include high school athletes and intercollegiate athletes in its “class” with each group bringing claims against its respective defendants). For relevance purposes, this Note will only describe the claims in connection to high school student athletes, the FHSAA, and NFHS.

Filed in Florida state court, specifically the Eleventh Judicial Circuit for Miami-Dade County, on January 10, 2022, plaintiffs in this class action allege that by not allowing them the opportunity to capitalize off their NIL, the defendants are violating of the Florida Constitution and the Florida Antitrust Act.¹³⁸ Specifically, plaintiffs claim that the FHSAA's NIL restraints are unconstitutional under the Florida Constitution because they infringe upon the high school student athlete's guaranteed freedom to contract.¹³⁹ Additionally, plaintiffs claim defendants are in violation of the Florida Antitrust Act for several reasons.¹⁴⁰ First, plaintiffs allege the NIL prohibition "constitutes an anticompetitive, horizontal agreement among competitors to fix artificially the remuneration for the services of high school athletes" and results in "an unlawful group boycott of any institutions or high school athletes who would not comply with these unlawful price fixing arrangements" (both of which are per se unlawful).¹⁴¹ Second, they claim such restraints are also "an unreasonable restraint of trade under the rule of reason analysis" since "[t]he FHSAA has power in the relevant markets for the services of top-tier high school athletes."¹⁴²

While it may be a while until a final decision on the merits is given, this case stands for the growing discontent and frustration among high school student athletes with their inability to monetize their NIL. The "rush to professionalism" rhetoric may be the case for several student athletes, but many are not as fortunate to be able to move states, pay for private school, or leave home a few years early so they can take advantage of NIL opportunities. So, for those less privileged, sadly the "NIL revolution" is meaningless, and they continue to be disadvantaged by state regulations.

With these clear effects in mind though, a question remains: should high school student athletes even be allowed to monetize off their NIL rights?

VII. POLICY ARGUMENTS FOR AND AGAINST GIVING HIGH SCHOOL STUDENT ATHLETES NIL RIGHTS

There exist many arguments in favor of affording high school student athletes the ability to monetize off their NIL. As for the

138. *See id.* at 3.

139. *See id.* at 15; *see also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (stating high school athletic associations are considered "state actors" and thus accountable to state and U.S. constitutions).

140. *See* Complaint, *supra* note 139 at 14.

141. *See id.*

142. *See id.*

arguments against, many are unconvincing. However, some make credible points. Regardless, those concerns can be best addressed through regulating legislation and should not forbid NIL rights from high school student athletes altogether.

A. Arguments *For* High School Student Athlete NIL Rights

The standard argument for high school student athlete NIL rights is that it would eliminate the continued rush to professionalism trend. Under this argument, high school student athlete would no longer need to choose financial support over collegiate athletic careers. However, there are several other strong reasons why these athletes should be able to capitalize on their rights of publicity.

1. *Difficulty Differentiating between Capitalizing off Athletic Fame or Social Media Popularity*

With the increasing popularity of social media and its ever-growing platforms, it is becoming more difficult to distinguish whether a student athlete is “capitalizing on their athletic fame and being a social media influencer.”¹⁴³ Some of the top student athletes have social media followings “as impressive as their athletic statistics.”¹⁴⁴ Mikey Williams, for example, has amassed over 3 million followers on his combined social media accounts.¹⁴⁵ While he is one of the top basketball recruits in the nation, he also is a “content creator,” having garnered a large following before rising to high school basketball greatness.¹⁴⁶ This rationale is one of the main drivers behind the California Interscholastic Association’s policies allowing high school athletes to monetize off their rights of publicity.¹⁴⁷ Due to the large number of child actors in California, the California Interscholastic Association was worried about a high school student athlete being declared ineligible to participate due

143. See Longman & Thames, *supra* note 28 (pointing to Mikey Williams as a great example since he is a phenomenal basketball player but also has amassed a huge social media following as a content creator).

144. See *High School Athletics Starting to Grapple with NIL Issues*, SPORTS BUS. J. (Aug. 15, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/08/16/Marketing-and-Sponsorship/High-School.aspx?hl=NIL&sc=0> [https://perma.cc/XSS7-JUBF].

145. See Longman & Thames, *supra* note 28.

146. *Id.*

147. See Heitner, *supra* note 35 (“One justification for [the California Interscholastic Federation’s allowance of high school NIL] has been the sheer number of child actors in the state. . . [i]t is incredibly difficult to determine whether athletes are earning compensation based on their athletic fame, entertainment fame, scholastic achievement, online personalities, etc.”).

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to their fame.¹⁴⁸ Given the “incredibl[e] difficult[y] to determine whether athletes are earning compensation based on their athletic fame, entertainment fame, scholastic achievement, [or] online personalities. . .,” amateur status is not impacted by compensation.¹⁴⁹ New York’s state athletic association’s recent regulation change was due to a similar reason.¹⁵⁰ Ultimately, high schoolers should not be penalized for capitalizing on their social media fame just because they are a student athlete.

2. *High School Student Athletes Cannot Hold Regular Jobs to Make Money Otherwise*

Being an average varsity high school student athlete requires a lot of dedication, commitment, and time management. A typical day consists of attending classes from 8am to 3pm, participating in team practice or playing in a game from 3pm to 6pm, and then going home to eat dinner and do homework from 6pm to 10pm. But to be a standout athlete, the student must also commit to workouts either before the school day or after practice and play on an outside travel team (with its own mandatory trainings, practice, and out-of-state tournaments). Off season training is even more demanding as this is when most travel teams play their respective seasons. These students do not have the time capacity to work a job, let alone an entry level position that typically varies the hours and days the employee must work. Most of the time, an employer does not even want to hire a student athlete either since it would cause them lots of difficulty in scheduling the student athlete’s shifts. Given the inability for high school student athletes to hold a job, they should not be penalized for their commitment and dedication.¹⁵¹ The difference between a high school student athlete scaling back their sports participation to work for minimum wage on weekends or during the summer and a high school student athlete signing an endorsement deal for \$1500 is the latter student athlete does not have to give up their passion.¹⁵² As one legendary coach put it, who

148. *See id.*

149. *Id.*

150. For a discussion of the similar reasoning, see *supra* Part IV, Section A.

151. *See* Longman & Thames, *supra* note 28 (“If a student-athlete is able on weekends or during the summer to work at a car dealership and make \$15 an hour washing cars, why is it that same student wouldn’t be able to entice people to purchase a car from that same dealership and make \$1,500?”).

152. *See id.*

are we to prevent high school student athletes from “monetizing their passion?”¹⁵³

3. *High School Athletics Has Become Big Business*

Just as the NCAA, its member schools, coaches, and conferences are making millions of dollars off collegiate athletes, high schools around the country are capitalizing just the same off their student athletes.¹⁵⁴ For example, Quinn Ewers’ former high school, Southlake Carrol Senior High School, in Southlake, Texas, plays at a \$15 million football stadium and played their season opener at AT&T Stadium, home of the Dallas Cowboys.¹⁵⁵ Similarly, Allen High School, located in Dallas, Texas, plays at a \$60 million stadium.¹⁵⁶ Other high school stadiums have inked naming rights deals, earning the school hundreds of thousands of dollars.¹⁵⁷ Even aside from football, several states, such as New York and California, have negotiated broadcasting contracts with networks to televise all types of high school athletic contests.¹⁵⁸ Obviously there exists the argument, similar to collegiate athletes, that high school student athletes should receive a portion of the revenue that they generate.¹⁵⁹ Though the more interesting argument is that by celebrating their high school student athletes, schools may see more fans in the stands and money from their boosters.¹⁶⁰ But if high school student athletes are forbidden from using their NIL rights, they are more willing to leave the high school altogether (leaving for college early, transferring to a private school, or even only playing for outside club teams).¹⁶¹ This would result in a major loss of talent, chances for a state championship, and ultimately money for high schools. Thus, allowing for high school student ath-

153. *Id.*

154. For a discussion of others capitalizing off their student athletes, see *infra* notes 155-161 and accompanying text.

155. See Longman & Thames, *supra* note 28.

156. See *id.*

157. See Mark Koba, *High School Sports Have Turned Into Big Business*, CNBC (Dec. 11, 2012, 5:27 PM), <https://www.cnbc.com/id/100001024> [<https://perma.cc/Y3LL-899Q>] (detailing three different naming rights deals for high school stadiums, each worth hundreds of thousands of dollars).

158. See *id.*

159. For a discussion of existing arguments, see *supra* Part I and II.

160. See Longman & Thames, *supra* note 28 (“[I]f a school does it right, they’re going to celebrate their athletes being marketable and they might see more fans in the stands.”).

161. For a discussion of high school athletes pursuing professionalism, see *supra* Part V.

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letes to monetize their NIL would not only help student athletes, but would also advantage the high schools themselves.

4. *Incentive to Stick with Athletics for the Good of the Athlete and Society*

By demanding a student athlete choose between athletics and financially supporting themselves and their families, states and state athletic associations are forcing that student to give up an extremely beneficial activity.¹⁶² Not only do sports teach athletes essential life skills (such as self-discipline, determination, commitment, and more), but sports also generally keep teens on a path destined for success.¹⁶³ With less time on their hands, student athletes are less likely to get into trouble.¹⁶⁴ Additionally, high school athletics require a minimum GPA level to participate, encouraging students to also dedicate themselves to their studies.¹⁶⁵ Not only is high school athletics important for student development, but it influences the next generation who view these athletes as role models. Thus, by giving high school student athletes NIL rights, they are more likely to stick with athletics, benefitting themselves and future student athletes. Colleen Maguire, the Executive Director of the New Jersey State Interscholastic Athletic Association expressed a similar sentiment: “If kids who love playing a sport realize there’s a way to stay involved in the sport, it’s better for everyone. . . [w]e need them to turn into coaches. . . to turn into officials. . . [i]t’s an unintended consequence, but it could turn into a positive.”¹⁶⁶

162. See Derrick Meador, *The Increasingly Important Role of Athletics in Schools*, THOUGHTCO. (Jan. 21, 2020), <https://www.thoughtco.com/important-role-of-athletics-in-schools-3194429> [<https://perma.cc/3KQ9-YFLH>] (discussing positive impact of youth sports on children and teenagers).

163. See *id.* (“Athletics is powerful because it can bridge gaps, bring people who otherwise might not interact together, and provide opportunities not available elsewhere.”).

164. See Janece Bass, *Does Participation in Sports Keep Teens Out of Trouble?*, MODERN MOM, <https://www.modernmom.com/95582028-3b45-11e3-8407-bc764e04a41e.html> [<https://perma.cc/V5MQ-JQ9Z>] (last visited Nov. 30, 2021) (“When teens are busy doing positive things, they don’t have as much time to get into trouble.”).

165. See Meador, *supra* note 162 (“[Minimum GPA requirements teach] athletes to value their classes and earn the privilege of playing sports.”).

166. Mike McGarry, *New Jersey High School Athletes May Be Eligible for Name, Image and Likeness Deals*, PRESS OF ATLANTIC CITY (Sept. 15, 2021), https://pressofatlanticcity.com/sports/local/new-jersey-high-school-athletes-may-be-eligible-for-name-image-and-likeness-deals/article_a63e37a4-1659-11e3-82d8-dbe38ea5bb84.html [<https://perma.cc/NG88-NLQL>].

B. Unconvincing Arguments *Against* High School Student Athlete NIL Rights

In response to the many strong arguments in favor of giving high school student athletes NIL rights, prominent figures have been zealously vocal in expressing several arguments in opposition. Ultimately, these reasons are weak and unconvincing. The three most prevalent, as explored below, are arguments that have been around for years as being originally used against collegiate NIL rights. Now, they are just re-branded and offered against high schoolers instead. But just as the Supreme Court and the large majority of people have dismissed these arguments against collegiate NIL, the same should be done for high school NIL.

1. *Wait & See NIL's Impact on College Athletes Before Giving to High School Student Athletes*

One expressed concern is that state legislatures wanted to confront the impact of NIL on college athletes before affording such opportunities to high school student athletes.¹⁶⁷ This concern is labeled the wait and see approach. While this concern only addresses the few states that have NIL statutes mentioning high schoolers, it is not an excuse for state high school athletic associations which still maintain such restrictions.

Regardless, this argument is a re-boxing of the many concerns regarding high school student athlete NIL rights. Why is there concern over high school student athlete's rights of publicity? Many arguments against can easily be addressed. Regardless, this population should cause less worry anyways since a majority of high school student athletes likely will not be bringing in millions of dollars from such deals.¹⁶⁸ But for that athlete, even the slightest amount of compensation could allow them to support themselves and their families, instead of being forced to choose one over the other.

167. See Chris Hummer, *An Unanticipated Result: Quinn Ewers' Decision, The Future of Texas NIL Laws for HS Athletes*, 247SPORTS (Aug. 11, 2021, 11:32 AM), <https://247sports.com/Article/Quinn-Ewers-leaves-high-school-early-Texas-name-image-and-likeness-law-Ohio-State-football-168992634/> [https://perma.cc/QS2K-2AFP] (“Senator Royce West, the author of [Texas Senate Bill preventing high school athletes from being compensated], said he wanted college athletes to be a ‘pilot program’ before taking up the issue with high school athletes.”).

168. See Longman & Thames, *supra* note 28 (“For most high school athletes, though, monetizing their name, image and likeness will amount to a ‘couple hundred bucks’ . . .”).

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2. *Concern over NIL's Impact on the Purity of High School Sports and its Essential Feature: Amateurism*

Another prevalent concern is that high school student athlete NIL opportunities will blur the lines between professional athletes and high school student athletes, disturbing the amateurism distinction which is integral to high school athletics.¹⁶⁹ High school sports should be about the team, “not an individual’s own personal pursuit of excellence.”¹⁷⁰ Adding NIL into this atmosphere will put self-interest over the team, disrupting the high school locker room environment, generating tension and jealousy amongst teammates, and creating awkward situations where players make more than their coach.¹⁷¹ So by eliminating NIL opportunities altogether, these situations are much less likely to occur.

There are many counterarguments here. First, NIL will not disrupt “amateurism” since “pay-for-play” restrictions are still in place within the NCAA.¹⁷² High school student athletes, like college student athletes, will not be similar in any way to professional athletes who are paid for their services. Second, tension within the locker room and on the field has been occurring long before NIL was an opportunity. Competition for college recruiting, for post-season awards, for playing time, and other issues have long caused drama. Additionally, NIL has so far not caused many issues amongst college teammates, so the same should be the case for high schoolers too.¹⁷³ Third, locker-room tension does not impact many sports

169. See Niehoff, *supra* note 78; Roman Stubbs, *High School Sports Will Feel the Impact of NIL Changes. For Some, That’s Cause for Concern.*, WASH. POST (June 21, 2021, 7:00 AM), <https://www.washingtonpost.com/sports/2021/06/21/nil-changes-high-school-sports/> [<https://perma.cc/3KMK-N463>].

170. See Niehoff, *supra* note 78.

171. See Longman & Thames, *supra* note 28 (interviewing Joe Martin, executive director of Texas High School Coaches Association, who suspects the dangers of NIL outweigh the benefit to the athletes).

172. See *Quick Guide to New NCAA Interim Policy*, *supra* note 60 (outlining current NIL restrictions still in place for college athletics, including “pay-for-play”).

173. See Dean Straka, *NIL: Alabama’s Nick Saban Says Equality In The Locker Room Is His “Biggest Concern” As Players Ink Deals*, 247SPORTS (Aug. 21, 2021, 1:00 PM), <https://247sports.com/Article/NIL-alabama-Nick-Saban-says-equality-in-locker-room-is-his-biggest-concern-Bryce-Young-seven-figures—169309397/> [<https://perma.cc/2RZN-2TX2>] (reporting Nick Saban’s biggest concern of NIL’s impact is equality in the locker room, but he has yet to hear any complaints); Dean Straka, *Texas LB DeMarvion Overshown Dismisses Talk Of NIL Deals Dividing Locker Room: “We All Want Each Other To Eat”*, 247SPORTS (July 9, 2021, 8:01 AM), <https://247sports.com/Article/texas-football-linebacker-demarvion-overshown-nil-endorsement-money-dividing-locker-room-167583097/> [<https://perma.cc/66MC-TM2W>] (indicating that NIL deals have yet to divide Texas football’s locker room); JP Priester, *Dabo Swinney Details How NIL Has Affected Clemson Locker Room*, SPORTS ILLUSTRATED (Oct. 1, 2021), <https://www.si.com/college/clemson/football/dabo->

where the focus is on the individual: golf, tennis, wrestling, etc. Lastly, coaches should not be worried about their student athletes making more than them. They instead should be focused on mentoring their athletes and putting together the most successful team possible.

3. *High School Sports is a Privilege, like Any Other Extracurricular Activity and Academics Should Come First*

The last common argument is that high school sports are a privilege to participate in, just like any other extracurricular activity, and should be less of a priority than academics.¹⁷⁴ Sports, like speech and debate, mock trial, band, chorus, and theater are just “part of the overall high school experience, which, combined with academic studies, prepares these students for life.”¹⁷⁵ And for a majority of students, they play sports to have fun and spend time with their peers.¹⁷⁶ This argument is a broad generalization of the experiences of high school student athletes. There are students who must have priorities over academics, such as how to financially support themselves and their families. They use athletics, just like high school and college, as a steppingstone to make the professional leagues and to eventually be paid. If high school administrations are that concerned in keeping academics the priority, the already-in-place GPA minimum eligibility requirement ensures this anyways. Why should those who need the money from NIL be penalized because many others are in more fortunate positions?

C. Convincing Arguments Against High School Student Athlete NIL Rights Which Can Be Addressed Through Legislation

Although most arguments against high school student athlete NIL opportunities are unconvincing, there are two which hold some merit: concern over corruption (since many high schoolers are minors) and concern over the created incentive to recruit at the high school level. While these concerns are valid, they can easily be

swinney-addresses-how-nil-has-affected-clemson-tigers-locker-room [perma.cc/WF6J-9NEV] (detailing how NIL has not affected the Clemson football team’s locker room dynamics).

174. See Niehoff, *supra* note 78 (claiming *Alston* should not apply to high school athletes because high school athletics are vastly different from college athletics).

175. *See id.*

176. *See id.* (“The focus [of high school sports] is not on self but rather the team.”)

addressed through legislation to sufficiently protect these athletes. Therefore, these two claims should not be what entirely precludes high school student athletes from having the ability to monetize their NIL.

1. *Concern over Corruption Given Many High School Student Athletes are Minors*

Some critics argue there is a legitimate interest in protecting high school student athletes, who are minors, from corrupted and deceitful fraudsters who may try to take advantage of the unsuspecting youth.¹⁷⁷ So, by not allowing high school student athletes any opportunity to engage in NIL, the possibility of exploitation is eliminated. Nonetheless, there are other ways to ensure high school student athletes are protected without fully outlawing NIL rights.

One potential solution lies within state statutory and common law as contracts with minors are nearly universally regulated.¹⁷⁸ Most states consider contracts entered into and signed by minors as voidable.¹⁷⁹ Also known as the infancy doctrine, this rule was adopted precisely to “protect minors ‘from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them. . ..’”¹⁸⁰ In such jurisdictions, if a high school student athlete enters into a contract that later turns out to be fraudulent or false-hearted, they can ask a court to declare the contract void.¹⁸¹ Some states, on the other hand, require judicial consent to form a contract with minors.¹⁸² In Florida, for example, a contract with a minor to monetize their rights of publicity

177. See Kristi Dosh, *Uncertainty Remains For High School Student Athletes On NIL Rights*, FORBES (July 31, 2021, 9:30 PM), <https://www.forbes.com/sites/kristidosh/2021/07/31/uncertainty-remains-for-high-school-student-athletes-on-nil-rights/?sh=37fb85c14e00> [https://perma.cc/LQP4-9UZ8] (reporting Dr. Karissa Niehoff’s greatest concern about NIL at the high school level is high school athletes being taken advantage of).

178. See Thomas R. Young, LEGAL RTS. CHILD REV. 3D *The Right Of A Child To Make Contracts And Disaffirm Them §10:1*, Westlaw (database updated Nov. 2021) (explaining how child contracts are created and regulated).

179. See generally Steven W. Feldman, 21 TENN. PRAC. CONT. L. AND PRAC. *Capacity-Infants-Disaffirmance §3:11* (database updated Sept. 2021); Michele Hughes, MD. L. ENCYC. INFANTS AND MINORS *Contracts of minors, generally §62* (database updated Dec. 2021); Wallace v. Francis, 103 So.3d 831 (Ala. Civ. App. 1958).

180. Young, *supra* note 178.

181. See *id.* (explaining how in jurisdictions that dictate child contracts as voidable, simply going to a court and asking for it to be voided will end the contract).

182. See, e.g., FLA. STAT. §743.08 (imposing judicial consent requirement before a minor can create a contract).

is valid so long as it is approved by a circuit court.¹⁸³ That court will not approved such contract unless they have written consent from a parent/legal guardian and the contract's term does not extend more than three years.¹⁸⁴ Therefore, state statutory and common law provide a solution to this concern. Nevertheless, if a fear of minors being taken advantage of remains, regulating legislation could include a provision mandating NIL contracts be signed by a parent/legal guardian, approved of by a student athlete's school, and/or sanctioned by a court. Any of these options would ensure a person with legal capacity to contract has approved the agreement and ensured its legitimacy.

Another solution to this concern falls within contract law's defenses to breach of contract actions. Even if a high school student athlete entered into a deceitful contract, they could plainly not perform. If the counterparty sues for breach of contract, the athlete could assert several defenses including fraud and/or unconscionability.¹⁸⁵ An unconscionability defense could be a strong argument since the high school student athlete is likely in a position of lesser bargaining power and could have felt compelled to enter into the NIL contract.¹⁸⁶

A final option to address this concern would be to allow high school student athletes the option to hire an agent or other "professional service provider" solely for the purpose of advisement on an NIL deal, just as state NIL statutes allow for collegiate student ath-

183. *See id.*

184. *See* FLA. STAT. §1006.74 (noting such judicial consent is also required under Florida's NIL Law, although it only applies to collegiate athletes). "An intercollegiate athlete under 18 years of age must have any contract for compensation for the use of her or his name, image, or likeness approved under §743.08." *Id.*

185. *See* Jay G. Safer, N.Y. PRACTICE SERIES – COM. LITIG. IN N.Y. STATE *Cts* Defenses to Breach of Contract Actions §89:21, Westlaw (database updated Oct. 2021); Jay G. Safer, N.Y. PRACTICE SERIES – COM. LITIG. IN N.Y. STATE *Cts* Defenses to Breach of Contract Actions – Fraud §89:24, Westlaw (database updated Oct. 2021).

186. *See* Jay G. Safer, N.Y. PRACTICE SERIES – COM. LITIG. IN N.Y. STATE *Cts* Defenses to Breach of Contract Actions – Unconscionability §89:31, Westlaw (database updated Oct. 2021). Unconscionability is a defense to a previously formed contract. If a party can successfully prove to a decisionmaker that the party had no meaningful choice as to whether to enter the contract and its terms were unreasonably favorable to its counterparty, they can have the contract declared null and void. Some factors the court considers in determining this include "size and commercial setting of the transaction, whether deceptive or high-pressure tactics were used, the use of fine print in the contract, the relative bargaining power of the parties, and the experience and education of the party claiming unconscionability." The purpose behind the unconscionability defense is to "protect the 'commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor . . .'" *Id.*

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letes.¹⁸⁷ Any of these additional clarifications added into state NIL statutes or state high school athletic association regulations could quell this concern.

2. *Concern over the Created Incentive to Recruit at the High School Level*

Some have expressed concerns over the potential that NIL will create an opportunity for “high school recruiting,” where schools and donors offer incentives for student athletes to attend one school over another.¹⁸⁸ By directing funds at players as inducement to attend or transfer, there is an opportunity for NIL deal abuse, especially in situations where a school has an “. . . active alumni group that could generate more NIL opportunities” or caters to wealthier families.¹⁸⁹ While this may be a legitimate fear, the NCAA’s Interim NIL Policy allows for college student athletes to enter NIL deals with school boosters while still maintaining an “impermissible recruiting inducements” prohibition.¹⁹⁰

Although an outright ban of NIL deals with school boosters could solve the problem, there are instead ways to police these deals to ensure no high school recruiting. One way would be to include prohibitions on such inducements, such as the one the NCAA still maintains.¹⁹¹ Such provision could also specifically limit the number of NIL deals a player could enter into and the amount of compensation a player could receive when such agreement is connected to a school’s donor, alumni, or parent. Additionally, requiring that high school student athletes and counterparties both report the sponsorship or endorsement agreement to the school would allow for an extra level of oversight. Ultimately, the arguments in favor of giving high school student athletes NIL rights outweigh those against, especially when the convincing points could be incorporated into regulating legislation.

187. See *Quick Guide to New NCAA Interim Policy*, *supra* note 60 (describing the NCAA’s policy of permitting the hiring of a “professional service provider” to provide collegiate student athletes advice on NIL deals).

188. See Longman & Thames, *supra* note 28 (speculating “[e]scalated abuse of transfer rules as powerhouse high schools recruit players on the promise that they can better build their brands with enhanced visibility.”).

189. See McGarry, *supra* note 166.

190. See *Name, Image and Likeness Policy: Question and Answer*, *supra* note 68.

191. See *Quick Guide to New NCAA Interim Policy*, *supra* note 60 (outlining the NCAA’s inducement restriction on all NIL deals).

VIII. HOW BEST TO GIVE HIGH SCHOOL STUDENT ATHLETES NIL RIGHTS?

Since high school student athletes should be afforded NIL rights and given its particularly convoluted “patchwork” of state legislation and regulation, the easiest and most efficient way to provide such opportunities is through federal legislation. While there currently is pending federal NIL legislation, none address high school student athletes. Therefore, not only should these proposals be amended specifically to address high school NIL, but they should include various protectionist provisions, including those to address the meritorious concerns against giving high school student athletes NIL rights.

A. Proposed Federal Legislation and the Need for Congressional Intervention for High School Student Athletes

NCAA President Mark Emmert is currently pushing for a federal NIL bill, stating that a national standard is necessary and such policy should be as pro-athlete as possible.¹⁹² Congress appears to agree with Emmert.¹⁹³ On September 30, 2021, the Consumer Protection and Commerce Subcommittee of the House’s Committee on Energy & Commerce held a hearing, entitled “A Level Playing Field: College Athletes Rights to Their Name, Image, and Likeness,” exploring NIL legislation.¹⁹⁴ Furthermore, there are currently seven different bills in various stages of the legislative process.¹⁹⁵ All of these bills are similar in many ways, although spe-

192. *NCAA’s Emmert pushes Congress for NIL Bill*, SPORTS BUS. J.: MORNING BUZZ (Oct. 1, 2021), <https://www.sportsbusinessjournal.com/Daily/Morning-Buzz/2021/10/01/NLRB.aspx> [<https://perma.cc/99JH-VULZ>].

193. *See* Congresswoman Lori Trahan (@RepLoriTrahan), TWITTER (Sep. 30, 2021, 5:11 PM), <https://twitter.com/RepLoriTrahan/status/1443685011841028100> [<https://perma.cc/RFR7-VJY2>] (“[T]hese are opportunities. . . that students can take enormous advantage of. . . they can generate some revenue, whether it’s modest or large, I think that’s all very helpful. . .”).

194. *Hearing on “A Level Playing Field: College Athletes’ Rights to Their Name, Image, and Likeness,”* H.R. COMM. ON ENERGY & COMMERCE, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-a-level-playing-field-college-athletes-rights-to-their-name> [<https://perma.cc/2PX3-PFA4>] (last visited Nov. 29, 2021).

195. The seven bills are: the “Amateur Athletes Protection and Compensation Act of 2021” (S.414); the “College Athlete Economic Freedom Act” (S.238); the “College Athlete Bill of Rights” (S.5062); the “Collegiate Athlete Compensation Rights Act” (S.5003); the “Student Athlete Level Playing Field Act” (S.8382); the “Student-Athlete Equity Act” (H.R.1804); and the “Fairness in Collegiate Athletics Act” (S.4004). Amateur Athletes Protection and Compensation Act of 2021, S.414, 117th Cong. (2021); College Athlete Economic Freedom Act, S.238, 117th Cong. (2021); College Athlete Bill of Rights, S.5062, 116th Con. (2020); Collegiate Athlete Compensation Rights Act, S.5003, 116th Cong. (2020); Student Athlete Level

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cific statutory provisions differ.¹⁹⁶ Unfortunately, none of these bills nor any of the written or verbal testimony from the House's NIL hearing discuss high school, high school student athletes, or prospective student athletes. Even just a general search through all documents yields no mentions of any of these words.

Nevertheless, just as it is the "wild west" for collegiate student athletes, the same can be said for high school student athletes.¹⁹⁷ As a result of the existing patchwork of legislation, high schoolers have greater apprehension to engage with NIL opportunities.¹⁹⁸ While states could amend NIL statutes and state high school athletic associations could revise their NIL regulations, both processes are long and arduous. Instead, preemption of all state policies by a single, comprehensive federal legislation is the best way to liberate high school student athlete NIL rights.¹⁹⁹ Federal legislation would set a uniform standard to protect all student athletes from corrupted, deceitful third-parties and to provide clear guidance so each can make informed and educated NIL decisions.²⁰⁰ As expressed by President Emmert, "[a] single federal framework is essential to protect student athletes and ensure they benefit from their NIL in an environment that is fair to themselves, their teammates and other student athletes."²⁰¹

B. Proposal for a Federal NIL Statute that Grants High School NIL Rights While Protecting Student Athletes

Although each proposed congressional NIL bill has its advantages and disadvantages, regardless, high school student athlete NIL rights need to be addressed. In examining the arguments for

Playing Field Act, H.R.8382, 116th Cong. (2020); Student-Athlete Equity Act, H.R.1804, 116th Cong. (2019); Fairness in Collegiate Athletics Act, S.4004, 116th Congress (2020). See *NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR LLP, <https://www.saul.com/nil-legislation-tracker> (last visited Nov. 7, 2021).

196. See Laura A. Ahrens & Gregg. E. Clifton, *Feature: "Game On" For College Athlete Compensation Changes at State and Federal Laws*, 33 S. C. LAW. 53, 53-56 (Sept. 2021).

197. See Ross Dellenger, *Group of ACC Athletes Urge Congress to Pass National NIL Law*, SPORTS ILLUSTRATED (Sept. 23, 2021), <https://www.si.com/college/2021/09/23/acc-athletes-letter-congress-nil> [<https://perma.cc/YL2N-8XLZ>] (referring to the current stage of NCAA NIL legislation and regulation as the "wild west").

198. See Emmert, *supra* note 110 (observing how the differences in state statutes and executive actions are causing confusion and anxiety for college athletes).

199. The United States Constitution's Supremacy Clause ensures that every state is bound by federal law. See U.S. CONST. Article VI.

200. See Emmert, *supra* note 110 (discussing how a Congressional NIL statute would create uniformity throughout the country, instead of the conflicting state by state legislation that is currently in place).

201. Emmert, *supra* note 110.

and against giving such student athletes the ability to monetize their rights of publicity, the benefits that result from such an opportunity outweigh the concerns. This is especially true when regulating legislation addresses the more convincing arguments against high school student athlete NIL opportunities.

Therefore, the optimal legislation should be pro-athlete while protectionist of both high school student athletes and the integrity of high school athletics. Broadly, federal legislation should be passed that explicitly grants high school student athletes the ability to capitalize off their athletic fame (by receiving money, compensation, endorsements, or gifts of monetary value) without impacting their high school eligibility, subject to several limitations. Firstly, there should be a School Identifier Limitation to ensure the athlete represents only themselves in commercial activity. Secondly, in compliance with the NCAA's Interim NIL Policy, the legislation should include prohibitions on "pay-for-play" and "improper recruiting inducements." Not only would these restrictions guarantee a high school student athlete's collegiate eligibility, but it would also preserve the distinction between amateur and professional sports. Additionally, explicit in the statute should be language that declares that the legislation shall preempt all state statutes, executive actions, and state high school athletic associations' regulations about student athlete NIL rights.

Now as to address the credible concerns on this issue, a mandatory high school reporting and approval requirement, reported by both the student athlete and the counterparty, needs to be included. Such obligation would allow the school to review all NIL deals and approve the contract before one of its student athletes enters into a deal. Although this would put more administrative demand on high schools, this would allow schools to police potential high school athletic recruiting. An added defense to ensure there is no improper recruiting at the high school level would be to include a limit on the number of NIL deals and/or the amount of compensation a high school student athlete can earn from or in affiliation with school boosters.

The reporting and approval requirement would also act as a guard against deceitful and unconscionable contracts, although each athlete should be afforded individualized protection. Therefore, federal legislation should allow for high school student athletes to use "professional service providers" (or agents) for NIL deal advisement while also requiring parent/legal guardian signature on all NIL contracts. Just as collegiate athletes are now being afforded

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the opportunity to hire an agent to assist with NIL sponsorship and endorsement contract drafting and interpretation, so should high school athletes.²⁰² If these student athletes can afford such services, representation would be the best safeguard against potential corruption. But, if high school student athletes cannot afford an agent's fees, then the parent/legal guardian requirement would ensure the contract is reviewed and approved of by an adult before the minor signs.

IX. CONCLUSION

We stand at the precipice of major change with regards to student athlete rights. A broad grant of NIL rights to high school student athletes, subject to various restrictions, would safely and securely give this population the rights they deserve. The collegiate student athlete NIL revolution should extend to high school student athletes and federal legislation is the way to guarantee that. Ultimately, as one law professor commented: "It is incomprehensible that one could argue that college athletes were unfairly prevented from enjoying these basic rights while another class of individuals, high school athletes, must remain shackled. If college athletes should never have had these rights taken away, then should not the same be true for high school athletes?"²⁰³

By including the above mentioned provisions in a federal NIL statute, high school student athletes will be afforded the opportunity to monetize their NIL while also being sufficiently protected.

202. See *Quick Guide to New NCAA Interim Policy*, *supra* note 60 (detailing the NCAA's policy of allowing collegiate student athletes to hire agents for purposes of NIL deal advisement and review).

203. Heitner, *supra* note 35.