

THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW PRESENTS

# THE BRANDT REPORT:

The Name, Image and Likeness (NIL) Revolution  
in College Sports



THE JEFFREY S. MOORAD

CENTER FOR THE STUDY OF SPORTS LAW

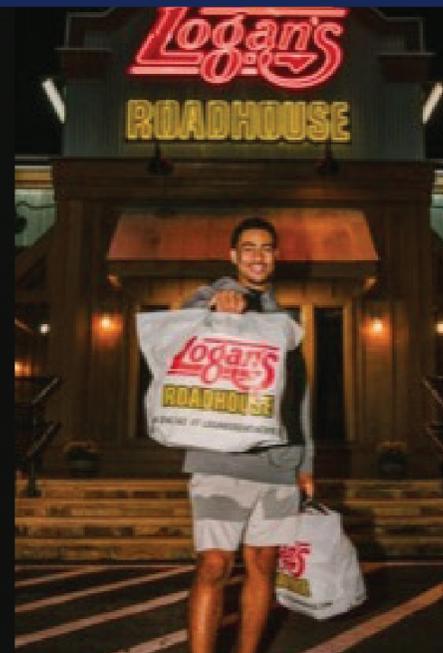
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VILLANOVA UNIVERSITY SCHOOL OF LAW

VOLUME III



# The Name, Image and Likeness (NIL) Revolution in College Sports



# BRANDT REPORT MISSION

**THE BRANDT REPORT** is an annual White Paper presentation to inform and educate students, sports industry professionals and other interested parties about a current sports law/business/policy topic that has experienced disruption in the prior year. The Report is prepared and constructed with research and analysis by students from the Jeffrey S. Moorad Center for the Study of Sports Law at Villanova University Charles Widger School of Law, under the guidance of Executive Director Andrew Brandt. The Moorad Center and Brandt are thought leaders on legal and business aspects of sports and the changing dynamics in sports law, sports business, sports media, sports policy and sports thought. The 2022 Brandt Report focuses on the topic of Name, Image and Likeness in Intercollegiate Sports.

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# TIMELINE OF LEGAL EVENTS

# THE EVOLUTION OF THE AMATEURISM PRINCIPLE



## 1905—MEETING OF UNIVERSITY PRESIDENTS

President Theodore Roosevelt met with the University presidents of Harvard, Princeton and Yale to reform the safety rules in collegiate sports.

[Intercollegiate Athletic Association of the United States Constitution By-Laws Article 12](#): “No student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.”

## EARLY 1920S—ADOPTION OF THE AMATEURISM PRINCIPLE

The NCAA adopts the “amateurism” principle to reduce competition amongst schools for the athletic services of players. The principle prohibits “non-amateurs” from participating in NCAA sports [competitions](#).

## 1948—CREATION OF THE SANITY CODE TO ENFORCE THE AMATEURISM PRINCIPLE

The NCAA created The Sanity Code, a set of rules that prohibited student-athletes from receiving athletic scholarships. The NCAA implemented the “Compliance Mechanism” to help enforce the NCAA’s [rules](#).

## 1956—THE SANITY CODE IS AMENDED TO PERMIT ATHLETIC SCHOLARSHIPS

The Sanity Code is amended to permit student-athletes to receive athletic scholarships.

Included: total cost of tuition and fees, room and board, and required course-related books.

# THE EVOLUTION OF THE AMATEURISM PRINCIPLE



## 1984—BOARD OF REGENTS V. NCAA

Cable networks become eligible to bid on broadcast rights of NCAA games. Media revenue becomes the greatest source of revenue for the NCAA.

## 2004—JEREMY BLOOM V. NCAA

Colorado state court rules Olympic skier Bloom cannot retain ski sponsorship income while playing college football.

## 2008—JASON WHITE V. NCAA

Former Stanford football player alleges scholarships aren't enough to cover student-athletes' needs. The settlement allows schools to purchase health insurance for [student-athletes.](#)

## 2014—O'BANNON V. NCAA

Student-athletes become eligible to receive stipends for Cost of Attendance (COA): living costs, per diems, awards for athletic performances, meals and snacks as part of their athletic scholarship without having their eligibility [impacted.](#)

# THE EVOLUTION OF THE AMATEURISM PRINCIPLE



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## SEPT. 2019— CALIFORNIA'S FAIR PAY TO PLAY ACT

California's [law](#) is the first in the country to allow college athletes to monetize their Name/Image/Likeness (NIL) and hire agents.



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## OCT. 2019—NCAA RELEASES STATEMENT

NCAA issues a [statement](#) that student-athletes will be able to “benefit from the use of their name, image, and likeness in a manner consistent with the collegiate model.”



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## 2021—NCAA V. ALSTON ET. AL.

The United States Supreme Court rules that student-athletes become eligible to earn non-cash benefits related to their education without having their eligibility [impacted](#).



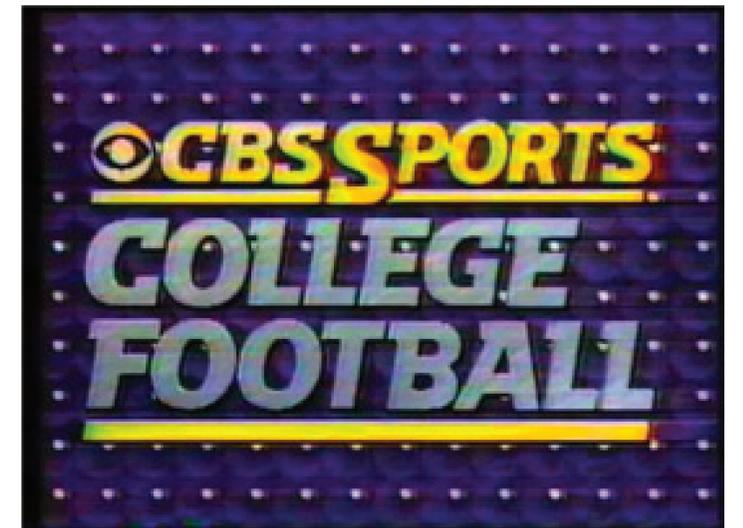
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## 2021—THE NCAA'S INTERIM POLICY ON ATHLETE COMPENSATION

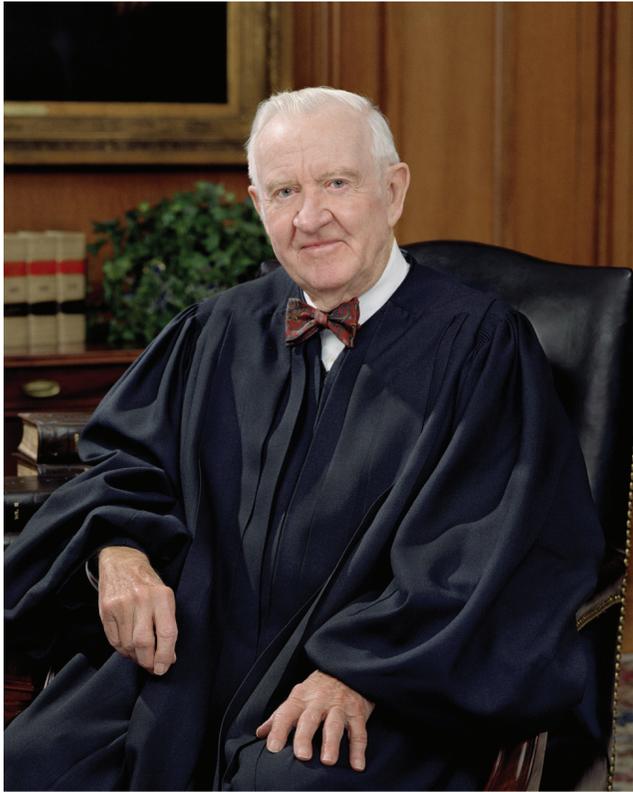
Student-athletes become eligible to earn compensation for the use of their NIL without having their eligibility [impacted](#).

# BOARD OF REGENTS V. NCAA (1984) SUMMARY

- **Background:** The NCAA signed an exclusive rights broadcasting contract with ABC and CBS. The contract capped how many times each NCAA member school would be allowed to appear on television, and each school's ability to pursue better deals with other broadcasting companies.
- **Issue:** Whether the NCAA's control over television rights amounted to an unfair restraint of trade under the Sherman Act.
- **Holding:** The United States Supreme Court held that the NCAA's television plan constituted a restraint on trade because it eliminated competitors from the market by limiting the broadcasting stations able to negotiate for rights to broadcast games.



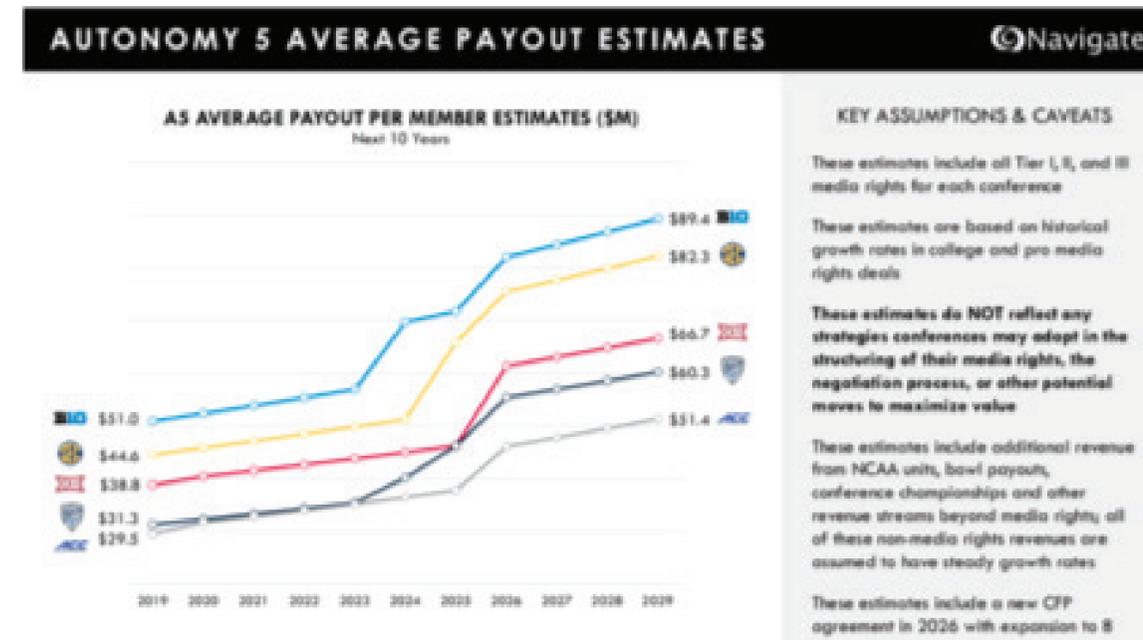
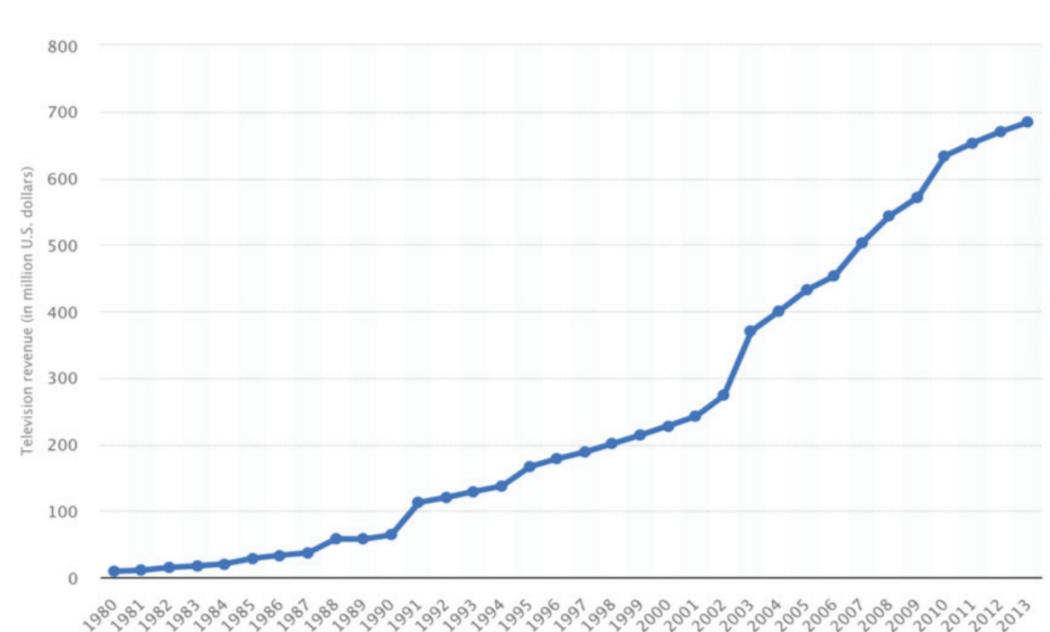
# BOARD OF REGENTS V. NCAA (1984) SIGNIFICANCE FOR FUTURE PLAINTIFFS



- The Supreme Court began a line of precedent where courts would deploy the Rule of Reason approach when litigating antitrust issues in suits brought against the NCAA.
- Future plaintiffs challenging the NCAA on antitrust grounds would have to prove:
  1. A restraint on trade with a substantial anticompetitive effect; and
  2. That the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.
- Within the majority opinion, Justice John Paul Stevens specifically wrote “the NCAA plays a critical role in maintenance of a revered tradition of amateurism in college sports.”
- Going forward after this case, the NCAA’s attorneys would often cite Justice Stevens’ mention of amateurism as a legal justification for the amateurism principle.

# BOARD OF REGENTS V. NCAA (1984) SIGNIFICANCE FOR COLLEGE SPORTS

- The decision directly resulted in higher revenue for the NCAA and its member schools, which created ethical concerns over the NCAA's "amateurism" principle prohibiting student-athletes from being compensated.
- College football was once only eligible to be broadcasted on one network. It is currently broadcast on over fifteen networks.



[Increase in Broadcast Revenue Generated from March Madness](#)  
[Increase in Broadcast Revenue per Conference](#)

# OTHER LAWSUITS MOTIVATING NCAA RULE CHANGES

- ***Bloom v. NCAA (2004)***: Colorado state court ruled Olympic skier, Bloom, cannot retain ski sponsorships while simultaneously playing college football.
- ***White v. NCAA (2008)***: Settlement between former Stanford football player and NCAA allowed for schools to purchase health insurance for student-athletes. White alleged that scholarships are not enough to cover a student-athlete's needs.



# O'BANNON V. NCAA (2014)



- **Background:** Former UCLA men's basketball player Ed O'Bannon and several other former student-athletes filed a class-action lawsuit against the NCAA claiming that the NCAA's amateurism principle was an illegal restraint of trade under the Sherman Act because the principle prevented current and former student-athletes from being compensated for the use of their name, image and likeness (NIL).
- **District Court of California on Amateurism:** *"The NCAA's definition of amateurism is malleable, changing frequently over time in 'significant and contradictory ways' and 'Inconsistently enforced' ...* However, amateurism plays some role in preserving the popularity of college sports because it helps drive demand."

# SIGNIFICANCE OF O'BANNON V. NCAA (2014)

- The 9th Circuit ruled that the NCAA must permit student-athletes to receive benefits that cover their legitimate costs of attending school without having their amateur status impacted.
- Student-athletes became eligible to receive stipends for Cost of Attendance (COA): living expenses, per diems, awards for athletic performances, meals and snacks as part of their athletic scholarship and their eligibility was not impacted.
- *“There are nights that I go to bed and I’m starving”* — [Shabazz Napier](#), the 2014 NCAA Tournament’s Most Outstanding Player award recipient prior to the court’s O’Bannon decision.
- The 9th Circuit was unwilling to permit student-athletes to receive cash payments for the use of their name, image and likeness.



# LEGISLATION MOTIVATING NCAA RULE CHANGE

- **California's Fair Pay to Play Act:** This state bill was passed in September 2019 and was the first state to permit college student-athletes to monetize from their NIL starting in [2023](#).
  - The NCAA responded to this state action by saying that athletes can *"benefit from the use of their name, image, and likeness in a manner consistent with the collegiate [model](#)."*
- **Missouri HB 1564:** Missouri Rep. Nick Schroer proposed a [bill](#) that would allow student-athletes to receive compensation. It was officially passed in March 2020.



# NCAA V. ALSTON ET AL. (2021) BACKGROUND

- In March of 2014, while the *O'Bannon* legislation was ongoing, several other student-athletes filed antitrust actions against the 11 Division 1 Conferences. The lead plaintiff was former West Virginia running back Shawne Alston.
- Judge Claudia Ann Wilken of the United States District Court for the Northern District of California denied the NCAA's motion because the relief sought by the Alston plaintiffs was different from the relief sought by the *O'Bannon* [plaintiffs](#).

RELIEF SOUGHT BY PLAINTIFFS IN O'BANNON	RELIEF SOUGHT BY PLAINTIFFS IN ALSTON
Allowing schools to award stipends to student-athletes up to the full cost of attendance, thus making up for any "shortfall" in their grants-in-aid. (Granted)	Allowing individual conferences to regulate student-athlete compensation, not the NCAA.
Permitting schools to hold a portion of the licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college in amounts not to exceed \$5,000 per year. (Not Granted)	Allowing student-athletes to receive non-cash benefits related to their education.

# NCAA V. ALSTON ET. AL (2021) DISTRICT COURT RULING

- The NCAA's arguments for restricting student-athletes from being able to receive the benefits that they were seeking:
  - To maintain the popularity of its product by preserving the distinction between pro and amateur sports;
  - To integrate student-athletes into the wider campus community.
- Less restrictive alternatives proposed by the student-athletes and accepted by Judge Wilken as valid:
  - Allowing individual conferences, but not the NCAA to regulate student-athlete compensation;
  - Allowing student-athletes to receive non-cash benefits related to their [education](#).



# NCAA V. ALSTON ET. AL (2021) AFTERMATH OF THE DISTRICT COURT RULING

- After Judge Wilken's ruling, individual states began to pass legislation which would allow student-athletes to earn money on the use of their NIL.
- This legislation made it illegal for any college in that state to take away a student-athlete's scholarship eligibility for engaging in sponsorship or marketing agreements.
- Florida's NIL bill was scheduled to go into effect on July 1, 2021. However, most other states did not have bills enacted.
  - This created urgency within the appeals process because the NCAA was fearful of a competitive imbalance caused by the recruiting advantages that would exist in states where NIL was permissible.



# NCAA V. ALSTON ET. AL (2021) APPELLATE COURT RULING

- **9th Circuit Ruling:**
  - The NCAA shall not prohibit student-athletes from receiving non-cash benefits related to their education. The court ruled that permitting these benefits would not harm the demand for college sports.
- **Examples of newly permissible benefits:** musical instruments, paid internships, computer equipment, etc.
  - The ruling invited the NCAA to create a definition of “related to education” subject to the court’s approval.
- **The NCAA’s fear: Pay for Play**
  - Uncapped, permissible benefits had the potential to become *“vehicles for payments that are virtually indistinguishable from professional salary.”*
- **Example:** a student-athlete internship with Nike could become a way to funnel large amounts of money to student-athletes akin to a professional salary with the disguise of an educational opportunity.



# NCAA V. ALSTON ET. AL (2021) SUPREME COURT DECISION

- Affirmed the 9th Circuit’s decision permitting student-athletes to receive non-cash benefits related to their education.
- Justice Stevens in Board of Regents wrote that *“The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports...”*
- *“This does not suggest that courts must reject all challenges to the NCAA’s compensation restrictions...student-athlete compensation rules were not at issue in Board of Regents... the market realities have changed significantly since Board of Regents was decided.”* — Justice Neil Gorsuch writing for the majority opinion in [NCAA v. Alston et. al.](#)



# NCAA V. ALSTON ET. AL (2021) KAVANAUGH'S CONCURRING OPINION



- Justice Kavanaugh harshly criticized the NCAA, [opining](#) that the remaining compensation rules generally restricting student-athletes from receiving other forms of compensation are also antitrust violations because they lack procompetitive justification.
- *“The NCAA’s business model would be flatly illegal in any other industry in America.”*
- **Significance:** Any future restrictions on compensation for student-athletes are likely to be deemed an illegal restraint on trade.

# THE CURRENT NIL LANDSCAPE

# NCAA INTERIM POLICY (2021)

- The NCAA's Interim Policy on NIL was implemented to regulate the new landscape of college athletics as student-athletes started signing deals immediately following the Alston decision.
- It took effect on July 1, 2021, and will remain in effect until federal legislation is passed or the NCAA adopts a permanent policy.
- All NCAA member institutions and their student-athletes are required to follow the guidelines in the interim policy.
- **Goals:**
  - To protect and enhance the student-athlete and maintain fair standards for national recruiting.
  - To continue to uphold the NCAA Bylaws, including the prohibition of any pay-for-play and inappropriate recruiting inducements.
- The policy is not very restrictive and appeared to be an abdication of responsibility to just leave enforcement and administration up to the conferences and schools.



[NCAA's NIL Interim Policy](#)



# MARKET FACTORS FOR STUDENT-ATHLETE DEALS

**Market Factors:** Endorsers pursuing a deal with a student-athlete to market their products or services will consider the following factors:

- **Social Media Following:** How many people follow this student-athlete on their various social media platforms?
- **Social Media Outreach:** Where are the student-athlete's followers from?
- **The School's Market:** How popular is the student-athlete's school within the geographical location relative to other schools or professional sports teams?
- **How Notable is the Student-Athlete:** Student-athletes who are easy to identify will have more success finding deals, especially in states that restrict the use of the school's intellectual property within the advertisement.

[Opendorse Insights on NIL Compensation](#)



# EXAMPLES OF STUDENT-ATHLETE NIL DEALS

## High-Profile Players in High-Revenue Generating Sports

- Alabama quarterback and Heisman Trophy winner [Bryce Young](#) has NIL deals with Cash App, Leaf, Wild Card, Onyx, Logan's Roadhouse and others.
  - Reports suggest Young has already signed \$1 million worth of NIL deals.
- Kentucky freshman point guard [TyTy Washington](#), a five-star recruit from Arizona, signed a NIL deal with Blue Grass Motorsport Porsche in Louisville, KY. The deal compensated Washington with a new Porsche.

## Deals for Athletes in High-Revenue Generating Sports

- [Arby's](#) has a promotion paying \$500 to each Division 1 running back who posts "Tonight, I'm getting Arby's!" on social media.
- Each player on the [UNLV](#) basketball team will receive a \$500 monthly car allowance under a new one-year NIL deal brokered by a Las Vegas management team financed by former tennis star Andrea Agassi.

## Deals for Walk-Ons

- [Walk-On's Sports Bistreaux](#), a leading national franchise in the restaurant and casual dining space, launched a "Walk-On of the Week" program that awards NIL deals to walk-on collegiate athletes across the country.
- BYU has a program for privately funded scholarships that compensate walk-ons for the football team with \$1,000 per student-athlete to be a brand ambassador.



# FEMALE ATHLETES IN THE NIL SPACE

Many feared NIL would create a compensation disparity between male and female athletes. However, female student-athletes have engaged in their fair share of NIL activity and compensation. The several notable examples are below.

- Twin Fresno State women's basketball players Haley Cavinder and Hanna Cavinder initially engaged in NIL activity by profiting from their social media presence on TikTok and Instagram on July 1, the day the NCAA officially allowed NIL deals.
  - Cavinder twins have since signed with a variety of companies including the WWE, Boost Mobile, SixStar Nutrition and Champs X Eastbay.
  - The twins have also capitalized on their entrepreneurial skills by launching a new streetwear clothing line with other Fresno State alumni, of which the girls will receive 25% of the company's overall profit. [Cavinder Twins NIL Activity](#)
- University of Nebraska volleyball star [Lexi Sun](#) signed sponsorship deals with Borsheims and REN Athletics, which enabled her to create a unique jewelry collection and a custom-designed sweatshirt.
- South Carolina women's basketball star [Aliyah Boston](#) signed a deal with Bojangles, a regional fast-food chicken chain.



# FEMALE ATHLETES MAKE HISTORY WITH NIL DEALS

## Nike signed their first deal with UCLA women's soccer player Reilyn Turner

- One of the world's largest athletics brands chose a female athlete to first partner within the NIL era. Their partnership focuses on bringing awareness to women's sports and will contribute back to Turner's local communities. [Nike Signs Female Soccer Player to First NIL Deal](#)

## Paige Bueckers makes history with Gatorade deal

- Paige Bueckers, UConn women's basketball star, signed her first NIL deal with online marketplace and clothing reseller, StockX. Her second deal was momentous as she became the first college athlete to sign a deal with Gatorade.
- Both of her notable NIL deals with StockX and Gatorade give her a massive platform to influence women's involvement in sports. [Gatorade Signs First NIL Deal with Women's Basketball Star](#)
- Bueckers and Turner's deals are not only providing the female players with large compensation, but they are also providing them with avenues to connect with younger female athletes and influence them to participate in sport. It also helps these brands with their reach to new populations.



# AGENT INVOLVEMENT

- **Legislation Regulating Sports Agents:**
  - Sports Agent Responsibility and Trust Act (Federal Statute)
  - Uniform Athletic Agents Act (Model State Statute)
- These two laws existed before NIL, but prohibit agents from representing student-athletes without violating the athlete's eligibility. With the introduction of NIL, there is confusion about whether student-athletes can hire agents.
- Each state's legislation will govern whether the student-athlete is able to hire an agent. The NCAA's interim policy specifically states that "Individuals can use a professional service provider for NIL activities." [State Laws](#)



Several established sports management agencies, including Athletes First, CAA, and Excel, represent professional athletes. Now, these agencies are starting to represent collegiate student-athletes in their pursuit for NIL contracts.

# AGENT INVOLVEMENT

- Not all student-athletes are represented by an agent for their NIL deals, however, high-profile athletes are more likely to hire agents to represent them. Some athletes are simply advised by family members and compliance officers at their respective schools.
- Agents are unlikely to see short-term monetary benefits from representing student-athletes. However, NIL representation is a unique way for agents to start a professional relationship with the athlete in the hopes of representing them in their professional sports careers.



# SCHOOL INVOLVEMENT PREPARING STUDENT-ATHLETES

- Several major college programs across the country have incorporated professional development programs to prepare their student-athletes for the burgeoning NIL landscape.
- Kansas University started a program this summer called [Jayhawks Ascend](#). The Jayhawks Ascend program is based on four elements:
  - Personal Brand Management
  - Name, Image and Likeness Protection
  - Resource Engagement
  - Post KU Preparedness



# SCHOOL INVOLVEMENT PREPARING STUDENT-ATHLETES

The University of Texas started a program called [LEVERAGE](#). The program will focus on four key areas to help student-athletes maximize their brand and platform:

- Personal Branding and Brand Management
- Business Formation & Entrepreneurship
- Opportunity Management
- Financial Literacy



# RECRUITING IMPACT

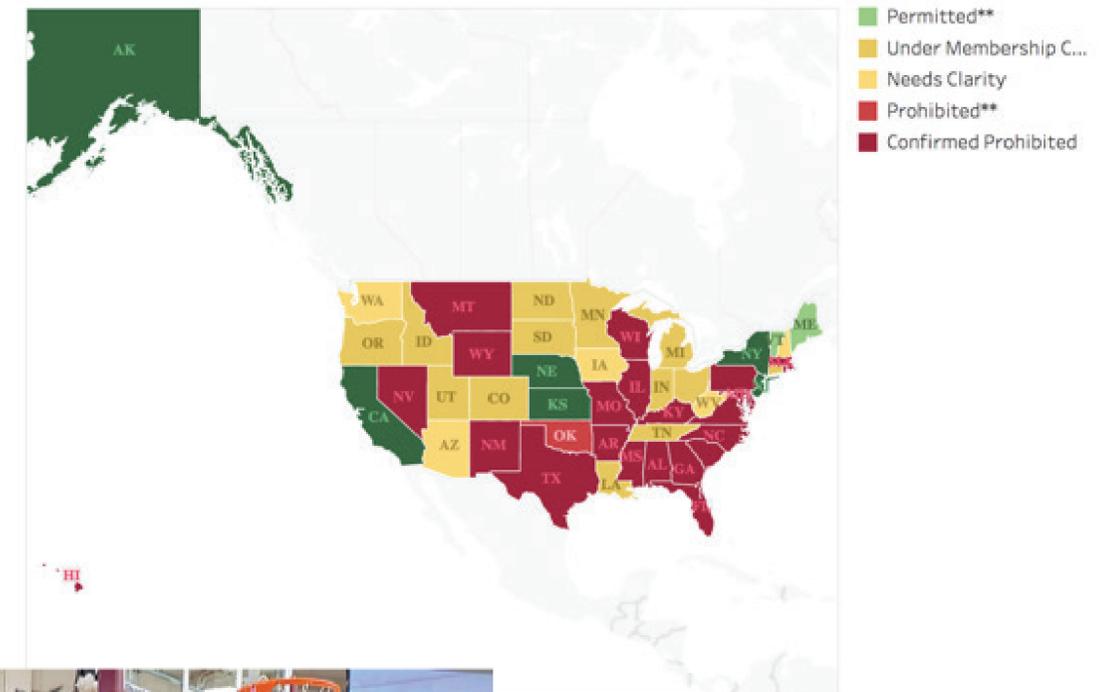
- The NCAA's new NIL policy has already begun to make college basketball more appealing to the most highly touted high school basketball recruits.
- Emoni Bates and Jalen Duren, both top 10 recruits from the 2021 recruiting class, were leaning towards playing in the NBA's G League until the changes in NIL rules ultimately impacted their decision. Both committed to playing at the University of Memphis for the 2021 season.
- "I was looking at the G League, but, for me, college just made more sense. With NIL and seeing what guys like Emoni [Bates] and Jalen [Duren] did definitely make me feel like the money is there in college now that NIL is something we can tap into."
  - [Kentucky](#) commit Chris Livingston (ESPN's 12th ranked recruit in the 2022 class)



# HIGH SCHOOL LAWS

- Generally, high school student-athletes are prohibited from engaging in NIL activity.
- There are five states that allow high school student-athletes to participate in NIL activity
- Alaska, New Jersey, New York, Nebraska and California.
- There are also a handful of states that have expressly prohibited NIL activity at the high school level. [High School NIL Regulations](#)
- Massachusetts, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, Kentucky, Georgia, Alabama, Mississippi, Texas, Wyoming, Montana, Missouri, Nevada
- Three high school athletes with NIL deals:
  - Jaden Rashada (football in California)
  - Ian Jackson (basketball in New York)
  - Boogie Fland (basketball in New York)

High School NIL Regulations



# START-UP COMPANIES

- There are several companies that have entered the marketplace to help schools, athletes and businesses navigate NIL.
- Some are compliance-driven, aiming to help student-athletes report deals to their schools to avoid eligibility concerns.
- Others are aimed towards helping facilitate deals between student-athletes and businesses



INFLCR is a content and compliance software helping student-athletes find opportunities and comply with NIL policies and guidelines.



Opendorse provides student-athletes and their supporters understand, maximize, and protect the student-athlete's personal brand.



MOGL serves as a platform for companies to connect with student-athletes to create business relationships in a compliant manner.

# START-UP COMPANIES — INFLCR

## For the Student-Athlete:

- A mobile app that allows student-athletes to track their social media follower growth and social media engagement metrics.
- Fair market value tools that allow student-athletes to receive social media monetization estimates based on the advertising market of their social media accounts.

## For the School:

- Compliance dashboards that give Athletic Department staff complete transparency into commercial transactions, and allow them to customize athlete NIL transaction monitoring and communicate with student-athletes about specific transactions.
- Implements a database to create a customized directory to send to any business, collective or individual interested in starting a NIL conversation with the school's student-athletes.

[INFLCR.com](https://INFLCR.com)



# START-UP COMPANIES — OPENDORSE

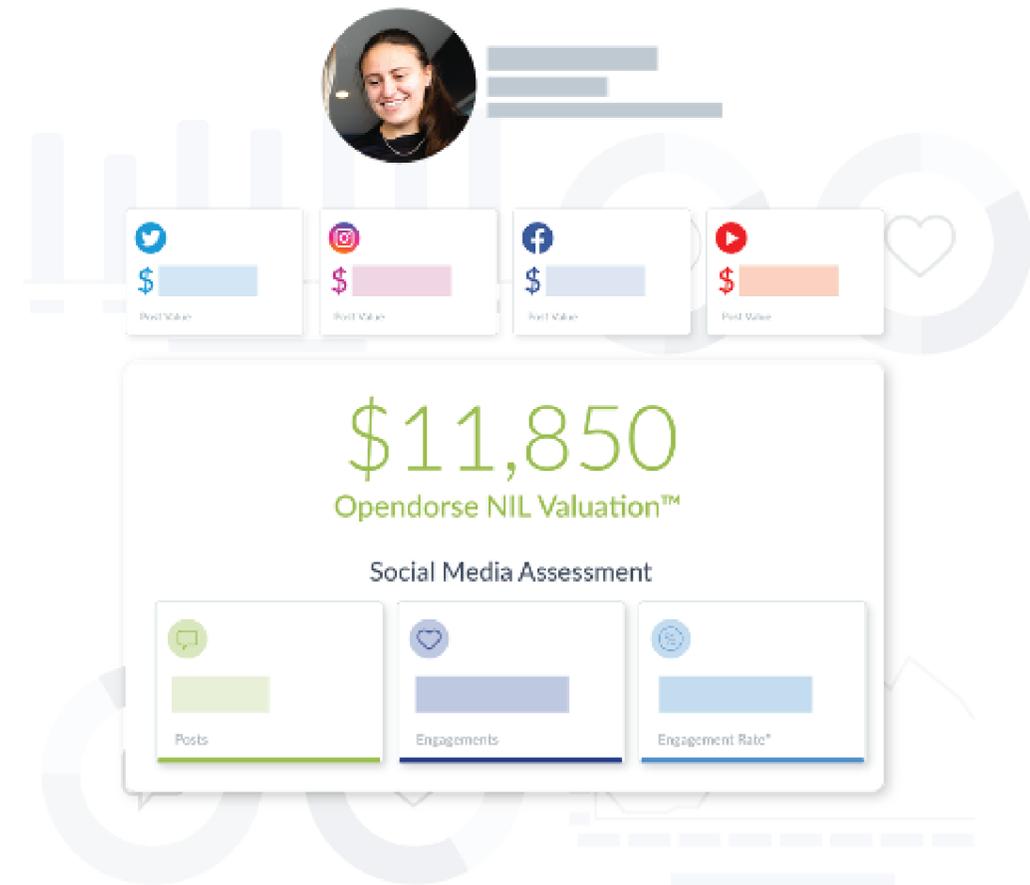
## Platform for Student-Athletes to:

- Clearinghouse to see deals, disclose activities, access content, understand their value

## Platform for the Schools to:

- Provide NIL education, monitor NIL activity
- For Sports Brands to:
- Browse student-athlete profiles, book custom activities
- Platform for Agents to:
- List student-athlete clients, negotiate brand opportunities, approve inbound pitches

[opendorse.com](https://opendorse.com)



# START-UP COMPANIES — MOGL

## For Businesses:

- Connect athletes and businesses/individuals for NIL engagements such as social media campaigns, appearances and athletic training

## For Student-athletes:

- Allows student-athletes to quickly and securely connect to businesses and individuals for opportunities to monetize their NIL

[MOGL.online](https://mogl.online)



# TAX IMPLICATIONS

- Most NIL deals will classify student [athletes](#) as independent contractors, NOT employees.
- Student-athletes must pay taxes out of pocket, they will not be deducted before payment.
- Student-athletes must file federal income taxes if the student-athlete earns more than \$600.
- Student-athletes that perform NIL activities in one state and are paid in another state may be taxed more than once through state income tax laws.



# INTELLECTUAL PROPERTY

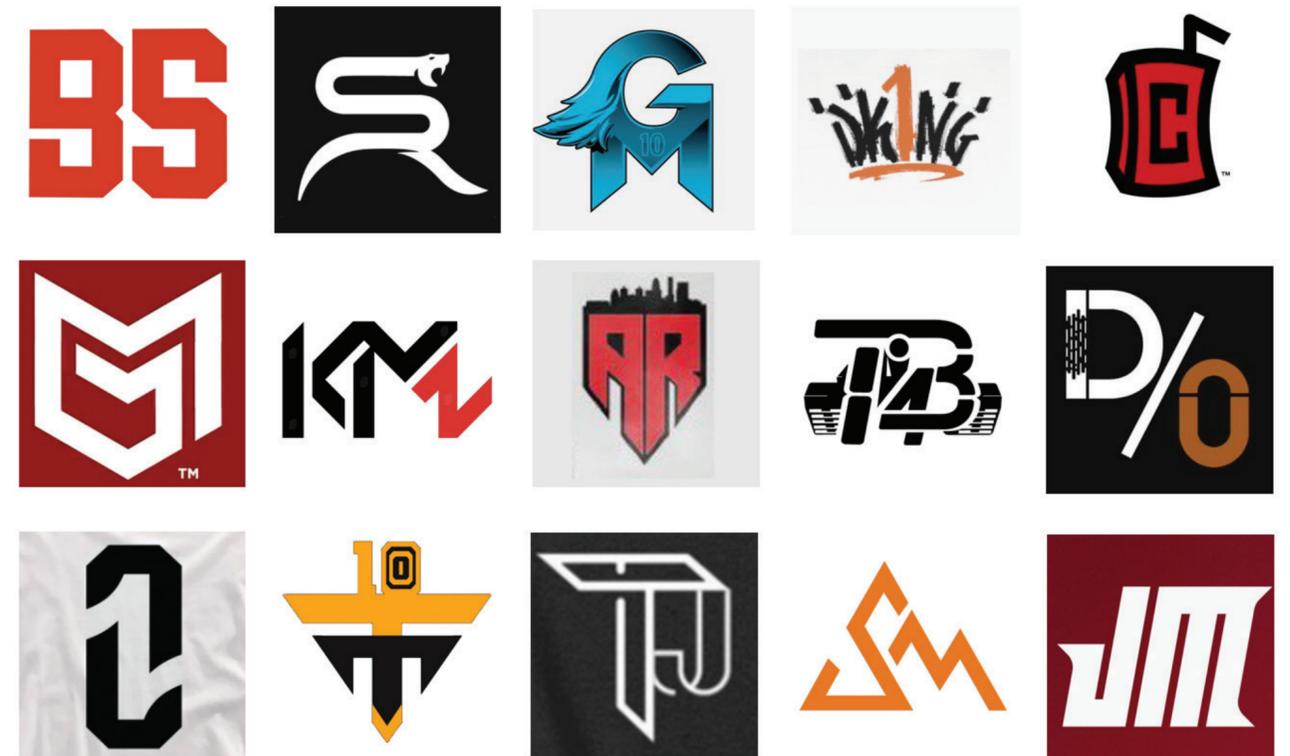
## Student-Athlete's Intellectual Property and Personal Brand

- A student-athlete's NIL is considered intellectual property (IP) and should be properly protected. Without appropriate protection, the athlete's brand can be subject to unauthorized use. Protection gives the student-athlete the exclusive right to use, produce, copy and profit from his or her IP.
- By establishing IP rights over several aspects of a student-athlete's NIL, the student-athlete creates exclusive ownership of its NIL. This protects the athlete in future commercial opportunities. For example, something that an athlete frequently says or puts in a hashtag is usually well known to fans. If it is not trademarked, it will be difficult for the athlete to use in a future branding campaign.



# TRADEMARK PROTECTION STRATEGY

- Filing for trademark protection is the suggested way for student-athletes to have control over the direction and commercialization of their NIL.
- Student-athletes can trademark their name, which establishes how their name is commercially used and defended against any unauthorized use. It is important to note that a trademarked name must be used for commerce, and not solely for defensive purposes. A trademarked logo or slogan allows the athlete to determine where it appears, how it is updated and who can license it.
- Student-athletes should carefully draft and review their NIL contracts for IP ownership terms and brand rights.



# UNIVERSITIES' INTELLECTUAL PROPERTY PROTECTION IN NIL

- Universities face another challenge in protecting and monitoring the use of their intellectual property (IP). This includes logos, mascots, names, colors; anything that would be copyrighted or trademarked by the university or would readily associate with a university.

## [University IP Controls](#)

- Generally, universities have policies that prohibit their students from using the school's IP. If a student-athlete attempts to use the school's IP in a commercial manner, they will violate the university's policies and be subject to sanction.



# INTELLECTUAL PROPERTY SOLUTIONS FOR STUDENT-ATHLETES

If universities enforce and maintain their IP rights, they protect the university's image from being exploited in individual NIL deals.

## Solutions:

- Education Programs for Student-Athletes: These programs can provide information on what IP student-athletes can and cannot use with their NIL deals.
- Group Licensing Program: The University of North Carolina established the first group licensing program for its athletes, [The Brandr Group Licensing Program](#) (also now in partnership with Villanova Athletics). It is designed to allow athletes to benefit from their NIL in conjunction with UNC's trademarks and logos.



# COLLEGE ATHLETES' PRIVACY RIGHTS AND CONCERNS IN NIL

**Tort of Appropriation:** The use of a student-athlete's personal data without consent.

- It can be reasoned that an athlete could sue a third party for appropriation if that party used the student-athlete's NIL — without their express consent — to advertise the party's business, product or for some other commercial purpose.
- However, appropriation is not limited to commercial purposes as long as the third party makes use of the student-athlete's NIL for the party's own purpose and benefit.



# COLLEGE ATHLETES' PRIVACY RIGHTS AND CONCERNS IN NIL—FERPA & NIL

- As college students, NCAA student-athletes enjoy privacy rights awarded by the Family Educational Rights and Privacy Act (FERPA). The Act initially gives a child's parents privacy rights with respect to educational records, but those rights transfer to the child when he or she turns 18 years old or attends school after high school.
- Certain privacy data may be subject to the law when disclosed to a student-athlete's institution as part of the approval process for NIL deals.
- LeRoy Rooker, former director of the Department of Education's Family Policy Compliance Office, believes NIL deals are within FERPA's scope of protection. NIL may be considered to constitute education records if the documents are deemed to be "directly related to a student or maintained by an educational agency or institution" under [FERPA](#).



## FERPA

Family Educational  
Rights & Privacy Act

# EXAMINING THE NIL LANDSCAPE

# THE BENEFITS OF NIL FOR STUDENT-ATHLETES

- **Financial Opportunities:** Student-athletes are able to reap financial benefits for the value that they bring to their programs.
- **Educational Opportunities:** Student-athletes are learning practical skills such as entrepreneurship, branding, and financial literacy with the implementation of educational programs at colleges and universities aimed towards assisting athletes to navigate the NIL landscape.
- **Branding and Networking:** Many student-athletes enjoy the peak of their popularity as college athletes. Those student-athletes are now able to establish a brand and create a professional network for themselves that may benefit them after graduation.



# THE BENEFITS OF NIL FOR COMMUNITIES AND LOCAL BUSINESSES

- Several student-athletes have pledged a portion of the money they have earned from NIL deals to charities.
  - University of Pittsburgh sophomore wide receiver Jordan Addison has partnered with [Tickets For Kids](#), a charitable group that provides at-risk children with inspiring experiences.
  - University of Texas senior quarterback [Casey Thompson](#) pledged every dollar that he earns from Cameo to the No Kid Hungry program, an organization that helps feed children who go hungry.
- Student-athletes with large social media followings have helped generate publicity and exposure for local businesses.



# CONCERNS ABOUT NIL SMALLER UNIVERSITIES

- Even though NIL activity is concentrated at large Division I schools, student-athletes at all levels are allowed to monetize their NIL while maintaining their eligibility. Smaller schools would be remiss to not address the NIL landscape and educate their student-athletes on the opportunities.
  - If universities fail to provide NIL education, student-athletes, coaches, administrators are at risk of violating NCAA and state NIL laws. Even if smaller schools do not have monetary resources for NIL education, there are in-house solutions that can help prevent violations.

[Opendorse Insights on NIL Compensation](#)



# CONCERNS ABOUT NIL NON-REVENUE GENERATING SPORTS

Almost one year into the NIL era of college athletics, most deals are contracted with athletes who play revenue-generating sports, such as football and men’s basketball. While there is already a disparity in the support and publicity between higher-profile sports and lower-profile sports, it is important that NIL does not further exacerbate this disparity. If NIL deals are only awarded to the top football and men’s basketball players, athletes in smaller sports may feel even less supported than they already do.

[Opendorse Insights on NIL Compensation](#)



**FUTURE DEVELOPMENTS THAT COULD  
LEAD TO MORE CHANGE**

# JOHNSON V. NCAA

**Defendants:** NCAA, Arizona, Cornell, Drexel, Duke, Fordham, Lafayette, Marist, Notre Dame, Oregon, Penn, Purdue, Sacred Heart, Tulane, Villanova.

**Plaintiffs:** 14 student-athletes (7 men & 7 women) from the Defendant schools, including former Villanova football player Trey Johnson.



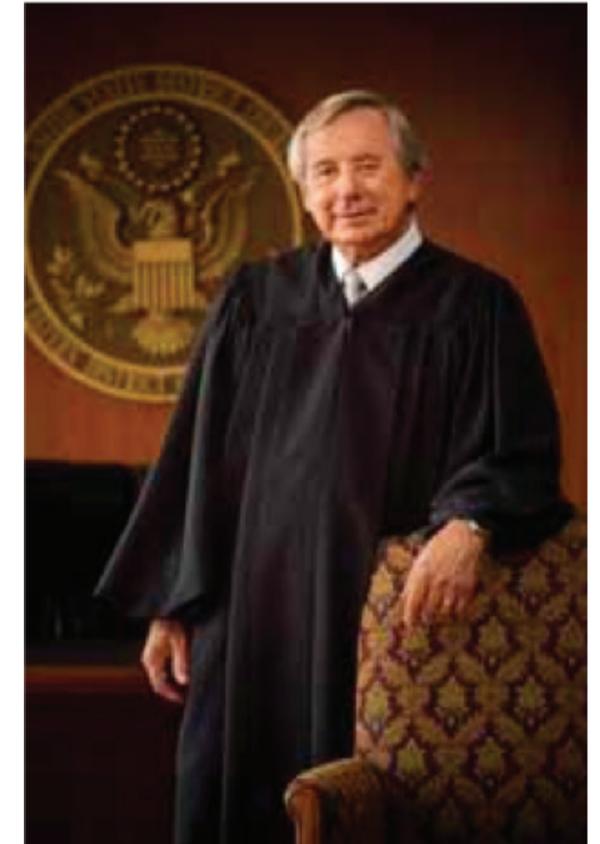
# JOHNSON V. NCAA

- **Plaintiff's Claim:** Players claim that they are employees of the NCAA and its member schools under state law and the Fair Labor Standards Act (FLSA).
  - FLSA guarantees overtime and minimum wage, among other benefits for employees.
- **Defendants filed a motion to dismiss:** NCAA relied on precedent in *Dawson v. NCAA* and *Callahan v. City of Chicago*.
- In *Dawson v. NCAA*, the 9th Circuit ruled that the FLSA did not apply to Pac-12 football players because they did not have the expectation of compensation.
- In *Callahan v. City of Chicago*, the 7th Circuit ruled that the city of Chicago was not considered the employer of taxi drivers because of the regulation of the industry.



# JOHNSON V. NCAA

- Judge John R. Padova distinguished the NCAA's precedent as non-binding and not on point with the facts of this case.
- The court found that the "economic reality" is used to determine whether an employee-employer relationship exists.
- There is a developed manufacturer test based on the circumstances of the whole relationship between the parties.
- The court rejected the NCAA's claim that the existing multi-factor tests should not apply because they did not factor in "revered tradition."
- The Court cited the 2nd Circuit's determination that "the proper question is whether the intern or employer is the primary beneficiary of the relationship."



# JOHNSON V. NCAA

## Primary Beneficiary Test

- Focuses on what the intern receives in exchange for work.
- Allows the court for flexibility to examine the economic reality that exists between the parties.
- Acknowledges that the intern-employer relationship should not be analyzed in the same way as standard employer-employee relationships because interns enter this relationship with the expectation of educational benefits.



# SEVEN FACTORS DESCRIBED IN THE PRIMARY BENEFICIARY TEST

GLATT FACTOR	IN FAVOR OF
1. Extent to which the intern and employer understand there is no expectation of compensation (may be implied)	NCAA (Not Employees)
2. Whether internship provides training similar to that in an educational environment	Neutral
3. Extent to which internship is tied to intern's formal educational program with credit or coursework	Athletes as Employees
4. Extent to which the internship accommodates the intern's academic commitments	Athletes as Employees
5. Extent to which internship's duration is limited to the period in which the intern is receiving beneficial learning	Neutral
6. Extent to which intern's work complements, rather than displaces, work of paid employees	Athletes as Employees
7. Extent to which the intern and employer understand that the internship is conducted without entitlement to a paid job at the conclusion	NCAA (Not Employees)

**Legal Conclusion:** The NCAA jointly employs student-athletes along with their attended schools under federal Pennsylvania wage and hour [law](#).

# WHAT IS TO COME AFTER JOHNSON?

- The NCAA is not supportive of student-athletes being employees of their university, arguing that such legislation would undercut the purpose of college, which is earning a degree. The NCAA and its member schools support student-athletes through scholarship, and many cover significant costs of education.
- Moving forward, the NCAA and its member schools support a movement to modernize and legalize NIL activity.



# GRANT HOUSE V. NCAA

- **Plaintiffs:** Class of student-athletes including Grant House (Arizona State Men's Swimmer); Sedona Prince (Oregon Women's Basketball player); and Tymir Oliver (Illinois Football Player).
- **Defendants:** NCAA, Member Schools, Power 5 Conferences

Plaintiffs filed a class action suit in June 2020 claiming defendants violated antitrust laws for their name, image, and likeness compensation for their NCAA participation.

Plaintiffs seek (1) an injunction voiding the policies prohibiting them from earning NIL compensation and (2) damages based on earnings they could have received if not for the NCAA's prohibitions.



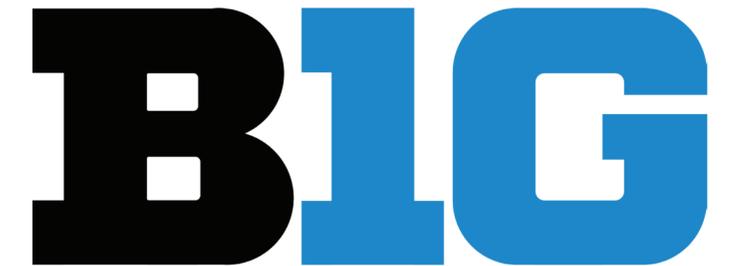
# GRANT HOUSE V. NCAA

## Plaintiff's Arguments

- Defendants violated Section 1 of the Sherman Antitrust Act and have unjustly enriched themselves by prohibiting student-athletes from:
  - Using their NIL for endorsement
  - Self-employment
  - Using their platform to promote their own business
- The defendants are colluding to unreasonably restrain trade, which is illegal under Section 1 of the Sherman Antitrust Act.
- NCAA member schools are using the benefits of their player's NIL for promotion without compensating the players accordingly.
- College athletes should be given the opportunity for group licensing with conferences and schools.

## Defendant's Arguments:

- Preventing student-athlete compensation is vital to customer demand in college sports.
  - College fans will view paid players as a minor league or inferior professional sport.
- Players lack "publicity rights" in live broadcasts.

The logo for the Big 12 conference, featuring the letters "BIG" in a bold, sans-serif font. The "B" is black, and the "IG" is blue.The logo for the National Collegiate Athletic Association (NCAA), featuring the word "NCAA" in a bold, blue, sans-serif font with a registered trademark symbol (®) to the right.

# GRANT HOUSE V. NCAA

**Judge Wilken's Ruling:** NCAA's motion to dismiss was denied.

- There is a “reasonable inference” that competition among schools would increase if the defendants did not deny broadcast revenue to the student-athletes.
- The Plaintiffs do not need to establish a “legal entitlement” to the compensation in question, just show that they were “deprived of the opportunity to receive compensation” they should have otherwise received.



# NCAA CONSTITUTIONAL CONVENTION

## NCAA ADOPTED NEW CONSTITUTION

- In January 2021, the NCAA held its association-wide convention to discuss and vote on the proposed new [constitution](#). The NCAA's member schools and conferences overwhelmingly voted in support of the new Constitution. The association requires a vote of at least two-thirds for ratification.
- Impact: While the constitutional convention was a step in the right direction for the NCAA's member schools and conferences to govern their own course of action, there is still a great deal of uncertainty surrounding NIL. It appears that the uncertainty will linger for the foreseeable future.



# THE NCAA'S NEW CONSTITUTION

- The main focus of the new constitution is **to decentralize**: award the individual divisions, conferences, and universities with more governing authority. [New NCAA Constitution](#)
- It edits the NCAA's definition of amateurism and grants individual divisions with more autonomy in determining NIL guidelines.
  - *Amateurism definition: "Student-athletes may not be compensated by a member institution for participating in a sport, but may receive educational and other benefits in accordance with guidelines established by their NCAA division."*
  - While this new definition is helpful, it also leaves a lot of uncertainty for student-athletes and third parties looking to contract with athletes. It does not address the distinguishing differences between "Pay for Play" and permissible NIL activity. State laws also do not fully address this issue.
- One of the most significant issues that the NCAA sees with NIL is the potential violations in team-wide NIL deals. Companies that partner with a team and provide all team members compensatory benefits are subject to "Pay for Play" scrutiny.
- The NCAA is currently investigating both BYU and University of Miami football deals with third-party businesses.



# NATIONAL LABOR RELATIONS BOARD'S PUSH FOR STUDENT-ATHLETES TO BE CONSIDERED EMPLOYEES

- Since the court denied the motion to dismiss in *Johnson*, the National Labor Relations Board (NLRB) issued a memorandum on the employee status of players at academic institutions.
- NLRB General Counsel Jennifer Abruzzo issued a [memo](#) stating that some student-athletes (she refers to them as **Players at Academic Institutions**) are employees under the NLRA and should be afforded all statutory protections (including the right to be protected from retaliation).
  - Abruzzo mentioned that the collective action by athletes after the killing of George Floyd and their efforts to salvage their seasons during the pandemic demonstrated that they “better understand their value in generating billions of dollars in revenue for their colleges and universities, athletic conferences, and the NCAA.”
  - Abruzzo further alleges that misclassifying such employees as mere “student-athletes” and leading them to believe that they are not entitled to the Act’s protection has a chilling effect on Section 7 activity and is an independent violation of Section 8(a)(1) of the Act.



# CONCERNS WITH EMPLOYEE STATUS FOR STUDENT-ATHLETES

- If student-athletes become employees, there will be drastic changes to the traditional and fundamental student-athlete experience.
  - The academic component of college athletics would become very detached.
  - Athletes in non-revenue generating sports likely won't have the same opportunities.
- Potential termination implication: In the event student-athletes become at-will employees of their universities, there is a possibility that their scholarship could be terminated for poor performances.



# NIL SCHOLARSHIP TAX ACT

Senator Richard Burr proposed an [amendment](#) to Section 117(c) of the Internal 4 Revenue Code of 1986 that would force student-athletes who earn more than \$20,000 through their NIL activity to include their athletic scholarships as federal income.

The purpose of the legislation is to protect the integrity of college athletics. If passed, it will give student-athletes the opportunity to choose between (1) receiving a tax-free scholarship for post-secondary education or (2) earning compensation for NIL.



# A LEVEL PLAYING FIELD: COLLEGE ATHLETES' RIGHTS TO NIL

[Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce](#)

- Five witnesses testified to the Subcommittee in September 2021
  - Ramogi Huma, Executive Director at National College Players Association
  - Mark Emmert, NCAA President
  - Linda Livingstone, Baylor University President
  - Jacqie McWilliams, Commissioner of CIAA
  - Cameron March, Student-athlete at Washington State University
- When Chairman Pallone asked all witnesses if Congress should establish a federal framework for NIL, all five respondents answered **“YES.”**
  - Huma added that NIL legislation should be attached to broad-based reforms as well.
- Big Takeaways:
  - Establish a uniform federal policy.
  - Prioritize the student-athletes.
  - Preserve gender equity practices.
  - Distinguish between pay-for-play and NIL.
  - Level the playing field.

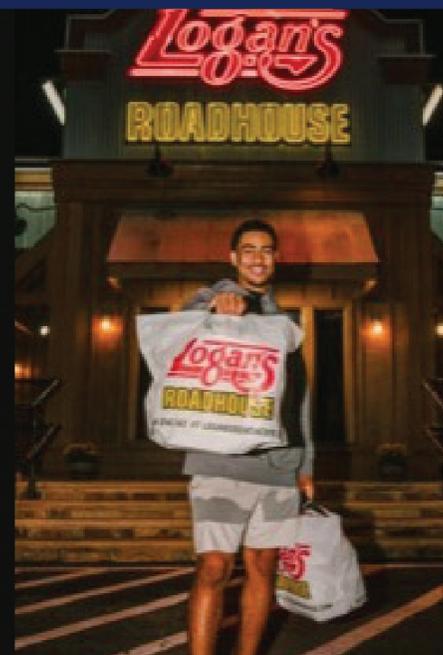


# SUMMARY

- The Supreme Court's Decision in NCAA v. Alston et al. forced the NCAA to permit student-athletes the ability to monetize their NIL after years of legal battles.
- On July 1, 2021, student-athletes began signing deals with businesses, endorsers and individuals.
- There are a variety of new areas for student-athletes and universities to consider, including agent involvement, income tax implications, intellectual property rights, and privacy rights.
- The NCAA is currently facing challenges from plaintiffs in Johnson and the National Labor Relations Board in an attempt to classify student-athletes as employees.



# The Name, Image and Likeness (NIL) Revolution in College Sports



# ACKNOWLEDGEMENTS

**The Jeffrey S. Moorad  
Center For The Study of Sports LAW**

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# ABOUT US

**The Jeffrey S. Moorad Center for the Study of Sports Law** advances a new era of education for sports industry professionals as one of only a handful of institutes in the United States dedicated to the study of sports law. The Moorad Center takes students behind the games to broader issues through rigorous academic study, innovative programs, internship opportunities, scholarship and research to lead discourse and provide thoughtful and experienced analysis in the field of sports. Under the leadership of respected and accomplished voices in the industry, the Center educates and inspires students to new heights in sports law and beyond. The Center aims to be a thought leader in not only sports law but also in topical issues and the changing dynamics in sports news, sports business, sports media, sports policy and more.

# LEADERSHIP



**ANDREW BRANDT**, *Executive Director*

Andrew Brandt is a nationally-recognized accomplished sports executive and is Professor of Practice and Executive Director of the Jeffrey S. Moorad Center for the Study of Sports Law at Villanova University Charles Widger School of Law. Brandt is guiding the Moorad Center to be a destination for young lawyers interested in a career in sports through curricula including sports law courses and nationally recognized events and lectures. Brandt has been involved with sports at a variety of levels, as an agent, as Vice President of the Green Bay Packers from 1999-2008, and as a consultant for the Philadelphia Eagles. He has become a trusted advisor and asset to the Villanova Athletics Department and writes weekly columns on legal and business issues in sports for *The Athletic* and *Sports Illustrated*. Brandt served as the Legal and Business Analyst for ESPN from 2011-2017, analyzing business, legal and policy sports issues on programs such as *Outside the Lines* and *SportsCenter*, as well as multiple appearances on ESPN radio programs every week.



**JEFFREY S. MOORAD**, *Founder and Chairman*

Jeffrey S. Moorad '81 committed \$5 million for the creation of the Jeffrey S. Moorad Center for the Study of Sports Law. Moorad is one of the most recognizable names in professional sport and has been a leader in the sports industry for more than 25 years. The founder of Moorad Sports Management, he began specializing in athlete representation in 1983, focusing mainly on Major League Baseball. Two years later, Moorad joined forces with Leigh Steinberg to form one of the most dynamic partnerships in the history of sports representation, covering both Major League Baseball and the National Football League. In 2004, Moorad was named a member of the executive team of the Arizona Diamondbacks. Moorad has also served as Vice Chairman and Chief Executive Officer of the San Diego Padres.

# PROGRAMS

**THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW** provides students with unique value-add towards careers in amateur and professional sports.

**SPORTS LAW CONCENTRATION** complements existing programs through the highest level of speakers and symposia, innovative fellowship and internship opportunities, mentorship and research.

**SYMPOSIUM** addresses current issues and hot topics in the world of sports law annually. Past symposia have covered issues ranging from concussions in sports, agents and the media.

**SPEAKER SERIES** provides interactive, behind-the-scenes looks at the workings of the sports industry as the speakers share their knowledge, professional experiences and career advice.

# CASE COMPETITIONS

The Jeffrey S. Moorad Center for the Study of Sports Law allows students to attend a variety of sports-related competitions around the country. Our teams have had great success at these competitions.

## **Gameday Sports Competition**

- Annual competition hosted by Villanova Law and UCLA Anderson School of Management.

## **Tulane Professional Football Negotiation Competition**

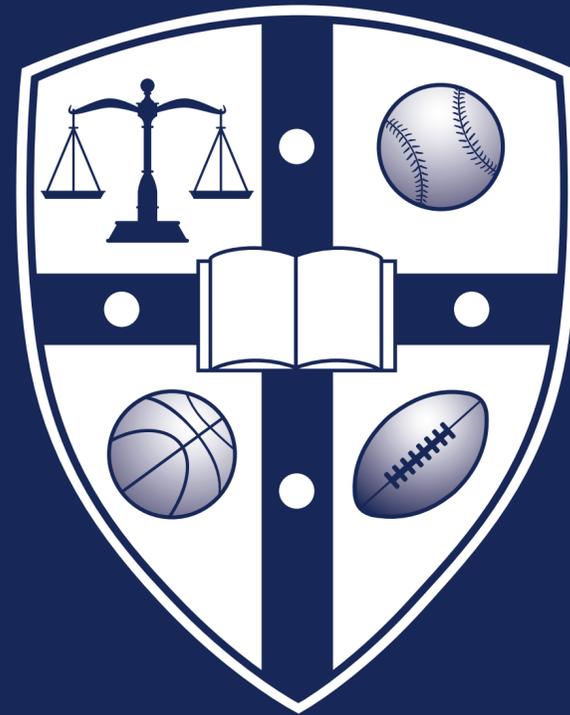
- 2022, 2020, 2019, 2017: 1st Place
- 2018: Finalists
- 2021: Semifinalists

## **Tulane Professional Basketball Negotiation Competition**

- 2020: Finalists
- 2021: 1st Place
- 2022: Quarter-Finalists

## **Tulane International Baseball Arbitration Competition**

- 2021: Semifinalists
- 2022, 2020: Quarter-Finalists



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