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NOTE

Pay-for-Play(ers): Missouri's Recent NIL Amendment Is a Solid Blueprint for Federal NIL Regulation

*Tyler Kraft**

I. INTRODUCTION

The issues facing the national name, image, and likeness (“NIL”) debate came to a head on January 17, 2023.¹ On that day, Jaden Rashada—the No. 27 rated high school football recruit in the country—decommitted from Florida when a \$13 million NIL deal failed to materialize as promised.² The story prompted questions about how schools handle NIL initiatives, the amounts of money thrown at collegiate athletes, and the business model at large for college athletics.³ It also reveals the challenges states face as they attempt to develop regulatory frameworks for NIL.

In May 2022, Missouri lawmakers amended the state’s NIL law less than a year after its enactment.⁴ The amendment was sparked by the

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¹ See ESPN Staff, *A \$13-million NIL Deal Gone Wrong, a Top QB Recruit and What Happens Next*, ESPN (Jan. 20, 2023), https://www.espn.com/college-football/story/_/id/35482485/jaden-rashada-faq-top-recruit-nil-deal-florida-football [<https://perma.cc/PM2T-8QZV>].

² *Id.*

³ *Id.*

⁴ Dave Matter, *Missouri Legislature Passes Amendment Allowing Colleges — and Coaches — to Assist with NIL Deals*, ST. LOUIS POST-DISPATCH (May 12, 2022), https://www.stltoday.com/sports/college/mizzou/missouri-legislature-passes-amendment-allowing-colleges-and-coaches-to-assist-with-nil-deals/article_af77ace8-2cdf-51c2-8226-6d22b47e6e60.html [<https://perma.cc/3U99-PLWR>] [hereinafter *Missouri Legislature Passes Amendment*]. At the time of publication, Missouri is once again considering an update for its NIL law. Dave Matter, *Missouri Lawmakers*

rapidly evolving national landscape regarding collegiate student-athletes' rights to monetize their NIL.⁵ State NIL laws came to the forefront following the United States Supreme Court's ruling in *NCAA v. Alston* in 2021, which struck down certain limits on student-athlete compensation.⁶ The aftermath of the decision saw states throwing together their own laws to allow student-athletes to monetize their NIL given the National Collegiate Athletic Association's ("NCAA") newfound lack of authority.⁷ However, state laws quickly devolved into a race to deregulate student-athletes' NIL rights, as states viewed less restrictive measures as a means to attract more talented players.⁸

Missouri was no different. State legislators determined Missouri's law needed to evolve for its schools to remain competitive in attracting top student athletes.⁹ Many lawmakers view the 2022 amendment, which added several provisions relating to NIL-related school activities and financial literacy requirements, as necessary to keep Missouri "on par" with other states.¹⁰ Yet, the Missouri law's place on the cutting edge of NIL regulation is likely short-lived, as other states seek to win the deregulation race and a potential federal preemption looms large.¹¹ In fact, the latter option appears to be a near certainty, with bipartisan support of a potential bill already present.¹² One question, however, still remains: what should such a uniform law look like given the current lack of common ground among state NIL legislation?¹³ This Note explores the

Revise State's NIL Law, Expand College Coaches' Role in Negotiations, ST. LOUIS POST-DISPATCH (May 9, 2023), https://www.stltoday.com/sports/college/mizzou/missouri-lawmakers-revise-states-nil-law-expand-college-coaches-role-in-negotiations/article_56ee420a-ee95-11ed-bbf8-077630df774d.html [https://perma.cc/TB2S-H5LB].

⁵ *Id.*

⁶ *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021).

⁷ See Michael Poyfair, *NCAA v. Alston: The Supreme Court Paves the Way for Name, Image, and Likeness Opportunities Among Collegiate Student-Athletes as the NCAA Is Forced to Create an Interim Name, Image, and Likeness Policy to Comply with Antitrust Legislation*, 55 CREIGHTON L. REV. 269, 286 (2022).

⁸ 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/Q6ZE-A9TY].

⁹ *Missouri Legislature Passes Amendment*, *supra* note 4.

¹⁰ *Id.*

¹¹ Moody, *supra* note 8; Maddie Biertempfel, 'The Federal Government Will Have to Act' Sen. Tuberville Drafting Bill to Regulate NIL, NEWS19 (Sept. 7, 2022), <https://whnt.com/news/alabama-news/the-federal-government-will-have-to-act-sen-tuberville-drafting-bill-to-regulate-nil/> [https://perma.cc/GPT4-GLE8].

¹² Biertempfel, *supra* note 11. At least one U.S. Supreme Court justice has implied a federal bill regulating NIL would be viewed favorably. See *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

¹³ Poyfair, *supra* note 7, at 286.

answer to this question and provides a blueprint for the imminent federal law.

Part II of this Note describes the historical backdrop of *NCAA v. Alston*, the Court's decision to allow student-athletes to monetize their NIL, and the state measures implemented following this monumental decision. Part III discusses Missouri's recent amendment, including its changes to school involvement in the NIL process and its introduction of financial literacy courses for student-athletes.¹⁴ Part IV analyzes the Missouri law's place in the national NIL landscape, specifically as it relates to the balance between student-athlete rights and encouragement of a level playing field. Finally, it argues that federal legislation is necessary for NIL uniformity and proposes that such a law should follow Missouri's lead—as Missouri's most recent amendment strikes the perfect balance between competition and student-athlete protection.

II. LEGAL BACKGROUND

To properly understand the modern landscape of NIL laws, it is necessary to examine the circumstances from which they arose. While NIL may appear new, it is not the first time student-athletes have earned compensation for their services.¹⁵ This Part examines why student-athletes were barred from compensation for a large portion of collegiate athletics' history, why the prohibition was ultimately struck down, and the national response to student-athletes' new rights.

A. Historical Background of Compensation for Student-Athletes

Intercollegiate athletics began over 170 years ago, with the first formal interschool athletic competitions beginning in the 1850s.¹⁶ College athletics continued to grow over the course of the nineteenth century, with top athletes eventually afforded the ability to earn compensation for their services.¹⁷ For example, a football player chose to attend Yale after the school promised free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards at his games, and a job as a cigarette agent.¹⁸ During this time, university administrators realized the commercial value of high-profile collegiate athletics.¹⁹ Strong athletics programs also increased

¹⁴ MO. REV. STAT. § 173.280.

¹⁵ See Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L. J. 985, 989–90 (1987).

¹⁶ *Alston*, 141 S. Ct. at 2148.

¹⁷ Smith, *supra* note 15, at 989.

¹⁸ *Alston*, 141 S. Ct. at 2148.

¹⁹ Smith, *supra* note 15, at 989–90.

economic support and student enrollment at their respective schools.²⁰ At times, the pursuit of athletic victory led universities to pay non-student-athletes to play for their teams.²¹ Due to fractures within the collegiate administrative community regarding the role of college athletics, efforts began in the 1890s to establish standardized rules and potential athletic conferences under which collegiate athletic programs could function.²²

The tipping point came in 1905, a year in which there were over one hundred football injuries and eighteen football-related deaths.²³ Then-President Theodore Roosevelt held several national meetings with university officials, which eventually led to the creation of the NCAA in 1906.²⁴ The organization was founded to eliminate “unsavory violence” and “preserve amateurism.”²⁵ More specifically, the NCAA declared that “[n]o 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.”²⁶

Still, the NCAA’s formation did not initially deter universities from paying student-athletes.²⁷ As the NCAA was preoccupied with developing standardized rules, a majority of NCAA member universities continued to compensate student-athletes.²⁸ These payment schemes were not particularly secretive. In fact, freshmen football players at the University of Pittsburgh went on strike in 1939 to demand payment equal to upperclassmen players.²⁹ In 1948, the NCAA adopted the “Sanity Code,” reaffirming its opposition to student-athlete compensation.³⁰ The code allowed colleges and universities to pay for a student’s tuition but also granted authority to the NCAA to suspend or expel offenders of the non-compensation requirement.³¹ Relying on this power, the NCAA penalized several university athletic programs for providing improper benefits to student-athletes.³²

²⁰ *Id.*

²¹ Kelly Charles Crabb, *The Amateurism Myth: A Case for A New Tradition*, 28 STAN. L. & POLICY REV. 181, 189 (2017).

²² Smith, *supra* note 15, at 990.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021) (quoting Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII §3 (1906)).

²⁷ See Crabb, *supra* note 21, at 190.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Alston*, 141 S. Ct. at 2149.

³¹ *Id.*

³² The instances for which schools have been punished vary greatly. They range from serious violations, such as Southern Methodist University’s university-directed payment of football players, to seemingly innocent violations, like an instance where

At the same time, the Supreme Court of the United States has consistently expressed hesitation about the NCAA's rule over college athletics and the extent of its regulatory scope.³³ In *NCAA v. Board of Regents*, for example, the Court limited the NCAA's ability to oversee deals for college football television rights, holding that the NCAA's oversight violated antitrust law.³⁴ The NCAA had limited member schools' abilities to negotiate their own television rights,³⁵ which, according to the Court, created a horizontal restraint on competition.³⁶ In other words, schools were forced to agree not to compete with each other.³⁷ These restrictions, the Court stated, were "not consistent with [the] fundamental goal of antitrust law" and therefore violated the Sherman Act.³⁸ Thus, the Court struck down the NCAA's restrictions on television rights and opened the door for individual schools to negotiate their own television contracts.³⁹ These television deals helped grow the scale of college athletics, which has now turned into a multi-billion-dollar enterprise for participating schools each year.⁴⁰ This holding set the stage for the Court's ruling in *NCAA v. Alston*.

In a unanimous 9-0 ruling, the *Alston* Court upheld a decision that struck down the NCAA's cap on student-athlete benefits.⁴¹ Importantly, the Court took special note of the value student-athletes bring to their

Ohio State football players sold their own memorabilia in exchange for discounted tattoos and other payments at a local tattoo parlor. Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015), <https://time.com/3720498/ncaa-smu-death-penalty/> [<https://perma.cc/WGT2-EV6X>]; *Ohio State Football Players Sanctioned*, ESPN (Dec. 23, 2010), <https://www.espn.com/college-football/news/story?id=5950873> [<https://perma.cc/NKP2-R7SH>]. In the former, the NCAA handed down a "death penalty" to the SMU football program, barring it from participating in the 1988 football season along with other sanctions. Dodds, *supra* note 32. In the latter, the NCAA banned Ohio State from participating in a bowl game in 2012 and vacated its wins in the 2010 season. Associated Press, *Ohio State Gets Bowl Ban, Other Penalties After Tattoo Scandal*, AL.COM (Dec. 20, 2011), https://www.al.com/sports/2011/12/ohio_state_gets_bowl_ban_other.html#:~:text=The%20NCAA%20hit%20Ohio%20State,rings%20and%20other%20Buckeyes%20memorabilia [<https://perma.cc/UD45-7648>].

³³ See *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 98.

³⁷ *Id.* at 99.

³⁸ *Id.* at 107–08.

³⁹ See *id.* at 120.

⁴⁰ Felix Richter, *U.S. College Sports are a Billion-Dollar Game*, STATISTA (Jul. 2, 2021), <https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/> [<https://perma.cc/L7A4-5TW4>].

⁴¹ Gregory Marino, *NCAA v. Alston: The Beginning of the End or the End of the Beginning?*, JDSUPRA (Aug. 5, 2021), <https://www.jdsupra.com/legalnews/ncaa-v-alston-the-beginning-of-the-end-9351737/> [<https://perma.cc/SVK7-H9LD>].

universities.⁴² As the Court pointed out, collegiate athletes bring in billions of dollars for their schools and conferences.⁴³ The lack of compensation compared to the overwhelming value is particularly troublesome, especially where the administrators of these sports have annual salaries worth millions of dollars.⁴⁴

In deciding the case, the Court again looked to antitrust principles.⁴⁵ In observing the NCAA's limitations on payments to student-athletes, the Court considered whether the rules in place were overly restrictive given the goals they were meant to achieve.⁴⁶ If the rules were too restrictive, they would flunk the "rule of reason" analysis used to determine if regulations rose to the level of anticompetitive practices the Sherman Act prohibits.⁴⁷ The Court concluded the restraints were "inexplicably stricter than necessary," putting them in contravention of the Sherman Act.⁴⁸

Throughout its opinion, the Court emphasized the changes in market realities since its past decisions involving the NCAA.⁴⁹ While the majority did not do away entirely with the NCAA's power to police certain benefits for student-athletes, it noted that the NCAA never sought an understanding of which benefits it could enforce.⁵⁰ Justice Brett Kavanaugh, however, indicated a willingness to further evaluate claims relating to the NCAA's restrictions on student-athlete payment.⁵¹ In the immediate aftermath of the decision, the NCAA created an interim policy allowing student-athletes to earn compensation based on their name, image, and likeness according to state law.⁵²

B. State Law Interpretations of Name, Image, and Likeness Law

Since *Alston*, twenty-nine states have started enforcing NIL laws, one state (Maryland) has codified an NIL law that has yet to take effect, and twenty states have not yet enacted an NIL law or something similar.⁵³

⁴² NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) ("By permitting colleges and universities to offer enhanced education-related benefits, [the district 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.").

⁴³ *Id.* at 2150.

⁴⁴ *Id.* at 2151.

⁴⁵ *See id.* at 2162.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2158.

⁵⁰ *Id.* at 2165.

⁵¹ *Id.* at 2168 (Kavanaugh, J., concurring).

⁵² Poyfair, *supra* note 7, at 286.

⁵³ *See, e.g.*, ARK. CODE ANN. § 4-7-51301-1308 (2022); CAL. EDUC. CODE § 67456 (2022); COLO. REV. STAT. § 23-16-301 (2022). *See, e.g.*, MD. CODE. EDUC. §

Student-athletes in states without an active NIL law still have a right to engage in NIL activities without NCAA interference.⁵⁴ In these situations, schools may develop their own individual policies regarding how and when student-athletes can engage in NIL compensation activities.⁵⁵ This includes South Carolina and Alabama, both of which recently repealed their NIL laws because they were too restrictive.⁵⁶

Missouri entered the fray in July 2021, when it passed its first NIL legislation into law.⁵⁷ Missouri's original NIL law barred any postsecondary educational institution from limiting a student-athletes' ability to earn NIL compensation while participating in athletics.⁵⁸ Crucially, this law barred school involvement in the compensation of a student-athlete, prospective athlete, or an individual's family.⁵⁹ Under this version, however, student-athletes could not enter into NIL deals that conflicted with a school's contracts or required some form of activity during official, mandatory team activities.⁶⁰ As more states implemented NIL laws, it became apparent to Missouri's legislature that its NIL law would need to evolve to remain competitive.⁶¹

III. RECENT DEVELOPMENTS

In May 2022, Representative Kurtis Gregory (R-Marshall) introduced a bill to expand the scope of rights offered under Missouri's NIL law, or, in Representative Gregory's words, to "keep up with the Joneses."⁶² Governor Mike Parson signed the bill on June 16, 2022, and

15-131 (2022); MICH. COMP. LAWS § 390.1731 (2022); NEB. REV. STAT. § 48-3601 (2022).

⁵⁴ NCAA *Interim NIL Policy*, NCAA (Jul. 2021), http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/KED5-FU2S].

⁵⁵ Poyfair, *supra* note 7, at 290.

⁵⁶ Nick Schultz, *Alabama Governor Approves Repeal of NIL Legislation*, ON3 (Feb. 16, 2022), <https://www.on3.com/nil/news/alabama-legislature-approves-repeal-of-nil-legislation/> [https://perma.cc/L922-E47E]; Jon Blau, *NIL Landscape Shifting Again for South Carolina Schools Come July 1*, POST AND COURIER (June 24, 2022), https://www.postandcourier.com/sports/clemson/nil-landscape-shifting-again-for-south-carolina-schools-come-july-1/article_95e1b71a-f34d-11ec-80e6-63954f4ae46b.html [https://perma.cc/42NQ-L573].

⁵⁷ Kaitlyn Schallhorn, *Missouri to Allow Student-Athletes to Profit Off Likeness*, MISSOURI TIMES (Jul. 13, 2021), <https://themissouritimes.com/missouri-to-allow-student-athletes-to-profit-off-of-likeness/> [https://perma.cc/R4Y4T-YWGS].

⁵⁸ MO. REV. STAT. § 173.280 (amended 2022).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Missouri Legislature Passes Amendment*, *supra* note 4.

⁶² Kurt Erickson, *Parson Signs New Missouri NIL Law for Student Athletes*, ST. LOUIS POST-DISPATCH (June 16, 2022), <https://www.stltoday.com/news/local/govt->

it went into effect on August 28, 2022.⁶³ The bill's key change allows for more school involvement in the NIL process.⁶⁴ Specifically, it provides:

A postsecondary educational institution or any officer, director, or employee of such institution, including but not limited to a coach, member of the coaching staff, or any individual associated with the institutions athletic department, *may identify or otherwise assist with opportunities for a student athlete to earn compensation* from a third party for the use of the student athlete's name, image, likeness rights, or athletic reputation⁶⁵

There are still restrictions on a school's ability to assist student-athletes with endorsement deals, as the school or its official cannot (1) serve as an athlete's agent, (2) receive payment from an athlete for enabling NIL opportunities, (3) influence an athlete's choice of professional representation relating to NIL opportunities, (4) attempt to reduce an athlete's opportunities from competing third parties, or (5) be present during the negotiation process of any deal between an athlete and a third party.⁶⁶

The law also requires schools to conduct an annual financial development program for its student-athletes if the school enters into commercial agreements that utilize a student-athlete's NIL.⁶⁷ These programs include providing information regarding financial aid, debt management, and budgeting for student-athletes.⁶⁸

Legislators saw the bill as necessary to keep up with other states in the NIL landscape.⁶⁹ Current NIL laws provide greater flexibility to student-athletes, as states continue to loosen restrictions in the hopes that more NIL opportunities will lead to more high-profile athletes in the state.⁷⁰ For example, many of Missouri's competitors in the Southeastern Conference have loosened their NIL restrictions; Alabama, Mississippi, South Carolina, and Tennessee have all either amended or repealed their

and-politics/parson-signs-new-missouri-nil-law-for-student-athletes/article_bf80ea48-a278-5495-8f0c-2dd127f7e9b5.html [https://perma.cc/NF3K-EMDN].

⁶³ *Id.* See *Missouri Legislature Passes Amendment*, *supra* note 4.

⁶⁴ MO. REV. STAT. § 173.280 (amended 2022).

⁶⁵ *Id.* An amendment to the statute that has not been signed into law at the time of publication would allow coaches or other institutional staff to actively participate in negotiations regarding student-athlete NIL. See H.B. 417, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

⁶⁶ MO. REV. STAT. § 173.280 (amended 2022).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Missouri Legislature Passes Amendment*, *supra* note 4.

⁷⁰ Erickson, *supra* note 62.

NIL laws in order to afford student-athletes more freedom.⁷¹ Since the 2022 amendment, the University of Missouri has created a division in its athletics department to identify and notify student-athletes about NIL opportunities.⁷² Recently, the university system helped its athletes enter a deal with Topps, the trading card company, to make trading cards featuring Missouri's athletes.⁷³ Nonetheless, Missouri's NIL law may soon go from cutting edge to outdated as more and more states seek to relax their restrictions to create greater opportunities for athletes within their borders.⁷⁴

IV. DISCUSSION

By abrogating the NCAA's authority to regulate what student-athletes can and cannot do with their name, image, and likeness, the *Alston* Court opened the floodgates for states and schools to create earning opportunities for their student-athletes.⁷⁵ Yet crucially, the Court chose not to weigh in on where the line should be drawn between fair compensation for student-athletes and the preservation of the collegiate competitive sports model.⁷⁶ The result is a patchwork of laws which do not necessarily align with each other, incentivizing a race to the bottom as states and schools seek to loosen restrictions in hopes of attracting more high-profile athletes.⁷⁷ To illustrate this implication, one need look no further than the two states whose schools have combined for five of the last ten Division I college football championships—Alabama and South

⁷¹ Darren Heitner, *The New Race by States to Remove NIL Restrictions on College Athletes*, ABOVE THE LAW (Apr. 27, 2022), <https://abovethelaw.com/2022/04/the-new-race-by-states-to-remove-nil-restrictions-on-college-athletes/> [https://perma.cc/NB54-SFRR]; Blau, *supra* note 56.

⁷² Pete Nakos, *Mizzou Rolls Out NIL Changes Following Amendment to State Law*, ON3 (June 16, 2022), <https://www.on3.com/nil/news/mizzou-tigers-missouri-football-legislation-amendments-opendorse-marketplace-education-nil-name-image-likeness/> [https://perma.cc/K7EY-K85M].

⁷³ *Id.*

⁷⁴ Eric Prisbell, *State Governments, Especially in SEC Footprint, Relaxing Their Rules on NIL*, ON3 (Apr. 26, 2022), <https://www.on3.com/nil/news/state-governments-especially-in-sec-footprint-relaxing-their-rules-on-nil/> [https://perma.cc/49VF-9WJM].

⁷⁵ See John T. Holden et. al., *Reimagining the Governance of College Sports After Alston*, 74 Fla. L. Rev. 427, 463–64 (2022).

⁷⁶ NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (“The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we.” (quoting *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1265 (9th Cir. 2020))).

⁷⁷ Michael D. Fasciale, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes' Name, Image, and Likeness Compensation*, 52 SETON HALL L. Rev. 899, 900 (2022).

Carolina. These states have already disbanded their NIL laws, giving their schools free reign to decide how to assist student-athletes.⁷⁸

The *Alston* Court neutered the NCAA's ability to police violations of its policy, with Justice Kavanaugh's concurrence making it clear that any such policing measure could be overturned.⁷⁹ As a result, states and colleges cannot look to the NCAA for further guidance on NIL regulation.⁸⁰ This Discussion argues that federal legislation is the only realistic option to adequately and uniformly regulate NIL opportunities for student-athletes, and such federal legislation would be well served to follow the framework of Missouri's most recent NIL law.

A. Common Themes of NIL Law

A survey of the twenty-four active state NIL laws reveals that many have common approaches. Every state allows a student-athlete to earn some form of NIL compensation; that is, no state prohibits NIL compensation.⁸¹ Similarly, states commonly allow student-athletes to obtain professional representation to negotiate NIL contracts with potential sponsors—a crucial departure from previous NCAA provisions, which barred college athletes from retaining an agent.⁸² This common sense condition helps ensure that athletes are not taken advantage of by potential predatory contracting practices.

On the other hand, many current NIL laws also place restrictions on an athlete's potential marketability. For instance, many states bar athletes from entering into NIL contracts which conflict with a school's own contracts.⁸³ And similarly, states commonly prohibit a student-athlete from engaging in NIL-related activities during official team activities, such as games or practices, if those contracts conflict with a school's contract.⁸⁴ Thus, while there are some scarcely regulated areas of the NIL

⁷⁸ Schultz, *supra* note 56; Blau, *supra* note 56.

⁷⁹ *Alston*, 141 S. Ct. at 2167.

⁸⁰ It is plausible that conferences and schools would be able to establish payment caps without incurring the Court's scrutiny due to the conferences and schools not having absolute control over the college athletics market. *See id.* However, this would appear unlikely, as states are currently attempting to loosen restrictions in hopes of attracting student-athletes with more NIL opportunities. *See* Moody, *supra* note 8.

⁸¹ *See, e.g.*, MO. REV. STAT. § 173.280; 2021 CAL. STAT. § 67456; KY. REV. STAT. & R. SERV. § 164.6941-.6951.

⁸² Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VANDERBILT J. OF ENT. AND TECH. L. 214, 215 (2005).

⁸³ *See, e.g.*, MO. REV. STAT. § 173.280; ARK. CODE § 4-75-1301-1308 2022; 2021 CAL. STAT. § 67456.

⁸⁴ *See, e.g.*, MO. REV. STAT. § 173.280; 2021 OHIO LEGIS. SERV. ANN. § 3376.06; OKLA. STAT. tit. 70 § 820.25.

landscape, college athletes still face more limitations in their ability to earn NIL compensation than their professional counterparts.

In the professional sports landscape, athletes commonly wear a particular shoe brand or take some other on-the-field action to earn NIL money.⁸⁵ In many instances, a professional athlete's in-game promotion of a particular brand is extremely lucrative for both the athlete and the sponsoring party.⁸⁶ Only one state, New Mexico, expressly allows its student-athletes to engage in NIL activities while participating in team activities.⁸⁷ But, this unique law suffers from some tension. It allows student-athletes to wear any footwear they want during team activities, so long as the footwear is not reflective nor a health risk.⁸⁸ However, the law also bars third parties from requiring such advertisement without school approval.⁸⁹ As such, while an athlete could earn a sponsorship for footwear, that sponsorship is still contingent on school approval when the school may have already contracted with another company.⁹⁰

Many states also allow schools to review NIL contracts and bar those that conflict with the school's values.⁹¹ Potential conflicts may arise under sponsorships with alcohol companies or sports gambling companies.⁹² Not only do these restrictions further distinguish the student-athlete NIL landscape from the professional athlete NIL landscape, but they are somewhat comical and hypocritical in states that have legalized these

⁸⁵ See Tom Williams, *Inside Footballers' Boot Deals: Swag, Sole Plates and Small Print*, BLEACHER REPORT (Jan. 16, 2020), <https://bleacherreport.com/articles/2871664-inside-footballers-boot-deals-swag-sole-plates-and-small-print> [https://perma.cc/FV5R-DS74]; Max Molski, *Which NBA Players Have Signature Shoe Deals?*, NBC SPORTS (Oct. 19, 2021), <https://www.nbcsports.com/bayarea/warriors/which-nba-players-have-signature-shoe-deals> [https://perma.cc/YB52-72WF].

⁸⁶ Kurt Badenhausen, *Why Cristiano Ronaldo's \$1 Billion Nike Deal May Be a Bargain For Sportswear Giant*, FORBES (Dec. 2, 2016), <https://www.forbes.com/sites/kurtbadenhausen/2016/12/02/cristiano-ronaldos-1-billion-nike-deal-is-a-bargain-for-sportswear-giant/?sh=605450f65a91> [https://perma.cc/VDF9-92KX]. For example, Nike and Under Armour waged a public battle to sign NBA star Kevin Durant to a shoe deal worth upwards of \$250 million. Zach Harper, *Report: Nike has Right to Match 10-Year, \$265m Deal for Kevin Durant*, CBS SPORTS (Aug. 20, 2014), <https://www.cbssports.com/nba/news/report-nike-has-right-to-match-10-year-265m-deal-for-kevin-durant/> [https://perma.cc/ZWJ9-GVWS].

⁸⁷ N.M. STAT. § 21-31-3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See, e.g.*, N.C. EXEC. ORDER NO. 223; MISS. CODE § 37-97-101-109; PA. CONST. STAT. § 3706(e).

⁹² LA. STAT. ANN. § 17:3703.

“value-conflicting” activities.⁹³ In some cases, universities even promote activities like gambling and alcohol at collegiate sporting events.⁹⁴ These common policies all serve to inhibit the NIL opportunities available to student-athletes.

B. The Positives of Missouri’s NIL Legislation

Like other states, Missouri’s NIL statute allows for student-athletes to obtain representation and earn money from their NIL.⁹⁵ And it prevents contracts which require the student-athlete to engage in NIL activities during official team activities if the provision conflicts with an existing university contract.⁹⁶ Yet, even with some of its inherent limits, Missouri’s NIL statute is among the most progressive in the country. Importantly, it strikes a balance between two competing interests: it affords student-athletes opportunities to earn money but prevents them from running roughshod over active school contracts.

One of the progressive aspects of Missouri’s new law is its limits, or lack thereof, on what kinds of partnerships student-athletes can enter. Unlike many other states, Missouri’s statute does not explicitly ban athletes from contracting with certain third parties that may “conflict” with the values of the school.⁹⁷ As such, student-athletes in Missouri will have more opportunities to gain sponsorships than athletes in states with prohibitions on such contracts.⁹⁸ In many ways, this makes sense. It is commonplace for schools to partner with companies that would seem contrary to their standing as educational institutions.⁹⁹ For example,

⁹³ See Dan Preciado, *States Where Sports Betting is Legal*, FORBES (Jul. 5, 2022), <https://www.forbes.com/betting/sports-betting/legal-states/> [<https://perma.cc/Q72Q-HYJF>].

⁹⁴ Ben Portnoy, *Mississippi State to Sell Alcohol at Football Games, School’s 2020 Gameday Protocols State*, THE DISPATCH (Aug. 21, 2020), <https://cdispatch.com/sports/2020-08-21/mississippi-state-to-sell-alcohol-at-football-games-schools-2020-game-day-protocols-state/#:~:text=Friday%2C%20Mississippi%20State%20released%20its,MSU%20football%20games%20this%20fall> [<https://perma.cc/FRM2-2KF9>].

⁹⁵ MO. REV. STAT. § 173.280.

⁹⁶ *Id.*

⁹⁷ See *id.* The term “values” is not well defined in states allowing schools to restrict NIL deals in conflict with the perceived values, creating a potential problem for student-athletes attempting to define what contracts do and do not run afreet of their school’s values. See N.C. EXEC. ORDER NO. 223; MISS. CODE § 37-97-101–109; PA. CONST. STAT. § 3706(e); LA. STAT. ANN. § 17:3703.

⁹⁸ See N.C. EXEC. ORDER NO. 223 MISS. CODE § 37-97-101–109; PA. CONST. STAT. § 3706(e); LA. STAT. § 17:3703.

⁹⁹ See Laine Higgins, *The Bar is Now Open at More College Football Stadiums*, WALL ST. J. (Sept. 21, 2021), <https://www.wsj.com/articles/college-football-beer-gambling-cannabis-sponsorships-11631759264> [<https://perma.cc/6FN6-Y6Y9>].

alcohol sales are becoming the norm at collegiate sporting events, with sports gambling likely to follow.¹⁰⁰ The contracts are lucrative for the alcohol and gambling companies as well, as they gain access to a platform with millions of annual spectators and even more watching from home on television.¹⁰¹ As the *Alston* Court pointed out, student-athletes deserve a piece of the revenue they generate for universities.¹⁰² It follows that they should also be able to benefit from the same companies from which their own institutions benefit.¹⁰³ The Missouri law implicitly allows its student-athletes to do just that. Nothing in its text authorizes schools to bar student-athletes from earning NIL deals that do not fit with the institution's values.¹⁰⁴

However, Missouri's NIL law does explicitly authorize schools, or individuals working on behalf of the schools, to identify opportunities and assist student-athletes in "earning compensation" from a third party.¹⁰⁵ This law joins a growing trend that encourages schools to play a more active role in their student-athletes' NIL deals.¹⁰⁶ Despite this trend, Missouri's law remains on the progressive end, as several states still bar institutional involvement in any form during the NIL process.¹⁰⁷ While there exists some benefit to less school involvement, such as the limitation of pressure to use the school's preferred sponsors, the advantages of the Missouri law substantially outweigh any potential institutional influence. Missouri's approach protects student-athletes from predatory contractual practices and simultaneously decreases the burden on courts relating to NIL disputes.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ Dennis Dodd, *College Football Attendance Declines for Seventh Straight Season to Lowest Average Since 1981*, CBS SPORTS (Feb. 24, 2022), <https://www.cbssports.com/college-football/news/college-football-attendance-declines-for-seventh-straight-season-to-lowest-average-since-1981/> [https://perma.cc/NNM6-H9T6].

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

¹⁰³ *Id.*

¹⁰⁴ MO. REV. STAT. § 173.280. A recent amendment that has not been signed into law as of publication would allow schools to limit student-athlete use of school-owned intellectual property such as logos or emblems in NIL deals that conflict with school values. H.B. 417, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

¹⁰⁵ MO. REV. STAT. § 173.280.

¹⁰⁶ See KENT. REV. STAT. § 164.6941–.6951; MISS. CODE § 37-97-101–109; TENN. CODE § 49-7-2802.

¹⁰⁷ See LA. STAT. ANN. § 17:3703; N. MEX. STAT. Ch. 21-31; OKLA. STAT. § 820.21–.26.

¹⁰⁸ See Josh Planos, *College Athletes Suffered When Schools Weren't Ready for NIL*, FIVETHIRTYEIGHT (June 30, 2022), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [https://perma.cc/A2ZU-GRE2].

In fact, a 2021 survey found that forty percent of collegiate athletes wanted help navigating NIL deals, with numerous instances of athletes facing an initial contract offer which was not in their best interest.¹⁰⁹ While athletes in Missouri can obtain professional representation, this representation would likely require compensation on the part of the athlete.¹¹⁰ Some athletes, like Southern California’s Caleb Williams, may be able to pay for professional representation given the large amounts of money involved in their NIL deals.¹¹¹ But not all athletes will be in position to sign deals that pay enough to have money leftover following taxes and a payment to an agent. Without professional representation, it is foreseeable that athletes would be lured into bad contracts. This would increase the burden on Missouri’s courts to resolve contractual disputes between ill-informed athletes and sophisticated businesses. Missouri’s law helps prevent unnecessary litigation by ensuring student-athletes have access to professionals who can assist them in finding satisfactory deals at no cost. And to the extent a student-athlete is skeptical of university involvement in the process, Missouri’s law provides flexibility—the school input is optional.

This available procedure does not create a de facto agent-athlete relationship between schools and their students.¹¹² To the contrary, the law specifically states any individual working on behalf of the school cannot “[s]erve as the athlete’s agent.”¹¹³ Specifically, school officials cannot (1) receive compensation for enabling deals, (2) influence a student-athlete’s choice regarding professional representation, (3) attempt to limit a student-athlete’s opportunities, or (4) be present for any meeting between a student-athlete and third party in which compensation for the student-athlete’s NIL is discussed.¹¹⁴ In this sense, university athletic departments are like agents only in that they may advise student-athletes regarding potential contractual and taxation issues.¹¹⁵ Unlike professional agents, they cannot be in the room while the deal is negotiated and agreed upon.¹¹⁶ While this could pose a potential danger to athletes, as third

¹⁰⁹ *Id.*

¹¹⁰ *See* MO. REV. STAT. § 173.280.

¹¹¹ Pete Nakos, *USC Quarterback Caleb Williams Signs NIL Deal With AT&T*, ON3 (Jan. 9, 2023), <https://www.on3.com/nil/news/caleb-williams-usc-trojans-football-quarterback-nil-deal-att-heisman-trophy/> [<https://perma.cc/L6LG-2EGJ>].

¹¹² MO. REV. STAT. § 173.280. An amendment that has not been signed into law at the time of publication codifies this loophole, allowing school officials to serve as a student-athlete’s agent subject to certain conditions. H.B. 417, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).

¹¹³ MO. REV. STAT. § 173.280.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (allowing schools to identify and assist student-athletes in earning compensation).

¹¹⁶ *Id.*

parties could present unfavorable terms to an athlete once in the meeting room and away from the athletic department's supervision, this concern is easily worked around.

By the letter of the law, any school's NIL personnel could advise the student-athlete beforehand on what to ask for or avoid in a deal and provide feedback on potential offers before the athlete agrees to them so long as the consultation does not occur in a "meeting."¹¹⁷ In fact, it may be argued that the law *calls for* schools to advise athletes in this manner, as the law states:

Before any contract for compensation for use of a student athlete's name, image, likeness rights, or athletic reputation is executed, and before any compensation is provided to the student athlete in advance of a contract, the student athlete shall disclose that contract to his or her postsecondary educational institution in a manner prescribed by such institution.¹¹⁸

As a result, schools are now required to see what the student-athlete is agreeing to before signing the contract and have a right to "assist" the student-athlete regarding the potential opportunity.¹¹⁹ While schools could potentially use their oversight to benefit their own interests, some of which may conflict with those of the student-athlete, the benefits of some institutional involvement to protect student-athletes surely outweighs the potential for schools to mislead their student-athletes given how much a misstep could impact the school's reputation with future student-athletes. The Missouri law provides a preferable amount of school oversight—it allows student-athletes to seek their school's advice as necessary but prevents school interference with NIL negotiations with third parties.¹²⁰ At the same time, the law allows schools to see what student-athletes are agreeing to, providing the schools with an opportunity to advise the student-athlete regarding potential issues.¹²¹ Under this scheme, student-athletes are free to maximize their NIL value.

The final difference between Missouri's NIL law and many other NIL laws regards student-athletes' abilities to use aspects of a school's intellectual property. In the NIL context, intellectual property includes a school logo, school colors, or other aspects of the sort.¹²² Several states expressly prohibit a student-athlete from engaging in an NIL activity in

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See* ARK. CODE § 4-75-1307.

which the student-athlete uses a school's intellectual property.¹²³ Several other states bar student-athletes from using a school's intellectual property without consent from the school.¹²⁴ In contrast, the phrase "intellectual property" does not appear anywhere in Missouri's NIL law.¹²⁵ As a result, it would appear, subject to state and federal trademark laws, Missouri's student-athletes can utilize a school's intellectual property. Missouri's loosened restrictions in this realm place student-athletes on similar footing as professionals, many of whom appear in advertisements wearing their team's logos and colors.¹²⁶ Under the new Missouri law, student-athletes will be able to appear in recognizable and highly viewed sponsorship campaigns, driving up their marketability and, thus, their compensation, making Missouri more attractive to prospective collegiate athletes.

In sum, Missouri's NIL statute (1) allows student-athletes to enter into contracts with third parties even when it conflicts with the university's "values," (2) adequately protects student-athletes against coercion from both third parties and school officials, and (3) permits use of schools' intellectual property.¹²⁷ Given the current and rapidly-evolving "race to the bottom," however, Missouri legislators may soon find that the law is outdated and more restrictive than the rest of the NIL landscape.

C. Alternative Solutions to Federal Legislation

The current state of affairs in NIL law sees states pitted in a race to the bottom, as schools in states without NIL laws are now seen as having a competitive advantage when it comes to providing student-athletes the most lucrative opportunities.¹²⁸ This creates an undesirable situation, as there is an obvious concern that, without any sort of framework to regulate what schools can and cannot provide to student-athletes, states are incentivized to de-regulate to a point where each school can create its own

¹²³ See, e.g., ARIZ. REV. STAT. § 15-1892; ARK. CODE § 4-75-1307; VA. CODE § 23.1-408.1.

¹²⁴ See, e.g., ARIZ. REV. STAT. § 15-1892; ARK. CODE § 4-75-1307; VA. CODE § 23.1-408.1.

¹²⁵ MO. REV. STAT. § 173.280. An amendment to the statute that has not been signed into law as of publication specifies that schools must develop a process to allow student-athletes to use school intellectual property, like emblems. H.B. 417, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023). The amendment provides that schools may charge licensing fees for use of the intellectual property and may limit when a student-athlete can use the intellectual property. *Id.*

¹²⁶ See, e.g., Alicia Kelso, *The Detroit Tie: Why Matthew Stafford Agreed to be the Spokesperson for Little Caesars' NFL Sponsorship*, FORBES (Sept. 1, 2022), <https://www.forbes.com/sites/aliciakelso/2022/09/01/the-detroit-tie-why-matthew-stafford-agreed-to-be-the-spokesperson-for-little-caesars-nfl-sponsorship/?sh=1b5045555bcb> [<https://perma.cc/R3AM-A7D9>].

¹²⁷ See MO. REV. STAT. § 173.280.

¹²⁸ Moody, *supra* note 8.

laws, further splintering an already-fractured college landscape. Without any standardization, programs with the largest donor bases will be able to buy out the vast majority of elite athletes, leaving smaller schools to fight for the scraps.¹²⁹ For example, Texas A&M's student-athletes have secured over \$4 million in NIL money since it became legal in 2021.¹³⁰ Coincidentally, Texas A&M's 2022 football recruiting class is regarded as the most talented recruiting class ever recorded by recruiting evaluators.¹³¹

If trends like this continue, it could lead to potential anticompetitive practices, even between universities inside the same state. For instance, Alabama has deregulated its NIL laws, leaving NIL policies up to the individual schools.¹³² This allows schools like Alabama and Auburn to create their own policies. If both schools provide completely unrestricted access to NIL contracts, it would likely become a race between boosters of both schools.¹³³ Theoretically, one university could bleed the other dry of recruits, which would cause the university's athletic programs—and their overall budgets—to suffer competitively. This could then lead to a trickle-down effect, with larger schools continuing to bleed smaller schools out of recruits.

The potential for competitive imbalance calls for a solution to ensure collegiate athletics remains competitive between more than a handful of schools. One potential solution would be for the NCAA to revise its current interim NIL provision, which allows schools in states without NIL laws to create their own policies, into something more standardized.¹³⁴ In fact, the NCAA recently attempted to do this, updating its NIL policies to bar schools from providing certain services such as contract review for

¹²⁹ See Mark Zeigler, *Column: NIL Was Supposed to Fix College Sports, Instead it's Become a Pay-For-Play Free-For-All*, SAN DIEGO UNION-TRIBUNE (Apr. 22, 2022), <https://www.sandiegouniontribune.com/sports/aztecs/story/2022-04-22/zeigler-college-sports-nil-name-image-likeness-recruiting-collectives-payouts> [https://perma.cc/BX5G-PDDA].

¹³⁰ Jeremy Crabtree, *Report: Texas A&M Athletes Topped \$4 Million in NIL Deals*, ON3 (Sept. 7, 2022), <https://www.on3.com/nil/news/report-texas-am-aggie-athletes-topped-4-million-in-nil-deals/> [https://perma.cc/V5UR-X76A].

¹³¹ Brian Perroni, *Texas A&M Officially Clinches the Highest-Ranked Recruiting Class of All-Time*, 247SPORTS (Feb. 2, 2022), <https://247sports.com/college/texas-am/Article/Signing-Day-2022-Texas-AM-football-highest-ranked-class181971857/#:~:text=Podcast,Texas%20A%26M%20officially%20clinches%20the%20highest,recruiting%20class%20of%20all%20time&text=Texas%20A%26M%20has%20put%20together,ranked%20class%20in%20the%20country> [https://perma.cc/MBQ9-CVBK].

¹³² Schultz, *supra* note 56.

¹³³ Josh Planos, *The NCAA Doesn't Know How to Stop Boosters From Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022), <https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/> [https://perma.cc/W3MU-RT2T].

¹³⁴ Poyfair, *supra* note 7, 286.

student-athletes.¹³⁵ However, this option is unlikely, if not impossible, given the *Alston* ruling.¹³⁶ Justice Kavanaugh’s concurrence suggests that any effort by the NCAA to re-enter the NIL landscape would likely be met with defeat in court due to antitrust law.¹³⁷ Specifically, Justice Kavanaugh implied the *Alston* decision could be used to challenge any NCAA regulation under the “rule of reason” analysis to determine if there is a substantially less restrictive alternative to the imposed restraints due to the NCAA’s absolute control over the college athletics market.¹³⁸

Another potential solution would be for student-athletes and their organizations to engage in collective bargaining agreements to put a cap on the NIL monetary payments.¹³⁹ The National Football League and National Basketball Association use similar agreements,¹⁴⁰ which Justice Kavanaugh advocated for in his *Alston* concurrence.¹⁴¹ This suggestion, however, is more complicated in the field of collegiate athletics as it is unclear whether student-athletes are even able to collectively bargain or what such a collective bargaining agreement would look like.¹⁴²

As to the first issue, the National Labor Relations Board recently reversed course to recognize college athletes as “employees” under the National Labor Relations Act.¹⁴³ But student-athletes still need an

¹³⁵ Megan Durham, *DI Board Approves Clarifications For Interim NIL Policy*, NCAA (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx> [<https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>].

¹³⁶ NCAA v. *Alston*, 141 S. Ct. 2141, 2166 (2021).

¹³⁷ *Id.* at 2166–67 (2021) (Kavanaugh, J., concurring) (“I add this concurring opinion to underscore that the NCAA’s remaining compensation rules raise serious questions under the antitrust laws.”).

¹³⁸ *See id.* at 2167 (2021) (Kavanaugh, J., concurring).

¹³⁹ *See generally id.* at 2168 (2021) (Kavanaugh, J., concurring) (implying a potential solution for paying college athletes could include collective bargaining to determine what revenue the college athletes should have access to).

¹⁴⁰ *See NFL Collective Bargaining Agreement* Art. 12, NFLPA, <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> [<https://perma.cc/XBC3-7V9H>] (last visited Mar. 25, 2023); Associated Press, *NBA salary cap and tax level expected to rise in 2023-24*, (Sept. 9, 2022), <https://www.nba.com/news/nba-salary-cap-and-tax-level-expected-to-rise-in-2023-24> [<https://perma.cc/JUQ4-TKJ7>].

¹⁴¹ *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

¹⁴² *See* Chris Isidore, *NLRB opens door for unions for college athletes*, CNN (Dec. 15, 2022), <https://www.cnn.com/2022/12/15/business/nlr-unfair-labor-practice-athletes-usc-pac-12-ncaa/index.html> [<https://perma.cc/QTQ9-K8LC>] (noting student-athletes at public universities are not covered by the NLRB, creating issues with large scale unionization efforts).

¹⁴³ *Id.*

employer to bargain with.¹⁴⁴ Under the current interpretation, student-athletes would be considered employees of their schools, their conferences, and the NCAA. Student-athletes could potentially bargain with their schools and/or conferences without falling under scrutiny of antitrust law, as the individual schools and conferences do not hold the “monopsony” control over the college athletics market, as opposed to the NCAA.¹⁴⁵ However, any collective bargaining agreements between student-athletes and their schools and/or individual conferences would still leave NIL regulations fragmented across schools or regions of the country. As a result, the only organization with the scope to ensure uniformity under a collective bargaining agreement would be the NCAA.

To collectively bargain with the NCAA, which has already been characterized as having monopsony control over the college athletics market, the NCAA would likely need some sort of federal antitrust exemption like the one enjoyed by Major League Baseball.¹⁴⁶ This is unlikely, especially given the Supreme Court’s previous objections to full NCAA control over conferences and conference rights.¹⁴⁷ Even assuming the NCAA could be granted such an exemption, it remains to be seen how student-athletes could form one singular bargaining association. The NCAA oversees 1,098 member schools and twenty-four sports across three divisions.¹⁴⁸ Unlike MLB, which covers only baseball players, a collective bargaining agreement for college athletes would require college football players to align their interests with college rowers. Similar issues would arise between athletes at different levels of the organization. For example, student-athlete representatives for large schools with large NIL budgets, like Ohio State and Alabama, would need to find commonality with student-athlete representatives from small schools with smaller

¹⁴⁴ See David J. Garraux et. al., *Student Athletes No More, NLRB Reinstates Scope of NLRA Section 7 to Include “Players at Academic Institutions”*, K&L GATES (Feb. 17, 2022), <https://www.klgates.com/Student-Athletes-No-More-NLRB-Reinstates-Scope-of-NLRA-Section-7-to-Include-Players-at-Academic-Institutions-2-17-2022> [https://perma.cc/AV4N-D79H].

¹⁴⁵ *Alston*, 141 S. Ct. at 2154, 2156.

¹⁴⁶ *Id.* Interestingly, the MLB’s antitrust exemption stems from a 1922 Supreme Court ruling that Major League Baseball does not impact interstate commerce. James Yasko, *Everyone Hates Baseball’s Antitrust Exemption, but What is It?*, HOUSTON CHRONICLE (Mar. 16, 2022), <https://www.chron.com/sports/astros/article/Major-League-Baseball-antitrust-exemption-explain-17004658.php> [https://perma.cc/E85A-DFDD].

¹⁴⁷ See *NCAA v. Bd. of Regents*, 468 U.S. 85, 94–95, 120 (1984).

¹⁴⁸ *What is the NCAA*, NCAA, <https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx#:~:text=in%2024%20sports%20across%203%20divisions> [https://perma.cc/2DF3-MVM5] (last visited Oct. 16, 2022).

budgets, like Cornell College (Iowa) and Franklin College (Indiana).¹⁴⁹ As such, even if athletes were to organize by sport, there would still be issues between aligning the interests of athletes at schools with large budgets with the interests of athletes at small-budget schools. With clear roadblocks making some solutions unlikely and other solutions infeasible, it is necessary to look toward a third solution for NIL regulation: federal legislation.

D. Why Federal Legislation Should Follow Missouri's NIL Framework

Schools should turn their focus toward the federal government for much needed guidance. Indeed, there are already steps toward creating a federal NIL law, which would replace the patchwork of state laws currently in action.¹⁵⁰ As such, it would appear only a matter of time before there is a federal law passed to regulate NIL activities given the bipartisan support for such measures.¹⁵¹ Yet, the question remains as to what a potential federal law would look like and what rights it would guarantee to, and take away from, student-athletes.

A potential source for federal NIL guidelines is the Uniform Law Commission's *Uniform College Athlete Name, Image, or Likeness Act* (the "Act").¹⁵² The Act was conceived in large part due to the potential for competitive imbalances a fragmented state law framework causes.¹⁵³ The Act shares many of the common characteristics of current state laws, such as ensuring a student-athlete's right to NIL money and allowing student-athletes to hire agents to assist with potential opportunities.¹⁵⁴ The Act also includes restrictive provisions related to student-athlete use of a school's intellectual property.¹⁵⁵ Under the Act, student-athletes are completely barred from utilizing a school's intellectual property in NIL activities unless the intellectual property can be used without a license

¹⁴⁹ Ohio State reportedly generated over \$250 million in revenue during 2022, whereas Franklin College generated just over \$2 million in revenue. See Ohio State Department of Athletics, *Ohio State Athletics Reports Rebound in Revenue in 2022*, OSU.EDU (Jan. 26, 2023), <https://news.osu.edu/ohio-state-athletics-reports-rebound-in-revenue-in-2022/> [<https://perma.cc/HB6X-L9MQ>]; *Franklin College Sports Information*, FRANKLIN COLLEGE SPORTS INFORMATION, <https://www.collegefactual.com/colleges/franklin-college/student-life/sports/> [<https://perma.cc/GA2Y-QS8Q>] (last visited Apr. 21, 2023).

¹⁵⁰ Biertempfel, *supra* note 11.

¹⁵¹ *Id.*

¹⁵² UNIFORM LAW COMMISSION, *Uniform College Athlete Name, Image, or Likeness Act*, 1 (2021).

¹⁵³ *Id.* at 1–3 (2021).

¹⁵⁴ *Id.* at 7–8.

¹⁵⁵ *Id.* at 8.

from the intellectual property's owner.¹⁵⁶ Finally, the Act allows schools to bar student-athletes from engaging in an NIL activity promoting something that has an "adverse impact on [the school's] reputation."¹⁵⁷

While similar to many current state laws, there are key drawbacks to choosing the Act as the blueprint for any federal legislation. First, the Act has not been adopted by any state, and only two state legislatures (one of which was the Washington D.C. legislature) have introduced it for consideration.¹⁵⁸ This lack of enactment indicates most jurisdictions disagree with the Act's provisions, prefer their own provisions, or a combination of both. In a world where there is a race to deregulate, it would likely not make sense for a state to be interested in introducing *more regulations* like those contained in the Act.¹⁵⁹ Therefore, states have likely not given the Act a chance due to the Act potentially putting their schools at a competitive disadvantage when trying to attract student-athletes. So, while the Act may have beneficial aspects, its practical impact has yet to be measured. It also suffers from restrictive provisions that many states have chosen to abandon, diminishing its appeal.¹⁶⁰ Therefore, federal legislators should model a potential bill after a state law which follows current trends rather than one experimental in nature.

Indeed, it would be in federal legislators' best interests to use Missouri's new law as a blueprint. The law successfully toes the line between maximizing NIL opportunity and promoting competition by avoiding a potential pay-for-play scheme—a concern of coaches and NIL leaders across the country.¹⁶¹ It is clear from the deregulation trend that the majority of states in the country would prefer a minimalistic approach

¹⁵⁶ *Id.* at 10.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ UNIFORM LAW COMMISSION, *College Athlete Name, Image, or Likeness Act: Enactment History*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=540d3a4a-82de-4b1a-bb1f-3abd6a23b67b> [https://perma.cc/582U-AYAQ] (last visited Oct. 16, 2022) (choose "Enactment History" from horizontal toolbar in the link).

¹⁵⁹ See Schultz, *supra* note 56; Blau, *supra* note 56.

¹⁶⁰ UNIFORM LAW COMMISSION, *supra* note 152, at 8.

¹⁶¹ MO. REV. STAT. § 173.280. Jeremy Crabtree, *NIL Experts Say NCAA 'Guidance' Only Continues Pay-For-Play Chaos*, ON3 (May 10, 2022), <https://www.on3.com/nil/news/nil-experts-say-ncaa-guidance-only-continues-pay-for-play-chaos/> [https://perma.cc/R59E-R4Z6]. While some coaches have concerns about the amount of money student-athletes earn from NIL, there is little incentive for states to listen to the coaches who want more limits due to the inherent disadvantage schools face when working in a more restrictive NIL scheme. Jeremy Crabtree, *Athletic Officials Realize it's Time to Support NIL Collectives or Get Left Behind*, ON3 (Nov. 14, 2022), <https://www.on3.com/nil/news/more-and-more-athletic-officials-throwing-support-behind-nil-collectives-tennessee-kansas-state-colorado-oregon-state-kentucky-wisconsin-oklahoma/> [https://perma.cc/8HET-GLPA].

to NIL regulation.¹⁶² Missouri falls within this category, as its lawmakers expressly noted they did not want to fall behind their counterparts, though they did not take the extreme approach of deregulating completely.¹⁶³ Instead, the state took measures that allow the student-athletes to maximize opportunities. Unlike many states, Missouri does not allow schools to prevent student-athletes from engaging in NIL opportunities which may conflict with a school's perceived values.¹⁶⁴ This makes sense given the money schools make by partnering with companies that run contrary to their values.¹⁶⁵ By authorizing schools to provide support services, Missouri's law also provides student-athletes with the resources necessary to ensure third parties do not prey upon the student-athletes.¹⁶⁶ At the same time, student-athletes may obtain professional representation to help analyze potential NIL deals.¹⁶⁷

Missouri's mix of common NIL themes and progressive ideals provides a framework that allows its schools to remain competitive in the NIL landscape while also providing uniform standards for the state's universities. The law's effectiveness is evidenced by the University of Missouri's partnership with Opendorse, which facilitates partnerships between third parties and Missouri student-athletes in all sports.¹⁶⁸ Since the law's passage, Missouri's men's basketball team received commitments from three players and ranks as the nation's 22nd best recruiting class, its highest rated class in over half a decade.¹⁶⁹ This comes despite finishing its 2021-2022 season with a 12-21 record.¹⁷⁰ This ranking is better than schools in other states with completely open markets regarding NIL, such as South Carolina (55th rated recruiting class), Clemson (83rd rated recruiting class), and Auburn (58th rated recruiting

¹⁶² Schultz, *supra* note 56; Blau, *supra* note 56.

¹⁶³ *Missouri Legislature Passes Amendment*, *supra* note 4.

¹⁶⁴ See MO. REV. STAT. § 173.280 (2021). See, e.g., *Postsecondary Educational Institutions' Responsibilities Regarding Name, Image, and Likeness Compensation of Student-Athletes*, N.C. EXEC. ORDER NO. 223 (Jul. 2, 2021); MISS. CODE § 37-97-107 (2021); 5 PENN. CONS. STAT. § 3706 (2022).

¹⁶⁵ See, e.g., Preciado, *supra* note 93; Portnoy, *supra* note 94.

¹⁶⁶ MO. REV. STAT. § 173.280 (2021).

¹⁶⁷ *Id.*

¹⁶⁸ MUTIGERS.COM, *Athletics Launches Official NIL Marketplace for Student-Athletes* (Sept. 13, 2022), <https://mutigers.com/news/2022/9/13/general-athletics-launches-official-nil-marketplace-for-student-athletes.aspx> [<https://perma.cc/JAZ2-L7N7>].

¹⁶⁹ *Missouri 2023 Basketball Commits*, TIGERPROWL: 247SPORTS, <https://247sports.com/college/missouri/Season/2023-Basketball/Commits/> [<https://perma.cc/96ML-TBPP>] (last visited Nov. 18, 2022).

¹⁷⁰ MUTIGERS.COM, *2021-22 Men's Basketball Schedule*, <https://mutigers.com/sports/mens-basketball/schedule/2021-22> [<https://perma.cc/K67G-BR25>] (last visited Feb. 14, 2023).

class).¹⁷¹ While there may be separate factors weighing into what creates successful recruitment efforts, it is clear that NIL availability is a factor in a student-athlete's decision.¹⁷² It is also clear Missouri's law is benefitting its schools in a manner similar to that of less-regulated states while still providing a uniform framework for schools.

VI. CONCLUSION

Missouri's 2022 revision of its NIL law was necessary to keep up with trends across the college sports landscape. While lawmakers looked to the future to ensure the state's law remained relevant, they also created a framework suitable for uniform federal application across the landscape of college sports.¹⁷³ The need for this uniform NIL legislation will grow only more necessary in the coming years, with many potential abuses already beginning to come to light.¹⁷⁴ When the federal government does act, crafting an NIL law like Missouri Revised Statute § 173.280 seems like an easy layup allowing schools and student-athletes to profit.

¹⁷¹ TIGERPROWL: 247SPORTS, *supra* note 169.

¹⁷² Jeremy Crabtree, *On3 exclusive: Top recruits open up about NIL's influence*, ON3 (Jul. 26, 2022), <https://www.on3.com/nil/news/on3-exclusive-survey-top-recruits-open-up-about-nils-influence/> [<https://perma.cc/QH9Z-BPP2>].

¹⁷³ *Missouri Legislature Passes Amendment*, *supra* note 4.

¹⁷⁴ Josh Schafer, *CEO defends \$800,000 NIL deal with college athlete: 'We're going to be on everybody's minds'*, YAHOO (May 17, 2022), <https://news.yahoo.com/ceo-defends-nil-deal-college-athlete-185444826.html> [<https://perma.cc/HTK3-6K9R>].