

## False Start: Federal Legislation is Needed to Prevent Name, Image, and Likeness Collectives From Improperly Receiving 501(C)(3) Tax-Exempt Status

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# FALSE START: FEDERAL LEGISLATION IS NEEDED TO PREVENT NAME, IMAGE, AND LIKENESS COLLECTIVES FROM IMPROPERLY RECEIVING 501(C)(3) TAX-EXEMPT STATUS

ANDRES CASTILLO\*

## ABSTRACT

Name, Image, and Likeness (“NIL”) is a prominent topic in college sports. States have adopted NIL laws regulating a student athlete’s ability to earn compensation from their NIL. However, states, universities, and the National Collegiate Athletic Association (“NCAA”) alike are looking to Congress for federal NIL legislation. This Comment argues in support of federal NIL legislation generally. Specifically, Congress should first declare that monetizing a student athlete’s NIL and developing paid NIL opportunities for student-athletes are substantial non-exempt purposes that preclude NIL collectives from exemption under section 501(c)(3) of the Internal Revenue Code (the “Code”). Second, Congress should enact the Athlete Opportunity and Taxpayer Integrity Act (“AOTIA”).

Part I is an introduction to NIL.<sup>1</sup> Part II summarizes the history of college sports and evaluates how NIL fits into that history.<sup>2</sup> Part III assesses NIL laws in other states and examines Maryland’s NIL laws.<sup>3</sup> Part IV provides an overview of section 501(c)(3) of the Code.<sup>4</sup> Part V analyzes

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\* © J.D. Candidate 2024, University of Maryland Francis King Carey School of Law. I want to first express my appreciation for all the current and former student-athletes. We are MORE than just athletes! I want to next express my gratitude for my amazing colleagues on the *Journal of Business & Technology Law* and Professor Paula Monopoli. Thank you for your help! I want to finally express my love and admiration for my partner, Cara. Your unconditional support and relentless work ethic motivate me every day to accomplish unthinkable feats – like publishing a Comment.

1. See *infra* Part I.
2. See *infra* Part II.
3. See *infra* Part III.
4. See *infra* Part IV.

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the status of NIL collectives under section 501(c)(3).<sup>5</sup> Part VI proposes language that Congress should adopt in its federal NIL legislation regarding the status of NIL collectives under section 501(c)(3).<sup>6</sup> Part VII is the conclusion.<sup>7</sup>

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5. See *infra* Part V.  
6. See *infra* Part VI.  
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## INTRODUCTION

On June 30, 2021, the NCAA adopted an interim policy implementing new NIL guidelines for student-athletes (the “NIL Policy”).<sup>8</sup> NIL refers to the rights of student-athletes to control and profit from their NIL.<sup>9</sup> The NIL Policy directed student athletes profiting from their NIL to refer to state law and university policies for compliance.<sup>10</sup> As of November 2023, 32 states have passed NIL laws.<sup>11</sup> The majority of state NIL laws are very similar in language.<sup>12</sup> However, as “laboratories of democracy,” state NIL laws differ.<sup>13</sup> For example, every state NIL law prohibits compensation for athletic performance, but not every state NIL law prohibits student-athletes from earning NIL compensation for activities related to alcohol and gambling.<sup>14</sup> With laws only recently going into effect, universities, athletic programs, coaching staffs, student-athletes, and the NCAA are all adapting to unfamiliar circumstances.

The NIL Policy has resulted in profitable outcomes for student-athletes. After the first year of the NIL Policy, student-athletes earned \$917 million from NIL-related deals.<sup>15</sup> After the second year, student-athletes earned nearly \$1 billion.<sup>16</sup> That figure is expected to reach \$1.17 billion

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8. See generally Michelle Brutlag Hosick, *NCAA Adopts 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> [hereinafter NCAA].

9. *What is NIL? NCAA Rule Explained*, NCSA, <https://www.ncsasports.org/name-image-likeness#:~:text=NIL%20refers%20to%20the%20rights,while%20participating%20in%20college%20sports> (last visited Oct. 28, 2023).

10. NCAA, *supra* note 8.

11. Amy Piccola et al., *NIL Legislation Tracker*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> (last visited Nov. 29, 2023).

12. See *infra* text accompanying notes 129-37 (providing examples of similar language between state NIL laws).

13. James Leonard et al., *Name, Image and Likeness Scouting Report, Week 4: The States Quarterback NIL Change*, JDSUPRA (Oct. 11, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-scouting-report-2414178>.

14. See *infra* text accompanying notes 132, 141.

15. Erica Hunzinger, *One year of NIL: How Much have Athletes Made?*, ASSOCIATED PRESS (July 6, 2022), <https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb>.

16. Amanda Christovich, *Led by Collectives, Year 3 of NIL to Reach \$1.17B Market*, FRONT OFFICE SPORTS (June 28, 2023, 1:56 PM), <https://frontofficesports.com/led-by-collectives-year-3-of-nil-to-reach-1-17b-market>.

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in year three.<sup>17</sup> Student-athletes have benefitted enormously from these opportunities; NIL deals are often life-changing.<sup>18</sup>

Approximately 75% of all NIL compensation is provided by NIL collectives.<sup>19</sup> An NIL collective is a group of boosters, alumni, and supporters of a university that pool funds from donations to provide paid NIL opportunities for student-athletes.<sup>20</sup> There are over 200 known NIL collectives nationwide.<sup>21</sup> The total amount of funds held in an NIL collective varies by university—some NIL collectives have promised to pay student-athletes an annual compensation of \$50,000, while others have set a fund-raising goal of \$20 million.<sup>22</sup> Additionally, nearly 80 of the 200 known NIL collectives nationwide are claiming section 501(c)(3) status.<sup>23</sup> When a booster, alumnus, or supporter contributes to an NIL collective that

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17. *Id.*

18. See Erica Hunzinger, *'Set Me up for Life': Female College Athletes Stash NIL Cash*, ASSOCIATED PRESS (Mar. 5, 2022), <https://apnews.com/article/sports-college-sports-basketball-college-basketball-11525c4429825f9df0d14248a2643e58> (telling the story of North Carolina basketball player, Deja Kelly, who received several NIL deals with brands such as Dunkin' Donuts and Outback Steakhouse, some of which included equity partnership).

19. Christovich, *supra* note 16.

20. Pete Nakos, *IRS Memo: Nonprofit NIL Collectives are not Tax Exempt*, ON3 (June 9, 2023), <https://www.on3.com/nil/news/nonprofit-nil-collectives-irs-memo-not-tax-exempt-ncaa-internal-revenue-service>.

21. *Id.*

22. See Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> (describing a University of Oklahoma NIL collective that guaranteed \$50,000 to each Oklahoma football player); Ross Dellenger, *The Other Side of the NIL Collective, College Sports' Fast-Rising Game Changer*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/nil-collectives-boosters-football-tennessee-daily-cover> (discussing how Gator Guard, a University of Florida NIL collective, was challenged by Florida's head football coach to raise \$20 million in donor funds).

23. Nakos, *supra* note 20; see, e.g., *Frequently Asked Questions About The Best is Ahead Foundation (TBIAF)*, THE BEST IS AHEAD FOUNDATION, <https://tbiaf.org/faqs> (last visited Nov. 14, 2023); *About SWARM*, THE SWARM COLLECTIVE, <https://iowaswarm.com/about> (last visited Nov. 14, 2023); *About the Matador Club*, THE MATADOR CLUB, <https://www.matadorclub.org/about> (last visited Nov. 14, 2023); *FAQ & Contact*, HAPPY VALLEY UNITED, <https://happyvalleyunited.com/pages/faq-contact> (last visited Nov. 14, 2023); *FAQs*, COHESION FOUNDATION, <https://www.cohesionfoundation.com/about/faqs> (last visited Nov. 14, 2023); *FAQ*, TRUEENU, <https://truenenu.org/faq> (last visited Nov. 14, 2023); *About*, WE WILL COLLECTIVE, <https://www.wewillcollective.com/about> (last visited Nov. 14, 2023); *About Hoosiers for Good*, HOOSIER FOR GOOD, <https://hoosiersforgood.org/about> (last visited Nov. 14, 2023); *BE THE DIFFERENCE NIL*, <https://bethedifferencenil.org> (last visited Nov. 14, 2023); *WILDCAT NIL*, <https://catsnil.com> (last visited Nov. 14, 2023).

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qualifies as an exempt organization under section 501(c)(3), that donor receives a tax deduction.<sup>24</sup>

Before problems arise from different state NIL laws, Congress should enact federal NIL legislation. This Comment argues in support of federal NIL legislation generally. Specifically, Congress should first declare that monetizing a student-athlete's NIL and developing paid NIL opportunities for student-athletes are substantial non-exempt purposes that preclude NIL collectives from exemption under section 501(c)(3). Second, Congress should enact the AOTIA.

**I. THE EVOLUTION OF COLLEGE SPORTS: FROM RULE ADOPTION TO NIL**

*A. College Sports' Quest for Governance*

College sports emerged in the United States beginning as early as 1852.<sup>25</sup> By the late 1870s, college sports, including crew, baseball, track and field, and football, were common at academic institutions and largely arranged by student-led associations.<sup>26</sup> Growing concerns about safety and integrity eventually raised questions regarding the governance of college sports.<sup>27</sup> Consequently, President Theodore Roosevelt invited officials from the three major football programs to meet at the White House to develop a plan to reform college football.<sup>28</sup> Despite the President's initial efforts, death and injuries persisted, and university officials eventually admitted that reform in college football was necessary.<sup>29</sup> With support from the White House, the Intercollegiate Athletic Association ("IAA")

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24. See generally 26 U.S.C. § 170(c)(2) (enabling a taxpayer to receive a tax deduction for a contribution made to an exempt organization under section 501(c)(3)). A tax deduction is an amount that a taxpayer can deduct from their taxable income to lower the amount of taxes that the taxpayer owes. Julia Kagan, *Tax Deduction Definition: Standard or Itemized?*, INVESTOPEDIA (Apr. 30, 2023), <https://www.investopedia.com/terms/t/tax-deduction.asp#:~:text=A%20tax%20deduction%20is%20an,of%20your%20income%20tax%20return>.

25. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970).

26. *Id.* at 229.

27. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000). In 1905 alone, football accounted for over eighteen deaths and hundreds of major injuries. *Id.*

28. Jim Weathersby, *Teddy Roosevelt's Role in the Creation of the NCAA*, THE SPORTS HISTORIAN (July 6, 2016), <https://www.thesportshistorian.com/teddy-roosevelts-role-in-the-creation-of-the-ncaa>. The three major football programs were Harvard, Yale, and Princeton. *Id.*

29. *Id.*; Smith, *supra* note 27, at 12.

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was established in 1906 to regulate college football.<sup>30</sup> In 1910, the IAA became the NCAA.<sup>31</sup>

#### *B. The NCAA's Development as Governing Body of College Sports*

As athletics became an integral part of higher education in the United States, college sports rapidly grew and became highly commercialized.<sup>32</sup> As college sports grew and became highly commercialized, the NCAA expanded its authority.<sup>33</sup> First, in 1948, the NCAA promulgated its first set of rules, called the "Sanity Code," designed to "alleviate the proliferation of exploitive practices in the recruitment of student athletes."<sup>34</sup> The Committee of Infractions ("COI") was created to enforce the Sanity Code and investigate possible violations.<sup>35</sup> Then, the NCAA, with the help of its first executive director, negotiated its first lucrative television contract, which strengthened its ability to enforce the Sanity Code against its member institutions.<sup>36</sup>

In the early 1970s, the NCAA divided its member institutions into three divisions to better reflect competitive ability.<sup>37</sup> During this time, the NCAA faced mounting criticism regarding its authority.<sup>38</sup> Critics alleged that the NCAA enforced its regulations unfairly and responded inadequately to the increased commercialization of college sports.<sup>39</sup> Consequently, university presidents grew concerned – and more involved – with the NCAA's operations because they realized that their universities were both financially and personally impacted by their association with the NCAA.<sup>40</sup> University presidents recognized the NCAA's role in generating

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30. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 22 (2009); Smith, *supra* note 27, at 12.

31. Smith, *supra* note 27, at 12.

32. *Id.* at 13.

33. *Id.* at 14.

34. *Id.* (citation omitted).

35. *Id.* at 14-15.

36. *Id.* at 15.

37. *Id.* The three divisions are Division I, Division II, and Division III. See generally *Our Three Divisions*, NCAA, <https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx> (last visited Oct. 30, 2023) (providing information on the three NCAA divisions.)

38. Smith, *supra* note 27, at 16.

39. *Id.*; see generally *NCAA Suspends SMU Football Program for 1987 Season*, HISTORY, <https://www.history.com/this-day-in-history/smu-ncaa-football-death-penalty> (last visited Oct. 31, 2022). In 1987, the NCAA banned the Southern Methodist University (SMU) football team from playing in the 1987 season and forbid them from hosting home games the following year. *Id.*

40. Smith, *supra* note 27, at 16.

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revenue for their schools and realized that their universities' reputations were tied to the success of their athletic programs.<sup>41</sup> The NCAA thus created the President's Commission, a group of presidents from each division charged with leading the NCAA.<sup>42</sup>

Now, each division enjoys greater autonomy in the NCAA's operations, and university presidents remain the NCAA's predominant decision-makers.<sup>43</sup> The Board of Governors is responsible for adopting policies that the divisions agree to enact on issues that affect college sports broadly.<sup>44</sup> The NCAA president, among other duties, is responsible for making recommendations to the Board of Governors regarding institutional violations of the NCAA's constitution or interests.<sup>45</sup> The NCAA enforcement staff investigates potential violations and presents cases to the COI, which conducts hearings, decides whether a violation occurred, and prescribes appropriate penalties.<sup>46</sup> Today, the NCAA has 1,098 member institutions, representing 102 athletic conferences.<sup>47</sup> Nearly half a million student-athletes make up 19,886 teams that participate in twenty-four sports.<sup>48</sup>

*C. The NCAA and Amateurism*

Amateurism has always been a fundamental component of the NCAA.<sup>49</sup> To ensure fair competition across its member institutions, the NCAA relies on amateurism to establish restrictions on who can compete in college sports.<sup>50</sup> The NCAA's original constitution prevented non-amateur

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41. *Id.*

42. *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> (last visited Oct. 31, 2022).

43. *Id.*

44. *Governance*, NCAA, <https://www.ncaa.org/sports/2021/2/9/governance.aspx> (last visited Oct. 31, 2022).

45. NCAA Constitution, NCAA (2021), [https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov\\_Constitution121421.pdf](https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf).

46. *NCAA Enforcement Overview*, NCAA, [https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc\\_grphcs/D1INF\\_InsideEnforcement.pdf](https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InsideEnforcement.pdf) (last visited Oct. 28, 2023).

47. *What is the NCAA?*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx> (last visited Oct. 31, 2022).

48. *Id.*

49. Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS. L. REV. 275, 294 (2018). When President Theodore Roosevelt gathered officials from Harvard, Yale, and Princeton to address the issues surrounding intercollegiate sports, he expressly acknowledged the preservation of amateurism as an important matter in defining a student-athlete. *Id.*

50. *Id.*



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participation.<sup>51</sup> In 1909, the NCAA first defined an amateur as:<sup>52</sup> “[O]ne who enters and takes part in athletic contests *purely in obedience to the play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived*. The nature or primary attitude of mind determines amateurism.”<sup>53</sup>

The NCAA also defined a professional athlete as:<sup>54</sup>

*[O]ne who enters or takes part in any athletic contest from any other motive than the satisfaction of pure play impulses, or for the exercise, training, or social pleasures derived, or one who desires and secures from his skill or who accepts of spectators, partisans, or other interests, any material or economic advantage or reward.*<sup>55</sup>

According to the NCAA, the difference between an amateur and a professional athlete was that an amateur did not get paid for play.<sup>56</sup> In 1916, the NCAA further defined an amateur as: “[O]ne who participates in competitive physical sport only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom.”<sup>57</sup> Pay for play was again excluded under the NCAA’s definition of an amateur.

The NCAA has said that “student participation in [college sports] is an avocation, and student athletes should be protected from exploitation by professional and commercial enterprises.”<sup>58</sup> It has historically used amateurism to “retain a clear line of demarcation between [college sports] and professional sports” in order for college sports to remain “an integral [part] of the educational program.”<sup>59</sup> To preserve this “clear line of

51. *Id.* (citing HOWARD J. SAVAGE ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS 83, 87 (1929) [hereinafter CARNEGIE REPORT]).

52. *Id.* at 294-95 (citing CARNEGIE REPORT, *supra* note 51, at 42).

53. *Id.* at 295 (citing CARNEGIE REPORT, *supra* note 51, at 42) (emphasis added).

54. *Id.* at 295.

55. *Id.* (citing CARNEGIE REPORT, *supra* note 51, at 42) (emphasis added).

56. *Id.* at 295.

57. *Id.* (citing CARNEGIE REPORT, *supra* note 51, at 44).

58. John A. Meghamez, *An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How O’Bannon v. NCAA and Keller v. NCAA Forever Changed College Athletics*, 9 LIBERTY UNIV. L. REV. 313, 318 (2015) (citing NCAA Division I Manual (2013-14), NCAA, <https://www.ncaapublications.com/productdownloads/D114.pdf>).

59. Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure Equitable Playing Field for Student Athletes’ Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 904 (2022) (citing NCAA Division I Manual (2020-21), NCAA, <https://www.ncaapublications.com/productdownloads/D121.pdf>).

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demarcation,” the NCAA created eligibility requirements to distinguish between amateurs and professional athletes that student-athletes must follow.<sup>60</sup> A student-athlete risks losing their eligibility to compete if they partake in an act that jeopardizes their amateurism. Acts that jeopardize a student-athlete’s amateurism include:

- Using their athletic skill (directly or indirectly) to receive compensation;
- Accepting a promise for pay, even if such pay would be received after graduation;
- Signing a contract to play professional sports;
- Entering into a professional sports league draft after graduation; or
- Hiring an agent.<sup>61</sup>

Federal courts originally endorsed the NCAA’s definition of amateurism.<sup>62</sup> In *Jones v. NCAA*,<sup>63</sup> a Massachusetts federal district court held that the NCAA was allowed to declare a hockey player ineligible to compete because he had received compensation from another hockey team prior to and while he attended college.<sup>64</sup> In *Gaines v. NCAA*,<sup>65</sup> a Tennessee federal district court found that “the public interest is promoted by preserving amateurism and protecting the educational objectives of [college sports],” and that the NCAA lawfully protects this interest by enforcing eligibility requirements that “prevent commercializing influences from destroying the unique “product” of college [sports].”<sup>66</sup> In *McCormack v. NCAA*,<sup>67</sup> the United States Court of Appeals for the Fifth Circuit held that the NCAA’s eligibility requirements limiting the compensation of student-athletes “reasonably further[ed]” the NCAA’s goal of integrating college sports with academics.<sup>68</sup> The Fifth Circuit found that the eligibility requirements were fundamental to allowing the NCAA to survive “in

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60. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 22 (2009).

61. *Id.*

62. Fasciale, *supra* note 59, at 904.

63. 392 F. Supp. 295 (D. Mass. 1975).

64. *Id.* at 304.

65. 746 F. Supp. 738 (M.D. Tenn. 1990).

66. *Id.* at 744, 747.

67. 845 F.2d 1338 (5th Cir. 1988).

68. *Id.* at 1345.

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the face of commercializing pressures.”<sup>69</sup> Lastly, and most notably, in *NCAA v. Board of Regents*,<sup>70</sup> the United States Supreme Court noted that the NCAA had “ample latitude” to enforce eligibility requirements that preserved and maintained amateurism in college sports.<sup>71</sup> *Jones, Gaines, McCormack*, and *Board of Regents* all held that amateurism was a sufficient justification for the NCAA’s eligibility requirements, so long as such requirements furthered amateurism and educational objectives.<sup>72</sup> In 2015 however, the United States Court of Appeals for the Ninth Circuit challenged the NCAA’s reliance on amateurism as a justification for restrictions on student-athlete compensation.

#### *D. The Rise of NIL in College Sports*

Historically, the NCAA has restricted a student-athlete’s ability to profit from their NIL to preserve amateurism in college sports. Under the NCAA’s regulations, student-athletes were deprived of their right to control their NIL and unable to participate in promotional activities.<sup>73</sup> The NCAA’s regulations stated that a student-athlete participated in an impermissible promotional activity if they: accepted any remuneration for or permitted the use of their name or picture to advertise, recommend, or directly promote the sale or use of a commercial product or service of any kind; or received remuneration for endorsing a commercial product or service through the individual’s use of such product or service.<sup>74</sup>

In 2015, the NCAA’s authority to restrict a student-athlete’s ability to profit from their NIL was challenged by former UCLA basketball player Ed O’Bannon.<sup>75</sup> O’Bannon filed a class action suit against the NCAA, alleging that the NCAA violated the Sherman Antitrust Act by restricting

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69. *Id.*

70. *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

71. Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS. L. REV. 275, 305-06 (2018).

72. *Id.* at 307. *See also* *Banks v. NCAA*, 977 F.2d 1081, 1091 (7<sup>th</sup> Cir. 2012) (observing that agents destroy a student athlete’s amateur status because of the commercialization of professional sports and the distraction an agent would be on a student athlete’s education); *Agnew v. NCAA*, 683 F.3d 328, 344-45 (recognizing that the NCAA’s limitation on athlete compensation beyond educational expenses directly advances the goal of distinguishing between amateur and professional athletes).

73. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 24 (2009).

74. *Id.*

75. McDavis, *supra* note 71, at 308 (citing Steve Eder & Ben Strauss, *Understand Ed O’Bannon’s Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), <https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html>).

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student-athletes from earning compensation for the use of their NIL in broadcasts and video games.<sup>76</sup>

The NCAA moved to dismiss O'Bannon's case, arguing that the *Board of Regents* case made O'Bannon's claim an invalid challenge to the NCAA's authority over amateurism.<sup>77</sup> However, the California federal district court refused to accept the NCAA's argument and allowed the case to proceed to trial.<sup>78</sup> At trial, O'Bannon presented sufficient evidence to demonstrate that the NCAA caused anti-competitive effects in the college education market.<sup>79</sup> The NCAA then offered four pro-competitive justifications for its restrictions on student-athlete compensation.<sup>80</sup> The court agreed with the NCAA that its compensation restrictions could increase consumer demand, and that the restrictions could serve to integrate student-athletes into their communities and improve the quality of education available at the university.<sup>81</sup> Once the pro-competitive justifications were accepted, the burden shifted to O'Bannon to prove that a less restrictive means than the NCAA's compensation restrictions existed to further these pro-competitive aims.<sup>82</sup> O'Bannon identified two less restrictive alternatives to the NCAA's compensation restrictions.<sup>83</sup> The court thus agreed with O'Bannon and found that the NCAA's amateurism

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76. *Id.* at 308-09.

77. *Id.* at 309 (citing *In re Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013)).

78. *Id.* at 310 (citing *In re Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 996, 1002, 1003, 1005). The court ruled that O'Bannon's claims were permitted to proceed past the pleading stage. *Id.*

79. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 988, 993 (N.D. Cal. 2014).

80. The following list sets out the NCAA's four pro-competitive justifications:

- Consumer demand is promoted by preserving the tradition of amateurism in college sports and distinguishing it from professional sports and other forms of entertainment;
- Consumer demand is sustained by maintaining competitive balance among teams;
- The integration of education and athletics is facilitated by ensuring that student-athletes receive educational benefits while participating in their schools' academic communities; and
- Greater institutional and athlete participation in Division I ensues, which increases the overall output of college athletics.

McDavis, *supra* note 71, at 312, 314-15 (citing *O'Bannon*, 7 F. Supp. 3d at 999, 978-79, 1002-04).

81. *Id.* at 315 (citing *O'Bannon*, 7 F. Supp. 3d at 1004).

82. *Id.* at 316.

83. *See id.* (citing *O'Bannon*, 7 F. Supp. 3d at 1005). The two less restrictive alternatives were to allow schools to offer scholarships to cover the full cost of attendance and to enable schools to hold shares of licensing revenues in a trust to be distributed to student athletes after their eligibility expires. *Id.*

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rules violated the Sherman Antitrust Act.<sup>84</sup> The court observed that these less restrictive alternatives would both preserve the popularity of the NCAA's product by promoting its current understanding of amateurism and improve the quality of educational opportunities for student-athletes by integrating academics and athletics.<sup>85</sup> Importantly, the court did not observe the "ample latitude" afforded to the NCAA in *Board of Regents* and instead limited *Board of Regents* to cases where the challenged restraint "actually play[s] a substantial role in maximizing consumer demand for the NCAA's products."<sup>86</sup> Since amateurism is "not [a] driving force behind consumer demand," the court found that it "[cannot] justify the [NCAA's compensation restrictions]."<sup>87</sup>

The NCAA appealed to the United States Court of Appeals for the Ninth Circuit and again argued that the *Board of Regents* case made restrictions preserving amateurism presumptively pro-competitive.<sup>88</sup> The Ninth Circuit disagreed and found that the language in *Board of Regents* regarding amateurism was dicta that could only be given appropriate consideration "where applicable."<sup>89</sup> The court thus observed that the NCAA could not always rely on *Board of Regents* to enforce a restriction under the justification of amateurism.<sup>90</sup> Unlike the district court, the court relied on *Board of Regents* in allowing the NCAA "'ample latitude' to govern college sports."<sup>91</sup> Using *Board of Regents*, the court evaluated O'Bannon's less restrictive alternatives to determine whether there was a "strong evidentiary showing" that one of his proposed less restrictive alternatives is "virtually as effective" at achieving the NCAA's pro-competitive justifications.<sup>92</sup> The court upheld the district court's holding that providing student-athletes with cost-of-attendance scholarships is a valid, less restrictive means of preserving amateurism than strictly permitting grant-in-aid scholarships, but the court reversed the district court's allowance of cash compensation to student-athletes.<sup>93</sup> The court found that the district court did not possess sufficient evidence to support a finding that

84. *Id.* (citing *O'Bannon*, 7 F. Supp. 3d at 983).

85. *Id.* at 317 (citing *O'Bannon*, 7 F. Supp. 3d at 1006-1007).

86. *Id.* at 313-14 (first citing *NCAA v. Board of Regents*, 468 U.S. 85, 121 (1984); and then citing *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014)).

87. *Id.* at 314 (citing *O'Bannon*, 7 F. Supp. 3d at 978).

88. *Id.* at 318 (citing *O'Bannon v. NCAA*, 802 F.3d 1049, 1061-62 (9th Cir. 2015)).

89. *Id.* (citing *O'Bannon*, 802 F.3d at 1063).

90. *Id.* at 321.

91. *Id.* at 319 (citing *O'Bannon*, 802 F.3d at 1074 (quoting *Board of Regents*, 468 U.S. at 120)).

92. *Id.* at 319-20 (citing *O'Bannon*, 802 F.3d at 1074, 1076).

93. *Id.* at 320-21 (citing *O'Bannon*, 802 F.3d at 1075-76, 1079).

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amateurism can be preserved by the allowance of cash compensation and observed that, under the NCAA's regulations, a student-athlete would threaten their amateurism if they received compensation above the costs of their educational expenses.<sup>94</sup> Because of *O'Bannon*, cash compensation beyond the cost of attendance was restricted.<sup>95</sup>

*E. The Current State of NIL in College Sports*

Five years after *O'Bannon*, Shawne Alston, a former football player at West Virginia University, filed a class action suit against the NCAA, again alleging that the NCAA violated the Sherman Antitrust Act by restricting student-athlete compensation.<sup>96</sup> The California federal district court held that the NCAA's restrictions on education-related benefits constituted unlawful restraints on trade under the Sherman Antitrust Act.<sup>97</sup> The court also found that a less restrictive means of distinguishing college sports from professional sports existed.<sup>98</sup> The court thus struck down the NCAA's restrictions on education-related benefits, finding that education-related benefits were easily distinguishable from compensation paid to professional athletes.<sup>99</sup> The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, agreeing with the district court that only some of the NCAA's restrictions served to distinguish between amateur and professional athletes.<sup>100</sup> The Ninth Circuit was satisfied with the district court's remedy, which it viewed as preventing "anti-competitive harm to student athletes while contributing to the pro-competitive purpose of preserving the popularity of college sports."<sup>101</sup>

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94. *Id.* at 321.

95. *Id.*

96. Robert Barnes & Molly Hensley-Clancy, *Supreme Court Rules Against NCAA Restrictions on Colleges Offering Additional Educational Perks to Compensate Student-athletes*, WASHINGTON POST (June 21, 2021, 6:33 PM), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-ncaa-student-athletes/2021/06/21/777e4718-d290-11eb-9f29-e9e6c9e843c6\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa-student-athletes/2021/06/21/777e4718-d290-11eb-9f29-e9e6c9e843c6_story.html).

97. *NCAA v. Alston*, 135 HARV. L. REV. 471, 472-73 (2021) (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019)).

98. *Id.* at 473 (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. at 1082-83).

99. *Id.* (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. at 1083, 1087-88).

100. *Id.* (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1257 (9th Cir. 2020)).

101. *Id.* at 474 (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1244, 1263).

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The United States Supreme Court affirmed the Ninth Circuit's opinion and again reiterated that *Board of Regents'* references to amateurism were dicta and not a way for the NCAA to enforce amateur-related restrictions without anti-competitive scrutiny.<sup>102</sup> Writing for the majority, Justice Neil Gorsuch noted that the NCAA still retained authority to define educational benefits and could "forbid in-kind benefits unrelated to a student's actual education."<sup>103</sup> In his concurrence however, Justice Brett Kavanaugh was much more critical of the NCAA. Specifically, Justice Kavanaugh warned that the NCAA's remaining rules restricting non-education-related benefits raised serious antitrust questions.<sup>104</sup> He wrote that "the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year," and that the "NCAA's business model would be flatly illegal in almost any other industry in America."<sup>105</sup>

In response to the Supreme Court's decision in *Alston*, on June 30, 2021, the NCAA adopted the NIL Policy.<sup>106</sup> The NIL Policy included the following guidelines:

- Student-athletes must refer to state law, in addition to any institution and conference policies, for compliance;
- Student-athletes attending a school without an NIL law are permitted to engage in NIL activities without violating NCAA rules;
- Student-athletes may hire an agent for NIL activities; and
- Student-athletes should report NIL activities to their school.<sup>107</sup>

The NIL Policy restated the NCAA's prohibition on pay-for-play arrangements and improper recruiting inducements.<sup>108</sup> The NCAA also updated its constitution to include language promoting NIL.<sup>109</sup> As a result

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102. *Id.* (citing *NCAA v. Alston*, 141 S. Ct. 2141, 2158, 2166 (2021)).

103. *Alston*, 141 S. Ct. at 2165.

104. *Id.* at 2166-67 (Kavanaugh, J., concurring).

105. *Id.* at 2167-68.

106. See Michelle Brutlag Hosick, *NCAA Adopts 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>.

107. *Id.*

108. *Id.*

109. See NCAA Constitution, NCAA (December 14, 2021), [https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov\\_Constitution121421.pdf](https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf). NIL is included in the NCAA's Constitution three times. First, the NCAA requires each division to establish

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of the NIL Policy, states have enacted their own NIL laws, leading to similarities and differences between state NIL laws.<sup>110</sup>

*F. The Impact of NIL on Student-Athletes*

Since the NIL Policy's adoption, student-athletes have experienced profitable outcomes.<sup>111</sup> NIL spending topped \$1 billion in its second year.<sup>112</sup>

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guidelines regarding the commercialization of NIL. *Id.* Second, the NCAA requires all conferences to provide student athletes with any conference policy for its commercial agreements that may involve the use of a student athlete's NIL. *Id.* Third, all member institutions are required to maintain policies for its commercial agreements that may involve the use of a student athlete's NIL. *Id.* These policies should be publicly available and provided to student athletes directly. *Id.*

110. See *infra* text accompanying notes 129-43 (providing examples of similar and different language between state NIL laws).

111. Here are some examples of student-athlete NIL deals:

Mohamed Ibrahim, former running back at the University of Minnesota and current Detroit Lion, inked an NIL deal with Gushers. Andy Greder, *A Gopher and Gushers: Mo Ibrahim Enters NIL Deal to Promote General Mills Snack*, PIONEER PRESS (Nov. 18, 2022, 3:54 PM), <https://www.twincities.com/2022/11/18/a-gopher-and-gushers-mo-ibrahim-enters-nil-deal-to-promote-general-mills-snack>. "Mo" was a former teammate at Our Lady of Good Counsel High School in Olney, MD. He was caught on camera eating Gushers on the sidelines, and weeks later, he entered into an NIL agreement with the General Mills product. *Id.* Gushers produced limited edition "Mo Packs" with "Touchdown Splash" and "Tropical Rush" flavors. *Id.*

Tyler Van Dyke, quarterback at the University of Miami, signed an NIL contract with an automobile gallery in Florida. Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, BLEACHER REPORT (Aug. 16, 2022), <https://bleacherreport.com/articles/10045014-college-footballs-most-unique-nil-deals-in-2022>. In return, Van Dyke was leased a new BMW sedan – free of charge – until he leaves Miami. *Id.*

Joshua Paschal, former linebacker at the University of Kentucky and current Detroit Lion, entered into an NIL contract with a local pediatric dentistry. Mike D. Sykes, II, *A Definitive List of the 16 Most Fun (and Kind of Weird!) NIL Deals Signed by College Athletes*, USA TODAY (Mar. 24, 2022, 9:00 AM), <https://ftw.usatoday.com/lists/nil-college-basketball-football-best-weirdest-deals>. He promoted the dentistry in a commercial. *Id.* Check out the commercial in the link. Josh was also a former teammate at Good Counsel.

North Carolina women's basketball player, Deja Kelly, signed six NIL deals, including with Dunkin' Donuts and Outback Steakhouse. Erica Hunzinger, *'Set me up for life': Female College Athletes Stash NIL Cash*, ASSOCIATED PRESS (Mar. 5, 2022), <https://apnews.com/article/sports-college-sports-basketball-college-basketball-11525c4429825f9df0d14248a2643e58>. Kelly understands the reality of sports and was quoted as saying that: "[Athletes] can't play forever[,] and we have to have something to fall back on ... [t]he ball stops bouncing at some point." *Id.* But, she views NIL as a life-changing opportunity: "[I]t's a generational opportunity, it'll set me up for life ... if I were to stop playing basketball in five years, I would be fine because [of] all the things I'm setting up now." *Id.*

112. Amanda Christovich, *Led by Collectives, Year 3 of NIL to Reach \$1.17B Market*, FRONT OFFICE SPORTS (June 28, 2023, 1:56 PM), <https://frontofficesports.com/led-by-collectives-year-3-of-nil-to-reach-1-17b-market>.



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Across the three NCAA divisions, the average annual NIL compensation for a student-athlete was \$3,438.<sup>113</sup> Division I student-athletes averaged an annual compensation of \$3,711, while Division II athletes received an average of \$204, and Division III athletes received \$309.<sup>114</sup> An average NIL transaction was valued at around \$1,700.<sup>115</sup>

NIL compensation varied by sport and gender. Male athletes received 59% of total NIL transactions, while female athletes received 41%.<sup>116</sup> Male athletes received 62.7% of total NIL compensation, while female athletes received 37.3%.<sup>117</sup> Football and men's basketball dominated total NIL compensation by sport, accounting for 49.9% and 17% of total compensation respectively.<sup>118</sup> Three women's sports rounded out the top five for total NIL compensation: basketball (15.7%), volleyball (2.3%), and softball (2.1%). Another two were in the top ten: track and field and soccer.<sup>119</sup> On average, female athletes received \$1,084 in compensation for an NIL deal.<sup>120</sup>

## II. STATE NIL LAWS

### *A. NIL Laws in Other States*

California was the first state to pass NIL legislation on September 30, 2019.<sup>121</sup> The Fair Pay to Play Act prevented academic institutions from punishing student-athletes for earning compensation as a result of their

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113. Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?*, ASSOCIATED PRESS (July 6, 2022), <https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb>.

114. *Id.*

115. *See id.* (average of \$1,815 from INFLCR and \$1,524.58 from Athliance). Opendorse, INFLCR, and Athliance are online platforms that allow student athletes to report their NIL contracts.

116. Erica Hunzinger, *It's a man's world': Male Athletes Leading Way in NIL Money*, ASSOCIATED PRESS (Jan. 27, 2022), <https://apnews.com/article/entertainment-sports-business-washington-volleyball-83b597ad309c74e224faa030665a016b>.

117. Hunzinger, *supra* note 113. Remove football from the equation, and female athletes received 52.8% of total NIL compensation, while male athletes received 47.2%. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. James Leonard et al., *Name, Image and Likeness Scouting Report, Week 4: The States Quarterback NIL Change*, JDSUPRA (Oct. 11, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-scouting-report-2414178>.

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NIL and allowed student-athletes to sign with licensed agents.<sup>122</sup> The law also preserved the NCAA's ban on pay-for-play arrangements.<sup>123</sup> Before passage, the Fair Pay for Play Act received criticism from the NCAA, conference commissioners, and university presidents. The NCAA expressed concerns that the law would materially alter college sports by creating local variances between member institutions situated in different states.<sup>124</sup> The NCAA was especially worried that unregulated licensing agreements and endorsement deals would threaten amateurism.<sup>125</sup> Universities were also worried that compliance with state law would result in their sports teams being expelled from the NCAA or conference.<sup>126</sup> Colorado, Nebraska, and Florida were the first states to follow California and adopt their own NIL laws.<sup>127</sup> As of November 2023, 32 states have passed NIL legislation.<sup>128</sup>

Because there is no federal NIL legislation, states have enacted their own NIL laws, leading to similarities and differences between state NIL laws. Generally, all state NIL laws include language barring the NCAA, conferences, and universities from prohibiting student-athletes from receiving compensation for their NIL.<sup>129</sup> In addition, the majority of state NIL laws contain the following language:<sup>130</sup>

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122. Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players>.

123. See CAL. EDUC. CODE § 67456(b).

124. Nathan Fenno and Melody Guitierrez, *'Fair Pay to Play' One Step Closer to Reality for California*, L.A. TIMES (June 25, 2019, 5:15 PM), <https://www.latimes.com/sports/sportsnow/la-sp-ncaa-california-ban-pay-to-play-20190625-story.html>.

125. See Tynes, *supra* note 122. In response to an interview question, NCAA president Mark Emmert said: "The biggest worry is that when you complete unfettered licensing agreements or unfettered endorsement deals, the model of college athletics is negligible at best and maybe doesn't even exist." *Id.*

126. *Id.*

127. James Leonard et al., *Name, Image and Likeness Scouting Report, Week 4: The States Quarterback NIL Change*, JDSUPRA (Oct. 11, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-scouting-report-2414178>.

128. Amy L. Piccola et al., *NIL Legislation Tracker*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> (last visited Nov. 29, 2023).

129. Andrew Smalley, *Student-Athlete Compensation*, NCSL (May 16, 2022), <https://www.ncsl.org/education/student-athlete-compensation>.

130. Leonard et al., *supra* note 127.

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- Specifies activities that student-athletes may not receive compensation for;<sup>131</sup>
- Prohibits student-athletes from receiving compensation for athletic performance;<sup>132</sup>
- Prohibits promotional activities that may conflict with existing university, or team, sponsorship agreements;<sup>133</sup>
- Allows student-athletes to exercise their NIL rights free from the risk of ineligibility;<sup>134</sup>
- Permits student-athletes to obtain an agent, or other professional representative;<sup>135</sup>
- Requires disclosure of NIL contracts to the university's athletic department;<sup>136</sup> and
- Grants, or restricts, the use of the university's facilities, uniforms, or intellectual property.<sup>137</sup>

Meanwhile, some states have their own unique NIL laws. In Texas, high school athletes are barred from earning compensation for their NIL.<sup>138</sup> In Florida, schools are required to provide financial literacy, life skills, and time management training to student-athletes.<sup>139</sup> In Georgia, universities can require their student-athletes to deposit a portion of their NIL compensation into a fund to be shared with all of the university's student-athletes.<sup>140</sup> In Mississippi and Virginia, student-athletes are prohibited from entering into sponsorship contracts with certain product categories, such as alcohol, controlled substances, tobacco, adult entertainment, gambling, sports betting, or other companies that may have a negative reflection on the university.<sup>141</sup> In California, universities cannot enter into compensatory licensing contracts with their own student-

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131. MISS. CODE ANN. § 37-97-107(13).

132. TEX. EDUC. CODE ANN. § 51.9246(g)(2)(B)(i).

133. CAL. EDUC. CODE § 67456(e)(1).

134. ARIZ. REV. STAT. ANN. § 15-1892(B).

135. CAL. EDUC. CODE § 67456(c)(1).

136. COLO. REV. STAT. § 23-16-301(3)(b).

137. MISS. CODE ANN. § 37-97-107(3).

138. TEX. EDUC. CODE ANN. § 51.9246(j)(1).

139. FLA. STAT. § 1006.74(2).

140. GA. CODE ANN. § 20-3-681(d)(4)(B).

141. MISS. CODE ANN. § 37-97-107(13); VA. CODE ANN. § 23.1-408.1(d)(1)-(9).

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athletes.<sup>142</sup> California also only allows student-athletes to be represented by attorneys licensed to practice in California.<sup>143</sup>

*B. Maryland's NIL Laws*

On May 18, 2021, Governor Larry Hogan signed the Jordan McNair Safe and Fair Play Act (the “Act”).<sup>144</sup> The Act derived from Senate Bill 439, which was approved by the Maryland General Assembly (the “Assembly”) on April 8, 2021.<sup>145</sup> Senate Bill 439 was passed before *Alston* and before the NCAA released the NIL Policy. In fact, *O'Bannon* inspired the Assembly to adopt NIL legislation.<sup>146</sup>

The Assembly considered three factors in deciding to adopt NIL legislation. First, the Assembly recognized that the residual impact of *O'Bannon* and the looming effect of *Alston* would require the NCAA and state legislatures to respond with NIL legislation.<sup>147</sup> The Assembly specifically expressed concern with the Act's possible conflict with the NCAA or conference bylaws.<sup>148</sup> It warned Maryland universities that their adherence to state NIL laws may result in substantial financial loss, depending on the Act's relationship with the NCAA or conference bylaws.<sup>149</sup> Second, the Assembly recognized that states were partners in defining NIL legislation. It took note of similar NIL legislation in Florida and California taking effect before the Act's effective date.<sup>150</sup> The Assembly wanted to pay close attention to how the NCAA reacted to Florida and California's NIL laws, so that Maryland universities could better prepare for challenges emerging from a potential conflict between the Act and the NCAA or conference bylaws. Finally, the Assembly recognized that Congress could eventually adopt federal NIL legislation.<sup>151</sup>

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142. CAL. EDUC. CODE § 67456(b).

143. CAL. EDUC. CODE § 67456(c)(2).

144. Bernard G. Dennis, III & Gregg E. Clifton, *Maryland Joins Student-Athlete Compensation Debate with Jordan McNair Safe and Fair Play Act*, MD. STATE BAR ASS'N (Sep. 21, 2021), <https://www.msba.org/maryland-joins-student-athlete-compensation-debate-with-jordan-mcnair-safe-and-fair-play-act>.

145. See S. 439, 2021 Leg., Reg. Sess. (Md. 2021).

146. See REVISED FISCAL AND POLICY NOTE ON SENATE BILL 439, S. 439, Reg. Sess., at 5 (2021).

147. *Id.* at 5-6.

148. *Id.*

149. *Id.*

150. *Id.* at 6.

151. *Id.*

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The Act is similar to the language of California's Fair Pay to Play Act.<sup>152</sup> The Act grants significant authority to universities in approving their student-athletes' NIL contracts. In fact, the Assembly expressly approved of universities drafting contracts that prohibit student-athletes from promoting a third-party sponsor during official team activities.<sup>153</sup> Unlike other state legislatures, the Assembly also granted universities the authority to determine how to govern the relationship between third-party NIL contracts and a student-athlete's obligations to their institution. The Act is also mute on whether a student-athlete can have an agent. Unlike other state legislatures, the Assembly did not include regulations regarding agents and student-athletes. The Act only restricts academic institutions only from preventing student-athletes from obtaining representation in contracts or legal matters.<sup>154</sup>

### III. SECTION 501(C)(3) OF THE CODE

Under section 501(c) of the Code, the IRS lists twenty-nine categories of organizations that are exempt from paying federal taxes on their income.<sup>155</sup> Section 501(c)(3) of the Code recognizes charitable organizations as a category of exempt organizations.<sup>156</sup> An individual who donates to a section 501(c)(3) exempt organization is allowed to claim a tax deduction for their charitable contribution.<sup>157</sup>

To be tax-exempt under section 501(c)(3), an organization must be organized and operated exclusively for one or more exempt purposes set forth in section 501(c)(3), and none of the organization's net earnings may inure to the benefit of any private shareholder or individual.<sup>158</sup> An organization will be regarded as "operated exclusively for one or more exempt purposes only if the organization engages primarily in activities that accomplish one or more exempt purposes set forth in section 501(c)(3)."<sup>159</sup> An organization will not be regarded as operated exclusively for one or more purposes "if more than an insubstantial part of its activities is not

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152. Compare CAL. EDUC. CODE § 67456, with MD. CODE ANN., EDUC. § 15-131.

153. MD. CODE ANN., EDUC. § 15-131(d)(2).

154. MD. CODE ANN., EDUC. § 15-131(c)(2).

155. 26 U.S.C. § 501(c)(1)-(29).

156. 26 U.S.C. § 501(c)(3).

157. *Exemption Requirements – 501(c)(3) Organizations*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> (last visited Oct. 28, 2023).

158. *Id.*

159. Treas. Reg. § 1.501(c)(3)-1(e)(1).

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in furtherance of an exempt purpose.”<sup>160</sup> Whether an organization is operated exclusively for one or more exempt purposes depends on the facts and circumstances.<sup>161</sup>

To maintain tax-exempt status under section 501(c)(3), an organization must follow the rules affecting six areas: private benefit, lobbying, political campaign activity, unrelated business income, annual reporting obligation, and operation in accordance with the organization’s stated exempt purpose.<sup>162</sup> This Comment will focus on the rules affecting two areas: private benefit and operation in accordance with the organization’s stated exempt purpose.

*A. Private Benefit Doctrine*

Section 501(c)(3) does not explicitly prohibit private benefit.<sup>163</sup> Instead, the private benefit doctrine is derived from the requirement under section 501(c)(3) that an organization be organized and operated exclusively for exempt purposes.<sup>164</sup> An organization is not operated for exempt purposes unless it serves public rather than private interests.<sup>165</sup> Even if an organization has many activities that further its exempt purposes, exemption under section 501(c)(3) may be precluded if the organization serves a private interest.<sup>166</sup> Whether an organization’s activities serve private interests exclusively is a factual determination.<sup>167</sup> A benefit that is a necessary part of an organization’s exempt purposes does not serve private interests.<sup>168</sup> The organization’s true purpose, not its stated purpose or organizational language, must be considered.<sup>169</sup>

The private benefit doctrine states that private benefits resulting from an organization’s activities must be both *quantitatively* and *qualitatively* incidental to find that an organization is not serving private interests

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160. *Id.*

161. I.R.S. Gen. Couns. Mem. 2023-004, at 6 (June 9, 2023) (citing *B.S.W. Grp., Inc. v. Comm’r*, 70 T.C. 352, 358 (1978); *Est. of Hawaii v. Comm’r*, 71 T.C. 1067, 1079 (1979)).

162. IRS, *How to Lose Your 501(c)(3) Tax-Exempt Status* (without really trying), <https://www.irs.gov/pub/irs-tege/How%20to%20Lose%20Your%20Tax%20Exempt%20Status.pdf> (last visited Oct. 28, 2023).

163. Andrew Megosh et al., *Private Benefit Under IRC 501(c)(3)*, IRS 135 (2001), <https://www.irs.gov/pub/irs-tege/eotopich01.pdf>.

164. *Id.*

165. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

166. Megosh et al., *supra* note 163, at 135.

167. *Id.*

168. *Id.* at 139.

169. *Id.*

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more than incidentally.<sup>170</sup> To be quantitatively incidental, the private benefit must be insubstantial in amount when compared to the overall public benefit conferred by the organization's activity.<sup>171</sup> The private benefit must be compared to the public benefit of the organization's activity in question, not the public benefit provided by all the organization's activities.<sup>172</sup> To be qualitatively incidental, the private benefit must be a byproduct of the organization's exempt activity or a necessary concomitant to the accomplishment of the organization's exempt purpose.<sup>173</sup> An example of a private benefit that is not qualitatively incidental to an organization's exempt purpose is a direct or intentional private benefit to a designated or identifiable individual.<sup>174</sup> The designated or identifiable individual does not have to control the organization for the organization's activities to impermissibly benefit private interests.<sup>175</sup>

#### *B. Operational Test*

Like the private benefit doctrine, the operational test is derived from the requirement under section 501(c)(3) that an organization be organized and operated exclusively for exempt purposes.<sup>176</sup> An organization is not operated exclusively for exempt purposes unless it engages primarily in activities that further an exempt purpose.<sup>177</sup> Under the operational test, the purpose towards which an organization's activities are directed is dispositive of whether an organization is tax-exempt under section 501(c)(3).<sup>178</sup> A single non-exempt purpose, if substantial in nature, will preclude exemption, regardless of the number or importance of exempt purposes.<sup>179</sup> Therefore, under the operational test, a court must first determine whether the organization's activity furthers an exempt purpose

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170. I.R.S. Gen. Couns. Mem. 2023-004, at 8 (June 9, 2023). "In other words, an activity that benefits private interests in a manner that is qualitatively incidental does not further exempt purposes if the benefit to private interests is quantitatively substantial." *Id.*

171. *Id.*

172. Megosh et al., *supra* note 163, at 137.

173. I.R.S. Gen. Couns. Mem. 2023-004, at 7 (June 9, 2023).

174. *Id.*

175. *Id.* at 8.

176. *Id.* at 6.

177. *Id.* (citing Treas. Reg. § 1.501(c)(3)-1(c)(1)).

178. *Id.* (citing *B.S.W. Grp., Inc. v. Comm'r*, 70 T.C. 352, 356-57 (1978); *Est. of Hawaii v. Comm'r*, 71 T.C. 1067, 1079 (1979); *Ky. Bar Found., Inc v. Comm'r*, 78 T.C. 921, 923-24 (1982); *Christian Manner Int'l, Inc. v. Comm'r*, 71 T.C. 661, 668 (1979)).

179. *Id.* (citing *Better Bus. Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945)).

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or a non-exempt purpose.<sup>180</sup> If the activity furthers both an exempt and non-exempt purpose, a court must then use the private benefit doctrine to determine whether the non-exempt purpose is *quantitatively* and *qualitatively* incidental to the exempt purpose such that the organization still qualifies for exemption under section 501(c)(3).<sup>181</sup> The operational test is designed to ensure that an organization's resources and activities are devoted to furthering its exempt purposes.<sup>182</sup>

**IV. THE STATUS OF NIL COLLECTIVES UNDER SECTION 501(C)(3)**

Today, there are approximately 80 NIL collectives that claim section 501(c)(3) status.<sup>183</sup> Presumably, then, these 80 NIL collectives are organized and operated exclusively for one or more exempt purposes under section 501(c)(3). However, the status of NIL collectives under section 501(c)(3) is not clearly defined. Recently, the IRS and Congress have made attempts at defining the status of NIL collectives under section 501(c)(3).<sup>184</sup> This section explores the actions of Congress and the IRS.

*A. IRS GLAM on NIL Collectives*

On June 9, 2023, the IRS publicly released a generic legal advice memorandum (“GLAM”) addressing whether the operation of an NIL collective furthers an exempt purpose under section 501(c)(3).<sup>185</sup> The IRS concluded that an NIL collective will, in many cases, be operating for a substantial non-exempt purpose—serving the private interests of student-athletes—which is more than incidental to any exempt purpose furthered by

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180. *Id.*

181. *Id.*

182. *Id.* (citing *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1064 (1989)).

183. Pete Nakos, *IRS Memo: Nonprofit NIL Collectives are not Tax Exempt*, ON3 (June 9, 2023), <https://www.on3.com/nil/news/nonprofit-nil-collectives-irs-memo-not-tax-exempt-ncaa-internal-revenue-service>; see, e.g., *FAQs*, BOILERMAKER ALLIANCE, <https://www.boilermakeralliance.com/faqs> (last visited Nov. 14, 2023) (noting that “the IRS released a memorandum in May 2023 that may impact our tax exempt status and the tax-deductibility of your donation”); POKES WITH A PURPOSE, <https://www.pokeswithapurpose.com> (last visited Nov. 14, 2023) (noting that “[w]hile the IRS has recently put out an opinion that questions whether or not donations to NIL collectives actually meet the criteria, and until the IRS revokes the 501(c)(3) designation, donations are tax deductible.”).

184. See generally I.R.S. Gen. Couns. Mem. 2023-004 (June 9, 2023); Athlete Opportunity and Taxpayer Integrity Act, S. 1454, 118th Cong. (2023).

185. I.R.S. Gen. Couns. Mem. 2023-004, at 1 (June 9, 2023).



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developing paid NIL opportunities for student-athletes.<sup>186</sup> Applying the private benefit doctrine and operational test, the IRS concluded that many NIL collectives are not tax-exempt under section 501(c)(3) because the benefit that NIL collectives provide to the private interests of student-athletes, in most cases, will be more than incidental both quantitatively and qualitatively, and that many NIL collectives have a substantial, single non-exempt purpose of helping student-athletes monetize their NIL that precludes exemption.<sup>187</sup>

The IRS first analyzed the 501(c)(3) status of NIL collectives under the private benefit doctrine. Under the private benefit doctrine, the IRS concluded that the private benefit of compensating student-athletes for NIL opportunities is quantitatively incidental to any exempt purpose furthered by developing such paid NIL opportunities because the private benefit is substantial when compared to the overall public benefit derived from such paid NIL opportunities.<sup>188</sup> The IRS recognized that the public benefit derived from paid NIL opportunities varies by the type of NIL activity but observed that many NIL collectives pay, or intend to pay, student-athletes for engaging in such NIL activity.<sup>189</sup> In fact, the IRS mentioned that some NIL collectives promise to pay out 80-100% of all contributions to student-athletes.<sup>190</sup>

Next, the IRS concluded that the private benefit of compensating student-athletes for NIL opportunities is qualitatively incidental to any exempt purpose furthered by developing such paid NIL opportunities for three reasons.<sup>191</sup> First, the IRS concluded that the private benefit of compensating student-athletes for NIL opportunities is not a byproduct but rather a fundamental part of an NIL collective's activities.<sup>192</sup> The IRS observed that an NIL collective's primary activity is developing paid NIL opportunities, which is a direct and intentional benefit to student-athletes.<sup>193</sup> Second, the IRS concluded that the private benefit of compensating student-athletes for NIL opportunities is not a necessary concomitant to the accomplishment of an NIL collective's exempt purpose of promoting the collective or its partner charities.<sup>194</sup> The IRS observed that it would

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186. *Id.* at 2.

187. *Id.* at 8, 11.

188. *Id.* at 11-12.

189. *Id.*

190. *Id.* at 12.

191. *Id.* at 8-11.

192. *Id.* at 8.

193. *Id.* at 8-9.

194. *Id.* at 9.

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be challenging for an NIL collective to establish that it is impossible to accomplish its exempt purpose without compensating student-athletes for NIL opportunities.<sup>195</sup> The IRS noted that private benefits to student-athletes often extend beyond compensation, and that such additional private benefits are not necessary to the promotion and marketing of charitable causes.<sup>196</sup> Third, the IRS concluded that the private benefit of compensating student-athletes for NIL opportunities is directed to a limited non-charitable class.<sup>197</sup> According to the IRS, student-athletes are not a recognized charitable class.<sup>198</sup> Absent a finding that NIL collectives select student-athletes for participation based on need, such that the collective's activities could be considered conducted for the relief of the poor or distressed, and that the collective's payments are reasonably calculated to meet that need, paying student-athletes for NIL opportunities is properly regarded as serving private rather than public interests.<sup>199</sup> The IRS also noted that an NIL collective's activities serve to increase the number of paid NIL opportunities available to student-athletes, and that the private benefit from these activities is limited to a narrow non-charitable class.<sup>200</sup>

The IRS then analyzed the 501(c)(3) status of NIL collectives under the operational test. Under the operational test, the IRS concluded that many NIL collectives have a substantial, single non-exempt purpose of helping student-athletes monetize their NIL that precludes exemption under section 501(c)(3).<sup>201</sup> The IRS identified four factors that suggest the primary purpose of an NIL collective is to compensate student-athletes for NIL opportunities. First, the IRS recognized that organizers of NIL collectives are often supporters of a particular school and may have an interest in limiting an NIL collective's NIL opportunities to student-athletes at that university.<sup>202</sup> Second, NIL collectives often inform donors that a significant percentage of a contribution will be paid to student-athletes.<sup>203</sup> Third, NIL collectives will sometimes notify the public that all student-athletes on a particular team will earn a specified level of compensation, or that the goal of the NIL collective is to pay student-athletes a specified

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 10.

200. *Id.*

201. *Id.* at 11.

202. *Id.*

203. *Id.*

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level of compensation.<sup>204</sup> Fourth, NIL collectives allow donors to select which athletic teams will benefit from a contribution without an option to designate a charitable program that the donor wishes to support.<sup>205</sup>

#### *B. Legislative Action*

On September 28, 2022, U.S. Senators John Thune (R-S.D.) and Ben Cardin (D-Md.) introduced the AOTIA.<sup>206</sup> Both senators are members of the Subcommittee on Taxation and IRS Oversight.<sup>207</sup> The proposed legislation amends section 170 of the Code by inserting the following language: “No deduction shall be allowed for any contribution any portion of which is used by the donee to compensate 1 or more secondary or post-secondary school athletes for the use of their [NIL] by reason of their status as athletes.”<sup>208</sup>

The proposed legislation would disallow a deduction for charitable contributions used by an NIL collective to compensate a student-athlete for use of their NIL.<sup>209</sup> The proposed legislation would apply to individuals, organizations, and NIL collectives.<sup>210</sup> Educational institutions would be exempt.<sup>211</sup> Like the IRS, Senators Thune and Cardin assert that certain NIL collectives that claim 501(c)(3) status partake in activity–developing paid NIL opportunities for student-athletes—that is inconsistent with the intended purpose of the charitable tax deduction and force taxpayers to subsidize the potential recruitment of, or payment to, student-athletes based on their NIL.<sup>212</sup>

According to Senator Thune, the proposed legislation would “prohibit [NIL collectives] from inappropriately using NIL agreements to reduce their own obligations” and “uphold the responsible stewardship of taxpayer dollars.”<sup>213</sup> Likewise, according to Senator Cardin, the proposed

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204. *Id.*

205. *Id.*

206. Press Release, John Thune, Senate, Thune, Cardin Introduce Bill to Prohibit Name, Image, and Likeness Tax Write-Offs for College Sports (Sep. 28, 2022), <https://www.thune.senate.gov/public/index.cfm/2022/9/thune-cardin-introduce-bill-to-prohibit-name-image-and-likeness-tax-write-offs-for-college-sports>.

207. *Id.*

208. Athlete Opportunity and Taxpayer Integrity Act, S. 1454, 118<sup>th</sup> Cong. § 2 (2023).

209. Thune, *supra* note 206.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

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legislation would “protect taxpayer funds” and ensure that “charitable deductions [are] reserved for charitable activities.”<sup>214</sup>

## V. PROPOSED FEDERAL NIL LEGISLATION REGARDING THE STATUS OF NIL COLLECTIVES UNDER SECTION 501(C)(3)

First and foremost, Congress should adopt federal NIL legislation. If Congress decides to adopt federal NIL legislation, or to address NIL issues in piecemeal, Congress should first declare that monetizing a student-athlete’s NIL and developing paid NIL opportunities for student-athletes are substantial non-exempt purposes that preclude NIL collectives from exemption under section 501(c)(3). Second, Congress should enact the AOTIA. This proposed legislation would provide two significant benefits. First, it would ensure fair competition between universities. Second, it would protect taxpayer funds.

First, if Congress were to adopt the proposed legislation, universities would compete on a more even playing field. NIL collectives are creating unfair advantages in recruiting.<sup>215</sup> Since NIL collectives are the

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214. *Id.*

215. These are the exact words of current college sports figures.

Nick Saban, head football coach at the University of Alabama, and a notable critic of NIL collectives, stated that “[Texas] A&M bought every player on their team. Made a deal for name, image and likeness. We didn’t buy one player.” The Athletic Staff, *Nick Saban and Jimbo Fisher NIL Comments: Reactions and Latest News*, THE ATHLETIC (May 26, 2022, 4:42 PM), <https://theathletic.com/live-blogs/nick-saban-jimbo-fisher-comments-reactions/sAbB6pMawRv2>. He continued: “We didn’t buy one player. A[lr]ight? But I don’t know if we’re going to be able to sustain that in the future, because more and more people are doing it. It’s tough.” Tony Tsoukalas, *Jimbo Fisher Responds to Nick Saban’s Comments that Texas A&M ‘Bought Every Player’*, SPORTS ILLUSTRATED (May 19, 2022, 11:31 AM), <https://www.si.com/college/alabama/bamacentral/jimbo-fisher-responds-to-nick-sabans-comments-that-texas-a-m-bought-every-player>. In an interview with Sports Illustrated, he also said that “[t]he issue is, when you create [collectives] for people, are you establishing a pay-for-play type of environment that can be used in recruiting? So now, all the sudden, guys are not going to school where they can create the most value for their future. Guys are going to school where they can make the most money.” Ross Dellenger, *Alabama Coach Nick Saban Weighs in on NIL, Player Safety and NCAA Rules Changes*, SPORTS ILLUSTRATED (Mar. 7, 2023), <https://www.si.com/college/2023/03/07/nick-saban-exclusive-interview-nil-rule-changes>.

Lane Kiffin, head football coach at the University of Mississippi, put it bluntly: “There are schools with no shot to recruit certain players.” Jeremy Crabtree, *Recruits’ Deals with NIL Collectives Continue To Reshape Football Recruiting*, ON3 (Apr. 19, 2022), <https://www.on3.com/nl/news/recruits-deals-with-nil-collectives-continue-to-reshape-football-recruiting>. A Southeastern Conference (“SEC”) director of recruiting warned universities that “[i]t’s the [expletive] Wild West[, a]nd you better have your collective carry a big gun.” *Id.*

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predominant source of NIL compensation for student-athletes, the universities that have NIL collectives with large pools of funds are better positioned to attract athletic talent than those with limited or no funds. The total amount of NIL compensation that a student-athlete could earn at one university compared to another is unquestionably a significant, and often deciding factor in which university a student-athlete chooses to attend.<sup>216</sup> The vast discrepancy in the financial wherewithal of NIL collectives creates unfairness in competition between universities.

Under the proposed legislation, donors would be unable to receive tax deductions for contributions made to NIL collectives whose primary activities are monetizing a student-athlete's NIL or developing paid NIL opportunities for student-athletes. Without the benefit of a tax deduction, it is likely that fewer donors, especially those with significant wealth, will contribute to an NIL collective. As a result, the vast discrepancy in the financial wherewithal of NIL collectives would be minimized, and more fairness in recruiting should ensue.

Second, under the proposed legislation, taxpayer funds would be better protected. If an NIL collective is an exempt organization under section 501(c)(3), the collective, donor, and student-athlete all receive a benefit at the expense of the taxpayer. The collective's incomes and revenues are

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When asked whether he discusses NIL collectives with recruits, Mike Gundy, head football coach at Oklahoma State University, said, "[w]e don't here because it's illegal ... [N]ow, I don't know if other people do or not. That's a good question!" Grayson Weir, *Mike Gundy Gets Sassy While Throwing Shade at Unnamed Programs for Illegal NIL Activity*, BROBIBLE (Oct. 3, 2023, 10:44 AM), <https://brobible.com/sports/article/mike-gundy-nil-recruiting-rules-oklahoma-state-name-image-likeness>.

According to a SEC staff member, "[e]verything now comes down to how willing are your boosters and how rich are your boosters. You're pretty much [expletive] if you don't have the booster bank." Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>.

Even the people running NIL collectives understand their importance. Hugh Hathcock, the founder of Gator Guard, said that "if we don't get the money, we're going to lose players. No matter how well a kid likes Florida, if a school comes in at the last minute and says, 'We are going to pay you \$100,000' and we have \$10,000, they're gone." *Id.* He added that "with NIL, we're going to play the game.... We'll listen to what the coach tells us to do. I just raise the money for them to use." *Id.*

216. See, e.g. Jeremy Crabtree, *Recruits' Deals With NIL Collectives Continue To Reshape Football Recruiting*, ON3 (Apr. 19, 2022), <https://www.on3.com/nil/news/recruits-deals-with-nil-collectives-continue-to-reshape-football-recruiting>. A Pacific-12 ("Pac-12") Conference school lost a recruit because a rival school's NIL collective offered the recruit a NIL deal worth more than \$1.5 million. *Id.* A Big-12 Conference school lost a recruit because a rival school's NIL collective offered the recruit a NIL deal worth \$50,000. *Id.*

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not taxed; the donor receives a tax deduction; and the student-athlete receives compensation. Essentially, taxpayers are subsidizing the activities of NIL collectives—activities that typically do not serve exempt purposes under section 501(c)(3), or intentionally benefit the private interests of student-athletes more than incidentally.

Finally, Congress is the appropriate actor here. As state NIL laws are challenged in court, judges may not be well-equipped or sufficiently informed to understand and opine on internal matters of the NCAA and universities.<sup>217</sup> Rather, Congress is uniquely positioned to consider all interests in the matter, including state legislatures, sports associations, conferences, universities, administrations, student-athletes, and third-parties.<sup>218</sup> Additionally, federal NIL legislation would ensure that all schools are playing under the same rules. The lack of uniformity in state NIL laws presents significant challenges to the NCAA and universities.<sup>219</sup> Inconsistent state NIL laws make it difficult for the NCAA and universities to effectively function as a national association of college sports.<sup>220</sup> Even if the NCAA or universities conform their rules to the most permissive state law, if a state modified an existing law, the impact of the change could have a ripple effect on schools in other states and dramatically affect the way in which other member institutions can compete and operate.<sup>221</sup>

## CONCLUSION

In conclusion, Congress should adopt uniform NIL legislation. If Congress decides to adopt federal NIL legislation, or to address NIL issues in piecemeal, Congress should first declare that monetizing a student-athlete's NIL and developing paid NIL opportunities for student-athletes are substantial non-exempt purposes that preclude NIL collectives from exemption under section 501(c)(3). Second, Congress should enact the AOTIA.

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217. Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure Equitable Playing Field for Student Athletes' Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 927 (2022) (citing *Ruiz v. Sauerland Event GMBH*, 801 F. Supp. 2d 118, 125 (S.D.N.Y. 2010)).

218. *Id.* at 927 n.173.

219. *Uniform College Athlete Name, Image or Likeness Act*, NAT'L CONF. COMM'RS ON UNIF. STATE LS. 1 (2021).

220. *Id.*

221. *Id.*

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