

## NIL Collectives Continue to Create Chaos in Collegiate Athletics

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In June of 2021, the Supreme Court handed down its decision in *NCAA v. Alston* which has forever changed the landscape of collegiate athletics.<sup>2</sup> *Alston* held that NCAA rules limiting education-related compensation violated antitrust laws under the Sherman Act.<sup>3</sup> The decision was significant for several reasons, but namely because it forced the NCAA to do away with longstanding policies that prohibited student athletes from benefiting from their name, image, and likeness (NIL).<sup>4</sup>

In response to the decision, several states enacted legislation permitting student athletes to generate revenue from their NIL.<sup>5</sup> The NCAA also implemented an interim policy allowing students to

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<sup>1</sup> Photo: Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>.

<sup>2</sup> See generally *Nat'l Coll. Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021). See also Milind Khurana, *Moneyball: The Landscape of College Athletics in the Wake of NCAA v. Alston*, U. MIAMI L. REV. (Mar. 1, 2022), <https://lawreview.law.miami.edu/moneyball-the-landscape-of-college-athletics-in-the-wake-of-ncaa-v-alston/> (“Recently, the Supreme Court dismissed NCAA practices for the first time in the past thirty-seven years and, to many, signaled a shifting tide in the conversation regarding student-athlete compensation.”).

<sup>3</sup> See *Alston*, 141 S. Ct. at 2166 (“By permitting colleges and universities to offer enhanced education-related benefits, [this Court’s] decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools.”).

<sup>4</sup> See *id.* (Kavanaugh, J., concurring) (“The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws.”); see also Recent Case, *NCAA v. Alston*, 135 HARV. L. REV. 471, 471 (2021) (“Although the NCAA generates roughly \$1 billion in revenues each year, NCAA rules restrict student-athlete compensation.”).

<sup>5</sup> See *State and Federal Legislation Tracker*, TROUTMAN PEPPER (Oct. 6, 2023), <https://www.troutman.com/state-and-federal-nil-legislation-tracker.html> (stating that in response to the *Alston* decision, many states enacted or amended state laws “to further govern or restrict these types of [NIL] arrangements and state athletic associations issued policies of their own”).

“engage in NIL activities that are consistent with the law of the state where the school is located.”<sup>6</sup> The policy, however, expressly prohibits pay-for-play deals, recruiting contact by boosters, and deals that serve as inducements to attend universities.<sup>7</sup>

Despite this new opportunity for college athletes, there fails to be clear guidance on permissible NIL practices.<sup>8</sup> State legislation is not uniform and many universities and student athletes remain confused about the rules.<sup>9</sup> Indeed, athletes in some states benefit more than athletes in other states where the NIL laws are less favorable.<sup>10</sup> There has also been discussion of a federal NIL law to create uniformity in the marketplace, but this effort has not been successful to date.<sup>11</sup>

## What Is a Collective?

While waiting for states and the NCAA to navigate this new area of the law, collectives emerged as a way to fund NIL opportunities for student athletes.<sup>12</sup> A collective is a “program designed to facilitate athletes’ potential endorsement opportunities.”<sup>13</sup> Collectives are often founded by prominent former athletes and university alumni affiliated with a specific school or athletic conference.<sup>14</sup> Today, more than 120 collectives have been formed or are in the process of being formed across the United States.<sup>15</sup> Commentators surmise that every school in the Power 5

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<sup>6</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT’L COLL. ATHLETIC ASS’N (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (noting colleges and universities should serve as a resource for students with questions about their respective state laws). The interim policy clarified that “[c]ollege athletes who attend a school in a state *without an NIL law* can engage in this type of activity without violating NCAA rules related to name, image and likeness.” *Id.* (emphasis added). In addition, the interim policy permits student athletes use a professional service provider for NIL activities and requires them to report NIL activities to their school. *Id.*

<sup>7</sup> *See id.* (clarifying that the policy “preserves the fact that college sports are not pay-for-play”). According to Division II President’s Council Chair Sandra Jordan, the NCAA’s interim policy “also reinforces key principles of fairness and integrity across the NCAA and maintains rules prohibiting improper recruiting inducements.” *Id.*

<sup>8</sup> *See* Josh Moody, *The Current State of NIL*, INSIDE HIGHER ED (June 7, 2023), <https://www.insidehighered.com/news/students/athletics/2023/06/07/two-years-nil-fueling-chaos-college-athletics#:~:text=NIL%20collectives%2C%20as%20defined%20by,NIL%20in%20exchange%20for%20compensation> (“In the absence of federal legislation, institutions face an unclear future on NIL matters.”).

<sup>9</sup> *See* Derin Dickerson & Trenton Hafley, *State Experiments With NIL Rules Put Athletes on Defense*, BLOOMBERG L. (Apr. 1, 2020, 4:00 AM), <https://news.bloomberglaw.com/ip-law/state-experiments-with-nil-rules-put-athletes-on-defense> (referring to state NIL laws as a “patchwork system”).

<sup>10</sup> *See id.* (“The differences in state laws put athletes being recruited by various schools in a difficult position when deciding where to attend, and NIL rules also create legal risks for universities . . .”).

<sup>11</sup> *See* Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced in Congress*, FORBES (July 29, 2023, 9:31 AM), <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=64a4466f4d46> (“Although nearly a dozen bills have been introduced at the federal level over the past few years, none have ever made it out of committee.”).

<sup>12</sup> *See* Moody, *supra* note 8 (explaining how collectives “began to emerge and quickly spread” following the introduction of NIL rights to collegiate athletics).

<sup>13</sup> Chase Garrett, *What Are NIL Collectives and What Do They Do?*, ICON SOURCE, <https://iconsource.com/blog/nil-collectives/> (last visited Oct. 10, 2023) (defining collectives and explaining their purpose).

<sup>14</sup> *See id.* (“University-specific collectives often pool money from boosters and other donors and use these resources to create and bring paid endorsement opportunities to student-athletes through a variety of activities.”).

<sup>15</sup> *See id.* (noting that every school in the Southeastern Athletic Conference (SEC) is affiliated with at least one NIL collective).

conferences will be affiliated with at least one NIL collective by the end of 2023.<sup>16</sup> This means programs that do not have a robust NIL collective may soon risk losing talented athletes to universities that can offer them more financial opportunity off the field.<sup>17</sup>

### How Do Collectives Operate?

Collectives pool funds from boosters, businesses, and other donors to help facilitate NIL deals for the athletes they represent.<sup>18</sup> According to the Internal Revenue Service (IRS), collectives can be categorized as either for-profit businesses or 501(c)(3) status non-profits.<sup>19</sup> Non-profit collectives enjoy tax-exempt status, which likely makes them an attractive investment opportunity for wealthy university boosters who want to receive tax deductions for their contributions.<sup>20</sup>

In many ways, collectives play an important role in helping college athletes monetize their NIL. In the first year following the *Alston* decision, college athletes reportedly earned \$917 million from NIL payments.<sup>21</sup> Former University of Alabama quarterback Bryce Young and University of Louisiana gymnast Olivia Dunne are among those who have benefitted from collectives, after partnering with national corporations such as Subway, American Eagle, and GrubHub.<sup>22</sup>

### The Concern Over Collectives

Coaches and university administrators seem to support collectives as a means to fund their athletic programs, but they diverge on how collectives should be used with respect to players.<sup>23</sup> Some coaches are concerned that certain players will have more financial opportunity than others,

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<sup>16</sup> See *id.* (highlighting that “92% of Power 5 schools now have at least one collective or are in the process of forming one”).

<sup>17</sup> See Moody, *supra* note 8 (expressing fear that without intervention from Congress, NIL is “becoming an arms race that will empower top athletic programs and conferences while leaving others behind”).

<sup>18</sup> See Nakos, *supra* note 1 (explaining how NIL collectives work in practice). “The NCAA defines a booster as an individual, independent agency, or corporate entity who is known by a member of the institution’s athletics administration to have participated in, or to be a member of, an agency or organization promoting the school’s intercollegiate athletics program.” *Id.*

<sup>19</sup> See *id.* (providing information about how the IRS categorizes collectives for taxation purposes).

<sup>20</sup> See *id.* (explaining how collectives’ tax-exempt status “potentially allow[s] benefactors to receive tax deductions for their payments”). According to Nakos, “the go-to model for tax-exempt collectives involves college athletes picking a charity to provide their services in exchange for NIL payment from the collective.” *Id.*

<sup>21</sup> See Moody, *supra* note 8.

<sup>22</sup> See *id.*

<sup>23</sup> See Ben Kercheval, *Alabama’s Nick Saban Goes In-Depth on Out-of-Control NIL: ‘[Texas] A&M Bought Every Player on their Team’*, CBS SPORTS (May 19, 2022), <https://www.cbssports.com/college-football/news/alabamas-nick-saban-goes-in-depth-on-out-of-control-nil-texas-a-m-bought-every-player-on-their-team/> (recognizing the benefits that NIL has contributed to colleges and universities across the United States). Nevertheless, University of Alabama Head Football Coach, Nick Saban, expresses concerns about “NIL’s sustainability in college football.” *Id.*

creating an imbalance among the team.<sup>24</sup> Others fear that players are leveraging financial opportunity from collectives as a bargaining chip in the recruiting process.<sup>25</sup>

This is due to the fact that “the NIL collective is not exclusive to just college student-athletes; it is open to any athlete who falls under NCAA bylaws,” including recruits (high school or transferring college athletes).<sup>26</sup> In May of 2022, the NCAA issued new guidelines clarifying that collectives are to be treated as boosters since NCAA rules already preclude boosters from offering NIL deals to recruits or influencing where they go to school.<sup>27</sup> Nonetheless, many athletic programs have gotten around this simply by promoting the amount of money available through the university’s collective to entice athletes to attend their school.<sup>28</sup> According to University of Alabama Head Football Coach, Nick Saban, coaches often know how much money is in their school’s collective and how much money they can promise each recruit upon enrollment.<sup>29</sup> Once the player joins the team, the collective funnels the money to the student as an “NIL deal.”<sup>30</sup>

Universities also need to carefully define their involvement with collectives to avoid Title IX implications. Any institutional assistance regarding NIL opportunities must be proportional between male and female student athletes.<sup>31</sup> If a university provides “significant assistance” to a collective engaging in “discriminatory” NIL activities, the university may risk liability for the collective’s actions under Title IX.<sup>32</sup>

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<sup>24</sup> See *id.* (explaining how Coach Saban told his players that “[w]e’re going to have a collective, but everyone is going to get the same amount of opportunity from that collective”); see also Moody, *supra* note 8 (noting that the most lucrative NIL deals “flow[] to football and men’s basketball stars”).

<sup>25</sup> See Kercheval, *supra* note 23 (noting Coach Saban’s realization that football recruits now will not commit to the University of Alabama unless they are going to be provided with more money and off-the-field opportunity). According to Coach Saban, “[c]ollectives . . . are perhaps the most significant element of NIL that needs to be regulated in order to create an even playing field.” *Id.*

<sup>26</sup> Garrett, *supra* note 13.

<sup>27</sup> See Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image, and Likeness Guidance to Schools*, NAT’L COLL. ATHLETIC ASS’N (May 9, 2022, 5:21 PM), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx> (issuing new guidance on NIL for those engaging in the “rapidly evolving NIL environment”). According to the new guidelines, “[t]he definition [of booster] could include ‘collectives’ set up to funnel name, image and likeness deals to prospective student-athletes or enrolled student-athletes who might be considering transferring.” *Id.*

<sup>28</sup> For further discussion of how some programs have gotten around the NCAA’s guidance on NIL collectives, see *infra* notes 29–30 and accompanying text.

<sup>29</sup> See Kercheval, *supra* note 23 (“The coach actually knows how much money is in the collective, so he knows how much he can promise every player.”).

<sup>30</sup> See *id.* (explaining how the collective then provides promised moneys to the players in the form of an NIL deal once they have enrolled at the university).

<sup>31</sup> See Kelleigh Irwin Fagan et al., *NIL and Collectives: The Title IX Question*, LEAD1 ASS’N, <https://lead1association.com/nil-and-collectives-the-title-ix-question/> (last visited Oct. 10, 2023) (stating that even though collectives are often described as being independent of a specific university, the university tends to be “closely aligned” with their collective). As a result, these institutions face a greater risk of Title IX liability if the collective is not awarding NIL opportunities equally to men and women. *Id.*

<sup>32</sup> See Dan Cohen & Donovan Sowder, *Supporting NIL Collectives . . . But Not Too Much*, LEAD1 ASS’N (Mar. 2023), [https://www.nelsonmullins.com/files/files/%23115594\\_NIL-2023\\_Mch-Apr%5B19%5D%20\(2\)\(1\).pdf](https://www.nelsonmullins.com/files/files/%23115594_NIL-2023_Mch-Apr%5B19%5D%20(2)(1).pdf) (clarifying that “[u]nder Title IX, a school can be liable for the actions of a third-party if the school provides ‘significant assistance’ to the third-party, and the third-party discriminates on the basis of sex in its provision of benefits or services to the school’s students or employees” (citing 45 C.F.R. § 86.31(b)(6) (2023))). According to the authors, “universities should be cautious to mitigate the potential for imputed liability if their collectives favor male college athletes and operate beyond purely market-based NIL transactions.” *Id.*

In practical effect, collectives provide college athletes with unchecked NIL benefits and make it difficult for the NCAA to distinguish between deals for an athlete's services on and off the field.<sup>33</sup> Some commentators blame collectives for "disrupting the status quo" of college sports and crippling the NCAA's amateurism model.<sup>34</sup> Others argue that college football programs, at least, have always "bought" players even if they could not directly offer them money outright.<sup>35</sup> Big schools with sizeable athletic funding have always been able to offer recruits nicer facilities, a bigger stadium, more nationally televised games, and promises of being high NFL draft picks.<sup>36</sup>

Going forward, the solution is not clear cut. Instead of permitting states to enact their own NIL laws, a uniform body such as Congress or the NCAA could better regulate NIL at the national level to provide much needed clarity over the scope of the rules.<sup>37</sup> The NCAA, however, has struggled to adequately enforce its existing bylaws, which may be due in part to concerns of triggering antitrust legal challenges that were the subject of the *Alston* decision.<sup>38</sup> As the only national governing body of collegiate athletics, the NCAA has to walk a fine line between regulating NIL compensation, complying with state NIL laws, and avoiding antitrust scrutiny.<sup>39</sup> Until there is clearer guidance, NIL collectives remain a lucrative opportunity for student athletes but must be used with caution if the NCAA's amateurism model is to be preserved.<sup>40</sup>

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<sup>33</sup> See Ross Dellenger, *The Other Side of the NIL Collective, College Sports' Fast-Rising Game Changer*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/nil-collectives-boosters-football-tennessee-daily-cover> ("[M]any believe collectives are exploiting a loophole, using a concept that wasn't the intention of NIL. Leaders within the college sports industry have questioned the collectives' motives and tactics, in many ways demonizing them for operating a pay-for-play scheme and doling out salaries to college athletes.").

<sup>34</sup> See *id.*

<sup>35</sup> Kyle Qualls, *College Football Teams Have Always Bought Players*, DEADSPIN (May 23, 2022), <https://deadspin.com/college-football-teams-have-always-bought-players-1848963688> ("The truth is that college football programs have always bought players, even if they couldn't offer them sums of money outright. The uneven playing field . . . has always existed.").

<sup>36</sup> See *id.* (arguing that schools with large football programs and budgets have always been able to offer recruits more attractive opportunities than smaller schools with less money). If anything, the author claims that "NIL has leveled the playing field a bit" now that a wealthy booster from a smaller school "can work out a deal" with the student athletes playing there. *Id.*

<sup>37</sup> See Ralph D. Russo, *SEC, Pac-12 Leaders to Push for NIL Law in DC*, NEWS4JAX (May 5, 2022, 1:05 AM), <https://www.news4jax.com/sports/2022/05/05/ap-source-sec-pac-12-leaders-to-push-for-nil-law-in-dc/> (noting that commissioners from different athletic conferences have been working closely with Congress to "present a framework for a possible solution").

<sup>38</sup> See Dellenger, *supra* note 33 (noting the NCAA made inquiries into some of the largest collectives funding NIL deals for student athletes but has not issued any restrictions). "[T]he NCAA presents the biggest obstacle if the association seriously sanctions schools for not policing their boosters and collectives. Many believe such sanctions will end up in a court battle—the NCAA vs. boosters." *Id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* (claiming the "NCAA's amateurism façade has mostly crumbled under the weight of legal challenges"). *But see* Moody, *supra* note 8 (noting that NCAA Division I athletes "reportedly earned an average of \$3,711 in the first year of NIL," which continues to make them an attractive financial opportunity for student athletes).