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The Marathon Continues: Texas NIL Has Room to Grow

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THE MARATHON CONTINUES: TEXAS NIL HAS ROOM TO GROW

Johnathon Blaine[†]

Abstract

College athletes are now permitted to profit off their name, image, and likeness. However, while a hodgepodge of different regulations exists state-by-state and Congress continues to drag its feet to pass a federal framework, Texas restricts college athletes from maximizing their name, image, and likeness earning potential. This Comment proposes improvements to Senate Bill 1385 that would allow college athletes in Texas to partner with the same categories of “taboo” products as their respective university and to endorse products from competing brands, provided such endorsement is outside of a university-sponsored event, with an exception allowing unrestricted endorsement of footwear. This Comment encourages Texas to develop a trust system that holds group licensing revenues in trust until the respective students leave the university. College athletes would not only maximize their name, image, and likeness earning potential but also connect with local businesses. At the same time, universities in Texas would continue to position themselves as attractive destinations for top athletes nationwide. These suggested improvements are inspired by existing state and proposed federal legislation and suggestions from federal judges and a Supreme Court Justice.

I. INTRODUCTION	28
II. BACKGROUND	30
A. <i>Origins of the National Collegiate Athletic Association</i>	30
B. <i>Rise of Athletes’ Demands for Employment Status</i>	33
1. <i>NCAA v. Miller</i>	33
2. <i>Influential Attempts</i>	34
3. <i>NLRB General Counsel Memorandum</i>	36
D. <i>Rise of Athletes’ Demands for Compensation</i>	37

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1. <i>O'Bannon v. NCAA</i>	37
2. <i>NCAA v. Alston</i>	39
III. FEDERAL PROPOSALS	42
A. <i>College Athletes Bill of Rights</i>	43
B. <i>Student Athlete Level Playing Field Act</i>	44
IV. TEXAS SB 1385.....	46
A. <i>Morality Provision</i>	46
B. <i>Exclusivity Provision</i>	47
C. <i>Group Licensing Provision</i>	47
V. IMPROVEMENTS.....	48
A. <i>Morality Provision</i>	48
B. <i>Exclusivity Provision</i>	51
C. <i>Group Licensing Provision</i>	53
VI. CONCLUSION.....	55

I. INTRODUCTION

Neptune Bottle, a reusable water bottle company, was founded in 2016 by a 17-year-old named Ryan Trahan.¹ The young entrepreneur used his YouTube channel with over 14,000 subscribers and nearly one million views to promote his small business.² When Trahan entered college in 2017 at Texas A&M, he planned on continuing to promote his business with a goal of \$500,000 of profit in 2018.³ However, the National Collegiate Athletic Association (“NCAA”) had other plans. Texas A&M recruited Trahan to run cross country and track and field, and he often posted videos on his YouTube channel displaying the extraordinary life of a college athlete and offering tips and insight into his training.⁴ Then, just two months into his collegiate running career, the NCAA ruled Trahan ineligible for promoting his small business while publicizing his status as a college athlete.⁵ NCAA rules prohibited college athletes from using their name, image, and likeness (“NIL”) to receive

1. *A&M Runner Seeking NCAA Waiver on YouTube-Promoted Company*, ESPN (Sept. 21, 2017), https://www.espn.com/college-sports/story/_/id/20779408/ncaa-puts-youtube-aims-texas-aggies-runner-ryan-trahan-check [<https://perma.cc/397X-KRR7>].

2. Chris Chavez, *Texas A&M Runner Ryan Trahan Says He Was Ruled Ineligible For Popular YouTube Page*, SPORTS ILLUSTRATED (Sept. 21, 2017), <https://www.si.com/more-sports/2017/09/21/texas-am-runner-ryan-trahan-ineligible-ncaa-ruled-ineligible-youtube-page> [<https://perma.cc/P6GL-ZL68>].

3. *Id.*; Jessica Gruenling, *Texas A&M Cross Country Runner Leaving School to Grow His Business*, KBTX (Nov. 6, 2017, 10:36 PM), <https://www.kbtx.com/content/news/Texas-AM-cross-country-leaving-school-to-pursue-business—455738843.html> [<https://perma.cc/6CDC-G78E>].

4. Chavez, *supra* note 2.

5. ESPN, *supra* note 1.

compensation, and because Neptune Bottle successfully earned revenue, Trahan violated NCAA rules.⁶ Texas A&M's compliance office then gave Trahan an ultimatum: hide the fact that he was a college athlete at Texas A&M when promoting Neptune Bottle or receive a ban from NCAA competition.⁷ Trahan chose his business.⁸

Athletes like Trahan no longer must choose between the sport that they love and promoting their start-up business. The NCAA—albeit reluctantly—no longer punishes athletes for using their NIL when promoting a business.⁹ However, the door is left open for states to set restrictions on the extent to which an athlete can use their NIL when receiving compensation.¹⁰

This Comment analyzes the development of legislation governing college athlete compensation using NIL, evaluates the effectiveness of Texas's current legislation, and ultimately provides Texas with specific provisions to implement. Part II will discuss the origins of the NCAA and the rise of college athletes' demands for compensation. It will also discuss some of the most notable cases that shaped the current legislative framework, including the NCAA's response to the rise in the pressure surrounding NIL. Before analyzing Texas's legislative solution—SB 1385—Part III will provide a synopsis of two proposed Federal bills. Then, in Part IV, this Comment will outline SB 1385 and identify provisions needing improvement. Finally, in Part V, this Comment will suggest specific improvements for Texas to strengthen its current framework to allow college athletes to maximize their NIL earning potential while preserving amateurism in collegiate athletics. These equitably designed suggestions: (1) allow college athletes the freedom to endorse the same types of “taboo” products and services endorsed by their school, (2) allow college athletes to endorse competing products and services as their respective university, and (3) facilitate group licensing earnings.

6. Chavez, *supra* note 2.

7. *Id.*

8. See Ryan Trahan, *Quitting D1 Sports for YouTube @NCAA*, YOUTUBE (Nov. 7, 2017), [https://www.youtube.com/watch?v=8yVJ8jYd\]xl](https://www.youtube.com/watch?v=8yVJ8jYd]xl) [<https://perma.cc/H5TP-3AJD>].

9. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA MEDIA CENTER (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/N4NS-LT8N>].

10. *Id.*

II. BACKGROUND

A. Origins of the National Collegiate Athletic Association

Collegiate athletics is in the midst of a new Wild West. Even before the existence of football and basketball—when collegiate boat racing was the sight to see—athletes received compensation for their performance.¹¹ During this time, however, the NCAA did not yet exist.¹² Then, in the late 1800s, the growth of football birthed the NCAA.¹³ In these early days, football had a reputation as a brutal sport.¹⁴ In 1904, there were 18 deaths and 159 severe injuries on the field, with some schools hiring players not enrolled in school to compete.¹⁵ With public outcry growing for the sport to be abolished or reformed and some schools halting football on their campuses, the White House was on notice.¹⁶ At this time, the NCAA defined “amateur” as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”¹⁷ Thus, the NCAA established that it would not tolerate compensation for athletic performance from its inception.

President Theodore Roosevelt—a longtime football fan—urged leaders at multiple top football universities to “clean up the game.”¹⁸ In 1906, a year following President Roosevelt’s call for reform, 62 universities formed the Intercollegiate Athletic Association of the United States (“IAAUS”).¹⁹ The IAAUS was quickly declared a “rules-making body” and renamed the National Collegiate Athletic Association.²⁰ Just over a decade later, universities from all corners of the country gathered to

11. Blair Shiff, *The History Behind America’s Oldest Active Collegiate Sporting Event*, ABC NEWS NETWORK (June 9, 2017, 3:00 AM), <https://abcnews.go.com/Sports/history-americas-oldest-active-collegiate-sporting-event/story?id=47852376> [<https://perma.cc/6QQN-7KPL>]; Dennis A. Johnson, Ed.D., John Acquaviva, Ph.D., *Point/Counterpoint: Paying College Athletes*, SPORT J. (June 15, 2012), <https://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/> [<https://perma.cc/HZ54-NWTF>].

12. *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/FZR4-R7T3>].

13. *Id.*; Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2148 (2021).

14. NCAA, *supra* note 12; *Alston*, 141 S. Ct. at 2148.

15. NCAA, *supra* note 12; *Alston*, 141 S. Ct. at 2148.

16. NCAA, *supra* note 12.

17. Peyton Woods and Adam Love, *College Athletes’ Voices Are Sidelined in Media Coverage of NIL Debate*, THE SOCIETY PAGES (May 21, 2021), <https://thesocietypages.org/engagingsports/tag/college-sport/> [<https://perma.cc/4MBJ-V3D7>].

18. *Id.*; *Alston*, 141 S. Ct. at 2148.

19. NCAA, *supra* note 12.

20. *Id.*

compete in the first NCAA championship conducted in any sport: the National Collegiate Track and Field Championships.²¹ Newspapers dubbed the event the “American Olympics,” and many sports followed with their respective national championships.²²

As collegiate athletics grew and commercialization intensified, the NCAA enacted a set of rules called the “Sanity Code” to “alleviate the proliferation and exploitive practices in the recruitment of student-athletes.”²³ The NCAA quickly experienced enforcement difficulties and replaced the committee responsible for enforcing the Sanity Code with the Committee on Infractions.²⁴ As the NCAA’s enforcement capacity increased, so did commercialization, signaled by the NCAA negotiating its first television contract valued at over one million dollars.²⁵ Revenues from such early television deals provided the NCAA with much-needed strength to enforce newly promulgated rules.²⁶

University presidents in the 1980s experienced a pivotal dichotomy surrounding collegiate athletics.²⁷ On the one hand, influential members of boards of trustees and alumni demanded winning athletic programs. On the other hand, faculty increasingly feared the rise of commercialization would hurt academics.²⁸ In response, many presidents formed the Presidents Commission to demand a collective role in the NCAA’s governance.²⁹ Their power grew immediately, with one sportswriter concluding that “[t]here is no doubt who is running college sports. It’s the college presidents.”³⁰

Despite such concerns, the NCAA grew into a sprawling enterprise.³¹ About 1,100 universities are split into three divisions, with Division I sitting at the top of the hierarchy regarding talent and money.³² Division I breaks down to 32 conferences, with each conference enacting its own rules.³³

21. *Id.*

22. *The First Championship*, U.S. TRACK & FIELD AND CROSS COUNTRY COACHES ASS’N (May 27, 2020), <http://www.ustfccca.org/ncaa-100/the-first-ncaa-championship-track-field> [<https://perma.cc/V2A2-ZWC6>].

23. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 14 (2000).

24. *Id.* at 15.

25. Smith, *supra* note 23, at 15.

26. *Id.*

27. *Id.* at 16–17.

28. *Id.*

29. *Id.* at 17.

30. *Id.*

31. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2150 (2021).

32. *Id.* at 2148.

33. *Id.*

The culmination of the NCAA's history brings it to its current state—a massive and highly profitable business. The NCAA's broadcasting rights for the March Madness basketball tournament are valued at \$1.1 billion annually.³⁴ The rights to televise the College Football Playoff are valued at \$470 million annually.³⁵ The conferences, particularly those in the “Power Five,” which see the highest revenue in Division 1, also make meteoric numbers.³⁶ For example, in the 2019–20 fiscal year, the Southeastern Conference (“SEC”) brought in nearly \$500 million through television rights.³⁷

Those who own the television contracts are not the only ones raking in massive earnings. Mark Emmert, president of the NCAA, makes nearly \$3 million annually.³⁸ Conference commissioners see anywhere from \$2 to \$5 million per year, and athletic directors make on average \$1 million annually.³⁹ Football coaches from the top conferences also rake in massive salaries, e.g., Texas A&M's Jimbo Fisher receiving nearly \$95 million over the next ten years.⁴⁰ Lucrative salaries even extend to non-revenue sports, where the University of Texas's tennis coach made \$232,338 in 2019, which is just under the men's golf coach's salary of \$275,000.⁴¹

Despite compensation flooding the pockets of executives and coaches, compensation has merely trickled to college athletes. In 2014, the NCAA permitted conferences to allow member universities to provide scholarships up to the full cost of attendance.⁴² All 80 universities in the Power Five promptly implemented this raise in scholarship

34. *Id.* at 2150.

35. *Id.*

36. *Id.*

37. Steve Berkowitz, *Analysis: If SEC Adds Texas and Oklahoma, the Conference Could Generate as Much Revenue as NCAA*, USA TODAY (July 26, 2021), <https://www.usatoday.com/story/sports/ncaaf/2021/07/26/college-football-if-sec-expands-could-match-ncaa-1-3-billion-revenue/5377990001/> [https://perma.cc/22ZJ-U2C3].

38. Steve Berkowitz, *NCAA President Mark Emmert Credited With \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/8015855002/> [https://perma.cc/YY4D-MYUQ].

39. *Alston*, 141 S. Ct. at 2158.

40. Barrett Sallee & Shehan Jeyarajah, *Jimbo Fisher Contract: Texas A&M Extends Coach's Deal for Three Years with Significant Raise*, CBS SPORTS (Sept. 1, 2021), <https://www.cbssports.com/college-football/news/jimbo-fisher-contract-texas-a-m-extends-coachs-deal-for-three-years-with-significant-raise/> [https://perma.cc/ML9G-9YNE].

41. Mac Engel, *College Football Coaches in Texas Make the Big Bucks. But They're Not the Only Ones*, FORT WORTH STAR-TELEGRAM (Nov. 26, 2019), <https://amp.star-telegram.com/sports/spt-columns-blogs/mac-engel/article236247343.html>.

42. *Alston*, 141 S. Ct. at 2150 (quoting *O'Bannon v. NCAA*, 802 F.3d 1049, 1054–55 (9th Cir. 2015)).

money.⁴³ Recently, the NCAA has allowed limited payments related to athletic achievements, such as qualifying for a bowl game or competing in the Olympics.⁴⁴ Postgraduate scholarships have also emerged, where universities are allowed up to two “Senior Scholar Awards” of \$10,000 to students attending graduate schools that have exhausted their athletic eligibility.⁴⁵ Finally, in 2021, the NCAA broke headlines by lifting its restrictions on college athletes earning compensation for their NIL.⁴⁶ Collegiate athletics has entered a new era. Many legal battles occurred between college athletes and the NCAA for this monumental change to occur.

B. Rise of Athletes’ Demands for Employment Status

1. NCAA v. Miller

Before the NCAA battled college athletes in federal courts, it faced off against the state of Nevada. While unrelated to NIL compensation, this monumental case showed the NCAA’s power inside the courtroom. On April 8, 1991, Nevada passed a law that required additional due process protections for students and employees of any Nevada university accused of an NCAA rules infraction.⁴⁷ Nevada passed the law following an extensive investigation by Nevada’s Attorney General, which discovered that allegations by the NCAA against Jerry Tarkanian⁴⁸ were false.⁴⁹ Before Nevada’s law, the NCAA did not have to provide the accused with the right to confront all witnesses, have all written statements signed under oath, or have judicial review of a Committee decision.⁵⁰

The NCAA sought a declaratory judgment and injunctive relief following an NCAA rules violations investigation against the University of Nevada, Las Vegas (“UNLV”), where UNLV and Jerry Tarkanian asserted

43. *Id.*

44. *Id.*

45. *Id.* at 2151.

46. Hosick, *supra* note 9.

47. Nat’l Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476, 1480–81 (D. Nev. 1992), *aff’d*, 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994).

48. Tarkanian coached the UNLV Runnin’ Rebels from 1973 to 1992 and was inducted into the national Naismith Memorial Basketball Hall of Fame in 2013. He is widely regarded as a legendary college basketball coach. *UNLV icon Jerry Tarkanian, 84 dies*, ESPN (Feb. 11, 2015), https://www.espn.com/mens-college-basketball/story/_/id/12309855/hall-fame-coach-jerry-tarkanian-dies.

49. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489 (1995).

50. *Id.* at 507–08.

their right to have the due process protections provided by the newly passed law.⁵¹ The NCAA argued that Nevada's law violated the Commerce Clause and the Contract Clause.⁵² The district court awarded the NCAA an injunction invalidating the law, and the Ninth Circuit later affirmed the injunction.⁵³

Writing for the Ninth Circuit, Justice Fernandez analyzed "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."⁵⁴ Justice Fernandez then found the possibility that the NCAA "could be forced to allow . . . an illegally recruited quarterback" to compete in a different state because the NCAA could not prove a rules violation under the procedural requirements in Nevada's law.⁵⁵ The court concluded that such control over a product in "interstate commerce that occurs wholly outside Nevada's borders" is forbidden by the Commerce Clause, thereby invalidating the law.⁵⁶ Furthermore, Justice Fernandez determined the law created a "serious risk of inconsistent obligations" between states, thus constituting a per se violation of the Commerce Clause.⁵⁷ The NCAA ultimately won the legal battle against Nevada. Interestingly, while an inconsistent hodgepodge of NIL obligations currently exists between states, the NCAA has not evoked this presumably powerful precedent to ensure national continuity. Meanwhile, like UNLV and Jerry Tarkanian, many college athletes have failed to elicit certain rights withheld by the NCAA.

2. Influential Attempts

In 2000, Alvis Waldrep—a football player at Texas Christian University ("TCU")—attempted to recover monetary compensation from the NCAA.⁵⁸ During a game against the University of Alabama, Waldrep suffered a severe spinal cord injury resulting in paralysis below the neck.⁵⁹ In 1991, Waldrep filed a worker's compensation claim against TCU and was awarded damages for his injury.⁶⁰ Despite his initial success, the jury found that Waldrep was not an employee of TCU and, therefore,

51. *Miller*, 10 F.3d at 637.

52. *Id.*

53. *Id.* at 637–40.

54. *Id.* at 639.

55. *Id.*

56. *Id.*

57. *Id.* at 640.

58. *Waldrep v. Tex. Emps. Ins. Ass'n*, 21 S.W.3d 692, 695 (Tex. App.—Austin 2000, pet. denied).

59. *Id.* at 696.

60. *Id.*

unable to receive worker's compensation.⁶¹ Arguing that he was indeed an employee of TCU, Waldrep appealed to the Third Court of Appeals of Texas in Austin.⁶²

The court was responsible for determining whether a scholarship or financial aid recipient becomes an employee of the university by agreeing to participate in intercollegiate athletics.⁶³ Waldrep argued that the Letter of Intent and Financial Aid Agreement that he signed when committing to play football at TCU constituted contracts of hire that set forth terms of employment.⁶⁴ The court, however, found this unpersuasive.⁶⁵ It was undisputed that both Waldrep and TCU agreed that NCAA rules would govern Waldrep's football career.⁶⁶ These rules, the court found, explicitly indicated that college athletes were not employees.⁶⁷ While the NCAA allowed college athletes to receive financial aid, the court did not consider this "taking pay" because "TCU never placed Waldrep on its payroll, never paid him a salary, and never told him that he would be paid a salary."⁶⁸ Despite this precedential obstacle in the way of college athletes seeking employment status, widespread attempts continued nationwide.

A breakthrough occurred in 2014 when a National Labor Relations Board ("NLRB") Regional Director ruled that scholarship athletes on Northwestern University's football team were indeed employees.⁶⁹ However, unfortunately for Northwestern athletes, this decision was withdrawn by the NLRB the following year.⁷⁰ The NLRB, however, did not withdraw the petition because the athletes were not indeed employees.⁷¹ The NLRB left that central issue untouched and instead withdrew the petition because asserting jurisdiction "would not promote stability in labor relations."⁷² While this significant ruling certainly ended Northwestern's football team's unionization efforts, it did not deter the hopes of college athletes to achieve employment status.

Unlike the NLRB, United States federal courts have not hesitated to rule on whether college athletes are employees of their school or the

61. *Id.* at 697.

62. *Id.* at 697.

63. *Id.* at 697-98.

64. *Id.* at 698.

65. *Id.*

66. *Id.* at 699-700.

67. *Id.* at 700.

68. *Id.* at 700.

69. *Nw. Univ. & Coll. Athletes Players Ass'n*, 362 N.L.R.B. 1350 (Aug. 17, 2015).

70. *Id.*

71. *Id.* at 1352.

72. *Id.* at 1353.

NCAA. In 2016, the Seventh Circuit held that because college athletes on the University of Pennsylvania’s track and field team were not employees of the NCAA, they were not entitled to a minimum wage under the Fair Labor Standards Act (“FLSA”).⁷³ The court emphasized that “participation in collegiate athletics is entirely voluntary.”⁷⁴ The Seventh Circuit further noted, in the circular fashion that Justice Kavanaugh heavily criticizes years later in his *Alston* concurrence, “by definition, student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.”⁷⁵

In 2017, the NCAA found similar success in the Ninth Circuit when a University of Southern California (“USC”) football player alleged that he was an employee of the NCAA and PAC-12.⁷⁶ Dawson argued that unlike the track and field athletes in *Berger*, Division I football players earn massive revenues for their schools.⁷⁷ The Ninth Circuit was unpersuaded, emphasizing that the NCAA nor PAC-12 had the power to hire or fire him.⁷⁸ The court further noted the lack of legal relevance regarding Division I football generating revenue.⁷⁹ Once again, the NCAA found success fighting off employment claims by college athletes. However, a recent development makes future NCAA success questionable.

3. NLRB General Counsel Memorandum

On September 29, 2021, Jennifer Abruzzo—General Counsel for the NLRB—released a memorandum unequivocally stating that college athletes are employees under the National Labor Relations Act (“NLRA”).⁸⁰ Abruzzo refused to use the term “student-athlete,” citing the NCAA historically using the term to “deprive [college athletes] of workplace protections.”⁸¹ The NLRA broadly defines “employee” with only a few enumerated exceptions, and Abruzzo clarified that college athletes do not

73. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 294 (7th Cir. 2016).

74. *Id.* at 293.

75. *Id.*; *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2167–69 (2021) (Kavanaugh, J., concurring).

76. *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 402–03 (N.D. Cal. 2017).

77. *Id.* at 406.

78. *Id.* at 405–08.

79. *Id.* at 406–07.

80. Memorandum GC 21-08 from Jennifer A. Abruzzo, General Counsel on the Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act 1, 1 (Sept. 29, 2021).

81. *Id.*

fall within those exceptions.⁸² The memorandum applies common-law agency rules, finding that an employee includes a person “who performs[s] services for another and [is] subject to the other’s control or right of control.”⁸³ Abruzzo continues by adding that “[c]onsideration, i.e., payment, is strongly indicative of employee status.”⁸⁴ According to the memorandum, because college athletes at universities perform services for their school and the NCAA in return for compensation and are subject to their control, such athletes are, therefore, employees under the NLRA.⁸⁵

The ramifications of this memorandum are still unclear. However, it is undoubtedly clear that when future litigations occur under the NLRA, Abruzzo will take the position that scholarship athletes at universities are employees.⁸⁶ Abruzzo also explicitly stated that if an employer misclassifies athletes at universities as “student-athletes,” she will pursue the misclassification as an independent violation of the NLRA.⁸⁷ While this memorandum is not binding authority, it has serious implications at face value. But until cases are brought before the NLRB, the memorandum’s effect on federal policy remains unclear.⁸⁸

D. Rise of Athletes’ Demands for Compensation

1. O’Bannon v. NCAA

O’Bannon v. National Collegiate Athletic Association is a landmark case that shaped the current NIL landscape in collegiate athletics. The District Court of Northern California’s decision was the first by any federal court not only to hold that the NCAA’s amateurism rules violated anti-trust laws but also to mandate the NCAA to change its practices. Ultimately, the Ninth Circuit rejected a deferred compensation requirement imposed on the NCAA.⁸⁹

Ed O’Bannon, a former All-American basketball player at the University of California Los Angeles (“UCLA”), sued the NCAA after discovering

82. *Id.* at 2–3.

83. *Id.* at 3.

84. *Id.*

85. *Id.*

86. Abruzzo, *supra* note 79, at 1.

87. *Id.* at 4.

88. Carolyn A. Pelligrini et al., *NLRB’s Top Prosecutor Proclaims College Athletes are Employees*, SAUL EWING ARNSTEIN & LEHR LLP (Oct. 6, 2021), <https://www.jdsupra.com/legalnews/nlrb-s-top-prosecutor-proclaims-college-5926218/> [<https://perma.cc/YK3S-V9F2>].

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

that a college basketball video game used his likeness without his consent.⁹⁰ Around the same time, Sam Keller similarly sued the NCAA for impermissibly allowing his NIL to appear in college football video games.⁹¹ These cases were consolidated and eventually turned into a class-action lawsuit of current and former college athletes.⁹² Plaintiffs specifically alleged that the NCAA's rules and bylaws functioned as an unlawful restraint of trade because they prevented college athletes from receiving any compensation—in excess of their athletic scholarships—for using their NIL in group licensing deals.⁹³ On the other hand, the NCAA argued that such restrictions on college athlete compensation were necessary to preserve amateurism and maintain a competitive balance in collegiate athletics.⁹⁴

The district court determined that the NCAA's restraint prohibiting college athletes from receiving NIL compensation violated federal anti-trust laws.⁹⁵ Writing for the court, Judge Wilkens acknowledged that by promoting amateurism and preventing the formation of a “wedge” between college athletes and other students, the compensation rules increased consumer demand for college sports.⁹⁶ However, by applying the “rule of reason” test, Judge Wilkens found that by fixing the price that schools pay to secure college athletes' services, the NCAA's compensation rules had “significant anticompetitive effects” on the college education market.⁹⁷ The district court then issued an injunction that partly required the NCAA to permit universities to provide compensation up to the full cost of attendance. On appeal, the Ninth Circuit found no error and upheld this part of the injunction.⁹⁸

Judge Wilkens's injunction also required the NCAA to permit universities to set aside at least \$5,000 per year in deferred compensation, which would be held in trust for college athletes until after they graduate.⁹⁹ Essentially, under Judge Wilkens's trust-fund model, college athletes could receive a limited share of group licensing revenue.¹⁰⁰ By preventing college athletes from accessing the money while in school, Judge

90. *Id.* at 1055.

91. *Id.*

92. *Id.*

93. *Id.* at 1052–53.

94. *Id.* at 1058.

95. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), *rev'd in part*, 802 F.3d 1049, 1079 (9th Cir. 2015).

96. *Id.*

97. *O'Bannon*, 802 F.3d at 1070.

98. *Id.* at 1053.

99. *Id.*

100. *O'Bannon*, 7 F. Supp. 3d at 1007–08.

Wilkins reasoned that the trust-fund model still ensures the NCAA may achieve its goal of integrating academics and athletics.¹⁰¹

The Ninth Circuit was not persuaded.¹⁰² Vacating the part of the district court's injunction requiring deferred compensation, the Ninth Circuit characterized the evidence supporting the trust-fund model as "threadbare."¹⁰³ Writing for the Ninth Circuit, Justice Bybee equated college athletes under the model to "poorly-paid professional collegiate athlete(s)." The court feared that this "quantum leap" would result in a slippery slope where the "NCAA will have surrendered its amateurism principles entirely" and transition to "minor league status."¹⁰⁴ Now, with college athletes nationwide gaining the right to use their NIL for compensation—contrary to Justice Bybee's wishes—Judge Wilkins's trust fund model may regain traction.¹⁰⁵

2. *NCAA v. Alston*

For the first time in over 35 years, the Supreme Court heard arguments in 2021 over antitrust matters and college athlete compensation that would prove to be monumental in changing the NCAA's policy on NIL.¹⁰⁶ Shawne Alston, a former West Virginia running back, filed the class-action lawsuit in the Northern District of California alleging that the NCAA violated antitrust laws by "placing a ceiling on the compensation that may be paid" to college athletes with "no legitimate pro-competitive justification."¹⁰⁷ The district court held partially in favor of each side.¹⁰⁸ First, in favor of the NCAA, the district court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance.¹⁰⁹ Yet, in favor of college athletes, the district court enjoined the NCAA from limiting "education-

101. *Id.* at 1008.

102. *O'Bannon*, 802 F.3d at 1077.

103. *Id.*

104. *Id.* at 1076–79.

105. *NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR LLP (Nov. 14, 2021), <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/4QQK-5HU2>].

106. Ngoc Hulbig & Joel Mitnick, *Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism"*, CADWALADER, WICKERSHAM & TAFT LLP: CLIENTS & FRIENDS MEMOS (Dec. 18, 2020), <https://www.jdsupra.com/legalnews/supreme-court-to-weigh-in-college-13406/> [<https://perma.cc/FB3B-P7GM>].

107. *Id.*; Second Amended Complaint-Class Action Seeking Injunction, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Lit.*, No. 4:14-md-02541-CW, 2015 WL 732448, at *1 (N.D. Cal. Feb. 13, 2015).

108. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2153 (2021).

109. *Id.*

related benefits” universities may provide to college athletes.¹¹⁰ Both sides appealed to the Ninth Circuit, and they fully affirmed the opinion.¹¹¹ The Ninth Circuit emphasized that the district court’s remedy “struck the right balance” by preventing anticompetitive harm and preserving the popularity of college sports.¹¹² Interestingly, only the NCAA appealed to the Supreme Court, leaving the highest court to exclusively consider whether the NCAA’s rules restricting education-related benefits are unlawful.¹¹³

Writing unanimously for the Supreme Court, Justice Gorsuch affirmed the Ninth Circuit’s decision.¹¹⁴ The NCAA strongly urged the Supreme Court to analyze the compensation restrictions under an “abbreviated deferential review.”¹¹⁵ The Court instead confirmed that the appropriate test for analyzing the NCAA’s restraints is the “rule of reason” test—a fact-specific assessment of market power and market structure to assess the challenged restraint’s actual effect on competition.¹¹⁶ Justice Gorsuch emphasized that while some restraints are necessary to maintain collegiate athletics, that does not mean “all aspects of elaborate interleague cooperation are.”¹¹⁷ Quoting the Seventh Circuit, Justice Gorsuch illustrated that “the ability of McDonald’s franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players.”¹¹⁸ The NCAA relied on a Supreme Court decision 37 years prior to *Alston*. In *Board of Regents*, the Court used an abbreviated antitrust review in considering the lawfulness of the NCAA’s rules restricting universities’ ability to broadcast football games.¹¹⁹ However, the Court noted not only that “student-athlete compensation rules were not even at issue in *Board of Regents*,” but also “the Court simply did not have occasion to declare—not did it declare—the NCAA’s compensation restrictions pro-competitive both in 1984 and forevermore.”¹²⁰ Before ultimately

110. *Id.*

111. *Id.* at 2154.

112. *Id.*

113. *Id.*

114. *Alston*, 141 S. Ct. at 2166.

115. *Id.* at 2155.

116. *Id.* (quoting *Ohio v. Am. Express Co.*, 585 S. Ct. 2274, 2284 (2018)).

117. *Id.* at 2156 (quoting *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 200 n. 7).

118. *Id.* at 2157 (quoting *Chi. Pro. Sports Ltd. v. Nat’l Basketball Assn.*, 95 F.3d 593, 600 (CA7 1996)).

119. *Id.* at 2157.

120. *Id.* at 2158.

declaring that the rule of reason test shall apply, Justice Gorsuch noted the “market realities have changed significantly since 1984.”¹²¹

The Court then held that the rule of reason test’s three parts were appropriately applied and rejected the NCAA’s fears regarding unjust outcomes.¹²² The NCAA feared that “education-related benefits” would result in a slippery slope, where boosters would promise post-eligibility internships with extravagant salaries as a “thinly disguised vehicle” for paying professional-level salaries.¹²³ The Court, however, reminded the NCAA that they remain free to police phony education activities, and thus the NCAA and the conferences may restrict illegitimate education activities.¹²⁴ The NCAA also feared that allowing in-kind education benefits would result in college athletes receiving luxury cars to get to class.¹²⁵ Unconvinced, the Court reminded the NCAA that “nothing stops it from enforcing a ‘no Lamborghini’ rule.” Justice Gorsuch added that the NCAA is free to seek clarification from the district court if it truly “believes meaningful ambiguity really exists about the scope of its authority” to enforce education-related benefits.¹²⁶

In a concurring opinion, Justice Kavanaugh strongly expressed his concerns regarding the NCAA’s remaining compensation rules.¹²⁷ He first acknowledged that the Court must pass judgment because the college athletes did not renew their appeal regarding the remaining restrictions.¹²⁸ However, he followed up by establishing that when the day comes to analyze such remaining restrictions, the rules should receive the rule of reason test.¹²⁹ Justice Kavanaugh then ripped apart the NCAA’s “circular and unpersuasive” argument regarding the need to preserve amateurism.¹³⁰ While stating that the NCAA’s current model is “price-fixing labor,” Justice Kavanaugh drew multiple comparisons to other industries:

The NCAA’s business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks’ wages on the theory that “customers prefer” to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers’ salaries in the name of providing legal services out of

121. *Id.*

122. *Id.* at 2160, 2162, 2165.

123. *Id.* at 2164.

124. *Id.* at 2164–65.

125. *Id.* at 2165.

126. *Id.*

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

128. *Id.* at 2167.

129. *Id.*

130. *Id.* at 2167–69.

a “love of the law.” Hospitals cannot agree to cap nurses’ income in order to create a “purer” form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a “tradition” of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a “spirit of amateurism” in Hollywood.¹³¹

Justice Kavanaugh also mentioned the potential for universities and athletes to engage in collective bargaining.¹³² He emphasized that collective bargaining effectively exists in professional football and basketball leagues.¹³³ Lastly, and perhaps most notably, Justice Kavanaugh ended his concurrence with “[t]he NCAA is not above the law.”¹³⁴ While this concurrence is not binding precedent, it is almost certainly a warning to the NCAA should they find themselves back in the Supreme Court.

The collegiate athletics landscape was immediately affected following *Alston*. A week after the Court’s unanimous ruling, the NCAA adopted an interim policy suspending the restrictions that prevented athletes from receiving compensation for their name, image, and likeness.¹³⁵

III. FEDERAL PROPOSALS

The pressure is on Congress to act. Mark Emmert, president of the NCAA, has repeatedly requested Congress to pass a federal NIL law.¹³⁶ A group of Atlantic Coast Conference (“ACC”) athletes sent a letter to U.S. Senators pleading for a solution to what they described as a “Wild West NIL philosophy.”¹³⁷ Texas explicitly calls on Congress in SB 1385 to provide uniform guidance on NIL compensation.¹³⁸ Nevertheless, Congress has passed nothing despite strong urges from all corners of collegiate athletics. There are, however, a handful of proposed NIL bills that are

131. *Id.* at 2167.

132. *Id.* at 2168.

133. *Id.*

134. *Id.* at 2169.

135. Tatianna Witter, *From “Student-Athletes” to “Players”: A Review of the 2021 Legal Developments Shaping a New Reality of College Sports*, JD SUPRA: LOCKE LORD LLP (Jan. 6, 2022), <https://www.jdsupra.com/legalnews/from-student-athletes-to-players-a-6189761/> [<https://perma.cc/5JEJ-W96B>].

136. Dan Murphey, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [<https://perma.cc/2V6W-7ZYD>].

137. Ross Dellenger, *Group of ACC Athletes Urge Congress to Pass National NIL Law*, SPORTS ILLUSTRATED (Sept. 23, 2021), <https://www.si.com/college/2021/09/23/acc-athletes-letter-congress-nil> [<https://perma.cc/XC4Z-3P6C>].

138. TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

gaining traction. Two of the most prominent bills differ in including a morality provision, exclusivity provision, and group licensing provision.

A. College Athletes Bill of Rights

Led by Senator Cory Booker, the College Athletes Bill of Rights was introduced in December 2020 and provides sweeping alterations to the college sports landscape.¹³⁹ Interestingly, although states are calling on Congress to pass a NIL law, the bill would not expressly preempt existing state legislation.¹⁴⁰

One of the most notable provisions in the College Athletes Bill of Rights is its approach to the issue of group licensing by simply requiring “revenue-generating sports to share 50 percent of their profit with the athletes from that sport.”¹⁴¹ Athletes would also be free to collectively market their name, image, and likeness.¹⁴² Additionally, the bill provides that a college athlete’s name, image, or likeness cannot be used as a member of a group “to sell or promote any product unless the person obtains a license from the group for that purpose.”¹⁴³ This bill increases the ease with which athletes can enter group licensing deals. With this extra protection, college athletes do not have to seek out such deals as actively since institutions can no longer facilitate group licensing without the athletes’ consent.

The College Athletes Bill of Rights opens the door for college athletes to sign endorsement deals with products that compete with a product that their school endorses.¹⁴⁴ Universities would not be able to prohibit an “athlete from carrying out activities pursuant to an endorsement contract during a period in which the college athlete is not engaged in a mandatory team activity.”¹⁴⁵ While some current NIL laws, such as SB 1385, explicitly prevent college athletes from endorsing products that compete with products endorsed by their university, the College

139. *Dissecting the “College Athletes Bill of Rights” Senate Bill*, ATHLETICDIRECTORU, <https://www.athleticdirectoru.com/sanil/dissecting-the-college-athletes-bill-of-rights-senate-bill/> [https://perma.cc/FFT4-KKMS]; College Athletes Bill of Rights, S. 5062, 116th Cong. (2d Sess. 2020).

140. S. 5062, 116th Cong. § 13 (2020).

141. *Senators Booker and Blumenthal Introduce College Athletes Bill of Rights*, CORY BOOKER, (Dec. 17, 2020), <https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights> [https://perma.cc/ZMZ3-AP97]; S. 5062, 116th Cong. § 5(a)(3).

142. CORY BOOKER, *supra* note 140.

143. S. 5062, 116th Cong. § 3(a)(2).

144. S. 5062, 116th Cong. § 3(a)(4)-(5).

145. *Id.*

Athletes Bill of Rights leaves out such provision.¹⁴⁶ On the other hand, the bill permits a university to require athletes to use university-issued apparel during practice or competition.¹⁴⁷ However, footwear is expressly excluded from this provision, meaning college athletes would be free to compete with shoes under the brand of their choice.¹⁴⁸ Thus, neither Duke nor Nike could stop him had Zion Williamson worn Adidas shoes during his one-year stint at Duke (Nike-sponsored school).¹⁴⁹

Lastly, the bill provides an avenue for states to restrict endorsements for certain types of products but with a significant restriction.¹⁵⁰ A state may only prohibit an athlete from endorsing any particular category of products, such as alcohol or gambling, if “the State also prohibits institutions of higher education located in the State from entering into agreements” with such categories of products.¹⁵¹ Thus, if Texas wanted to prevent college athletes from signing deals with alcoholic products—as it currently does—Texas would also have to prohibit significant universities, such as Texas A&M and the University of Texas, from entering into such deals.¹⁵² Furthermore, the bill requires all universities to provide their athletes with a definitive list of entities that the university prohibits engaging with for endorsement deals.¹⁵³ This requirement to provide a list of prohibited businesses could be cumbersome, especially when a new business opens that is not on the list.¹⁵⁴

B. *Student Athlete Level Playing Field Act*

The NCAA has a clear-cut favorite out of the handful of federal NIL bills introduced in Congress.¹⁵⁵ Co-sponsored by former college athletes Congressman Anthony Gonzales and Congressman Emanuel Cleave, the Student Athlete Level Playing Field Act was reintroduced in April

146. *Id.*; see TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

147. S. 5062, 116th Cong. (2020).

148. *Id.*

149. *Dissecting the “College Athletes Bill of Rights” Senate Bill*, *supra* note 138.

150. S. 5062.

151. *Id.*

152. See EDUC. § 51.9246.

153. S. 5062.

154. *Dissecting the “College Athletes Bill of Rights” Senate Bill*, *supra* note 139.

155. *NCAA Statement on Gonzalez-Cleaver Bill*, NCAA (Apr. 26, 2021, 5:22 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gonzalez-cleaver-bill-0> [<https://perma.cc/42HJ-WB4Z>]; Katie Lever, *NCAA Gives Thumb-Up to Student Athlete Level Playing Field Act. What Does That Mean?*, LRT SPORTS, <https://www.lrt-sports.com/blog/ncaa-gives-thumbs-up-to-athlete-level-playing-field-act-what-does-that-mean/> (Mar. 7, 2022) [<https://perma.cc/6VZ9-KUB7>].

2021.¹⁵⁶ The NCAA immediately released a statement expressing support for the bipartisan bill.¹⁵⁷ The NCAA stated that the bill “will strengthen the college athlete experience and support the NCAA” while also ensuring that “students can play the sport they love and earn a degree – often with a full scholarship and no debt.”¹⁵⁸

The newly proposed legislation aims to provide college athletes the right to “control their name, image and likeness” and ensure that college athletes have the “same rights every other American in the country is already afforded.”¹⁵⁹ Unlike the College Athletes Bill of Rights, this bill expressly preempts existing state legislation.¹⁶⁰ The Student Athlete Level Playing Field Act also differs from the College Athletes Bill of Rights by failing to provide a proposal to handle the impending rise of collegiate athletes handling group licensing.¹⁶¹

On the other hand, the Student Athlete Level Playing Field Act explicitly permits universities to prohibit the endorsement of “taboo” products.¹⁶² The bill provides categories of products and services that college athletes are restricted from endorsing, including alcohol, tobacco, marijuana, adult entertainment, and gambling.¹⁶³ While this bill leaves the door open for universities to restrict these potential endorsement opportunities, it does not require such a prohibition.¹⁶⁴ Thus, many schools may elect to avoid such provisions to keep a competitive advantage in recruiting by offering potential athletes the most endorsement opportunities.

The Student Athlete Level Playing Field Act takes a centric approach to exclude the endorsement of competing brands.¹⁶⁵ First, it allows universities to prohibit college athletes from wearing apparel from an

156. Arriana Sajjad, *The Student Athlete Level Playing Field Act: Time for College Athletes to Cash in?*, UNIV. OF BALT. L. REV. (Jan. 22, 2021), <https://ubaltlawreview.com/2021/01/22/the-student-athlete-level-playing-field-act-time-for-college-athletes-to-cash-in/> [https://perma.cc/F4L8-YDDC]; Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. (1st Sess. 2021).

157. *NCAA Statement on Gonzalez-Cleaver Bill*, *supra* note 155; Lever, *supra* note 155.

158. *NCAA Statement on Gonzalez-Cleaver Bill*, *supra* note 155.

159. Press Release, Emanuel Cleaver, Congressman, *Reps. Cleaver, Gonzalez Unveil Bipartisan Bill to Grant Name, Image and Likeness Rights to College Athletes* (Sept. 24, 2020), <https://cleaver.house.gov/media-center/press-releases/rep-cleaver-gonzalez-unveil-bipartisan-bill-grant-name-image-and-likeness-rights-to-college-athletes> [https://perma.cc/9NPM-B7MJ].

160. College Athletes Bill of Rights, S. 5062, 116th Cong. § 13(1) (2d Sess. 2020); Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong. § 7 (1st Sess. 2021).

161. H.R. 2841, 117th Cong. (2021).

162. *Id.* at § 2(b).

163. *Id.* at § 2(b)(1)–(5).

164. *Id.* at § 2(b).

165. *Id.* at § 2(c).

entity only during competition or an “athletic-related university-sponsored event.”¹⁶⁶ If a school were to pursue this prohibition, college athletes would be free to openly endorse apparel from a competing brand on social media or presumably any other public avenue that the university does not sponsor.¹⁶⁷ Thus, although this prohibition does not ensure college athletes can engage in a genuinely free market for advertising, it protects a limited range of opportunities.¹⁶⁸

IV. TEXAS SB 1385

While The College Athletes Bill of Rights and Student Athlete Level Playing Field Act would undoubtedly provide a uniform standard across the nation, there is no expectation that Congress will pass either bill anytime soon. Further, experts do not expect Congress to establish any uniform NIL legislation in the near future.¹⁶⁹ According to one expert, Capitol Hill is too self-consumed with “[hearing] themselves speak or talk about their time when they were in college.”¹⁷⁰ Thus, it is critical that Texas updates its NIL legislation rather than wait and hope that Congress steps in.

Texas passed SB 1385 after a 28-2 vote on June 14, 2021.¹⁷¹ Sponsored by Senator Brandon Creighton, Texas passed SB 1385 so college athletes could “earn compensation for their name, image, and likeness” and to “ensure Texas universities are competing on an equal playing field in the competitive world of collegiate athletics.”¹⁷² To accomplish these goals, the Texas Senate either included or excluded the following types of provisions: (1) morality provision, (2) exclusivity provision, and (3) group licensing provision.¹⁷³

A. Morality Provision

Morality provisions prohibit college athletes from endorsing specific types of “taboo” products. First, SB 1385 explicitly prohibits athletes

166. *Id.*

167. Lever, *supra* note 155.

168. *Id.*

169. Josh Moody, *States Rethink Restrictive NIL Laws*, INSIDE HIGHER ED (Feb. 11, 2022), <https://www.insidehighered.com/news/2022/02/11/states-rethink-restrictive-nil-laws> [<https://perma.cc/4Z3P-YB8Y>].

170. *Id.*

171. *Votes: TX SB1385 | 2021-2022 | 87th Legislature*, LEGISCAN, <https://legiscan.com/TX/votes/SB1385/2021> [<https://perma.cc/P5Y8-ULRF>].

172. S. Comm. on Higher Educ., Bill Analysis, Tex. S.B. 1385, 87th Leg., R.S. (2021).

173. TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

from endorsing “alcohol, tobacco products, e-cigarettes or any other type of nicotine delivery device, anabolic steroids, sports betting, casino gambling, a firearm the student athlete cannot legally purchase, or a sexually oriented business.”¹⁷⁴ According to the Texas House Research Organization (“HRO”), this provision imposes “reasonable restrictions.”¹⁷⁵ On the other hand, while the HRO does not state that critics explicitly criticized this provision, the HRO notes that critics generally believed some provisions in SB 1385 “would go too far, such as restricting the type of endorsements that student athletes can make.”¹⁷⁶ The current NCAA interim rules do not prohibit endorsement of these industries.¹⁷⁷

B. Exclusivity Provision

Exclusivity provisions prohibit endorsing products or services competing with those already endorsed by the college athlete’s respective university. SB 1385 also includes a heavily restrictive exclusivity provision.¹⁷⁸ The bill states that college athletes may not endorse products that are competitors with products endorsed by their university.¹⁷⁹ For example, if a school has an exclusive apparel and equipment contract with Adidas, athletes cannot sign a NIL deal with Nike. It is unclear whether universities provide college athletes with a list of competing entities or, at the very least, a list of the university’s current partnerships.¹⁸⁰

C. Group Licensing Provision

SB 1385 does not explicitly address whether college athletes can actively engage in group licensing.¹⁸¹ Without a state-wide framework, it is unlikely that college athletes will successfully bargain with their respective universities. Moreover, SB 1385 states that college athletes shall not be considered employees under Texas state law.¹⁸² Thus, the

174. *Id.*

175. H.R. Comm. Tex. S.B. 1385.

176. House Rsch. Org., Bill Analysis, Tex. S.B. 1385, 87th Leg., R.S. (2021).

177. Thomas Di Biasio, *Most States Pass “Name, Image, and Likeness” Laws for Student Athletes*, MULTISTATE (Sept. 21, 2021), <https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes> [<https://perma.cc/E6QL-5CD5>].

178. House Rsch. Org., *supra* note 176.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See Id.*

bill inherently prohibits collective bargaining. While collective bargaining is not a condition precedent for college athletes to achieve group licensing, this prohibition foreshadows Texas's disdain.

V. IMPROVEMENTS

A. *Morality Provision*

N'Kosi Perry, Drew Timme, and Colorado women college athletes all have one common advantage: favorable NIL legislation.¹⁸³ They also have seized opportunities permitted by their respective state legislatures by endorsing “taboo” companies in the eyes of Texas.¹⁸⁴ Texas needs to remove SB 1385's morality provision to ensure college athletes can maximize their NIL earning potential and ensure an equal playing field in the world of collegiate athletics.

First, the Statement of Intent in SB 1385 fails to come even remotely close to mentioning the enforcement of subjective moral standards on college athletes.¹⁸⁵ Instead, the only explicit purpose stated is to ensure “Texas universities are competing on an equal playing field with other states and institutions in the world of collegiate athletics.”¹⁸⁶ Thus, Texas's restriction on endorsing subjectively “taboo” industries is illogical from a purely Congressional intent perspective.¹⁸⁷ Other states—such as Florida, Washington, and Colorado—allow their athletes to endorse products in these banned categories. Athletes in these states have already seized these NIL opportunities.¹⁸⁸ Texas is achieving the opposite of its intended goal by facilitating an unequal playing field for Texas universities.

On September 8, 2021, N'Kosi Perry—a 23-year-old quarterback at Florida Atlantic University—partnered with a Florida-based brewery to

183. Amanda Christovich, *Alcohol, Betting NIL Deals Fair Game for Some Athletes*, FRONT OFFICE SPORTS (Oct. 11, 2021), <https://frontofficesports.com/alcohol-betting-nil-deals-fair-game-for-some-athletes/> [https://perma.cc/CZK7-B9NB]; Mike Selly, *Already a Hit with the Ladies, MaximBet Offers NIL Deals to Dudes*, COBETS (Nov. 30, 2021), <https://www.cobets.com/maximbet-offers-nil-deals-dudes/> [https://perma.cc/G5NP-VX5P]; Brianda Perez, *Northern Quest Partners with Gonzaga's Drew Timme in Name, Image and Likeness Deal*, KREM (Nov. 11, 2021), <https://www.krem.com/article/sports/northern-quest-drew-timme-nil-deal/293-251145e1-4f7e-4b68-a8f4-4c6aac161b92> [https://perma.cc/98RB-L9PR].

184. Christovich, *supra* note 183; Selly, *supra* note 183; Perez, *supra* note 183.

185. S. Comm. on Higher Educ., Bill Analysis, Tex. S.B. 1385, 87th Leg., R.S. (2021).

186. *Id.*; TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

187. EDUC. § 51.9246.

188. FLA. STAT. § 1006.74; Compensation and Representation of Student-Athletes, S.B. 20-123, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

receive compensation for his NIL.¹⁸⁹ This “taboo” opportunity with a local company in a billion-dollar industry is unavailable to Texas athletes.¹⁹⁰ While N’Kosi Perry’s partnership is with a local brewery, it is a matter of time before the floodgates open and the big players in these industries begin partnering with athletes outside of Texas.¹⁹¹ Missed endorsement opportunities are also not limited to the alcohol industry.¹⁹² When a Colorado-based sports betting operator extended a NIL deal to every 21+ women’s sports athlete in Colorado, it was such a hit that the company expanded the offering to men athletes.¹⁹³ Interestingly, roughly half of the women’s NIL deals were with Division II and III athletes, according to this company.¹⁹⁴ Moreover, in November 2021, Gonzaga University basketball star Drew Timme pushed NIL limits even further than N’Kosi Perry.¹⁹⁵ A Native American Casino in Washington partnered with Timme while emphasizing that he would not appear in any promotions specifically for the tribe’s sportsbook.¹⁹⁶ Nevertheless, by simply appearing in advertisements for the casino, Timme will achieve earning potential that is inaccessible to even active professional athletes.¹⁹⁷

While Texas is unlikely to open such a door to college athletes due to the local illegality of sports betting, there is surging NIL compensation in “taboo” industries already tapped into by college athletes on both ends of the country. SB 1385 explicitly states that it is “imperative” that Texas passes NIL legislation to “ensure Texas universities are competing on an equal playing field in the competitive world of collegiate athletics.”¹⁹⁸ Texas universities will find themselves on a lopsided playing field as more of these NIL partnerships form and receive national exposure, especially with athletes in non-revenue sports with a lower NIL earning potential.

It is also unclear why Texas elected to impose such restrictions on college athletes but not the institutions the athletes represent. For example, Texas A&M athletics and Anheuser-Busch signed a multi-year partnership deal in 2016, and it is common for beer cans to now use the

189. Christovich, *supra* note 183.

190. *Id.*

191. *Id.*; Selly, *supra* note 183.

192. Christovich, *supra* note 183.

193. Selly, *supra* note 183.

194. *Id.*

195. Perez, *supra* note 183.

196. *Id.*; Selly, *supra* note 183.

197. Selly, *supra* note 183.

198. S. Comm. on Higher Educ., Bill Analysis, Tex. S.B. 1385, 87th Leg., R.S. (2021).

Aggie logo in advertising.¹⁹⁹ Additionally, Texas A&M received \$1.3 million in the first year it allowed alcohol sales at Kyle Field.²⁰⁰ On the other hand, SB 1385 prohibits Texas A&M athletes from similarly endorsing beer companies.²⁰¹ Since college athletes would be advertising an alcoholic beverage to the same audience and market that Texas A&M as an institution already advertises to, it is unclear what objective SB 1385's morality prohibition is serving.

This illogical dichotomy is what the College Athletes Bill of Rights attempts to address, and Texas should follow its lead.²⁰² The accessibility of all categories available for Texas universities to sell and form partnerships with should be open to college athletes. In fact, college athletes in Texas already receive benefits from indirect partnerships with alcohol-based companies.²⁰³ In early 2022, an Austin-based vodka company announced a \$20 million investment in University of Texas athletics.²⁰⁴ University officials stated that the investment would assist with constructing new practice facilities for multiple sports.²⁰⁵ Despite the Texas legislature explicitly prohibiting college athletes from earning NIL compensation from this gratuitous Austin-based vodka company, there seems to be no problem with allowing college athletes to receive new training facilities from this “taboo” company.²⁰⁶

If Texas wants to maximize sponsorship opportunities for college athletes, Texas should implement a framework similar to the College Athletes Bill of Rights.²⁰⁷ Rather than have a blanket ban on “taboo” products, Texas should allow college athletes to endorse products within the

199. Eagle Staff, *Texas A&M athletics and Anheuser-Busch sign multi-year partnership deal*, THE EAGLE (Sept. 7, 2016), https://theeagle.com/news/a_m/texas-a-m-athletics-and-anheuser-busch-sign-multi-year-partnership-deal/article_fba1b7f0-7502-11e6-b6d5-33325c880e9c.html#:~:text=The%20Texas%20A%26M%20University%20athletics,professional%20sports%20leagues%20and%20teams [https://perma.cc/E9RY-GQXP].

200. Joseph Zucker, *Texas A&M Received \$1.3M in 1st Year Allowing Alcohol Sales at Kyle Field*, BLEACHER REPORT (Nov. 28, 2019), <https://bleacherreport.com/articles/2864695-texas-am-received-13m-in-1st-year-allowing-alcohol-sales-at-kyle-field> [https://perma.cc/PHC4-8M6X].

201. EDUC. § 51.9246.

202. College Athletes Bill of Rights, S. 5062, 116th Cong. (2d Sess. 2020).

203. Paul Livengood, *Austin-Based Tito's Vodka Investing \$20M for UT Student-Athletes, Athletics Facilities*, KVUE (Jan. 31, 2022), <https://www.kvue.com/article/sports/naaa/longhorns/titos-vodka-ut-athletics-investment/269-4f8c5061-f088-49b9-9c3a-a6a57ccde053> [https://perma.cc/RER7-YX56].

204. *Id.*

205. *Id.*

206. TEX. EDUC. CODE ANN. § 51.9246 (West 2021).

207. See College Athletes Bill of Rights, S. 5062, 116th Cong., § 3(c)(2), (2d Sess. 2020).

same category of products that their university endorses. At the very least, Texas should pursue the option contained in the Student Athlete Level Playing Field Act.²⁰⁸ Instead of preventing both athletes and universities from electing how to handle alcohol endorsements—or any other “taboo” industry—Texas should allow universities to decide whether such endorsements are permissible. Many of the big players in these industries are still in “wait-and-see mode” as NIL laws are continuously tested, thereby providing Texas with an immense opportunity.²⁰⁹

B. Exclusivity Provision

College athletes in Texas suffer from the ambiguity in SB 1385.²¹⁰ It states that college athletes’ endorsement deals must not conflict with any of their university’s endorsement deals.²¹¹ While not explicitly mentioned, the goal of this part of SB 1385 is most likely to prevent a college athlete from endorsing a product that competes with a product already endorsed by their respective university. This prohibition includes an athlete promoting a product even if the athlete is not engaged in official team activities.

First, it is unlikely that any college athlete is familiar with the contractual terms of their university’s endorsement deals. Presumptively, the burden then falls on the universities to heavily monitor their athletes’ endorsement deals while cross-referencing the provisions in such contracts with those of their own. Not only is this cumbersome, but there will also likely be ambiguity as to whether provisions indeed conflict. For example, Texas A&M Athletics is an official partner with Gatorade, a sports performance beverage.²¹² Thus, according to SB 1385, Texas A&M athletes are prohibited from endorsing any other sports performance beverage—arguably the category of products where a college athlete is most marketable.²¹³ Texas A&M Athletics is also an official partner with a protein beverage, coffee roaster, car manufacturer, and many more, covering virtually every category of goods.²¹⁴ Suppose one

208. See Student Athlete Level Playing Field Act, H.R. 2841, 117th Cong., § 2(a)–(d), (1st Sess. 2021).

209. Christovich, *supra* note 183.

210. EDUC. § 51.9246.

211. *Id.*

212. *Texas A&M Athletics Official Partners*, TEXAS A&M ATHLETICS, <https://12thman.com/sports/2017/8/25/texas-am-official-partners.aspx> [<https://perma.cc/Z32K-4EC8>].

213. EDUC. § 51.9246.

214. *Texas A&M Athletics Official Partners*, *supra* note 212.

reads SB 1385 adhering strictly to the text. In that case, it is difficult to imagine a product or service that a Texas A&M athlete can endorse outside of school-sponsored activities without competing against a product or service already endorsed by Texas A&M.²¹⁵

A strict interpretation of SB 1385 leads to absurd results. The bill's purpose is to allow college athletes in Texas to earn compensation for their name, image, and likeness.²¹⁶ By preventing the endorsement of products that compete with those already endorsed by an athlete's respective university, athletes are left with very few products to endorse and thus cannot reasonably use their NIL to earn compensation. Texas should remove this exclusivity provision in SB 1385; athletes should be free to utilize their NIL outside of school-sponsored activities to their fullest potential.²¹⁷

The restriction on endorsing products during official team activities is much more straightforward. An athlete cannot sign an endorsement that conflicts with his or her team contract. Presumably, every team contract requires that athletes wear official team apparel during practice and competition.²¹⁸ Texas, however, should tweak this restriction to permit a big exception: footwear. Basketball players can derive massive NIL value from footwear endorsements, as seen when Zion Williamson signed a five-year \$75 million deal with Jordan Brand before playing his first NBA game.²¹⁹ Even without the opportunity to sign footwear deals, University of Connecticut basketball star Paige Bueckers is estimated to make \$1 million a year in NIL endorsements.²²⁰ Nearly every NBA player

215. See Dean Straka, *Texas A&M WR Demond Demas Announces NIL Deal with Durex USA*, 247SPORTS (Dec. 7, 2021), <https://247sports.com/Article/Texas-AM-WR-Demond-Demas-announces-NIL-deal-with-Durex-USA-177074863/> [<https://perma.cc/F2AF-NBGH>]. On the other hand, a Texas A&M wide receiver's partnership with Durex condoms undoubtedly does not compete with any products endorsed by Texas A&M.

216. S. Comm. on Higher Educ., Bill Analysis, Tex. S.B. 1385, 87th Leg., R.S. (2021).

217. Some may fear the adverse ramifications of products and services partnering less with mid-major athletic programs and universities because of the exclusivity provision's removal. While surely a possibility, such concerns are improperly based, for apparel deals do not indeed provide any funding in nearly every mid-major athletic program. See Matt Brown, *Hey, what's in a small school apparel contract anyways?*, EXTRA POINTS WITH MATT BROWN (Sept. 9, 2020), <https://extrapoints.substack.com/p/hey-whats-in-a-small-school-apparel> [<https://perma.cc/VUW9-DRMV>].

218. EDUC. 51.9246.

219. Tres Dean, *Zion Williamson's First Signature Shoe is Here*, GQ (Apr. 20, 2021), <https://www.gq.com/story/zion-williamson-signature-shoe> [<https://perma.cc/UR6K-XX4E>].

220. Adam Zagoria, *UConn's Paige Bueckers Becomes First College Athlete to Sign with Gatorade, Could Earn \$1 Million in Endorsements*, FORBES (Nov. 30, 2021), <https://www.forbes.com/sites/adamzagoria/2021/11/30/uconns-paige-bueckers-becomes-first-college-athlete-to-sign-with-gatorade-could-earn-1-million-in->

has a deal with a shoe company, and even those who rarely see the court receive a \$25,000 product allowance.²²¹ While every NCAA basketball player is unlikely to see any footwear deals, Texas should ensure that its high-profile athletes do not have to miss out on maximizing their NIL value by wearing sponsored footwear on the hardwood. The College Athlete Bill of Rights similarly includes this carve-out, and it would undoubtedly provide Texas universities with a competitive advantage over those in other states.²²²

C. Group Licensing Provision

Group licensing deals are crucial for college athletes to unlock the full potential of generating wealth through NIL.²²³ Unfortunately, SB 1385 is silent regarding whether college athletes should have the freedom to negotiate group licensing agreements.²²⁴ To allow college athletes to truly tap into their NIL earning potential while still preserving amateurism, Texas should adopt the trust-fund model outlined by Judge Wilkens in *O'Bannon*.²²⁵

First, the college landscape has changed drastically since the Ninth Circuit in *O'Bannon* feared that amateurism principles would cease to exist if college athletes received the right to earn compensation for their NIL.²²⁶ Moreover, amateur athletics already implements a trust system. The International Olympic Committee (“IOC”) utilizes a similar trust system for athletes during the Olympics.²²⁷ The IOC’s system permits athletes to withdraw funds from the trust during competition only for necessary expenses.²²⁸ Then, after the Olympics, athletes receive all funds remaining in the trust.²²⁹ Moreover, Dean Smith—hall-of-fame

endorsements/?sh=420e28aee375 [https://perma.cc/7Z49-75DF].

221. Alex Kennedy, *How Sneaker Free Agency Works: The Three Types of Shoe Deals*, HOOPSHYPE (Mar. 17, 2020), <https://hoopshype.com/2020/03/17/how-sneaker-free-agency-works-the-three-types-of-shoe-deals/> [https://perma.cc/HZS9-9LLC].

222. See College Athletes Bill of Rights, S. 5062, 116th Cong. (2d Sess. 2020).

223. See generally Lee VanHorn, *When the Sanity Code Becomes the Insanity Code: Following O'Bannon's Lead is the Key to Solving Group Licensing for NCAA Student-Athletes*, 74 ARK. L. REV. 117, 138–39 (2021).

224. Tex. S.B. 1385, 87th Leg., R.S. (2021).

225. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1007–08 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

226. Jonathan Strom, Comment, *Putting Our Trust in the National Collegiate Athletic Association (NCAA): How Creating Trusts for Student-Athletes Can Save the NCAA From Itself*, 6 EST. PLAN. & CMTY. PROP. L.J. 423, 448–49 (2014).

227. VanHorn, *supra* note 223, at 140.

228. *Id.*

229. *Id.*

basketball coach from the University of North Carolina—directed his trust in his will to give \$200 to every letter winner that played for him.²³⁰ Without providing any reasoning, the NCAA stated that Coach Smith’s generous gift was not an NCAA violation.²³¹ Lastly, in December 2020, South Carolina’s legislature proposed a bill to create a trust fund for college athletes in football, men’s basketball, and women’s basketball.²³² Each year that a college athlete in South Carolina maintains good academic standing, \$5,000 would be deposited into the fund.²³³ The funds would then be distributed after graduation.²³⁴ South Carolina’s proposed trust fund system is strikingly similar to that suggested by Judge Wilkens in *O’Bannon*.²³⁵

By implementing a trust-fund model similar to those proposed by Judge Wilkens and South Carolina, Texas would allow college athletes to monetize their NIL as a group. At the same time, the NCAA would still ensure amateurism principles are preserved by controlling how and when college athletes are compensated.²³⁶ Revenue from group licensing deals, such as apparel and media rights agreements, would be held in trust until the respective collegiate athlete graduates or exhausts eligibility. While South Carolina’s proposal would strictly prohibit any early withdrawals from their proposed trust-fund model, Texas should follow the IOC’s lead and permit withdrawals for necessities such as food and housing.²³⁷ Furthermore, like South Carolina, Texas should require or at least incentivize good academic standing.²³⁸

230. Darren Rovell, *Dean Smith Remembers Players in Will*, ESPN (Mar. 26, 2015), https://www.espn.com/mens-college-basketball/story/_/id/12563125/former-north-carolina-tar-heels-coach-dean-smith-leaves-200-letterman [https://perma.cc/5J9Q-UCTD].

231. Inside the NCAA (@InsidetheNCAA), TWITTER (Mar. 28, 2015, 7:50 PM), https://twitter.com/InsidetheNCAA/status/581981631256363008?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E581981631256363008%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.cbssports.com%2Fcollege-basketball%2Fnews%2Fncaa-responds-to-inquiries-regarding-dean-smiths-200-gift-to-players%2F [https://perma.cc/BP4R-3CPF].

232. S. 256, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

233. *Id.*

234. *Id.*

235. *Id.*; *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1007–08 (N.D. Cal. 2014), *rev’d in part*, 802 F.3d 1049, 1079 (9th Cir. 2015).

236. S.C. S. 256; *O’Bannon*, 7 F. Supp. at 1008.

237. S.C. S. 256.

238. *Id.*

VI. CONCLUSION

The NCAA is trending in the right direction by allowing states to govern college athletes receiving compensation for their hard-earned name, image, and likeness. SB 1385 certainly provides Texas college athletes this long-awaited right, but it falls short of allowing athletes to tap into their full earning potential. While some states, such as Alabama, have repealed their NIL law, Texas should instead look to provide an NIL law for Congress to replicate when the time comes.²³⁹ The NCAA's amateurism model is not falling apart, and nor is it going to by allowing athletes more freedom in their endorsement deals. Texas has the opportunity to position itself at the forefront of collegiate athletics by establishing a name, image, and likeness law that finally allows college athletes to reap the fruits of their labor.

239. Rudy Hill & Jonathan D. Wohlwend, *Alabama and Florida Call an Audible on NIL Laws*, THE NATIONAL LAW REVIEW (Mar. 8, 2022), <https://www.natlawreview.com/article/alabama-and-florida-call-audible-nil-laws> [<https://perma.cc/2KGE-BLAV>].