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## Place Your Bets: An Analysis of Name, Image, and Likeness Deals with Barstool Sports

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## PLACE YOUR BETS: AN ANALYSIS OF NAME, IMAGE, AND LIKENESS DEALS WITH BARSTOOL SPORTS

### I. THE RAKE: AN INTRODUCTION TO THE NCAA AND THE CONTROVERSY AROUND COMPENSATING STUDENT-ATHLETES

At its inception, the National Collegiate Athletic Association (“NCAA”) was formed to protect young men who were being injured or even killed playing football.<sup>1</sup> However, the NCAA has grown from that original purpose to a multi-billion-dollar tax-exempt organization with twenty-four sports.<sup>2</sup> With that growth, public opinion regarding student-athletes not being able to earn revenue to preserve amateurism soured.<sup>3</sup> While the NCAA was earning billions off of student-athletes, reports were coming out every year of student-athletes living in their cars, working full time to afford housing, or experiencing food insecurity.<sup>4</sup> Further, the NCAA graduation rate for student-athletes receiving athletic scholarships is only sixty percent within six years of freshman enrollment.<sup>5</sup> Additionally, while Division I student-athletes are only

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1. See Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Aug. 6, 2013, 1:39 PM), [https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility\\_b\\_3020985](https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985) [<https://perma.cc/2KWC-96CT>] (describing original purpose of NCAA).

2. See *id.* (stating NCAA is tax-exempt entity worth billions of dollars); see also *What is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx#:~:text=in%2024%20sports%20across%203%20divisions> [<https://perma.cc/8ZWN-3WZV>] (last visited Nov. 12, 2022) (stating NCAA now has twenty-four sports and almost half of one million student-athletes participating annually).

3. See Michael Ricciardelli & Marty Appel, *By More Than 2-1, Public Says Student Athletes Should be Allowed to Profit from Use of Name/Image/Likeness; Number Opposed to Student Athlete Compensation Drops Dramatically*, SETON HALL UNIV. (Mar. 18, 2021), <https://www.shu.edu/business/news/sports-poll-public-favors-pay-for-student-athletes.cfm> [<https://perma.cc/8KEE-XHF3>] (finding fifty-six percent of general population in 2019 favored compensation of student-athletes).

4. See generally Matthew Dembicki, *Food, Housing Insecurity Among College Athletes*, COMMUNITY COLLEGE DAILY (Apr. 21, 2020), <https://www.ccdaily.com/2020/04/food-housing-insecurity-among-college-athletes/> [<https://perma.cc/6Y42-4JS2>] (finding twenty percent of student-athletes at two-year schools and fourteen percent of student-athletes at four-year universities were experiencing or had experienced homelessness while in school). The study also found that thirty-nine percent of student-athletes at two-year schools and twenty-three percent of student-athletes had experienced food insecurity while enrolled at school. See *id.* (noting rising costs of tuition and housing has led to students forgoing meal plans).

5. See *Why College Athletes Fail*, VARSITY EDGE, [https://www.varsityedge.com/why-college-athlete-fail/#.YXw\\_7EbMKfU](https://www.varsityedge.com/why-college-athlete-fail/#.YXw_7EbMKfU) [<https://perma.cc/R54Q-XFXE>] (last

permitted to spend twenty hours per week at practice, their practice schedule and team commitments are usually around forty hours per week.<sup>6</sup> Thus, student-athletes did not have time for academics and were taking “paper classes,” which were classes that did not meet and only required a final paper.<sup>7</sup>

The question of whether student-athletes were students or athletes first was answered definitively in 2020 as a result of the COVID-19 pandemic.<sup>8</sup> In a historic move, the NCAA Men’s and Women’s Basketball Tournaments were canceled in 2020.<sup>9</sup> However, in the fall of 2020, college football returned.<sup>10</sup> Yet, the majority of non-student-athletes did not return to campus, instead taking

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visited Oct. 29, 2021) (describing reasons behind sixty percent graduation rate for students on athletic scholarships).

6. See generally Peter Jacobs, *Here’s the Insane Amount of Time Student-Athletes Spend on Practice*, INSIDER (Jan. 27, 2015, 11:44 AM), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> [<https://perma.cc/PJ6B-5BGZ>] (stating that the average student-athlete exceeds twenty-hour restriction, affecting other aspects of their educational experience); see also Jake New, *What Off-Season?*, INSIDE HIGHER ED (May 8, 2015), <https://www.insidehighered.com/news/2015/05/08/college-athletes-say-they-devote-too-much-time-sports-year-round> [<https://perma.cc/6AT6-4MR7>] (explaining that it is common knowledge coaches get around twenty-hour per week limit on athletics). Coaches often call off-season workouts or weight-lifting sessions “voluntary,” but attendance is expected, and players sign in on a log that is given to the head coach. See *id.* (explaining student-athletes do not see these workouts as voluntary). Student-athletes report spending just as much time, if not more time, on their sport in the off-season, fueled by the expectation that voluntary events are mandatory and will affect playing time during the season. See *id.* (noting off-season can be more grueling than in-season for student-athletes). Further, during the season, the NCAA permits “travel days,” where the student-athlete is traveling to or from the competition, to be counted as rest days, thus eliminating true rest days from the student-athlete’s schedule. See *id.* (explaining a rest day may include an athlete traveling all day and not getting back to campus until late at night exhausted).

7. See Jacobs, *supra* note 6 (stating “paper classes” were offered because student-athletes were unable to attend class and needed to maintain credit and GPA requirements to stay NCAA-eligible).

8. For further discussion on how the gap between student-athletes and students was furthered due to the COVID-19 pandemic, see *infra* notes 9–14 and accompanying text.

9. See *NCAA Cancels Men’s and Women’s Basketball Championships due to Coronavirus Concerns*, NCAA (Mar. 17, 2020, 1:17 PM), <https://www.ncaa.com/live-updates/basketball-men/d1/ncaa-cancels-mens-and-womens-basketball-championships-due> [<https://perma.cc/KU7M-PUQT>] (citing concerns for pandemic as reason to cancel tournament).

10. See *Here’s Everything You Need to Know About Fall Sports*, NCAA (Aug. 25, 2020, 1:20 PM), <https://www.ncaa.com/live-updates/ncaa/ncaa-sports-news-schedule-changes-coronavirus-updates-all-sports> [<https://perma.cc/B8ME-US2B>] (stating six out of ten conferences had set up fall 2020 football schedules and intended to play).

online classes as schools cited concerns over spreading COVID-19.<sup>11</sup> Thus, television showed student-athletes playing in front of empty stadiums in order to generate revenue for the schools, television channels, and the NCAA.<sup>12</sup> The NCAA deemed it a health risk for fans to be at the games and for student-athletes to play at the games, however, the NCAA decided to have student-athletes play with no fans attending the games.<sup>13</sup> Over six thousand student-athletes or employees of school athletic departments had gotten COVID-19 in 2020, with the vast majority of the cases being reported after student-athletes and employees returned to campus for college football season.<sup>14</sup>

While all of this was occurring, the Ninth Circuit heard arguments to determine whether the NCAA could limit the education-based benefits schools could provide to their student-athletes.<sup>15</sup> In May 2020, the Ninth Circuit determined that the NCAA could not limit the education-based benefits.<sup>16</sup> After the Supreme Court affirmed the Ninth Circuit in the summer of 2021, the floodgates opened with regards to student-athlete compensation.<sup>17</sup> Days after

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11. See *eLearning Statistics*, THINK IMPACT, <https://www.thinkimpact.com/elearning-statistics/> [<https://perma.cc/73B7-PTFR>] (last visited Oct. 29, 2021) (finding ninety-eight percent of universities moved classes online in 2020).

12. See Adam Rittenberg, *Buckeyes AD Gene Smith: If Not Safe for Fans to Gather, Why for Athletes?*, ABC NEWS (Apr. 10, 2020), <https://abcnews.go.com/Sports/buckeyes-ad-gene-smith-safe-fans-gather-athletes/story?id=70089200> [<https://perma.cc/HZ3U-EGU5>] (stating that not playing college football would have huge impact on central Ohio's economy, home of Ohio State).

13. See *id.* (discussing that concern about health of student-athletes was not seen as high of priority as health of fans who would attend college football games).

14. See Alan Blinder, Lauryn Higgins, & Benjamin Guggenheim, *College Sports Has Reported at Least 6,629 Virus Cases. There are Many More.*, N.Y. TIMES (Dec. 12, 2020), <https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html> [<https://perma.cc/6UGX-M6FN>] (noting that this number is only out of publicly available data). The NCAA does not release the number of positive COVID-19 cases, and most universities also did not make their numbers public. See *id.* (keeping information confidential). Therefore, the number of 6,629 cases is only with sixty percent of the universities that compete at the highest level of college football reporting. See *id.* (explaining actual number is much higher).

15. See *Alston v. NCAA* (In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1243 (9th Cir. 2020) (stating issue on appeal as whether to affirm “an order enjoining the National Collegiate Athletic Association . . . from enforcing rules that restrict the education-related benefits that its member institutions may offer students who play Football Bowl Subdivision (“FBS”) football and Division I . . . basketball”).

16. See *id.* at 1244 (affirming lower court's order).

17. See *NCAA v. Alston*, 141 S.Ct. 2141, 2166 (2021) (affirming Ninth Circuit's decision to enjoin NCAA from limiting education-related benefits); see also Lan Kennedy-Davis & Meghan Kennedy, *College Athletes Should Proceed with Caution When Offered an Endorsement Deal Under New NIL Bill*, RUMBERGER KIRK (July 9, 2021), <https://www.rumberger.com/insights/college-athletes-should-proceed-with-cau->

the decision, the NCAA announced that student-athletes would be able to earn compensation from endorsement deals related to their Name, Image, and Likeness (“NIL”).<sup>18</sup> With NIL deals, student-athletes began receiving compensation in the form of money, cars, tuition, and even beer.<sup>19</sup>

Some NIL deals have raised eyebrows, with the public wondering if the deals are permitted.<sup>20</sup> One such deal, “Barstool Athletes,” where student-athletes are signing NIL deals with Barstool Sports (“Barstool”), a popular sports and content company, has raised heightened concern.<sup>21</sup> This Comment will examine what being a Barstool Athlete means and the potential conflicts between state NIL laws or the NCAA NIL policy with student-athletes becoming Barstool Athletes.<sup>22</sup> Part II of this Comment begins by discussing the background of how NIL came to be, starting with state legislation and the impact of the Supreme Court’s 2021 decision in *NCAA v. Alston*.<sup>23</sup> Part II of this Comment then discusses the regulation of

tion-when-offered-an-endorsement-deal-under-new-nil-bill/ [https://perma.cc/3SL9-Q6C2] (stating NIL floodgates have opened).

18. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [https://perma.cc/335K-EVTT] (permitting student-athletes to earn compensation based on their NIL and not violate NCAA’s policies).

19. See generally Matt Tait, *KU Guard Remy Martin Receives New Car as Part of NIL Deal with Crown Toyota*, KU SPORTS (Oct. 28, 2021), <http://www2.kusports.com/news/2021/oct/28/ku-guard-remy-martin-receives-new-car-part-nil-dea/> [https://perma.cc/M7QU-KNK7] (noting Martin’s new vehicle is part of NIL deal); see also Joseph Salvador, *FAU Quarterback N’Kosi Perry Signs First NIL Deal with Alcohol Company*, SPORTS ILLUSTRATED (Sept. 8, 2021), <https://www.si.com/college/2021/09/08/nkosi-perry-first-college-athlete-sign-nil-deal-alcohol-company> [https://perma.cc/C3TR-JLPJ] (stating that student-athletes NIL deal is believed to be first collegiate athlete deal with beer or liquor organization); see also Wilton Jackson, *BYU Football Strike NIL Deal to Pay Tuition for Walk-On Players*, SPORTS ILLUSTRATED (Aug. 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar> [https://perma.cc/G5FS-U68D] (noting that deal would cover tuition for all walk-on football players).

20. See Brendan Menapace, *Barstool Sports Has Signed Thousands of College Athletes to NIL Partnerships, But No One (Not Even Barstool) Seems to Know the Plan*, PROMO MARKETING MAGAZINE (Aug. 20, 2021), <https://magazine.promomarketing.com/article/barstool-is-trading-branded-merchandise-for-nil-rights-is-it-worth-it-for-athletes/> [https://perma.cc/F6RQ-BDUF] (noting concerns student-athletes are signing with Barstool are risking their athletic eligibility).

21. See *id.* (stating that uncertainty on what being “Barstool Athlete” is, as well as potential implications of Barstool, has led to concerns and discussions about whether student-athletes can sign with Barstool).

22. For further discussion on being a Barstool Athlete and potential conflicts with state NIL laws or the NCAA bylaws, see *infra* notes 137–278 and accompanying text.

23. For further discussion on the background of state NIL legislation and *NCAA v. Alston*, see *infra* notes 30–76 and accompanying text.

NIL, NIL deals, and the concerns that have come out of them.<sup>24</sup> Part II concludes by introducing Barstool Sports and the intersection between Barstool, Barstool Sportsbook, and Barstool Athletes.<sup>25</sup> Part III of this Comment analyzes Barstool Athletes.<sup>26</sup> Part III begins by analyzing the permissibility of Barstool Athletes in the thirteen states that offer Barstool Sportsbook.<sup>27</sup> Part III then analyzes an additional four states that have been mentioned at top targets to begin offering Barstool Sportsbook as soon as possible.<sup>28</sup> In Part IV, this Comment concludes by calling for federal legislation to set a uniform standard for all student-athlete NIL deals in order to level the playing field between student-athletes.<sup>29</sup>

## II. ACROSS THE BOARD: AN INTRODUCTION AND BACKGROUND ON NAME, IMAGE, AND LIKENESS AND BARSTOOL SPORTS

College athletics are intertwined with the fabric of American society.<sup>30</sup> By the end of the nineteenth century, there were concerns that college athletics had turned into “major commercial spectacles.”<sup>31</sup> Today, college athletics is a business for schools, the NCAA, the public, and student-athletes.<sup>32</sup> However, the NCAA only began discussing the possibility of allowing student-athletes to earn

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24. For further discussion on NIL deals, see *infra* notes 77–136 and accompanying text.

25. For further discussion on Barstool, see *infra* notes 137–184 and accompanying text.

26. For further discussion of Barstool Athletes, see *infra* notes 185–288 and accompanying text.

27. For further discussion of Barstool Athletes in states where Barstool Sportsbook operates, see *infra* notes 189–278 and accompanying text.

28. For further discussion on Barstool Athletes in states where Barstool Sportsbook has targeted to start operations, see *infra* notes 279–288 and accompanying text.

29. For further discussion of this Comment’s conclusion, see *infra* notes 289–312 and accompanying text.

30. See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10–11 (2000), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1393&context=sportslaw> [<https://perma.cc/22EY-Y72P>] (stating first collegiate event occurred in nineteenth century).

31. See *id.* at 11 (stating president of Harvard was concerned about state of college athletics as being out of control and meaning of academics had left sphere of college athletics).

32. See Abigail Johnson Hess, *Majority of College Students Say Student-Athletes Should be Paid, Survey Finds*, CNBC (Sept. 11, 2019, 12:53 PM), <https://www.cnbc.com/2019/09/11/student-athletes-should-get-paid-college-students-say.html> [<https://perma.cc/SQ3T-PBE9>] (stating public support is in favor of student-athletes being compensated).

NIL compensation in 2019.<sup>33</sup> In 2020, a working group appointed by the NCAA's Board of Directors completed their research and recommended to the NCAA that student-athletes should be able to receive NIL compensation but that there needed to be significant safeguards to protect student-athletes and ensure schools do not abuse NIL.<sup>34</sup> However, some states and student-athletes felt that the NCAA was not moving quickly enough, so states began passing NIL legislation.<sup>35</sup> After the Supreme Court issued a unanimous opinion against the NCAA, the NCAA quickly passed an interim NIL policy.<sup>36</sup> After the interim NIL policy went into effect, deals were immediately announced all over social media.<sup>37</sup>

#### A. Double or Nothing: How a Case about Education-Related Benefits Led to the NCAA Adopting Name, Image, and Likeness

For years, the NCAA, student-athletes, and the public have debated the pros and cons of student-athletes being compensated like professional athletes.<sup>38</sup> However, the conversation came to a head

33. See *NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations*, NCAA at 1–2 (Apr. 17, 2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf) [<https://perma.cc/NF9B-EMBR>] (stating NCAA created group in 2019 to begin discussing NIL).

34. See *id.* (voicing support for NIL, but with significant safeguards and protections).

35. See Madeline Coleman, *Florida Changes Course Again, Passes Amendment to Make NIL Law Effective July 1*, SPORTS ILLUSTRATED (Apr. 30, 2021), <https://www.si.com/college/2021/04/30/florida-nil-law-effective-july-2021-ncaa-athletes> [<https://perma.cc/B8V4-EZGS>] (describing immense support for Florida's NIL law to be passed and made effective as soon as possible).

36. See Brutlag Hosick, *supra* note 18 (permitting all student-athletes to engage in NIL deals “that are consistent with the law of the state where the school is located.”).

37. See Jada Allender, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. (July 1, 2021), <https://harvardjse.com/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-ncaa/> [<https://perma.cc/SBV2-X36R>] (noting deals were announced as soon as possible); see also Cassandra Negley, *Cavinder Twins Sign Endorsement with Boost Mobile on NIL Day, Showing Female Athletes Have Plenty to Gain*, YAHOO! SPORTS (July 1, 2021), [https://perma.cc/S8GU-3ND8](https://sports.yahoo.com/ncaa-nil-fresno-state-cavinder-twins-boost-mobile-endorsement-female-athletes-benefit-103459408.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAABylsI6pOiHrQCDiZu6SCekH9BG4rmf2rLUQKetmsbIF4eWfmuz9nB74b7bY8X7lik5FiuPbRjFSTI33IFEX8TK6-OIyr2yKIWvbnvZVc5qIMr3Az11rVMdBYCrm3KTTEFIMoviovahLi-HnY6hraUsC3Bryw3CLzRjDuPXuHJV)] (discussing NIL deals announced on social media).

38. See Sean Gregory, *March Madness is Back. And It's Going to the Supreme Court Too*, TIME (Mar. 17, 2021, 7:00 AM) <https://time.com/5947071/march-madness-college-athlete-pay/> [<https://perma.cc/VFV7-V7LV>] (explaining movement to

during the COVID-19 pandemic when student-athletes were openly being treated differently than their non-athlete peers.<sup>39</sup> Student-athletes were being told to play in a March Madness tournament where they risked contracting COVID-19 and were confined to a bubble, while making no money.<sup>40</sup> Meanwhile, March Madness provides the NCAA with over \$800 million annually.<sup>41</sup> During March Madness, the Supreme Court heard oral arguments in a case arguing that “the NCAA cannot limit education-related benefits for college athletes.”<sup>42</sup> This led to the Supreme Court releasing the landmark decision of *NCAA v. Alston* in the summer of 2021.<sup>43</sup> Even before the *Alston* decision, several states had legislation set to go into effect allowing for student-athletes to benefit from their NIL, so the NCAA decided to allow all student-athletes to benefit, regardless of whether their state had legislation or not.<sup>44</sup>

### 1. *State NIL Legislation Pre-Alston*

Before *Alston*, states discussed allowing student-athletes to make money off of their NIL as a recruiting tool.<sup>45</sup> California was the first state to pass NIL legislation but decided not to make the legislation operative until 2023.<sup>46</sup> The Bill put pressure on the

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pay college athletes has been discussed in media for years and had been gaining popular support with fans in past five years).

39. *See id.* (“Schools faced enormous pressure to take public health risks in order to provide entertainment content for media networks—and generate athletic department revenues.”). This pressure came from the NCAA’s shifting perspective from “incorporating sports into the educational experience to more commercial endeavor.” *See id.* (explaining NCAA’s first priority is to generate money, therefore, the argument for student athlete compensation is that the NCAA must change how it treats the athlete).

40. *See id.* (explaining athletes will not receive any funds they help NCAA generate through entertainment).

41. *See id.* (stating March Madness provides NCAA with “north of \$800 million, annually” through television contracts).

42. *See id.* (noting that on March 31, 2021, Supreme Court heard oral arguments in *NCAA v. Alston*).

43. *See NCAA v. Alston*, 141 S.Ct. 2141, 2141 (2021) (stating release date of June 21, 2021); for further discussion on *NCAA v. Alston*, see *infra* notes 53–76 and accompanying text.

44. *See Allender, supra* note 37 (noting Florida NIL was set to go into effect before NCAA action).

45. *See Coleman, supra* note 35 (explaining that outrage occurred when Florida considered pushing back NIL from 2021 to 2022 but was quickly returned to 2021 effective date); see also Eric Prisbell, *Technically, it’s Illegal, but it’s Smart to Use NIL Deals as Recruiting Tools*, ON3 (Sept. 23, 2021), <https://www.on3.com/nil/news/nil-recruiting-tool-ncaa-rules-name-image-likeness/> [<https://perma.cc/NR38-FWDC>] (stating NIL can be used to recruit athletes).

46. *See CAL. EDUC. CODE* § 67456 (West 2021) (providing student-athletes right to profit from their NIL starting in 2023); see also Laura A. Ahrens & Gregg E. Clifton, *Feature: “Game On” For College Athlete Compensation Changes at State and Fed-*



NCAA, which was already debating the idea, to permit NIL.<sup>47</sup> Florida also passed legislation to permit student-athletes to make money off of their NIL starting in 2021 while protecting their ability to earn financial aid from their institution.<sup>48</sup>

The Florida NIL legislation sparked a flurry of states to write and pass NIL legislation.<sup>49</sup> Specifically, states that regularly compete with Florida schools, such as Texas, Alabama, Florida, Georgia, Mississippi, and New Mexico, recognized that not having NIL legislation would put them at a competitive disadvantage.<sup>50</sup> Accordingly, the NCAA felt pressure to come up with a uniform policy to deal with NIL.<sup>51</sup> However, once the Supreme Court had agreed to hear *Alston*, all conversations paused to await the Court's decision.<sup>52</sup>

## 2. *Education-Related Benefits: NCAA v. Alston*

While *Alston* brought about NIL, the case did not revolve around NIL rights for student-athletes.<sup>53</sup> Instead, the plaintiffs asserted that the NCAA violated the Sherman Antitrust Act ("Act") by artificially limiting the amount of aid student-athletes could receive.<sup>54</sup> The Supreme Court unanimously found in favor of the

*eral Laws*, 33 S.C. LAW. 53, 54 (Sept. 2021) (explaining California's statute served as model for other states to pass NIL legislation).

47. See Steve Berkowitz, *Proposed California Bill Could Create New Pressure in NCAA Name, Image and Likeness Debate*, USA TODAY (Dec. 7, 2020, 1:11 PM), <https://www.usatoday.com/story/sports/college/2020/12/07/ncaa-could-face-pressure-new-california-name-image-likeness-bill/3856850001/> [https://perma.cc/XT6M-JYM9] (explaining California bill is meant to liberate student-athletes, but NCAA responded that law is unconstitutional and is being debated with NCAA Board of Governors).

48. See FLA. STAT. § 1006.74 (2020) (providing permission for student-athletes to be compensated for NIL while requiring financial literacy instruction to protect student-athletes).

49. See Allender, *supra* note 37 (stating six other states quickly followed Florida's lead with legislation becoming effective on July 1, 2021, with thirteen more states passing legislation with later effective date).

50. See *id.* (listing states who immediately passed NIL legislation after Florida passed it); see also Ross Dellenger, *In Stunning Change, Florida Pushes to Delay its State NIL Law Until 2022*, SPORTS ILLUSTRATED (Apr. 29, 2021), <https://www.si.com/college/2021/04/29/florida-name-image-likeness-nil-bill-delay> [https://perma.cc/8GNV-SCT7] (stating NIL laws were passed to avoid a recruiting disadvantage).

51. See Allender, *supra* note 37 (noting concern about how NCAA would deal with states passing NIL legislation).

52. See *id.* (halting NCAA discussion about NIL due to Supreme Court hearing *NCAA v. Alston*).

53. See *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, 135 HARV. L. REV. 471, 471 (2021) (explaining NCAA decided by itself to allow NIL compensation post-*Alston* decision).

54. See *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (arguing NCAA was artificially limiting aid to student-athletes).

plaintiffs, with Justice Kavanaugh writing a separate concurrence expressing his distaste for the NCAA's business model.<sup>55</sup>

a. 9-0 Supreme Court Decision

The Supreme Court unanimously rejected every argument the NCAA presented.<sup>56</sup> First, the Court refused to exempt the NCAA from the Act.<sup>57</sup> Therefore, the Court proceeded to analyze whether the NCAA's actions violated the Act.<sup>58</sup> Courts analyze antitrust violations in three steps.<sup>59</sup> Step one requires the plaintiff "to prove that the challenged restraint has a substantial anticompetitive effect."<sup>60</sup> Step two then shifts the burden to "the defendant to show a procompetitive rationale for the restraint."<sup>61</sup> If the defendant succeeds, step three then requires the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved

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55. See generally *id.* at 2144 (stating unanimous decision from Court). Justice Kavanaugh's concurring opinion expressed, "NCAA's business model would be flatly illegal in almost any other industry in America." See *id.* at 2166–69 (Kavanaugh, J., concurring) (stating Justice Kavanaugh's opinion on the NCAA's structure).

56. See generally *id.* at 2144–66 (rejecting every claim made by NCAA).

57. See *id.* at 2155–59 (holding Court cannot grant NCAA exemption from Sherman Act). The Court explained that it had regulated the NCAA and other nonprofit actions before and that the Court does not regularly give out antitrust exemptions. See *id.* at 2156–59 (explaining NCAA has monopoly on college athletics and restraints necessary for interleague cooperation are not tied to student-athlete athletic benefits). The only antitrust exemption for a sports entity is for Major League Baseball (MLB), which held that baseball is just a game and does not affect interstate commerce. See *Fed. Baseball Club of Balt. v. Nat'l. League of Pro. Baseball Clubs*, 259 U.S. 200, 208–09 (1922) (clarifying this exemption applies to baseball and not other professional sports); see *Flood v. Kuhn*, 407 U.S. 258, 282–83 (1972) (holding antitrust exemption will not be given to other sports leagues); see e.g. *McCourt v. Cali. Sports*, 600 F.2d 1193, 1203 (6th Cir. 1979) (holding National Hockey League ("NHL") does not qualify for antitrust exemption); see e.g. *Wood v. NBA*, 809 F.2d 954, 957–58 (2d Cir. 1987) (holding that National Basketball Association ("NBA") does not qualify for antitrust exemption).

58. See *Alston*, 141 S. Ct. at 2160 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)) (explaining Court uses "three-step, burden-shifting framework" to analyze antitrust claims).

59. See *id.* (identifying proper test to apply to antitrust claims); see also *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 53 (explaining this is first time Court stated NCAA was subject to Sherman Act and first time Court would be applying this test to NCAA challenge).

60. See *Alston*, 141 S. Ct. at 2160 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)) (explaining step one of the test places the burden on the plaintiff).

61. See *id.* (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)) (identifying step two as the defendant's burden).

through less anticompetitive means” before the plaintiff can prevail.<sup>62</sup>

As the NCAA did not contest the district court’s finding on step one, the Court was able to move on to step two of the test.<sup>63</sup> While the NCAA challenged the legal interpretation of the second part of the test, the Court held that it did not make a difference to the result that the NCAA met its burden for the second step.<sup>64</sup> The Court also determined that the district court did not overstep its authority for the third step and that the district court’s holding was valid.<sup>65</sup> Additionally, the district court did not prevent the NCAA from developing “its own definition of benefits that relate to education” or changing to the amount of cash rewards given.<sup>66</sup>

The NCAA then argued that the district court redefined “amateurism.”<sup>67</sup> The Court also rejected this argument, noting that agreeing with the NCAA would require the Court to overturn a

62. *See id.* (quoting *Am. Express Co.*, 138 S. Ct. at 2284) (noting the burden shifts back to the plaintiff for step three of the analysis).

63. *See id.* at 2160–61 (noting NCAA did not dispute conclusion its behavior was anticompetitive). The Court explained that nearly all cases fail at this first step, and the district court held that the plaintiffs achieved their burden here. *See id.* (noting meeting this is no “slight burden”). “The district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes’ labor – and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects.” *Id.* at 2161 (explaining how plaintiffs met step one).

64. *See id.* at 2161–62 (explaining that while NCAA brings up inconsistency, there was “nothing about the district court’s analysis that offends the legal principles the NCAA invokes.”).

65. *See id.* at 2163–64 (explaining principles district court should honor before ruling against business in antitrust decision and that district court stayed within these boundaries). In an antitrust case, the court must give wide deference to the business and not impose anything the court could not enforce. *Id.* (noting court’s limited power). Additionally, the court should be wary about imposing anything hindering competition. *Id.* (explaining public policy is to promote competition in the market). The Court determined that the district court did not err in its findings, as “the court enjoined only restraints on education-related benefits – such as those limiting scholarships for graduate school, payments for tutoring, and the like.” *Id.* at 2164 (finding appropriate use of court’s limited power).

66. *See id.* at 2164 (explaining district court’s decision does not lock NCAA into specific rules). The NCAA can create rules and regulations about how schools can distribute these education-related benefits. *See id.* (reminding NCAA it has not been stripped of its regulatory power). Additionally, the NCAA can change the dollar amount of these rewards as “long as those ‘limits are never lower than the limit’ on awards for athletic performance.” *See id.* at 2164 (citation omitted) (focusing on academics over athletics for college-athletes). Further, as these restrictions only apply to the NCAA, “individual conferences remain free to reimpose every single enjoined restraint tomorrow.” *See id.* (describing other ways to impose limits).

67. *See id.* at 2162–63 (arguing district court defined amateurism way it wanted to, not way it was presented).

statement of fact found by the district court.<sup>68</sup> It concluded by addressing the NCAA's concerns about the effects of not capping education-related benefits to student-athletes.<sup>69</sup> It determined each of the NCAA's concerns were unfounded, and these benefits would not change the concept of amateurism that the NCAA promotes.<sup>70</sup> Therefore, the NCAA is unable to place limits on benefits such as graduate school scholarships, laptops, paid internships, or tutoring.<sup>71</sup>

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68. *See id.* at 2163 (explaining “the district court found that the NCAA had not adopted any consistent definition” of amateurism). Additionally, the district court found that the NCAA's rules and regulations had changed over time without regard for demand. *See id.* (discussing evolution of NCAA over time); *see also* Ahrens, *supra* note 46, at 53 (noting NCAA depends on “amateur” athletes to suppress market value below student-athletes' true market value artificially).

69. *See Alston*, 141 S. Ct. at 2164–65 (stating NCAA's objections to district court's ruling comes down to three complaints).

70. *See id.* at 2164–66 (presenting and discounting NCAA's top concerns). The first concern is that the “inclusion of paid post-eligibility internships” will lead to a way for student-athletes to receive compensation for athletic performance. *See id.* at 2164 (arguing benefits will be abused by institutions). The Court dismissed this concern, stating that this “does not stop the NCAA from continuing to prohibit compensation from ‘sneaker companies, auto dealerships, boosters, or ‘anyone else.’” *See id.* (quoting Brief for Respondents 47-48) (noting NCAA has already passed regulations clarifying that only conferences or schools can offer post-eligibility internships and plaintiffs are not arguing against this restriction). Further, the NCAA can create “whatever limits on paid internships it thinks appropriate.” *See id.* (permitting NCAA to continue control over internships). Therefore, a former student-athlete cannot receive an internship at an auto-dealership run by a booster that pays that student-athlete the equivalent of a professional salary. *See id.* (reminding student-athletes that they are not professional athletes). The second concern for the NCAA is the ruling that awards given for academic achievement can be no lower than the awards for athletic achievement. *See id.* at 2165 (arguing this “is the very definition of a professional salary”). The Court again stated that the NCAA is free to change the amount awarded for athletic performance if it does not wish to match that amount for academic performance. *See id.* (concluding concern is unfounded). The NCAA's final concern is that “allowing schools to offer scholarships . . . to pay for things like ‘computers’ and ‘tutoring’” will be exploited. *See id.* (characterizing concern student-athletes will be given “luxury cars to get to class” or “other unnecessary” items). The Court again dismisses this concern as the NCAA is still within its right to forbid benefits it deems unrelated to education. *See id.* at 2150 (explaining this injunction continues to give NCAA considerable power over tailoring restrictions and boundaries of these benefits student-athletes are not permitted to receive).

71. *See id.* at 2156–66 (explaining that NCAA can always lower athletic benefits if it does not want to offer equivalent amounts for academics and is free to ask district court to interpret injunction for specific benefits at any point). The Court stated that the injunction has been in place for three years already and the NCAA has only asked for clarification from the district court once. *See id.* (surmising NCAA is not confused by court order).

## b. Justice Kavanaugh's Concurrence

Although the Court's decision in *Alston* was unanimous, Justice Kavanaugh wrote a concurring opinion addressing the remaining NCAA compensation rules that were not at issue in *Alston*.<sup>72</sup> He emphasized three points of the majority's opinion: (1) the Court did not "address the legality of the NCAA's remaining compensation rules;" (2) this decision established "how any such rules [remaining] should be analyzed going forward;" and (3) this opinion raised "serious questions whether the NCAA's remaining compensation rules can pass muster."<sup>73</sup> He further described the NCAA's argument for not paying student-athletes as "circular and unpersuasive."<sup>74</sup> Justice Kavanaugh stressed that student-athletes "generate billions of dollars in revenues for colleges every year."<sup>75</sup> The concurrence concludes with the statement, "nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. . . . The NCAA is not above the law."<sup>76</sup>

3. *Education-Related Benefits to Name, Image, and Likeness Compensation*

Following the Supreme Court's June 21, 2021 decision in *Alston* and multiple years of study into NIL, the NCAA released a statement that it is committed to supporting NIL rights for student-athletes.<sup>77</sup> At the time of the decision, fifteen states already had

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72. *See id.* at 2166–69 (Kavanaugh, J., concurring) (explaining he is in full support of majority's opinion but would like to point out some potential future claims against NCAA that could be brought).

73. *See id.* at 2167 (laying out points of opinion that he wanted to draw attention to).

74. *See id.* at 2167–68 (explaining NCAA's argument not to pay student-athletes is because "the defining feature of college sports, according to the NCAA, is that the student athletes are not paid."). Justice Kavanaugh stated, "the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product." *See id.* (dismantling NCAA's circular argument).

75. *Id.* at 2168 (noting how much money student-athletes collectively bring to NCAA and colleges but are not benefitting in any monetary way).

76. *Id.* at 2169 (explaining that NCAA traditions cannot justify them not compensating student-athletes while making money from their efforts); *see also* Ahrens, *supra* note 46, at 53 (explaining Justice Kavanaugh did not explicitly state, but alluded to, potentially needing federal legislation or collective bargaining to keep student-athletes receiving fair portion of money they bring into NCAA).

77. *See NCAA Statement on U.S. Supreme Court decision*, NCAA (June 21, 2021, 11:39 AM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-us-supreme-court-decision> [<https://perma.cc/F42D-KSC3>] (stating although decision is not directly about NIL, NCAA will continue to work on policies

NIL bills that were set to go into effect on July 1, 2021.<sup>78</sup> Therefore, on June 30, the NCAA released another statement stating that student-athletes would be able to profit from their NIL starting on July 1, 2021.<sup>79</sup> Thus, on July 1, 2021, a new era of college athletics began.<sup>80</sup>

#### 4. *Determining the Authority*

With its statement in favor of NIL, the NCAA also released a statement outlining the rules and regulations that would control student-athletes.<sup>81</sup> The student-athletes would fall under the NIL law, if there were one, for the state in which the school the student-athlete attends is located.<sup>82</sup> If there was no state NIL law, the student-athlete would be required to follow the NCAA's guidelines.<sup>83</sup>

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while reaffirming their right to determine what is education related benefit and what is not); *see also* Ahrens, *supra* note 46, at 57 (explaining Alston did not require colleges to engage in any behavior, such as additional education-related benefits, and did not require NCAA to allow NIL); *see e.g.*, *Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston*, *supra* note 53, at 480 (clarifying that *Alston* and NIL does not mean that college athletics are now “pay-for-play”).

78. *See* Kristi Dosh, *Tracker: Name, Image, and Likeness Legislation by State*, BUSINESS OF COLLEGE SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/336B-K7GD>] (last updated Oct. 23, 2022) (listing states that have passed or proposed NIL legislation). The fifteen states with NIL legislation that would go into effect on July 1 are Alabama, Colorado, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, Ohio, Oregon, and Texas. *See id.* (naming the fifteen states).

79. *See* Brutlag Hosick, *supra* note 18 (announcing that starting on July 1, 2021, students will be able to make money off their NIL). The policy further stated that students in states with NIL legislation going into effect would be required to follow the state's legislation. *See id.* (giving states first regulatory power). Meanwhile, athletes in states that do not have NIL legislation will be required to follow the NCAA's regulations. *See id.* (ensuring all student-athletes had NIL rules to follow). Additionally, students will be required to report their NIL activities to their school and conference. *See id.* (placing responsibility on schools to ensure student-athletes are compliant with rules). The NCAA concluded by stating that their temporary policy will exist until there is federal legislation passed. *See id.* (waiting for federal legislation to ensure equal restrictions for all student-athletes).

80. *See* Joseph Henry, *NIL Bill Ushers in New Era of College Athletics*, THE INDEPENDENT FLORIDA ALLIGATOR (July 5, 2021), <https://www.alligator.org/article/2021/07/nil-bill-ushers-in-new-era-of-college-athletics> [<https://perma.cc/K6CC-WAMJ>] (stating NIL “changes the landscape of collegiate athletics forever.”).

81. *See* Brutlag Hosick, *supra* note 18 (outlining rules and regulations regarding NIL).

82. *See id.* (“Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.”).

83. *See id.* (stating that if there is no NIL law, student-athlete should follow NCAA's interim policy).

State NIL laws have the same general guidelines, with the specifics being individual to each state.<sup>84</sup> Generally, the state NIL laws allow student-athletes to obtain professional representation, prohibit contracts that conflict with the student-athletes team contract, and require the student-athlete to disclose any NIL deal with the school.<sup>85</sup> Further, state NIL laws prohibit universities and colleges from preventing a student-athlete from profiting from their NIL, revoking scholarships based on NIL compensation, or compensating a student directly for their NIL.<sup>86</sup> As related to NIL deals with sports betting companies, state NIL laws either have provisions prohibiting such deals or no such provision.<sup>87</sup>

### B. Double Up: NIL Deals

NIL deals can take many different forms, including deals for individual student-athletes as well as deals for an entire team.<sup>88</sup> The average student-athlete is worth anywhere between \$1,000 and \$10,000 in NIL deals.<sup>89</sup> While some student-athletes have signed deals for more than \$10,000 or amassed deals together that are worth more than that, the average Division I student-athlete has earned only \$471 on NIL.<sup>90</sup> There are also disparities in the different types of NIL deals.<sup>91</sup>

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84. See *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/XVZ4-VYC8>] (last visited Oct. 17, 2021) (stating some generalities of state NIL laws).

85. See *id.* (listing general similarities in state NIL laws).

86. See *id.* (listing general restrictions in state NIL laws aimed at colleges and universities).

87. For further discussion of NIL laws, see *infra* notes 189–255 and accompanying text.

88. See R.J. Curington, *NIL Deal Structure for Student-Athletes, Businesses, and Institutions*, CONDUCT DETRIMENTAL <https://www.conductdetrimental.com/post/nil-deal-structure-for-student-athletes-businesses-and-institutions> [<https://perma.cc/8TJT-K6SY>] (last updated Aug. 6, 2022) (noting common NIL deals as individual and team deals).

89. See A.J. Maestas & Jason Belzer, *How Much is NIL Worth to Student Athletes?*, ADU, <https://www.athleticdirector.com/articles/how-much-is-nil-really-worth-to-student-athletes/#:~:text=Thus%20from%20a%20licensing%20standpoint,the%20same%20group%20usage%20licenses> [<https://perma.cc/26QW-EWSE>] (last visited Jan. 16, 2022) (noting student-athletes' worth in NIL).

90. See Maria Carrasco, *Some College Athletes Cash in While Others Lose Out*, INSIDE HIGHER ED (Oct. 12, 2021), <https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out> [<https://perma.cc/ML8R-P9QL>] (noting most student-athletes are not earning substantial amounts of money through NIL).

91. See *id.* (explaining differentials in NIL deals across athletes and teams).

### 1. *Individual Deals*

Within hours of the July 1, 2021 announcement allowing NIL deals, players started announcing their deals on social media.<sup>92</sup> Immediately, large deals began getting announced, such as deals with Boost Mobile.<sup>93</sup> As the beginning of NIL coincided with the beginning of media coverage starting on college football again, many top football players began announcing large deals.<sup>94</sup> However, most deals were regional advertising deals where a student-athlete would receive compensation for promoting a local business on social media.<sup>95</sup> While student-athletes may not have hundreds of thousands of followers on social media, a small amount of compensation offered to a student-athlete makes a NIL deal worth it to the student-athlete.<sup>96</sup> Additionally, incoming student-athletes were able to cash in on NIL deals before their first collegiate season even began.<sup>97</sup>

NIL deals have also permitted student-athletes from non-revenue-generating sports to promote themselves and their sport.<sup>98</sup>

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92. See Allender, *supra* note 37 (noting college athletes could secure deals after release of NCAA guidance on July 1, 2021).

93. See Robert Kuwada, *Fresno State Twins Cash in on TikTok Fame – and Could Earn More than College President*, THE FRESNO BEE (July 1, 2021, 4:19 PM), <https://www.fresnobee.com/sports/college/mountain-west/fresno-state/article252490978.html> [<https://perma.cc/8LNJ-UNC9>] (stating Fresno State twins and basketball players immediately announced deal on July 1, 2021).

94. See David Kenyon, *The Biggest and Most Notable NIL Deals in College Football so Far*, BLEACHER REPORT (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far> [<https://perma.cc/A7E3-H49A>] (noting University of Alabama quarterback was announced to have amassed almost one million dollars worth of NIL deals before ever playing in college football game).

95. See Dan Whateley & Colin Salao, *How College Athletes are Getting Paid From Brand Sponsorships as NIL Marketing Takes Off*, INSIDER (Sept. 7, 2022, 2:29 PM), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12> [<https://perma.cc/478C-WDA5>] (explaining common NIL deals).

96. See *id.* (noting couple hundred dollars means more for student-athlete than for professional influencer).

97. See Alex Scarborough, *Sources: Alabama Crimson Tide QB Bryce Young has Already Signed more than \$800K in NIL Deals*, ESPN (July 29, 2021), [https://www.espn.com/college-football/story/\\_/id/31911674/sources-alabama-crimson-tide-qb-bryce-young-already-signed-800k-nil-deals](https://www.espn.com/college-football/story/_/id/31911674/sources-alabama-crimson-tide-qb-bryce-young-already-signed-800k-nil-deals) [<https://perma.cc/A8AN-2HT8>] (noting Bryce Young had not yet played collegiate football game at time of his six-figure total in deals).

98. See Kaufman & Canoles, *NIL Market Creates New Opportunity for “Non-Revenue” Sports and Regional Endorsers*, JD SUPRA (Jun. 8, 2022), <https://www.jdsupra.com/legalnews/nil-market-creates-new-opportunity-for-4073866/> [<https://perma.cc/SJM9-9HXS>] (discussing NIL success of athletes in “non-revenue sports”); *NIL Insights*, OPENDORSE, <https://opendorse.com/nil-insights/> [<https://perma.cc/69ZC-V6M3>] (last updated August 31, 2022) (listing amount of NIL deals by sport).



Five women's sports and multiple smaller sports, such as swimming and diving, and volleyball, are in the top ten for NIL deals amounts in early 2022.<sup>99</sup> Women's basketball players have the third highest amount of NIL compensation, mostly due to their strong social media presences.<sup>100</sup> These deals may incentivize female and non-revenue generating athletes to stay in college longer, as opposed to pursuing professional careers to earn compensation.<sup>101</sup>

However, there are concerns about booster and alumni involvement in the brokering of NIL deals.<sup>102</sup> Collectives, consisting of donors and alumni, have formed to "connect athletes with marketing opportunities."<sup>103</sup> The college or university itself cannot be responsible for or engage in the brokering of NIL deals.<sup>104</sup> As such, the donor groups may not engage with the institution, but there are concerns that the donors are involved in some capacity, whether through communications with a coach or someone in the athletic department.<sup>105</sup> Additionally, while the donors may advertise that there is a service to help student-athletes at a particular institution get NIL deals, the donors cannot simply provide compensation to student-athletes without requiring service in return.<sup>106</sup>

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99. See *NIL Insights*, *supra* note 98 (listing top ten sports in terms of NIL compensation from highest to lowest as football, women's basketball, men's basketball, women's swimming and diving, women's volleyball, men's swimming and diving, softball, baseball, men's track and field, and women's track and field).

100. See Eric Prisbell, *With NIL, Women's Basketball Players Doing Better than Male Counterparts*, ON3 (Apr. 1, 2022), <https://www.on3.com/nil/news/nil-womens-basketball-players-doing-better-than-male-counterparts/> [<https://perma.cc/JXJ3-3LP8>] (noting women players who have large social media presence are marketable); see also *NIL Insights*, *supra* note 98 (listing women's basketball as third in NIL compensation behind football and men's basketball).

101. See Marc Edelman, *Women's Athletes are Big Winners in College Sports' 2021 NIL Reform*, FORBES (Jan. 1, 2022, 12:00 AM), <https://www.forbes.com/sites/marcedelman/2022/01/01/womens-college-athletes-are-big-winners-in-2021-nil-reform/?sh=63af2437de55> [<https://perma.cc/P62Q-RCGW>] (noting compensation and NIL make keep students in school longer).

102. See Jim Vertuno, *Latest NIL Twist: Millions Being Pledged to College Athletes*, NBCDFW (Dec. 15, 2021, 7:20 AM), <https://www.nbcdfw.com/news/sports/latest-nil-twist-millions-being-pledged-to-college-athletes/2838989/> [<https://perma.cc/T8Y7-PMZR>] (noting concern about alumni enticing athletes to come to particular school in exchange for payment in form of supposed NIL deals).

103. See *id.* (noting collectives are being formed at major college football programs).

104. See Max Forer & Nicoleas Mayne, *Evolution of NIL – Donor Funded NIL Groups*, JD SUPRA (Nov. 9, 2021), <https://www.jdsupra.com/legalnews/evolution-of-nil-donor-funded-nil-groups-1014901/> [<https://perma.cc/ML66-TUV7>] (providing NCAA provision against institution involvement with brokering of student-athlete NIL deals).

105. See *id.* (noting compliance issues may arise due to close relationships between influential donors and alumni and top college athletics programs).

106. See *id.* (mentioning arrangement is still against NCAA bylaws).

These groups are advertising with clear intent to sway students to pick a particular school over another and show a recruiting advantage.<sup>107</sup> As such, the ability or promise of individual NIL deals will continue to be a huge recruiting tool in college athletics.<sup>108</sup>

## 2. *Team Deals*

Team NIL deals arise when a company offers a deal to an entire team and the players can elect to participate in the deal or not.<sup>109</sup> For example, TiVo, a television streaming service, offered a deal to the entire Georgia Tech football team in exchange for a streaming subscription, payment, and gear.<sup>110</sup> A local gym offered all scholarship football players at the University of Miami a monthly payment of \$500 to endorse the gym on social media.<sup>111</sup> A cryptocurrency company offered a NIL deal for promotion of the company with the payment to be in cash, rather than cryptocurrency.<sup>112</sup> While there is nothing explicitly in any state NIL legislation or the NCAA NIL policy forbidding team-wide NIL deals, there is concern about the deals crossing the line into “pay for play.”<sup>113</sup>

The NCAA has expressed concerns about team NIL deals.<sup>114</sup> Schools would be engaging in impermissible behavior if the ath-

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107. See Paul Steinbach, *New NIL Twist: Alumni, Collectives Pledging Cash to College Athletes*, ATHLETIC BUSINESS (Dec. 15, 2021), <https://www.athleticbusiness.com/operations/marketing/article/15286423/new-nil-twist-alumni-collectives-pledging-cash-to-college-athletes> [<https://perma.cc/RUZ2-KWH5>] (noting collectives are “a clear bid to attract attention from recruits weighing their options.”).

108. See *id.* (remarking various parties taking advantage of NIL is not going to go away).

109. See Erin Butcher, Jeff Knight & Kasey Nielsen, *College-Wide and Team-Specific NIL Deals: Considerations for Colleges and Universities to Avoid Unwanted Consequences*, JD SUPRA (Sept. 22, 2021), <https://www.jdsupra.com/legalnews/college-wide-and-team-specific-nil-6646801/> [<https://perma.cc/W3NJ-RY4Y>] (defining team-specific NIL deals).

110. See *id.* (providing example of team NIL deal).

111. See Ross Dellenger, *Florida State Football Team Scores NIL Cash Deal from Crypto Company*, SPORTS ILLUSTRATED (Aug. 17, 2021), <https://www.si.com/college/2021/08/17/florida-state-football-team-nil-deal> [<https://perma.cc/5QHE-4WZJ>] (noting announcement of deal sent shockwaves through market as first team deal).

112. See *id.* (explaining that Yummy Crypto offered NIL deal to Florida State football team and University of Miami Men’s Basketball team).

113. See Josh Moody, *Lack of Clear-Cut NCAA Rules Creates Confusion About NIL*, INSIDE HIGHERED (Jan. 4, 2022), <https://www.insidehighered.com/news/2022/01/04/lack-clear-ncaa-rules-creates-confusion-around-nil> [<https://perma.cc/KF43-BJ49>] (noting team-wide deals create concern about inducing athletes to attend certain schools).

114. See *id.* (noting NCAA concerns and investigations into NIL deals that have been offered to all team members).

letes collected NIL money without providing any services.<sup>115</sup> Concerns have arisen because most NIL deals are in exchange for social media posts, but some student-athletes do not have public social media accounts, which limits the ability to promote a company on social media.<sup>116</sup> However, while the NCAA has questioned some schools about team deals, it has not laid down any punishments to schools.<sup>117</sup>

### 3. *Student-Athletes Trademarks*

With NIL, student-athletes also began filing trademarks.<sup>118</sup> A trademark is “any word, phrase, symbol, design, or a combination of these things that identifies your goods or services.”<sup>119</sup> A trademark provides legal protection for a brand and can be key for student-athletes who are trying to develop their own brand.<sup>120</sup> Notably, top student-athletes began filing trademarks within days of NIL becoming official.<sup>121</sup> As such, college athletes can protect their names and potential brands in the same way that professional athletes can.<sup>122</sup>

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115. See Tabatha Wethal, *Lack of NIL Rules Makes Way for Murky Whole-Team Deals*, ATHLETIC BUSINESS (Jan. 5, 2022), <https://www.athleticbusiness.com/operations/governing-bodies/article/15286907/lack-of-nil-rules-makes-way-for-murky-whole-team-deals> [<https://perma.cc/KF3C-AUBE>] (noting any payment that is not in exchange for services is considered “pay for play” and against NCAA and state NIL policies).

116. See *id.* (revealing most NIL deals require advertisements on social media).

117. See Moody, *supra* note 113 (noting NCAA has investigated but not punished any schools for team NIL deals).

118. See Sam Dunn, *Boardroom’s Favorite College Athlete NIL Trademarks of 2021*, BOARDROOM (Dec. 23, 2021), <https://boardroom.tv/best-college-sports-nil-trademarks/> [<https://perma.cc/L6PM-FSAB>] (listing multiple student-athletes trademarks filed in 2021).

119. See *What is a Trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/what-trademark> [<https://perma.cc/W538-ZCWV>] (last modified June 13, 2022) (defining trademark).

120. See *id.* (providing trademark gives its owner important protections).

121. See Michael Shapiro, *UConn Star Paige Bueckers Files ‘Paige Buckets’ Trademark Application*, SPORTS ILLUSTRATED (Aug. 3, 2021), <https://www.si.com/college/2021/08/03/paige-bueckers-trademark-application-uconn-nil-era> [<https://perma.cc/P8SY-B4XE>] (stating Bueckers’ trademark application was filed on July 13, 2021).

122. See David O. Klein, *United States: College Athlete Trademarks: Protecting Student Athletes’ Name, Image, and Likeness Rights*, MONDAQ (Oct. 19, 2021), <https://www.mondaq.com/unitedstates/trademark/1122410/college-athlete-trademarks-protecting-student-athletes-39-name-image-and-likeness-rights#:~:text=Like%20professional%20athletes%2C%20student%20athletes,can%20be%20a%20random%20design.&text=A%20trademark%20can%20be%20filed,additional%20%24250%20fee%20per%20class.> [<https://perma.cc/N2ZM-XCRN>] (drawing similarities between college athletes and professional athletes).

#### 4. *NIL Concerns*

Since the possibility of NIL was being discussed, there were concerns that NIL would just further the disparities between male and female student-athletes.<sup>123</sup> There have always been disparities between men's and women's athletics.<sup>124</sup> With the passage of Title IX, schools were required to provide equal athletic opportunities to women.<sup>125</sup> However, the 2021 NCAA Basketball tournaments showed that there are still stark disparities between men's and women's athletics.<sup>126</sup> Thus, when NIL began, there were concerns that the deals offered and accepted by athletes would further the disparities between male and female athletes.<sup>127</sup>

However, instead of hurting female athletes, NIL is believed to have helped female athletes and female sports.<sup>128</sup> As universities are not required to spend the same amount advertising male and female sports, female athletes can promote themselves and their sport through NIL.<sup>129</sup> University of Alabama softball pitcher, Montana Fouts, who gained national recognition after pitching a perfect game in the 2021 Women's College World Series, has signed multiple NIL deals and is the most requested college athlete on Cameo,

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123. See NCAA Board of Governors, *Federal and State Legislation Working Group Final Report and Recommendations*, *supra* note 33 (noting concerns that NIL could be used to damage the NCAA's value of gender equity).

124. See Associated Press, *Second NCAA Gender Equity Report Shows More Money Spent on Male Athletes Than Female Ones on Average*, ESPN (Oct. 26, 2021), [https://www.espn.com/college-sports/story/\\_/id/32481915/second-ncaa-gender-equity-report-shows-more-money-spent-male-athletes-female-ones](https://www.espn.com/college-sports/story/_/id/32481915/second-ncaa-gender-equity-report-shows-more-money-spent-male-athletes-female-ones) [<https://perma.cc/RE3Y-N67K>] (explaining this is second report showing gross disparity in treatment, culture, and spending between male and female athletics by NCAA).

125. 20 U.S.C § 1681 (2018) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

126. See generally NCAA *External Gender Equity Review*, KAPLAN HECKLER & FINK (Aug. 2, 2021), <https://kaplanhecker.app.box.com/s/6fpd51gxxk9ki78f8vvhqcg0b0o95oxq> [<https://perma.cc/EXQ6-YJZD>] (noting stark differences between men's and women's basketball tournaments demonstrating history of NCAA's preference for men's tournament).

127. See Alicia Jessop & Joe Sabin, *The Sky is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sport Athletes*, 31 J. LEGAL ASP. SPORT 253, 255 (2021) (noting female athletes often do not have professional opportunities to make money so adding NIL deals could further divide in earning potential between male and female athletes).

128. See *id.* at 274 (explaining NIL will further expand publicity of female athletes).

129. See *id.* at 276 (noting schools are not required to spend the same amount advertising male and female sports, which is not a Title IX violation).

a video messaging site.<sup>130</sup> Not coincidentally, Alabama Softball has sold over 3,200 season tickets for the 2022 season, the most in program history.<sup>131</sup> University of Connecticut (“UConn”) basketball star, Paige Bueckers, became the first college athlete to sign an NIL deal with Gatorade, just prior to the start of the basketball season tickets going on sale.<sup>132</sup> Shortly thereafter, UConn announced that the season ticket and single-game ticket demand for women’s basketball games are the highest that they have been in years.<sup>133</sup> Louisiana State University (“LSU”) star gymnast Olivia Dunne announced her first NIL deal in September 2021 with an activewear brand.<sup>134</sup> In January 2022, LSU announced that the gymnastics team set a new season ticket record with 7,351 season tickets sold, over a thousand more season tickets sold than the 2019 season.<sup>135</sup> NIL has given female athletes an ability to market themselves and

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130. See Max Wolborsky, *Alabama Softball: How Montana Fouts’ Life Has Changed Since World Series Perfect Game*, TUSCALOOSA NEWS (Jan. 28, 2022, 6:01 AM), <https://www.tuscaloosanews.com/story/sports/2022/01/28/how-alabama-softball-ace-montana-fouts-life-has-changed-since-perfect-game/6588197001/> [<https://perma.cc/4G25-CAG4>] (listing Fouts’ NIL deals as Diamond Kinetics Pitch-Tracker, Dirtroad Outfitters, and Pure Country Automotive). Fouts outperforms top college quarterbacks as the most requested collegiate athlete on Cameo. See *id.* (explaining reach of female athletes to general public).

131. See Blake Byler, *Alabama Softball Breaks Season Ticket Sales Record*, THE CRIMSON WHITE (Feb. 1, 2022), <https://cw.ua.edu/92795/sports/alabama-softball-breaks-season-ticket-sales-record/> [<https://perma.cc/GLM8-MDSF>] (explaining that team broke their season ticket record and stadium only holds 3,940 people).

132. See Nick DePaula, *UConn Women’s Basketball Star Paige Bueckers Signs NIL Deal with Gatorade*, ESPN (Nov. 29, 2021), [https://www.espn.com/womens-college-basketball/story/\\_/id/32745945/uconn-star-paige-bueckers-signs-nil-deal-gatorade](https://www.espn.com/womens-college-basketball/story/_/id/32745945/uconn-star-paige-bueckers-signs-nil-deal-gatorade) [<https://perma.cc/ZQK9-D5L6>] (noting Bueckers joins elite company with this partnership, including Michael Jordan and Serena Williams).

133. See Paul Doyle, *UConn Reports High Demand for Basketball Season Tickets, Single-Game Seats Available Next Week*, CT INSIDER (Oct. 29, 2021), <https://www.ctinsider.com/uconn/article/UConn-reports-high-demand-for-basketball-season-16575301.php> [<https://perma.cc/NWA4-EHNL>] (describing high demand for tickets, especially for women’s basketball team, which has sold nearly 9,000 tickets, the highest total since the 2007 season).

134. See Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal is With Activewear Brand Vuori*, FORBES (Sept. 14, 2021, 9:00 AM), <https://www.forbes.com/sites/kristidosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori/?sh=105a3df82c78> [<https://perma.cc/8VQ7-FCTP>] (describing Dunne’s process and decision to choose Vuori as her first NIL deal).

135. See *Gymnastics Sets New Season Ticket Record*, LSU (Jan. 19, 2022, 9:22 AM), <https://lsusports.net/news/2022/01/19/gymnastics-sets-new-season-ticket-record/> [<https://perma.cc/Q3PK-SPPS>] (listing growth in season ticket sales over past eight seasons).

their sport without depending on their universities to do it for them, and is leading to the growth of female sports.<sup>136</sup>

### C. The Deal: An Introduction to Barstool Sports and Barstool Athletes

This section begins with an overview of Barstool Sports from its beginning as a Boston sports blog to a multi-million-dollar content and media company.<sup>137</sup> It then moves into a discussion of the intersection of Barstool, sports betting, and NIL.<sup>138</sup> This section concludes with the concerns that NIL deals with Barstool Sports have raised and the NCAA's response to those concerns.<sup>139</sup>

#### 1. *Barstool Sports*

Dave Portnoy founded Barstool in 2003 as a Boston sports blog.<sup>140</sup> Throughout the years, Barstool and Dave Portnoy gained a following outside of the Boston area, which led to AOL airing Barstool content on its website.<sup>141</sup> In 2017, Pat McAfee, kicker for the Indianapolis Colts, announced that he was retiring from football to become a contributor to the site.<sup>142</sup> The following year, Barstool received a valuation of \$100 million.<sup>143</sup> In 2020, Barstool again

136. See Jessop, *supra* note 127, at 281 (explaining female sports gain more publicity they are free to market themselves, pointing to exponential growth of U.S. Women's National Soccer Team once team was able to promote themselves and not depend on U.S. Soccer).

137. For further discussion on the origins and background of Barstool Sports, see *infra* notes 140–155 and accompanying text.

138. For further discussion on the overlap between Barstool, sports betting, and NIL, see *infra* notes 156–184 and accompanying text.

139. For further discussion on the origins and background of Barstool Sports, see *infra* notes 140–155 and accompanying text.

140. See Jarvis Dobrik, *Dave Portnoy: The Story Behind the Founding of Barstool Sports*, VALIANTCEO (Oct. 4, 2021), <https://valiantceo.com/dave-portnoy/> [<https://perma.cc/69HE-SL9Q>] (describing background of Barstool Sports).

141. See Brian Fitzsimmons, *Barstool Sports to Air Exclusive Content on AOL.com*, AOL (Apr. 21, 2014, 4:51 PM), <https://www.aol.com/article/2014/04/21/barstool-sports-to-produce-exclusive-content-on-aol-com/20872849/> [<https://perma.cc/SH74-RFK3>] (explaining that in 2014, AOL decided to air exclusive Barstool content on their website).

142. See *Colts Punter Pat McAfee Retires from NFL to Join Barstool Sports*, SPORTS ILLUSTRATED (Feb. 2, 2017), <https://www.si.com/nfl/2017/02/02/pat-mcafee-retires-joins-barstool-sports-colts> [<https://perma.cc/QB4C-PWSR>] (posting McAfee's surprising decision to retire from NFL at twenty-nine).

143. See Janko Rottgers, *Barstool Sports gets Another \$15 Million from Chernin Group*, VARIETY (Jan. 23, 2018, 5:08 PM), <https://variety.com/2018/digital/news/barstool-chernin-investment-1202674676/> [<https://perma.cc/D68F-R225>] (stating valuation of Barstool in 2018).

made national news for creating a fundraiser for small businesses impacted by COVID-19.<sup>144</sup>

Today, Barstool has a variety of bloggers and podcasters who discuss and post content regularly on multiple social media sites, including the Barstool website.<sup>145</sup> The website features over fifteen popular bloggers, with an option to scroll through all bloggers.<sup>146</sup> Individuals can search content by blogger, podcast, topic, or sport.<sup>147</sup> Additionally, the Barstool Store sells a variety of apparel.<sup>148</sup> There are over forty collections to shop from, all based off of content that is produced and published on the website or Barstool-affiliated social media accounts.<sup>149</sup> Further, Barstool has over four million followers on Twitter.<sup>150</sup> Dave Portnoy personally has over two and a half million followers.<sup>151</sup> On Instagram, Barstool has almost fourteen million followers, where the account posts a variety of pictures and clips from current sporting events, podcas-

144. See Audrey Conklin, *The Barstool Fund is Here to Stay, Looking for a Philanthropic Leader*, FOX BUSINESS (Aug. 4, 2021, 12:18 PM), <https://www.foxbusiness.com/lifestyle/portnoy-barstool-fund-permanent-job> [<https://perma.cc/L55B-2AP5>] (describing Barstool Fund). The Barstool Fund was created to support small businesses around United States and attracted celebrity donations. See *id.* (becoming much more popular than originally expected). Overall, the fundraiser has raised over \$41 million from over 200,000 donors. See *id.* (noting much higher donation amount than expected).

145. See *Barstool Sports Homepage*, BARSTOOL SPORTS, <https://www.barstoolsports.com/> [<https://perma.cc/ME6T-JNZE>] (last visited Sept. 19, 2021) (showing various content for website visitors). Visitors to the site can sort the content by topic, sport, blogger, podcaster, blogs, videos, or pictures. See *id.* (cataloging ways to search website).

146. See *Bloggers*, BARSTOOL SPORTS, <https://www.barstoolsports.com/bloggers> [<https://perma.cc/DN6K-AGNR>] (last visited Dec. 19, 2022) (listing featured bloggers of Barstool Sports).

147. See *Shows*, BARSTOOL SPORTS, <https://www.barstoolsports.com/shows> [<https://perma.cc/33WD-JFNW>] (last visited Dec. 19, 2022) (listing shows); *Shows*, BARSTOOL SPORTS, <https://www.barstoolsports.com/shows#topics> (last visited Dec. 19, 2022) (listing topics).

148. See *All Brands & Podcasts*, BARSTOOL SPORTS, <https://store.barstoolsports.com/> [<https://perma.cc/BBX8-VF3G>] (last visited Oct. 17, 2021) (bringing users to main page for Barstool Store).

149. See *All Brands & Podcasts*, BARSTOOL SPORTS, <https://store.barstoolsports.com/collections/sale-collection> [<https://perma.cc/B5A4-APZQ>] (last visited Nov. 24, 2022) (listing all collections available to shop from).

150. See Barstool Sports (@barstoolsports), TWITTER, [https://twitter.com/barstoolsports?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/barstoolsports?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) [<https://perma.cc/VV5V-Z6VE>] (last visited July 25, 2022) (showing amount of followers Barstool account has).

151. See Dave Portnoy (@stoolpresidente), TWITTER, <https://twitter.com/stoolpresidente> [<https://perma.cc/8QQ8-P6XN>] (last visited July 25, 2022) (showing amount of followers founder Dave Portnoy personally has on Twitter).

ters, and other content producers for the company.<sup>152</sup> Dave Portnoy also has a strong following on Instagram, with almost four million followers.<sup>153</sup> Other Barstool content creators also have their own social media followings, promoting themselves on Twitter and Instagram.<sup>154</sup> Overall, Barstool reaches a large audience base through the usage of multiple platforms.<sup>155</sup>

## 2. *Buying In: The Intersection of Barstool, Sports Gambling, and NIL*

Barstool expanded its enterprise into sports gambling as a result of the *Murphy v. NCAA*<sup>156</sup> decision as well as Penn National Gaming (“Penn National”) buying a significant portion of ownership in Barstool.<sup>157</sup> In 2018, the Supreme Court decided the landmark decision of *Murphy v. NCAA*.<sup>158</sup> In *Murphy*, New Jersey was challenging a federal statute that made it illegal for any state or private actor to engage in, advertise, or be involved in, directly or indirectly, with sports gambling.<sup>159</sup> The Court determined that the

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152. See Barstool Sports (@barstoolsports), INSTAGRAM, <https://www.instagram.com/barstoolsports/?hl=en> [<https://perma.cc/JQ6Q-2AJQ>] (last visited July 25, 2022) (showing Barstool Sports’ Instagram page to currently have 11.9 million followers).

153. See Dave Portnoy (@stoolpresidente), INSTAGRAM, <https://www.instagram.com/stoolpresidente/?hl=en> [<https://perma.cc/682E-GHJB>] (last visited July 25, 2022) (showing that as of July 25, 2022 Portnoy has 3.8 million followers on Instagram).

154. See also Big Cat (@BarstoolBigCat), TWITTER, [https://twitter.com/BarstoolBigCat?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/BarstoolBigCat?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) [<https://perma.cc/6TPK-8RHQ>] (last visited Oct. 17, 2021) (showing Dan Katz is Barstool podcaster with over 1 million followers on Twitter); see e.g. Kevin Clancy (@kfcbarstool), INSTAGRAM, <https://www.instagram.com/kfcbarstool/?hl=en> [<https://perma.cc/73JR-AEXE>] (last visited Oct. 17, 2021) (showing another Barstool contributor having over 500,000 followers on Instagram).

155. For further discussion of the platforms Barstool uses today, see *supra* notes 145–154 and accompanying text.

156. *Murphy v. NCAA*, 138 S.Ct. 1461 (2018).

157. See Brian A. Saunders, Barstool Sports to be Fully Acquired by Penn Entertainment in \$387 Million Deal, PhillyVoice (Aug. 19, 2022), <https://www.phillyvoice.com/barstool-sports-sold-penn-entertainment/> [<https://perma.cc/8WPS-EQR5>] (explaining that in January of 2020, Penn National Gaming purchased thirty-six percent stake in Barstool). Less than ten months after Penn National Gaming had purchased its share, Barstool began offering sports betting, under name Barstool Sportsbook, in select states. See *id.* (explaining benefit of legalized sports betting in some states); See also *Murphy*, 138 S. Ct. at 1465 (holding it is unconstitutional for federal government to forbid states from offering, funding, advertising, or participating in sports betting).

158. See *Murphy*, 138 S. Ct. at 1461 (listing date of decision as May 14, 2018).

159. See *id.* at 1468 (explaining New Jersey’s challenge to Professional and Amateur Sports Protection Act (“PASPA”)); see also 28 U.S.C. § 3702 (1992) (“It shall be unlawful for – (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental en-



statute was unconstitutional because the federal government cannot pass laws directing a state to take a particular action.<sup>160</sup> Immediately after *Murphy*, states began passing or proposing legislation to legalize sports betting within their state.<sup>161</sup> As of December 1, 2021, thirty-two states had active sports betting, and another fifteen have proposed legislation or legislation that has not gone into effect yet, leaving only three states that have had no movement towards legalizing sports gambling.<sup>162</sup> With that legalization came a huge industry with an estimated \$8 billion bet on Super Bowl LVI alone.<sup>163</sup>

Barstool expanded into the sports betting market in January 2020, when Penn National officially bought a thirty-six percent stake in the company.<sup>164</sup> This deal was the result of Penn National hoping to expand its gambling company and to take advantage of the ready consumers Barstool would provide.<sup>165</sup> Barstool and Penn National created “Barstool Sportsbook” and filed for a trademark at the end of 2019 in preparation for the purchase.<sup>166</sup> The Sportsbook offers a full array of sports betting for all major professional

tity a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate.”)

160. See *Murphy*, 138 S. Ct. at 1476 (stating Tenth Amendment does not permit federal government to issue orders to states).

161. See Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 325 (2018) (noting Delaware passed legislation immediately after *Murphy* decision was announced, leading to other states following suit).

162. See Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021), [https://www.espn.com/chalk/story/\\_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization) [<https://perma.cc/DYW5-RFJD>] (noting that Idaho, Wisconsin, and Utah are the only states not to have or propose legislation for sports gambling).

163. See Christopher J. Brooks, *Americans Expected to Bet Nearly \$8 Billion on Super Bowl LVI*, CBS NEWS (Feb. 12, 2022, 7:05 PM), <https://www.cbsnews.com/news/super-bowl-new-york-sports-betting/> [<https://perma.cc/5G99-63VB>] (estimating amount to be bet on Super Bowl LVI).

164. See Peter Kafka, *A Casino Company is Buying Barstool Sports in a \$450 Million Deal*, VOX (Jan. 29, 2020, 1:37 AM), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-chermin> [<https://perma.cc/UL7L-UP6F>] (stating agreement was for thirty-six percent stake in Barstool in exchange for \$163 million in cash and stock).

165. See *id.* (noting Penn National ran low-profile casinos and hotels and was hoping to expand its brand).

166. See *Barstool Sportsbook*, USPTO, <https://uspto.report/TM/88733567> [<https://perma.cc/C8BF-VXVG>] (last visited Sept. 21, 2021) (showing Barstool’s trademark application for Barstool Sportsbook which was filed on December 19, 2019). The application shows that the trademark was registered on December 22, 2020. See *id.* (dating application).

sports leagues.<sup>167</sup> Betterers are only able to place bets within participating states, and Barstool Sportsbook is currently offered in twelve states, three of which also permit casino games while in the state.<sup>168</sup>

Barstool also expanded into NIL when it became legal.<sup>169</sup> Immediately, Barstool announced that college athletes could apply to become Barstool Athletes.<sup>170</sup> As of July 3, 2021, Barstool had received about 75,000 applications from Division 1 college athletes.<sup>171</sup> Barstool then decided that athletes that fill out the paperwork to be a Barstool Athlete will receive Barstool merchandise and be required to put “Barstool Athlete” in the biography sections on their social media accounts.<sup>172</sup> The form to apply is very straightforward, asking for personal information, school and sport played, as well as

167. See *Barstool Sportsbook & Casino*, BARSTOOL SPORTS, <https://www.barstoolsportsbook.com/> [<https://perma.cc/H5A6-W4ZW>] (last visited Oct. 17, 2021) (showing all of leagues available to place bets in, including, but not limited to, NFL, MLB, NHL, NBA, Ultimate Fighting Championship (“UFC”), Major League Soccer (“MLS”), and NCAA football).

168. See *Where Can I Use the Barstool Sportsbook & Casino?*, BARSTOOL SPORTS, <https://support.barstoolsportsbook.com/hc/en-us/articles/360044406072-Where-can-I-use-the-Barstool-Sportsbook-Casino-> [<https://perma.cc/K9BK-ZDYJ>] (last visited Sept. 20, 2021) (describing states that Barstool Sportsbook is available). The Sportsbook is available in Pennsylvania, Michigan, Illinois, Colorado, Virginia, New Jersey, Tennessee, Arizona, West Virginia, Iowa, Indiana, Kansas, and Louisiana. See *id.* (listing availability). Casino games are also available to users in Pennsylvania, New Jersey, or Michigan. See *id.* (showing in-person availability).

169. For further discussion of Barstool’s NIL involvement, see *infra* notes 170–184 and accompanying text.

170. See Claudette Montana Pattison, *USC Athlete Joins Barstool Athletics After Founder Dave Portnoy Admits: ‘No Clue What We Are Doing’*, SPORTS ILLUSTRATED (July 3, 2021, 2:36 PM), <https://www.si.com/college/usc/basketball/usc-athlete-signs-with-barstool-athletics> [<https://perma.cc/K853-Q6Y6>] (discussing beginning of Barstool Athletes). An athlete from Jacksonville State messaged Portnoy on social media asking to be the first Barstool Athlete. See *id.* (explaining idea for Barstool Athletes came from student-athletes). Portnoy agreed before figuring out what that would entail or how the program would select athletes. See *id.* (deciding to immediately offer opportunity).

171. See Julie Williams, *A Growing Army of Barstool Athletes Includes a Handful of College Golfers. But What does it all Mean?*, GOLFWEEK (July 3, 2021, 5:55 PM), <https://golfweek.usatoday.com/2021/07/03/barstool-sports-athletes-ncaa-name-image-likeness-college-golf/> [<https://perma.cc/C35T-C6WU>] (describing immediate popularity of Barstool Athletes).

172. See Brendan Menapace, *Barstool Sports Has Signed Thousands of College Athletes to NIL Partnerships, But No One (Not even Barstool) Seems to Know the Plan*, PROMO MARKETING MAGAZINE (Aug. 21, 2021), <https://magazine.promomarketing.com/article/barstool-is-trading-branded-merchandise-for-nil-rights-is-it-worth-it-for-athletes/#:~:text=Student%20athletes%20can%20simply%20apply,any%20Barstool%20platform%20or%20channel.> [<https://perma.cc/YA24-WHEX>] (listing Barstool Athlete requirements). Any Division I athlete who applies will be signed as a Barstool Athlete and receive free merchandise in exchange for putting “Barstool Athlete” in their social media biographies. See *id.* (explaining benefits of being a Barstool Athlete).

photographs of the athlete in uniform to be used in any Barstool posts.<sup>173</sup> As of the end of August 2021, two months into NIL, Barstool had announced over 4,000 Barstool Athletes.<sup>174</sup>

Furthermore, Barstool has started selling NIL apparel that benefits student-athletes.<sup>175</sup> The first apparel collection that went live was created with Iowa wrestler, Spencer Lee, who is a three-time national champion.<sup>176</sup> When Lee won his last national championship, he revealed that he had zero healthy ACLs stating that he “didn’t want to tell anybody, because excuses are for wusses.”<sup>177</sup> Barstool had shared the clip of that interview at that time.<sup>178</sup> On July 3, 2021, Dave Portnoy reshared that interview with a comment indicating that Spencer Lee had become a Barstool Athlete.<sup>179</sup> Shortly thereafter, Lee announced that his t-shirt with the phrase “excuses are for wusses” was on sale through a partnership with Barstool.<sup>180</sup>

However, with the expansion of Barstool into NIL, concerns arose about the allowability of the deals.<sup>181</sup> Most state NIL laws

173. See *Barstool Athlete Application*, BARSTOOL SPORTS, <https://www.barstoolsports.com/barstool-athlete> [<https://perma.cc/ZCG6-7XLT>] (last visited Sept. 19, 2021) (containing application to become Barstool Athlete). The form also states that the student-athlete agrees to not enter into any NIL deals contrary to state law, including gambling or sports betting NIL deals. See *id.* (listing Barstool Athlete requirements).

174. See Menapace, *supra* note 172 (stating Barstool Athletes Instagram account has announced over 4,000 athletes so far). Additionally, Portnoy made several statements urging student-athletes to be patient as the company goes through the thousands of applications it has received. See *id.* (explaining demand was much higher than expected).

175. See David Eickholt, *Iowa Wrestler Spencer Lee Launches Clothing Line*, HAWKEYE INSIDER (July 19, 2021), <https://247sports.com/college/iowa/Article/Spencer-Lee-Launches-Clothing-Line-Iowa-Hawkeyes-Wrestling-167966261/> [<https://perma.cc/9P99-SL52>] (explaining Iowa Wrestler Spencer Lee’s apparel went on sale on Barstool Store).

176. See *id.* (stating Lee has won three national championships in three complete seasons at Iowa).

177. See *id.* (quoting Lee from interview given to ESPN after winning his third national championship).

178. See Barstool Sports (@barstoolsports), TWITTER (Mar. 20, 2021, 11:14 PM), <https://twitter.com/barstoolsports/status/1373473122033229827> [<https://perma.cc/HT6W-X7RA>] (sharing Spencer Lee’s ESPN interview where Lee stated “excuses are for wusses”).

179. See Dave Portnoy (@stoolpresidente), TWITTER (July 3, 2021, 3:54 PM), <https://twitter.com/stoolpresidente/status/1411412931431092231?lang=en> [<https://perma.cc/UC3R-AR2R>] (sharing interview video with hashtag “#BarstoolAthlete”).

180. See Spencer Lee (@LeeSpencerlee36), TWITTER (July 28, 2021, 7:37 PM), <https://twitter.com/leespencerlee36/status/1420528890594963466?lang=en> [<https://perma.cc/3SBB-LDXS>] (announcing t-shirt release with Barstool).

181. See Leah Vann, *One Week into NIL, Lawyers Caution Athletes on Barstool, YOKE Gaming and Misinformation that Could Affect Iowa Athletes*, THE GAZETTE (July

have provisions that do not permit student-athletes to partner with any gambling companies.<sup>182</sup> Even so, thousands of student-athletes have signed up to become Barstool Athletes in states that have a provision that forbids NIL deals with gambling companies.<sup>183</sup> However, the NCAA has not brought forth any enforcement actions or lawsuits against student-athletes who are engaging in deals that may be contrary to state NIL laws; instead the NCAA has opted to leave enforcement to the states.<sup>184</sup>

### III. COVERING THE SPREAD: AN ANALYSIS OF BARSTOOL ATHLETES

This section analyzes the permissibility of student-athletes to become Barstool Athletes.<sup>185</sup> Section A examines states where Barstool has an operating Sportsbook.<sup>186</sup> It then turns to the states that it has labeled as upcoming targets to join the Sportsbook.<sup>187</sup> Each section also covers states that do not have a NIL law and instead are covered by the NCAA's NIL Interim Policy ("Interim Policy").<sup>188</sup>

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11, 2021, 6:00 AM), <https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/> [<https://perma.cc/BK3D-EQU6>] (noting concerns about NIL deals with Barstool because of sportsbook and state NIL laws not permitting deals with gambling companies).

182. *See id.* (explaining many state NIL laws place limits on permissible deals, including forbidding deals with gambling companies).

183. *See id.* (noting that thousands of athletes have signed up to be Barstool Athletes in states where NIL law has provision against gambling-related deals).

184. *See* Amy Dash, *Did Barstool & Deion Sanders Violate NIL Law When Travis Hunter Flipped to Jackson State?*, LEAGUE OF JUSTICE (Dec. 15, 2021), <https://leagueofjustice.com/did-barstool-deion-sanders-violate-nil-law-by-flipping-travis-hunter-to-jackson-state/> [<https://perma.cc/KS85-KFBM>] (detailing NCAA's hesitation to bring enforcement action against any student-athlete for deals that are forbidden by their state's NIL law).

185. For further discussion on Barstool Athletes, see *infra* notes 186–288 and accompanying text.

186. For further discussion on states with an operating Barstool Sportsbook, see *infra* notes 189–278 and accompanying text.

187. For further discussion on states with an operating Barstool Sportsbook, see *infra* notes 189–278 and accompanying text.

188. For further discussion on NCAA's NIL Interim Policy, see *infra* notes 256–278 and accompanying text.

### A. The Royal Flush: States Where Barstool Sportsbook is Offered

This section covers the thirteen states that currently offer Barstool Sportsbook.<sup>189</sup> Of the thirteen states, only four, West Virginia, Indiana, Iowa, and Kansas do not have their own NIL legislation.<sup>190</sup> As such, the NCAA's NIL Policy covers those four states.<sup>191</sup> However, Michigan's NIL law did not go into effect until December 31, 2022, so Michigan student-athletes are also currently governed by the NCAA's NIL policy.<sup>192</sup>

#### 1. *Colorado, Arizona, Michigan, and Pennsylvania: No Restrictions*

Colorado, Arizona, Michigan, and Pennsylvania have very similar NIL laws.<sup>193</sup> All four laws permit student-athletes to earn money from their NIL.<sup>194</sup> Colorado's legislation is the most lenient, requiring student-athletes to disclose the deal to their institution within seventy-two hours of signing the contract.<sup>195</sup> Arizona, Michigan and Pennsylvania all state that student-athletes cannot enter into any deals that conflict with any current deals the school has in place already.<sup>196</sup> None of these statutes provide any consequences

189. See BARSTOOL SPORTSBOOK, *supra* note 168 (listing thirteen states where Barstool Sportsbook is offered as Pennsylvania, Michigan, Illinois, Colorado, Virginia, New Jersey, Tennessee, Arizona, West Virginia, Iowa, Indiana, Kansas, and Louisiana).

190. See *Tracker: Name, Image, and Likeness Legislation by State*, *supra* note 78 (documenting NIL legislation in all Barstool Sportsbook states except West Virginia, Indiana, Iowa, and Kansas).

191. See Brutlag Hosick, *supra* note 18 (stating if there is no state NIL law, student-athletes will be governed by NCAA's interim policy).

192. See MICH. COMP. LAWS § 390.1741 (2021) (stating effective date of NIL legislation).

193. Compare COLO. REV. STAT. § 23-16-301 (2021) (providing state's NIL legislation and provisions) with 2021 Ariz. Sess. Laws 1296(d) (providing student-athletes with NIL legislation) and MICH. COMP. LAWS § 390.1733 (stating that student-athletes may earn compensation from their name, image, and likeness without sacrificing their ability to play NCAA athletics); and 5 Pa.C.S.A. § 3703 (updating Pennsylvania NIL law to allow all types of NIL deals with no restrictions).

194. See generally COLO. REV. STAT. § 23-16-301 (permitting student-athletes to earn money from their NIL deal); 2021 Ariz. Sess. Laws 1296(d) (allowing student-athletes to engage in NIL deals); MICH. COMP. LAWS § 390.1733 (permitting NIL deals for student-athletes); 5 Pa.C.S.A. § 3703 (allowing student-athletes to engage in NIL deals).

195. See COLO. REV. STAT. § 23-16-301(3)(b) (requiring student-athlete to disclose NIL deal to their school).

196. See 2021 Ariz. Sess. Laws 1296(d) (outlining prohibitions on student-athlete NIL deals); see also MICH. COMP. LAWS § 390.1737(2) (stating institutions must review any proposed NIL deals and can inform student-athlete they are unable to enter into this deal because it would cause conflict with school); see also 5 Pa.C.S.A. § 3703 (permitting student-athletes to enter into NIL deals with no restrictions).

for student-athletes that are found to have violated the statute.<sup>197</sup> Therefore, student-athletes are generally able to earn money from their NIL deal with very few restrictions, if any, from the state.<sup>198</sup> As such, these student-athletes statutorily should have no issues becoming Barstool Athletes.<sup>199</sup> Further, the NCAA has not announced any investigations or warnings to schools or players about the permissibility of NIL deals with gambling companies in these states.<sup>200</sup>

MaximBet, a gambling company, offered a NIL deal to every female student-athlete in Colorado.<sup>201</sup> MaximBet was looking at how to launch their platform in Colorado and realized that the state NIL law does not prohibit student-athletes from working with sports betting companies, therefore, student-athletes would be an excellent platform to launch MaximBet advertising in Colorado.<sup>202</sup> This opportunity was presented to all female student-athletes in the

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197. See COLO. REV. STAT. § 23-16-301(6)(b) (providing no restrictions on deals student-athletes can enter but also stating any student-athlete aggrieved in action in violation of this statute can bring action for injunctive relief); see also 2021 Ariz. Sess. Laws 1296(d) (providing no restrictions on types of deals student-athletes can enter into); see also MICH. COMP. LAWS § 390.1737(2) (stating institutions must review any proposed NIL deals and can inform student-athlete they are unable to enter into this deal because it would cause conflict with school does not provide any specific types of restrictions); see also 5 Pa.C.S.A. § 3703 (permitting student-athletes to enter into NIL deals with no restrictions permitted by universities or institutions).

198. For a discussion of NIL restrictions in Colorado, Arizona, Michigan, and Pennsylvania, see *supra* notes 193–197 and accompanying text.

199. For a discussion of NIL restrictions in Colorado, Arizona, Michigan, and Pennsylvania, see *supra* notes 193–197 and accompanying text.

200. See Daniel Chavkin, *NCAA Says It's Investigating 'Potential Violations' Regarding NIL*, SPORTS ILLUSTRATED (June 9, 2022), <https://www.si.com/college/2022/06/09/ncaa-enforcement-nil-issues-letter-potential-violations> [<https://perma.cc/S67N-RGPL>] (stating NCAA's awareness of complaints of NIL violations, but no active investigations).

201. See Kristi Dosh, *MaximBet Offers Statewide NIL Deal to every NCAA Female Student Athlete in Colorado*, FORBES (Sept. 28, 2021, 8:00 AM), <https://www.forbes.com/sites/kristidosh/2021/09/28/maximbet-offers-statewide-nil-deal-to-every-ncaa-female-student-athlete-in-colorado/?sh=440e290f127d> [<https://perma.cc/FL9S-PPJG>] (explaining this deal is legal as state NIL law has no prohibitions on products student-athletes can endorse); see also Eben Novy-Williams, *MaximBet Shuts Doors Amid Wave of U.S. Sportsbook Retrenchment*, SPORTICO (Nov. 16, 2022, 3:55 PM), <https://www.sportico.com/business/sports-betting/2022/maximbet-closes-down-sportsbook-1234695385/> [<https://perma.cc/RL7V-2MMD>] (stating MaximBet stopped operations on November 16, 2022). Although MaximBet has ceased operations, that does not change the analysis and comparison of a gambling company offering NIL deals to student-athletes.

202. See *id.* (recognizing company could use student-athletes through NIL deals to promote company in state).

state, regardless of what division the athlete competed in.<sup>203</sup> The student-athletes are expected to promote the brand on social media, but are not required to encourage others to create an account with MaximBet or place any bets with the company.<sup>204</sup> The only potential conflict for student-athletes taking advantage of this opportunity would be a potential conflict with the University of Colorado's deal with a different sports gambling company.<sup>205</sup> As MaximBet is a strictly gambling company that is permitted for NIL deals, Barstool would not have any statutory obstacles as a mixed-media company that offers a variety of services, not just sports gambling.<sup>206</sup>

2. *New Jersey: Related to or Associated with Casinos or Gambling, Including Sports Betting*

New Jersey's NIL law that expressly prohibits student-athletes from "earning compensation as a result of the use of the student's name, image, or likeness in connection with any person, company, or organization related to or associated with . . . casinos and gambling, including sports betting."<sup>207</sup> The statute has a provision that allows for an institution to take away a student-athlete's athletic scholarship if they violate the statute.<sup>208</sup> However, if a student does lose athletic scholarship eligibility, they may still be eligible for academic scholarships and are still able to play NCAA sports.<sup>209</sup>

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203. *See id.* (explaining MaximBet felt that female student-athletes, especially non-Division I student-athletes, were "getting the short end of the stick" with NIL deals and that it was untapped potential in NIL market). Further, MaximBet felt that Division II and III athletes are often more influential on their campuses than Division I athletes, collectively, because those student-athletes are on smaller campuses and have personal connections with other students at the institution. *See id.* (targeting markets that some brands are ignoring).

204. *See id.* (disclosing student-athletes have to follow MaximBet social media accounts and promote company at specific events, but after those events, any promotion is up to discretion of student-athlete).

205. *See id.* (noting University of Colorado recently entered into deal with PointsBet, which may conflict with potential NIL deals with MaximBets, but there are no statutory conflicts).

206. *Cf.* MaximBet, <https://maximbet.com/> [<https://perma.cc/EDH4-2G34>] (showing company's prior services, which are strictly gambling).

207. *See* N.J. STAT. ANN. § 18A:3B-87(3)(b) (West 2020) (describing limitations on student-athletes to endorse certain products in NIL deals).

208. *See id.* (stating that any student in violation of this statute will lose their school's scholarship eligibility).

209. *See Athletic Scholarships: Everything You Need to Know*, NCSA, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts> [<https://perma.cc/4EY2-K9UM>] (last visited Sept. 21, 2021) (stating there are multiple reasons athletic scholarship might be revoked from student-athlete, but that does not mean student loses their academic scholarship or NCAA eligibility). It is also noted that only about two percent of student-athletes are on athletic scholarships

For these student-athletes, the determination of whether they are potentially risking their scholarship eligibility turns on whether Barstool is an organization related to sports betting.<sup>210</sup> To “relate” means “containing, governing, showing, mentioning, referring, discussing or pertaining in any way, directly or indirectly, to the subject matter.”<sup>211</sup> In Barstool’s case, it is directly related to the subject matter, sports betting, through the corporation’s trademark, Barstool Sportsbook, which contains its use to only Barstool.<sup>212</sup> Further, Penn Gaming, which owns over a third of Barstool, runs Barstool Sportsbook.<sup>213</sup> Additionally, Barstool regularly refers to, mentions, or discusses Barstool Sportsbook on social media or in interviews.<sup>214</sup> Portnoy even promoted Barstool Sportsbook’s launch in New Jersey on his Twitter account.<sup>215</sup>

If Barstool is not considered to pertain directly to sports wagering, it is indirectly related.<sup>216</sup> Both Barstool and Barstool Sportsbook are owned and operated by the same company.<sup>217</sup> On the Barstool website, a link to Barstool Sportsbook is available on the

and most students receive academic scholarships instead. *See id.* (explaining myth that all student-athletes have an athletic scholarship).

210. For further discussion of the New Jersey NIL law, see *supra* notes 207–221 and accompanying text.

211. *See Relate Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/relate#:~:text=Relate%20or%20%20E2%80%9Crelating%20%80%9D%20means%20containing,Sample%201> [<https://perma.cc/6HWU-R5ES>] (last visited Sept. 22, 2021) (defining relate or relating).

212. *See Barstool Sportsbook Application*, *supra* note 166 (demonstrating that Barstool owns trademark for Barstool Sportsbook and is entitled to standard trademark protections).

213. For further discussion of Penn Gaming’s involvement in Barstool and Barstool Sportsbook, see *supra* notes 156–165 and accompanying text; see also Gary Rotstein, *Penn National CEO Stands by Portnoy and Barstool in Planning Full Acquisition*, USBETS (Feb. 3, 2022), <https://www.usbets.com/penn-national-acquisition-barstool-portnoy/> [<https://perma.cc/X5W6-X422>] (discussing Penn Gaming’s ownership share of Barstool).

214. *See* Barstool Sports (@barstoolsports), TWITTER, [https://twitter.com/barstoolsports?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/barstoolsports?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) [<https://perma.cc/P8TR-3B4Z>] (last visited Sept. 22, 2021) (mentioning or discussing Barstool Sportsbook in variety of tweets on page).

215. *See* Dave Portnoy (@stoolpresident), TWITTER (Aug. 20, 2021, 1:27 PM), [https://twitter.com/stoolpresident/status/1428770625888440324?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1428770625888440324%7Ctwgr%5E%7Ctwcon%5Esl\\_&ref\\_url=https%3A%2F%2Fbarrettsportsmedia.com%2F2021%2F08%2F20%2Fbarstool-sportsbook-new-jersey%2F](https://twitter.com/stoolpresident/status/1428770625888440324?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1428770625888440324%7Ctwgr%5E%7Ctwcon%5Esl_&ref_url=https%3A%2F%2Fbarrettsportsmedia.com%2F2021%2F08%2F20%2Fbarstool-sportsbook-new-jersey%2F) [<https://perma.cc/F2SS-7RWT>] (promoting sports betting in New Jersey through Barstool Sportsbook).

216. For further discussion of how Barstool is indirectly related to sports wagering, see *infra* notes 217–221 and accompanying text.

217. *See* Peter Kafka, *A Casino Company is Buying Barstool Sports in a \$450 Million Deal*, VOX (Jan. 29, 2020, 1:37 AM), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-cherin> [<https://>



front page.<sup>218</sup> There is also a Sportsbook app that lists as owner “Penn Sports Interactive, LLC” as opposed to Barstool Sports.<sup>219</sup> Penn Sports Interactive is the online gaming arm of Penn National Gaming.<sup>220</sup> Thus, even if Barstool is not relating directly to sports wagering, the company is indirectly about sports betting, making Barstool an impermissible NIL deal in New Jersey.<sup>221</sup>

### 3. *Tennessee and Illinois: Promoting Gambling*

Tennessee’s and Illinois’s NIL statutes prohibit NIL deals “that promote gambling.”<sup>222</sup> There is no provision that provides any consequences if a student-athlete is found to have broken any of the provisions provided.<sup>223</sup> However, student-athletes in Tennessee can hire agents to solicit NIL deals.<sup>224</sup> Those agents could be held liable if the agent is responsible for a deal that causes the student-athlete to be disqualified or suspended from college athletics.<sup>225</sup> Additionally if the student-athlete is successful in their suit, the student-athlete could recover both actual and punitive damages, as

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perma.cc/WV38-ABP8] (explaining that Penn Gaming owns thirty-six percent of Barstool Sports and completely operates Barstool Sportsbook).

218. *See Shows, supra* note 147 (providing link to access Barstool Sportsbook).

219. *See Barstool Sportsbook & Casino*, APPLE APP STORE, <https://apps.apple.com/us/app/barstool-sportsbook-casino/id1474416533> [<https://perma.cc/Y3JX-BPQV>] (last visited Aug. 15, 2022) (listing Penn Sports as the owner of app).

220. *See Interactive Online Gaming*, PENN NATIONAL GAMING, INC., <https://www.pngaming.com/> [<https://perma.cc/KU39-R6XF>] (last visited Oct. 25, 2021) (describing Penn Sports Interactive as part of Penn National Gaming).

221. *See Relate Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/relate#:~:text=Relate%20or%20%E2%80%9Crelating%E2%80%9D%20means%20containing,Sample%201> [<https://perma.cc/U424-JLN6>] (last visited Sept. 22, 2021) (stating that “relating to” covers anything indirectly related to subject matter).

222. *See* TENN. CODE ANN. § 49-7-2802(g)(3) (2022) (prohibiting NIL deals with gambling, tobacco, alcohol, and adult entertainment activities); *see also* 110 ILL. COMP. STAT. 190/20(1) (2021) (listing prohibited NIL deals).

223. *See* TENN. CODE ANN. § 49-7-2802(g)(3) (2022) (noting that under none of terms of legislation does it provide procedures and consequences for student-athletes breaking any of provisions); *see also* 110 ILL. COMP. STAT. 190/1-99 (noting entirety of NIL legislation does not include provision for consequences for student-athletes breaking these provisions).

224. *See* TENN. CODE ANN. § 49-7-2802(h) (stating student-athletes may have representation by agent or another licensed third party to solicit NIL deals).

225. *See id.* at §§ 49-7-2115–2117 (providing civil and criminal penalties and remedies for student-athletes hurt by their agent’s actions).

well as attorney's fees.<sup>226</sup> The Illinois statute protects any institution that could potentially face a claim from specific NIL deals.<sup>227</sup>

For these student-athletes, the determination of whether they can become a Barstool Athlete turns on whether being a Barstool Athlete would be a promotion of gambling.<sup>228</sup> To promote something, the student-athletes NIL deal would need to "procure," "distribute," circulate," "present," "or advertise" a business or enterprise or product.<sup>229</sup> When Barstool Sportsbook went live in Tennessee, Dave Portnoy tweeted an announcement of such.<sup>230</sup> Additionally, Portnoy tweeted about the Sportsbook being offered specifically in Tennessee on September 7, 2021, the day before it went live.<sup>231</sup> Furthermore, Portnoy was promoting Barstool Sportsbook in general on social media since the idea was created.<sup>232</sup> Penn National was discussing the rollout of Barstool Sportsbook starting at the beginning of 2021 stating that the plan is to have the Sportsbook offered in ten states in 2021, including Tennessee.<sup>233</sup>

Like Tennessee, a few days prior to Barstool Sportsbook going live in Illinois, Portnoy tweeted an announcement of such.<sup>234</sup> Addi-

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226. See *id.* § 49-7-2116(b) (providing that student-athletes who bring forth successful claims can recover damages and attorney's fees).

227. See 110 ILL. COMP. STAT. 190/35 (2021) (protecting institutions from liability).

228. For further discussion of the Illinois NIL statute, see *infra* notes 229–233 and accompanying text.

229. See *Promote or Promotion Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/promote> [<https://perma.cc/2LSH-KRCE>] (last visited Sept. 22, 2021) (defining promote to mean "procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise.").

230. See Dave Portnoy (@stoolpresidente), TWITTER (Sept. 8, 2021, 12:22 PM), <https://twitter.com/stoolpresidente/status/1435639656364875777?lang=en> [<https://perma.cc/FSF2-V4XU>] (tweeting that Barstool Sportsbook is live in Tennessee).

231. See Dave Portnoy (@stoolpresidente), TWITTER (Sept. 7, 2021, 7:13 PM), <https://twitter.com/stoolpresidente/status/1435380690670047234> [<https://perma.cc/B2HS-PBAP>] (advertising fact that Barstool Sportsbook will be available in Tennessee next day).

232. See Dave Portnoy (@stoolpresidente), TWITTER <https://twitter.com/stoolpresidente> [<https://perma.cc/72SJ-NRUT>] (last visited Sept. 22, 2021) (advertising, promoting, and posting about Barstool Sportsbook since at least February 2021).

233. See Matthew Waters, *Penn CEO Says This State is up Next for Barstool Sportsbook Launch*, LEGAL SPORTS REPORT (Feb. 4, 2021), <https://www.legalsportsreport.com/47848/barstool-sportsbook-next-state-launch-snowden/> [<https://perma.cc/3UXQ-DZ9M>] (stating Barstool Sportsbook will be launched in Illinois in early 2021 and then expand to New Jersey, Tennessee, and West Virginia).

234. See Dave Portnoy (@stoolpresidente), TWITTER (Mar. 9, 2021, 2:14 PM), [https://twitter.com/stoolpresidente/status/1369366038329106441?ref\\_](https://twitter.com/stoolpresidente/status/1369366038329106441?ref_)

tionally, the main Barstool Sports Twitter account tweeted an announcement when the Sportsbook went live.<sup>235</sup> Furthermore, other popular Barstool employees also promoted Barstool Sportsbook in Illinois prior to it being launched.<sup>236</sup>

#### 4. *Virginia: “Connected to” Gambling*

The Virginia NIL legislation provides that a student-athlete cannot enter into any NIL deals that have a “connection” with “casinos or gambling, including sports betting.”<sup>237</sup> The Virginia law also does not have a provision that specifies the consequences of breaking these laws.<sup>238</sup> Thus, Virginia student-athletes being able to become Barstool Athletes is determined by which Barstool entity has a connection with sports betting.<sup>239</sup> Law Insider defines “connection” as the existence of “business or professional relations generally or control . . . in a company.”<sup>240</sup> Barstool is a Delaware corporation that owns the trademark for Barstool Sportsbook.<sup>241</sup> Penn National owns a significant stake in Barstool Sports and is responsible for the launching and running of Barstool Sportsbook.<sup>242</sup>

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src=twsr%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1369366038329106441%7Ctwgr%5E%7Ctwcon%5Es1\_&ref\_url=https%3A%2F%2Fsportshandle.com%2Fbarstool-illinois-launch-030921%2F [https://perma.cc/7BEK-UUBC] (announcing that Barstool Sportsbook will be going live in Illinois in few days).

235. See Barstool Sports (@barstoolsports), TWITTER (Mar. 11, 2021, 8:51 AM), <https://twitter.com/barstoolsports/status/1370009565996138497?s=10> [https://perma.cc/3GRW-S889] (announcing Barstool Sportsbook will be live in Illinois later that day).

236. See Big Cat (@BarstoolBigCat), TWITTER (Mar. 9, 2021, 2:09 PM), <https://twitter.com/barstoolbigcat/status/1369364781078093825?lang=en> [https://perma.cc/4S9U-V2AQ] (announcing Barstool Sportsbook will be live few days later).

237. See H.B. 7001(18)(d), 2020 Spec. Sess. 1 (Va. 2020) (providing list of prohibited NIL deals, including sports betting and gambling).

238. See *id.* (noting no provision exists in bill for consequences of not following this legislation).

239. For further discussion on the Virginia NIL statute, see *supra* notes 237–238 and accompanying text.

240. See *Connection definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/connection> [https://perma.cc/CN7K-VCME] (last visited Sept. 22, 2021) (defining connection).

241. See *Department of State: Division of Corporations*, STATE OF DELAWARE, <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx> [https://perma.cc/6742-G59Y] (last visited Sept. 22, 2021) (providing incorporation information for Barstool Sports); see also *Barstool Sportsbook Application*, *supra* note 166 (showing Barstool’s approved and confirmed trademark application for Barstool Sportsbook which was approved and confirmed).

242. See *Penn National Gaming to Launch Barstool Sportsbook Mobile App in Indiana*, BUSINESSWIRE (May 14, 2021), <https://www.businesswire.com/news/home/20210514005339/en/Penn-National-Gaming-to-Launch-Barstool-Sportsbook-Mo>

Therefore, there is shared control of the two entities, Barstool and Barstool Sportsbook, which falls under the definition of connected to.<sup>243</sup>

### 5. *Louisiana: “Endorsing” Gambling*

The Louisiana NIL law prohibits any NIL deal that endorses “any form of gambling including sports wagering.”<sup>244</sup> The legislation requires all colleges and universities in the state to implement policies to regulate and carry out the NIL legislation.<sup>245</sup> Further, the legislation originally forbade any past or present college booster from soliciting, directly or indirectly, any NIL deals, but the statute was amended to omit the provision.<sup>246</sup>

For student-athletes in Louisiana, like the student-athletes in Illinois, the determination of whether they can become a Barstool Athlete turns on whether being a Barstool Athlete would be an “endorsement of gambling.”<sup>247</sup> To “endorse” something would be “to confirm or convey or declare an approval” of something “in any manner.”<sup>248</sup> All that is required of a student-athlete to be considered a Barstool Athlete is to submit photos for Barstool to use and to put “Barstool Athlete” in the student-athletes social media bios.<sup>249</sup> Student-athletes are not required to post about Barstool or Barstool Sportsbook online or upload photographs of themselves wearing Barstool merchandise.<sup>250</sup> While it could be argued that student-athletes are declaring their approval of gambling through partnering with Barstool, Barstool is a multi-media company that

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bile-App-in-Indiana [<https://perma.cc/H66N-AFJE>] (stating Penn National will be launching Barstool Sportsbook in collaboration with Barstool Sports); for further discussion about Penn National’s ownership in Barstool Sports, see *supra* notes 156–165 and accompanying text.

243. See Rotstein, *supra* note 212 (noting Penn Gaming owns over one-third of Barstool Sports).

244. See 2022 LA. SESS. LAW SERV. 307 § 3703 (WEST) (forbidding NIL deals that promote “tobacco, alcohol, illegal substances or activities, banned athletic substances, or any form of gambling, including sports wagering).

245. See *id.* at § 3703(B) (requiring institutions to adopt policies to carry out and regulate NIL deals).

246. See *id.* at § 3703(D) (amending statute that forbade booster involvement).

247. For further discussion of the Louisiana NIL statute, see *supra* notes 244–246 and accompanying text.

248. See *Endorse Definition*, LAWINSIDER, <https://www.lawinsider.com/dictionary/endorse> [<https://perma.cc/QCY5-SY2Z>] (last visited Sept. 23, 2021) (defining endorse).

249. See *Barstool Athlete Application*, *supra* note 173 (describing requirements to be Barstool Athlete).

250. See *id.* (noting there are no other requirements to be considered Barstool Athlete).

stated that their goal with this program is to help student-athletes build their brands.<sup>251</sup>

Further, multiple student-athletes in Louisiana have become Barstool Athletes, and Portnoy has spoken out about how pro-student some Louisiana universities have been with NIL deals.<sup>252</sup> LSU has several student-athletes who are Barstool Athletes, and the school has had no issue with their affiliation.<sup>253</sup> Portnoy has said that LSU has been much easier to work with in terms of additional NIL deals, such as an apparel line, than other schools across the country.<sup>254</sup> Therefore, it seems that being a Barstool Athlete does not mean that the student-athlete is promoting sports gambling, which may help guide student-athletes in other states with similar NIL statute wording.<sup>255</sup>

#### 6. *States Governed by the NCAA's NIL Policy*

Student-athletes who live in a state where there is no NIL legislation are subject to the NCAA's Interim NIL Policy.<sup>256</sup> The Interim Policy states that all student-athletes can engage in NIL activities without forfeiting their eligibility and that the NCAA will continue to regulate all activities, besides regulating whether a NIL deal complies with state law.<sup>257</sup> Additionally, the Interim Policy

251. Cf. Trent, *Spencer Lee "Excuses Are for Wusses" Shirts on Sale Now, Becomes the First Ever Barstool Athlete NIL Deal*, BARSTOOL SPORTS (July 29, 2021, 10:55 AM), <https://www.barstoolsports.com/blog/3375843/spencer-lee-excuses-are-for-wusses-shirts-on-sale-now-becomes-the-first-ever-barstool-athlete-nil-deal> [https://perma.cc/5PKM-WMLS] (advertising Barstool Athlete's first NIL deal). Barstool Sports promoted this deal and stated that the entire Barstool audience should support athletes and any merchandise or products they sell. See *id.* (promoting products).

252. See Daniella Medina, *Gymnast Olivia Dunne, Barstool's Dave Portnoy on NIL at LSU: 'One of the More Progressive Schools'*, DAILY ADVERTISER (Aug. 19, 2021, 2:58 PM), <https://www.theadvertiser.com/story/sports/college/lsu/2021/08/19/olivia-dunne-lsu-nil-dave-portnoy/8197827002/> [https://perma.cc/G9PS-N5TJ] (stating Louisiana State University has been very pro-student with their NIL deals).

253. See *id.* (noting LSU holds sessions to educate their student-athletes on NIL and has several prominent student-athletes who are partnered with Barstool).

254. See *id.* (noting LSU has been receptive to deals its student-athletes want to make, as compared to other schools in country, making it extremely difficult for student-athletes to cash in on NIL).

255. See *id.* (explaining LSU does not have issue with Barstool Athletes, which implies being Barstool Athlete does not endorse sports gambling); see also 110 ILL. COMP. STAT. ANN. 190/20(i) (2021) (providing student-athletes cannot enter NIL deals that promote sports gambling).

256. See Brutlag Hosick, *supra* note 18 (stating that student-athletes attending school in states without NIL legislation should follow their school guidelines and NCAA's guidelines).

257. See *Interim NIL Policy*, NCAA, [http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf) [https://perma.cc/P6C9-Z2DK] (last visited Sept. 21,

prohibits “pay for play” deals and involvement by any school or conferences.<sup>258</sup> Further, NIL deals cannot be given based on athletic performance.<sup>259</sup> Student-athletes must also abide by the NCAA Bylaws that state student-athletes cannot participate in sports wagering or provide information for others to engage in sports wagering on any competition.<sup>260</sup> Any student-athlete in violation of these provisions is subject to a suspension where the student-athlete cannot compete in any competition for the duration of the suspension.<sup>261</sup>

Student-athletes in these states will then have to determine if becoming a Barstool Athlete will be considered them “participat[ing] in sports wagering” or “provid[ing] information to individuals involved in or associated with any type of sports wagering activities.”<sup>262</sup> The only obligation of Barstool Athletes is to put “Barstool Athlete” in their social media bio.<sup>263</sup> It is unlikely that the NCAA would determine that this would be a student-athlete engag-

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2021) (stating NCAA’s Interim NIL policy). The policy is divided between schools in states with NIL legislation and schools in states without NIL legislation. *See id.* (explaining all student-athletes will not be governed by the same rules). If the student-athlete goes to school in a state with NIL legislation, then the NIL legislation is considered to preempt the NCAA’s standards unless the NIL law is invalidated. *See id.* (recognizing state law has more legal power than the NCAA’s Interim Policy). If a student-athlete goes to school in a state without NIL legislation, the NCAA’s interim policy and NCAA bylaws regulate the student-athlete’s perspective NIL deals. *See id.* (ensuring all student-athletes have a policy to follow). The policy further states that the NCAA will continue its normal regulations and enforcement of all issues besides compliance with state law for NIL deals. *See id.* (demonstrating NCAA is not yielding all power to states).

258. *See Questions and Answers on Name, Image and Likeness*, NCAA, <https://www.ncaa.org/questions-and-answers-name-image-and-likeness> [<https://perma.cc/U82S-XZDK>] (last visited Sept. 21, 2021) (describing limits on NIL deals for student-athletes).

259. *See* Gregory A. Marino, *The NCAA Declares Independence from NIL Restrictions*, FOLEY & LARDNER LLP (Aug. 20, 2021), <https://www.foley.com/en/insights/publications/2021/08/ncaa-declares-independence-nil-restrictions> [<https://perma.cc/9ERG-BZ7J>] (noting NCAA prohibits NIL deals that are contingent on athletic performance).

260. *See 2021-2022 NCAA Division I Manual*, NCAA, 39–40 (Aug. 1, 2021), <https://web3.ncaa.org/lldb/reports/getReport/90008> [<https://perma.cc/NR5B-6W5F>] (stating that it is against Ethical Conduct of NCAA for student-athlete to participate in sports wagering in any way). Sports wagering is defined as “placing, accepting or soliciting a wager . . . of any type with an individual or organization on any intercollegiate, amateur or professional team or contest.” *See id.* at 44 (defining sports wagering).

261. *See id.* (describing punishment for breaking these provisions of NCAA Division I Bylaws).

262. For further discussion about the NCAA Bylaws that govern NCAA student-athletes, see *supra* notes 260–261 and accompanying text.

263. For further discussion about being a Barstool Athlete, see *supra* notes 169–184 and accompanying text.

ing in sports wagering.<sup>264</sup> First, student-athletes do not need to be of legal gambling age in order to become a Barstool Athlete.<sup>265</sup> Second, even if the student-athlete is of the legal age for gambling in their state, the student-athlete is not required to open a Barstool Sportsbook account, place any bets, or promote Barstool Sportsbook on their social media accounts.<sup>266</sup> Thus, through the student-athletes NIL deals with Barstool, there is no obligation to “participate in sports wagering” in violation of the NCAA Bylaws.<sup>267</sup>

It is also unlikely that being a Barstool Athlete would be considered “provid[ing] information to individuals involved in or associated with any type of sports wagering activities.”<sup>268</sup> Once a student-athlete is confirmed as a Barstool Athlete, the student-athlete will receive Barstool merchandise and exposure on Barstool’s social media accounts.<sup>269</sup> The student-athlete puts “Barstool Athlete” in their social media bio, and their obligations are met.<sup>270</sup> There is no requirement for student-athletes to provide any information to Barstool employees about injuries or any information that would give someone inside information for placing bets on the team.<sup>271</sup> Further since NIL deals cannot be based on performance, there is no legal way to influence an athlete to shave points to make money

264. See *Engage Definition*, LAWINSIDER, <https://www.lawinsider.com/dictionary/engage> [<https://perma.cc/ZKC9-7KV2>] (last visited Sept. 23, 2021) (defining engage as “to actively participate” or “perform or assist in the performance of an activity.”). As a student-athlete is not being asked to participate in sports wagering or gambling to be a Barstool Athlete, it is unlikely that the NCAA would consider that the student-athlete has a partnership with Barstool as to mean the student-athlete is gambling. See *id.* (noting Barstool Athletes are not gambling as part of the NIL deal).

265. See *Barstool Athlete Application*, *supra* note 173 (providing space to input student-athletes graduation year and not limit graduation year to current upper-level college students).

266. See *id.* (listing requirements to be Barstool Athlete limited to putting “Barstool Athlete” in student-athlete’s social media bios and submitting photos of student-athlete in uniform to be posted on Barstool social media accounts).

267. For further discussion about the NCAA Bylaws that govern NCAA student-athletes, see *supra* notes 260–261 and accompanying text.

268. For further discussion about the NCAA Bylaws that govern NCAA student-athletes, see *supra* notes 260–261 and accompanying text.

269. See Connor Glunt, *Student Athletes Cash in on New Name, Image and Likeness Laws*, THE ITHACAN (Aug. 26, 2021), <https://theithacan.org/sports/student-athletes-cash-in-on-new-name-image-and-likeness-laws/> [<https://perma.cc/E3FP-54VL>] (noting there is no direct monetary payment for being Barstool Athlete, but benefits include exposure and merchandise).

270. See *id.* (noting Barstool does not require much of student-athletes and is advertising itself as marketing agency).

271. See *Barstool Athlete Application*, *supra* note 173 (listing all requirements to be a Barstool Athlete).

through sports betting.<sup>272</sup> Thus, simply placing “Barstool Athlete” in a social media bio should not violate the NCAA bylaws.<sup>273</sup>

There are also student-athletes in these states that have signed up to be Barstool Athletes.<sup>274</sup> However, this is not indicative that the NCAA has determined that being a Barstool Athlete does not violate any policies or bylaws because the NCAA has stated that it is not investigating or enforcing the NCAA NIL Policy.<sup>275</sup> Yet, the NCAA has stated the NIL policy is very permissive and has few restrictions.<sup>276</sup> As such, with thousands of student-athletes becoming Barstool Athletes in states where the NCAA NIL Policy governs, the NCAA would wipe out a significant portion of student-athletes if it decides that being a Barstool Athlete is not permitted.<sup>277</sup> With billions of dollars of revenue depending on student-athletes, doubtful

272. See *Quick Guide to New NCAA Interim Policy*, NCAA, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QuickGuideToNewPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QuickGuideToNewPolicy.pdf) [<https://perma.cc/7PCW-XGYG>] (last visited Oct. 29, 2021) (forbidding NIL deals based on athlete performance, or lack thereof).

273. See 2021-2022 Division I Manual, *supra* note 260, at Section 10.3, (prohibiting student-athletes from providing information for others to engage in sports wagering).

274. See, e.g., Chloe Peterson, *Hawkeyes Capitalize in Name, Image, and Likeness as Barstool Athletes*, THE DAILY IOWAN (July 13, 2021), <https://dailyiowan.com/2021/07/13/hawkeyes-capitalize-in-name-image-likeness-as-barstool-athletes/#:~:text=sponsored%20by%20Barstool-,%E2%80%9D,to%20sign%20with%20the%20business> [<https://perma.cc/2CQA-BX2H>] (listing student-athletes at University of Iowa who have joined Barstool Athletes); see, e.g., Clayton Sayfie, *NIL Tracker: Jace Howard is Michigan Basketball's First 'Barstool Athlete'*, MAIZE & BLUE REVIEW (July 5, 2021), <https://michigan.rivals.com/news/nil-tracker-jace-howard-is-michigan-basketball-s-first-barstool-athlete-> [<https://perma.cc/A9C3-75PN>] (listing student-athletes at University of Michigan who are Barstool Athletes); see, e.g., *Carter Bonecutter Joins Barstool Athlete program*, NIL COLLEGE ATHLETES, <https://nilcollegeathletes.com/deals/carter-bonecutter-joins-barstool-athlete-program> [<https://perma.cc/8J93-UTU5>] (last visited Mar. 6, 2022) (noting student-athlete at Indiana University has become Barstool Athlete); see, e.g., Barstool Athletics (@stoolathletics), TWITTER, <https://twitter.com/stoolathletics/status/1414528711915884546> [<https://perma.cc/C2GW-UBGF>] (July 12, 2021, 6:15 AM) (noting student-athlete from West Virginia University became Barstool Athlete).

275. See Ralph D. Russo, *Lack of Detailed NIL Rules Challenges NCAA Enforcement*, AP (Jan. 29, 2022), <https://apnews.com/article/college-football-sports-business-15e776b5d115dac0a37a1563d5bfce00> [<https://perma.cc/AB3H-5G7N>] (referring to NCAA VP of Enforcement statements that NCAA is “not enforcing NIL deals . . . [or] the interim policy.”).

276. See *id.* (explaining NCAA policy is “largely permissive”).

277. See Brinley Chabot, *What do Barstool Athletes Actually Get from the Sponsorship?*, CENTER FIELD (Nov. 24, 2021), <https://centerfieldmarist.com/2021/11/24/what-do-barstool-athletes-actually-get-from-the-sponsorship/#:~:text=Across%20the%20nation%2C%20there%20are,baseball%20and%20many%20other%20sports.> [<https://perma.cc/56SX-ZDWN>] (reporting roughly 4,000 Barstool student-athletes nationwide as of November 2021).



the NCAA would make that decision with one of the most popular NIL deals available to student-athletes.<sup>278</sup>

### B. The Next Hand: States Barstool Sportsbook is Looking to Expand to

Barstool Sportsbook is continuing to expand, hoping to eventually be offered in every state that has legal gambling.<sup>279</sup> Portnoy has identified states such as Maryland and New York as markets for Barstool and Penn Gaming to offer the Sportsbook.<sup>280</sup> Massachusetts and Texas have also been identified as top markets if they legalize betting.<sup>281</sup> Massachusetts has not passed NIL legislation, and Maryland's and New York's legislation are not in effect yet.<sup>282</sup> Texas has active NIL legislation.<sup>283</sup>

Maryland's and New York's NIL laws have no restrictions on the types of deals that student-athletes can enter.<sup>284</sup> Therefore, these student-athletes will have no restrictions to the types of deals, similar to student-athletes in Colorado, Arizona, and Michigan.<sup>285</sup> Texas's NIL law prohibits NIL deals that involve an "endorsement of alcohol, tobacco products, e-cigarettes . . . sports betting, casino

278. See Rory Jones, *NCAA Generates Record US \$1.16bn Revenue for 2021*, SPORTS PRO MEDIA (Feb. 3, 2022), <https://www.sportspromedia.com/news/ncaa-finances-2021-revenue-march-madness-college-sports/#:~:text=The%20National%20Collegiate%20Athletic%20Association,US%24519%20million%20in%202020>. [<https://perma.cc/M8RE-AK4U>] (noting record amount of revenue earned by NCAA in 2021 with numbers surpassing pre-COVID-19 levels).

279. See *Barstool Sportsbook App Set to Expand State Availability Across U.S.*, ACTION RUSH, <https://actionrush.com/sports-betting/barstool-sportsbook-app/> [<https://perma.cc/BN9J-4YPS>] (last visited Mar. 15, 2022) (stating Barstool is continuing to expand where sports gambling is legal).

280. See *id.* (announcing intentions to offer Barstool Sportsbook in Maryland and New York).

281. See Waters, *supra* note 233 (naming Massachusetts and Texas as priorities once states legalize sports gambling).

282. See *Tracker: Name, Image, and Likeness Legislation*, *supra* note 78 (listing Maryland and Texas as having passed NIL legislation and New York as waiting on assembly vote).

283. See *id.* (noting Texas has active NIL legislation).

284. See MD. CODE REGS. § 15-131(e)(1) (2022) (providing few restrictions on student-athlete NIL deals); see also 2021 NY A.B. 5115 (NS) (allowing NIL deals with no restrictions).

285. Compare MD. CODE REGS. § 15-131(e)(1) (providing few restrictions on student-athlete NIL deals); 2021 NY A.B. 5115 (NS) (effective Jan. 1, 2022) (allowing NIL deals with no restrictions) with COLO. REV. STAT. § 23-16-301 (2021) (providing state's NIL legislation and provisions); 2021 ARIZ. SESS. LAWS NO. 1296(d) (providing student-athletes with NIL legislation), and MICH. COMP. LAWS § 390.1733 (2020) (stating that student-athletes may earn compensation from their name, image, and likeness without sacrificing their ability to play NCAA athletics).

gambling.”<sup>286</sup> Thus, student-athletes in Texas will face the same types of restrictions that student-athletes in Louisiana face, assuming that sports gambling becomes legal in the state.<sup>287</sup> Massachusetts does not have any NIL legislation, and therefore, the student-athletes are governed by the NCAA’s Interim NIL policy, which places no restrictions on the types of deals student-athletes can enter.<sup>288</sup>

#### IV. CASHING OUT: A CALL FOR FEDERAL LEGISLATION AND AN EVEN PLAYING FIELD FOR STUDENT-ATHLETES

As of this time, there are many questions remaining about NIL deals.<sup>289</sup> Most NIL laws do not specify any repercussions for student-athletes that sign deals that are not permitted.<sup>290</sup> Therefore, there are no standard and uniform repercussions; instead, each school can set up its own system.<sup>291</sup> This will lead to potential inequality between student-athletes going to different schools in the same state.<sup>292</sup> Additionally, NIL deals have been signed to benefit a

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286. See 2021 TX S.B. 1385 §51.9246(g)(2)(B)(iv) (effective July 1, 2021) (prohibiting certain types of NIL deals).

287. Compare *id.* (prohibiting certain types of NIL deals) with LA. STAT. ANN. § 17:3703(E)(2) (2021) (forbidding NIL deals that promote “tobacco, alcohol, illegal substances or activities, banned athletic substances, or any form of gambling including sports wagering”).

288. For further discussion on the Interim NIL Policy and potential restrictions, see *infra* notes 256–278 and accompanying text.

289. See Emily Giambalvo, *What to Know About Name, Image and Likeness and How it Will Affect the NCAA*, WASHINGTON POST (June 29, 2021), <https://www.washingtonpost.com/sports/2021/06/15/nil-ncaa-paying-college-athletes/> [<https://perma.cc/ALL6-5PZZ>] (listing open questions as “Where does the NCAA stand on this issue?”, “Which states have already passed bills?”, and “Is there going to be a national law?”).

290. Compare N.J. STAT. ANN. § 18A:3B-87 (West 2021) (providing consequences for student-athletes that do not comply with statute), with TENN. CODE ANN. § 49-7-2802 (2021), and 110 Ill. Comp. Stat. 190/1 (2021) (observing no consequences for student-athletes that do not comply with statute); for further discussion on New Jersey’s NIL statute, see *supra* notes 207–221 and accompanying text; for further discussion on Tennessee’s NIL statute, see *supra* notes 222–236 and accompanying text; for further discussion on Illinois’s NIL statute, see *supra* notes 222–236 and accompanying text.

291. See Kristi Dosh, *With NCAA Stepping Back from NIL Regulations, Colleges Begin Preparing to Adopt Their Own Policies*, FORBES (June 24, 2021, 8:40 PM) <https://www.forbes.com/sites/kristidosh/2021/06/24/schools-begin-preparing-to-adopt-their-own-nil-policies/?sh=1b8fea673ce6> [<https://perma.cc/9ZBX-RWFN>] (stating schools are on their own to create their NIL policies).

292. Compare Erik Gibbs, *Barstool Sports Can’t Play NIL Ball with University of Louisville Athletes*, GAMBLING NEWS (Aug. 11, 2021), <https://www.gamblingnews.com/news/barstool-sports-cant-play-nil-ball-with-university-of-louisville-athletes/> [<https://perma.cc/3DDB-JRHY>] (determining it is against Kentucky NIL law for student-athletes at University of Louisville to become Barstool Athletes), with Amanda Christovich, *Alcohol, Betting NIL Deals Fair Game to Some Ath-*

team, not an individual student-athlete, which was not anticipated when the debate about allowing NIL deals were being discussed.<sup>293</sup> Further, one commenter questions whether Barstool is a separate entity from Barstool Sportsbook.<sup>294</sup> Regardless of the answer, some school compliance departments have come out and stated that their student-athletes could not become Barstool Athletes.<sup>295</sup> However, no resolution or definitive conclusion about the permissibility of Barstool Athletes has been reached.<sup>296</sup> Further, there has been no determination on possible repercussions of student-athletes who have signed with Barstool and then are told they are not permitted to be a Barstool Athlete.<sup>297</sup>

While the number of student-athletes seeking to cash in on NIL continues to grow, so does the legalization of sports betting.<sup>298</sup> Ten states already have approved retail sports betting, and twenty have approved online betting.<sup>299</sup> There are an additional number of states are currently contemplating legalizing sports betting or

*letes*, FRONT OFFICE SPORTS (Oct. 11, 2021), <https://frontofficesports.com/alcohol-betting-nil-deals-fair-game-for-some-athletes/> [<https://perma.cc/2NJU-RTMD>] (allowing betting related NIL deals in certain states).

293. See generally Jackson, *supra* note 19 (explaining Built Brands has signed deal with Brigham Young University football team to cover tuition for all walk-on players).

294. See *A Caution for Student-Athlete NIL Deals*, CG SPORTS CO., <https://www.cgssportsco.com/cejih-explains/a-caution-for-student-athlete-nil-deals> [<https://perma.cc/7RBX-G8GQ>] (last visited Nov. 1, 2021) (stating there is debate about whether Barstool's Sportsbook creates conflict of interest for student-athletes who are governed by NIL laws that prohibit partnerships with sports gambling companies).

295. See *id.* (noting some schools do not want to take chance and do not allow their student-athletes to become Barstool Athletes).

296. Compare Katie Kohler, *Pennsylvania College Players and Barstool Athletes Navigate New World of NIL*, PLAY PENNSYLVANIA, <https://www.playpennsylvania.com/pa-college-athletes-barstool-nil-deals/> [<https://perma.cc/MT3Q-9UQW>] (last updated Aug. 9, 2022) (observing Barstool and Barstool Sportsbook are two separate entities and therefore there is no conflict with PA NIL law prohibiting deals with sports gambling companies), with Gibbs, *supra* note 292 (determining it is against Kentucky NIL law to partner with Barstool Sports for NIL deal).

297. Cf. Josh Moody, *Name, Image, Likeness: What College Athletes Should Know about NCAA Rules*, U.S. NEWS (Aug. 9, 2021), <https://www.usnews.com/education/best-colleges/articles/name-image-likeness-what-college-athletes-should-know-about-ncaa-rules> [<https://perma.cc/BU45-NHSX>] (listing information and regulations student-athletes should be aware of, but not listing any potential consequences for breaking NIL rules).

298. See Sam McQuillan, *Where is Sports Betting Legal? Projections for all 50 States*, ACTION NETWORK, <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections#Possible> [<https://perma.cc/K3Z7-Y5GL>] (last updated Nov. 22, 2022) (noting it is possibility that sports gambling become legal in over thirty-three states by 2023).

299. See *id.* (noting political opposition has impeded several other states from legalization).

pending legalizing sports betting in some capacity.<sup>300</sup> As of right now, approximately half of the United States has legal sports betting in some capacity.<sup>301</sup> Thus, even if only a portion of the states projected to legalize sports betting through 2022 do so, a large majority of the United States will have some form of sports betting within the next twelve to fourteen months.<sup>302</sup> As sports gambling continues to grow, Barstool Sportsbook plans to capitalize on that growth at every opportunity.<sup>303</sup> Considering that Barstool received over 75,000 applications to become a Barstool Athlete within the first three days of NIL, Barstool Athletes will also continue to grow.<sup>304</sup>

Accordingly, more and more schools will need to examine their state's NIL laws and try to determine what the appropriate response to Barstool Athletes is.<sup>305</sup> Some student-athletes will not be able to sign certain deals, including becoming a Barstool Athlete, while others will be able to do so.<sup>306</sup> These unclear and unstandardized results call for a uniform policy that clearly lays out the boundaries for student-athletes in order to maintain an equal playing field.<sup>307</sup> Multiple federal NIL laws have been proposed, but none have been passed.<sup>308</sup> The proposed bills all vary with regards

300. *See id.* (listing California, Florida, Kansas, Maine, Massachusetts, Nebraska, and Ohio as states that have contemplated legalizing sports betting, some of which have legislation pending).

301. *See id.* (stating over thirty-three states have legalized sports betting in some capacity, whether in retail, online, or both).

302. *See id.* (noting that if projected states pass sports betting, vast majority of United States would have legalized sports betting).

303. *See* Jason Ziernicki, *When Will Barstool Sportsbook & Casino Come to Your State?*, ACTION RUSH, [https://actionrush.com/when-will-barstool-sportsbook-casino-come-to-your-state/#Barstool\\_wants\\_to\\_launch\\_in\\_states\\_as\\_soon\\_as\\_possible](https://actionrush.com/when-will-barstool-sportsbook-casino-come-to-your-state/#Barstool_wants_to_launch_in_states_as_soon_as_possible) [<https://perma.cc/4CGS-E7TP>] (last updated Jan. 27, 2022) (highlighting Barstool expansive efforts across all of North America).

304. *See* Williams, *supra* note 171 (noting Barstool received over 75,000 applications within first three days of NIL and had since dedicated team of over fifteen people to review applications).

305. *See* Gibbs, *supra* note 292 (deciding that being Barstool Athlete is against Kentucky NIL law because of Barstool's partnership and ownership by Penn Gaming).

306. *See* Carrasco, *supra* note 90 (explaining individual state NIL laws are leading to more inequality between college athletes).

307. *See id.* (stating that federal statute would even playing field between universities).

308. *See* Gregg Clifton & Nicholas Plinio, *UPDATE: Sixth Federal NIL Bill Proposed by Kansas Senator Jerry Moran; Senator Booker Comments on Status of College Athlete Bill of Rights*, JDSUPRA (Mar. 2, 2021), <https://www.jdsupra.com/legalnews/update-sixth-federal-nil-bill-proposed-1013228/> [<https://perma.cc/P3UJ-2B5Y>] (noting six bills have been introduced, but none have passed). The sixth proposal is titled "The Amateur Athletes Protection and Compensation Act of 2021" and combines aspects of the previously proposed legislation. *See id.* (describing bill as a

to medical coverage, scholarship timeframe, and maintaining eligibility if a student-athlete enters a professional draft.<sup>309</sup> The NCAA has even asked Congress for legislation, stating that each state passing its own legislation creates an uneven playing field for student-athletes.<sup>310</sup> However, while Congress has decided to step in and not let the NCAA self-govern, no final bills have been passed.<sup>311</sup> Therefore, student-athletes will continue to be confused about NIL boundaries and an uneven playing field between student-athletes at different universities will continue to exist.<sup>312</sup>

*Stella Pratt\**

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compromise of previous proposed bills). Previously proposed legislation includes the “College Athlete Economic Freedom Act” and bi-partisan proposals from other senators. *See id.* (mentioning previously proposed legislation). The first federal bill was proposed in 2019, but to this date, nothing has been passed. *See State and Federal NIL Legislation Breakdown*, ATHLETIC DIRECTOR U, <https://athleticdirector.uconn.edu/sanil/state-and-federal-nil-legislation-breakdown/> [<https://perma.cc/WX2G-2ERV>] (last visited Dec. 20, 2022) (listing and explaining all proposed federal NIL legislation).

309. *See id.* (noting differences between bills pertaining to schools covering medical expenses after student-athlete’s eligibility has expired, honoring scholarship money for number of semesters initially offered to student-athlete, and allowing or not allowing student-athlete to retain eligibility if student-athlete declares for professional draft but does not sign professional contract).

310. *See Carrasco, supra* note 90 (describing NCAA President Mark Emmert’s presentation to Congress asking for sweeping federal legislation).

311. *See id.* (noting that in past, Congress has told NCAA to self-govern and that it would not get involved in NCAA’s inner policy issues and workings).

312. *See id.* (stating lack of federal bill has led to student-athletes being placed on unequal playing fields leading to more inequality).

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